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

BRIEF OF DEFENDANT OWENS-ILLINOIS, INC. IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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QUESTIONS PRESENTED *

A. Should this Court grant plaintiffs leave to file their original jurisdiction complaint against Owens-Illinois, Inc., where other States have pursued similar claims in forums bettter suited to this litigation, and where there are substantial practical obstacles to adjudicating this highly fact-bound case under the original jurisdiction of this Court?

B. Should this Court grant plaintiffs leave to file their original jurisdiction complaint against Owens-Illinois, Inc., where any final adjudication by this Court will involve either the burdensome task of applying the laws of each State to its individual claims under the principles of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), or the creation of a new, unnecessary, and inappropriate body of federal common law?

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* Defendant Owens-Illinois, Inc. joins with other defendants in the contention that plaintiffs, by seeking to sue their own citizens, are beyond the boundary of the federal judicial power as set out in Article III, § 2 of the United States Constitution. The prudential considerations against accepting jurisdiction here are so strong there is no reason for the Court to reach the constitutional limits on original jurisdiction.

STATEMENT PURSUANT TO RULES 24.1 AND 29.1

The caption of this case contains the names of all proposed parties to this case, except the State of New Jersey, which filed a motion to intervene on April 2, 1990.

Defendant Owens-Illinois, Inc. has no corporate parents. It is owned by three limited partnerships, none of which are publicly traded. Their names are: 1) KKR Partners II; 2) OII Associates; and 3) OII Associates II. Owens-Illinois, Inc. has no subsidiaries or affiliates other than wholly-owned subsidiaries.

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Defendant Owens-Illinois, Inc. submits this brief in opposition to plaintiffs' motion for leave to file an original complaint in this Court.

JURISDICTION

Plaintiffs purport to invoke the original jurisdiction of this Court under Article III, § 2 of the United States Constitution and 28 U.S.C.A. § 1251(b) (West 1966 and Supp. 1989).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article III, § 2 of the United States Constitution provides in part as follows:

> The judicial Power shall extend to . . . Controversies . . . between a State and Citizens of another State. . . .
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Title 28 U.S.C.A. § 1251(b) (West 1966 and Supp. 1989) provides as follows:

> (b) The Supreme Court shall have original but not exclusive jurisdiction of:
>
> (1) All actions or proceeding to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;
>
> (2) All controversies between the United States and a State;
>
> (3) All actions or proceedings by a State against the citizens of another State or against aliens.

Title 28 U.S.C.A. § 1652 (West 1966) provides as follows:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

THE POSITION OF OWENS-ILLINOIS, INC. IN THIS CASE

Thirty States seek to file an original jurisdiction complaint in this Court against Owens-Illinois, Inc. and 25 other companies. The other 20 States are

not parties in this Court, although at least six of them have pursued similar claims in their own courts. Plaintiffs allege that Owens-Illinois, Inc. and the other defendants sold "asbestos-containing building products" that were installed in buildings owned by the plaintiff States, and that in doing so defendants breached a duty to the States. Complaint ¶ 6-8. According to the proposed complaint, "[i]mmediate action" is necessary to "abate the asbestos hazards" that allegedly result from these materials, and the defendants should be held liable for the costs of this abatement. *Id.* ¶¶ 15-16. Indeed, in the brief in support of their motion to file the proposed complaint, plaintiff States suggest that a Master appointed by this Court may simply apportion defendants' "resources" among the plaintiff States. Plaintiffs' Brief in Support of Motion for Leave to File Complaint ("Brief") at 26.

Owens-Illinois, Inc. many years ago manufactured rigid, pre-formed hydrous calcium silicate materials in the form of pipecovering, blocks and sheets, which contained approximately 15% asbestos. Owens-Illinois, Inc. ceased all manufacture of these products in April 1958—32 years ago. These products were typically used as high-temperature (greater than 1,000 degrees) thermal insulation in industrial settings, including chemical and petroleum refineries and shipyards. Their only rational application in a public building would involve boilers and attendant piping. Over a period of decades, boilers are overhauled and replaced, which entails the removal and replacement of existing insulation. Consequently, even if Owens-Illinois, Inc. products were installed over three decades ago in buildings owned by the plaintiff States, which is unlikely, those products would have been long since removed and replaced.

Owens-Illinois, Inc. is routinely dismissed, usually by stipulation, from cases brought by States for lack of evidence that its products are actually present in any State's

buildings. *Kentucky v. United States Gypsum Co., et al.*, No. 85-CIV-1915 (Franklin Co., Kentucky, Circuit Court, Mar. 21, 1986) (complaint dismissed by stipulation as to Owens-Illinois, Inc. without prejudice); *Virginia v. Owens-Corning Fiberglas Corp., et al.*, No. LJ-414-3 (Richmond Circuit Court, Feb. 5, 1988) (summary judgment granted Owens-Illinois, Inc. on statute of limitation grounds); *West Virginia v. AAER Sprayed Insulations, et al.*, No. 86-C-458 (Monongahela Co., West Virginia, Circuit Court, Sept. 15, 1989) (complaint dismissed as to Owens-Illinois, Inc. with respect to Board of Regents buildings based on absence of Owens-Illinois, Inc. products); *Maryland v. Keene Corp., et al.*, Civil No. 1108600 (Anne Arundel Co., Maryland, Circuit Court) (complaint dismissed as to Owens-Illinois, Inc. on statute of repose grounds); *Minnesota v. Owens-Illinois, Inc.*, No. 99081, and *University of Minnesota Bd. of Regents v. Owens-Illinois, Inc.*, No. 99082 (First Judicial District Court) (suits involving 3,000 State buildings settled for payment of $3,500 from Owens-Illinois, Inc.; total settlement from all defendants was approximately $13 million); *see SSM Health Care, Inc., et al. v. Armstrong Constr. and Supply, et al.*, No. 85-CV-5952 (Dane Co., Wisconsin, Circuit Court, Feb. 26, 1990) (dismissing complaint against Owens-Illinois, Inc. on the merits with respect to 11 hospitals based on absence of Owens-Illinois, Inc. products.) Owens-Illinois, Inc. has never been found liable in any action alleging that Owens-Illinois, Inc. insulation products are present and creating a hazard in any building.

THE NATURE OF ASBESTOS-IN-BUILDINGS LITIGATION

The premise for plaintiff States' request for the exercise of discretionary original jurisdiction is a label: "The National Asbestos Problem." Brief at 13. The issue presented is "national" because it involves the individual claims of slightly more than one half of the States. The issue is "asbestos" because some buildings owned by these

States contain various types of asbestos-containing material that, depending on their condition, "can" cause the release of asbestos fibers that "may" be inhaled. *Id.* at 15. The issue is a "problem" because inhaled asbestos "may" cause disease and, due to that possibility, various regulatory acts prescribe, or may in the future prescribe, precautionary steps that may cost the States money. *Id.* at 15-17.

Plaintiff States offer this label in lieu of any description of what an individual asbestos-in-buildings claim actually entails. Such a claim invariably involves: (1) a building owner who believes, rightly or wrongly, that hazardous levels of asbestos are presently being, or may someday be, released by friable asbestos-containing materials in its building; and (2) those companies whom the building owner has reason to believe manufactured, distributed or sold the asbestos-containing materials currently in the building.

There is, of course, no generic building owner; there is no generic "Asbestos Company;" there is no generic building, asbestos fiber or asbestos-containing material. Indeed, years of litigation in the state and federal courts have demonstrated that there is not even a generic legal theory underlying asbestos-in-building claims.

Asbestos is a term that refers to a group of related minerals. There are no fewer than 30 types of fibers included in the category "asbestos," six of which have been found fit for industrial use. *Case v. Fibreboard Corp.*, 743 P.2d 1062, 1065 (Okla. 1987). Even plaintiff States admit that these various types of asbestos have been used in approximately 3,000 different commercial applications throughout this country. Brief at 13.

Defendants made different products containing different types and percentages of asbestos at manufacturing plants in different parts of the country and at different points in time. The Environmental Protection

Agency has recently published summaries of such information submitted by various manufacturers of asbestos products in accordance with the Asbestos Information Act of 1988. EPA, Asbestos; Publication of Identifying Information, 55 Fed. Reg. 5144 (Feb. 13, 1990).

Owens-Illinois, Inc. is and always has been primarily a manufacturer of glass containers. For a limited period of time ending in April 1958, it also manufactured high-temperature pipecovering, block and sheet insulation that contained a relatively small percentage of asbestos. It never made any of the other 3,000 types of asbestos-containing materials encompassed by the proposed complaint. It never used a number of the fiber types encompassed by the term "asbestos."

Such a limited and unique history is the rule, not the exception, among the so-called "Asbestos Companies" that the plaintiffs seek to bring before this Court. *See, e.g.*, EPA, Asbestos; Publication of Identifying Information, 55 Fed. Reg. 5144, 5146 (Eagle-Picher Industries manufactured insulating and finishing cements from 1930 to 1971); *id.* at 5150 (H.K. Porter Co. manufactured wet cement from 1970 to 1973); *id.* at 5155 (National Gypsum Co. manufactured acoustical plaster from 1933 to 1972); *id.* at 5156 (Pfizer, Inc. manufactured ceiling plaster from 1962 to 1972). These differences between and among defendants matter a great deal in an individual asbestos-in-buildings case.

FACTUAL AND LEGAL ISSUES PRESENTED IN ASBESTOS-IN-BUILDINGS LITIGATION

The threshold issue to be resolved in any asbestos-in-buildings case is whether plaintiff can identify the manufacturer(s) of the asbestos-containing materials currently in its building. No building contains the asbestos products of every defendant named here. What subgroup of defendants is appropriately named in an individual case turns upon when the building was built, where, by

whom, and how frequently the building has been renovated since its construction. Obviously, no public building built in the last thirty years could reasonably be expected to have ever contained, let alone still contain, an asbestos-containing material manufactured by Owens-Illinois, Inc., which ceased making such products in April 1958.

Product identification is not the only issue which involves facts unique to each building. Regardless of the legal theory advanced, the gravamen of a plaintiffs' case is that there are hazardous levels of asbestos in the plaintiffs' building, caused by the asbestos-containing materials currently in place. *See Board of Education v. A, C & E, Inc.*, 546 N.E.2d 580 (Ill. 1989). While it is true that various government agencies, based on limited information, have assumed for regulatory purposes that there is no safe level of exposure to asbestos, that assumption has never been proven accurate. Indeed, recent scientific publications demonstrate that buildings containing in-place asbestos-containing materials generally do not expose building occupants to any meaningful risk of asbestos-related disease. *E.g.*, Mossman, Bignon, Corn, Seaton & Gee, *Asbestos: Scientific Developments and Implications for Public Policy*, 247 Science 294, 298 (Jan. 19, 1990) ("This available data do not indicate that asbestos-associated malignancies or functional impairment will occur as a result of exposure to most airborne concentrations of asbestos in buildings.").

Owens-Illinois, Inc. does not here suggest that in-place asbestos-containing materials could never release hazardous levels of asbestos fibers. It does suggest, however, that no *presumption* of hazardous exposure can be justified and that in a civil claim plaintiff will have the burden of proving that such a hazard exists in a particular building with evidence specific to that building. That proof must focus on the type, condition, and location of the asbestos-containing materials, the levels of asbestos

fibers found inside and outside the building and on the type of asbestos fibers that are found. *Sisters of St. Mary v. AAER Sprayed Insulation*, 445 N.W.2d 723, 726 (Wis. App. 1989) (affirming denial of class certification on ground, *inter alia*, that "a jury would need to determine these facts separately for each [asbestos] product and removal project"). Detailed facts concerning the asbestos materials actually present in a given building are crucial because, as the Supreme Court of Florida has recognized, "[a]sbestos products . . . have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others." *Celotex Corp. v. Copeland*, 471 So. 2d 533, 537-38 (Fla. 1985) (rejecting "market share" liability in asbestos litigation). Proof of amount of asbestos in each building is indispensable because there is asbestos in the ambient air in virtually every portion of the United States. *See, e.g.*, EPA, Airborne Asbestos Health Assessment Update, EPA/600/8-84/003F (June 1986), at 146. There are hard scientific data demonstrating that rarely, if ever, will the level of asbestos in the air *inside* a building containing asbestos products exceed the level of asbestos in the ambient air *outside* the building, even where the asbestos products are friable. *E.g.*, Mossman, Bignon, Corn, Seaton & Gee, *supra* p. 7, at Table 1.

The elements of an asbestos-in-buildings claim are not, of course, limited to product identification and the existence of an actual hazard. In their proposed Complaint and their brief, plaintiff States directly put in issue defendants' knowledge, "prior to distribution and marketing," of the supposed hazards of asbestos-containing materials in buildings. Complaint ¶¶ 6-8; Brief at 12, 32. This alleged knowledge which purportedly gives rise to defendants' duty to abate asbestos hazards, *id.* at 32, will require proof unique to each defendant. Due to such defenses as statute of limitations, assumption of risk and contributory negligence, however, the actual knowledge

of each plaintiff will also be an issue. *Sisters of St. Mary*, 445 N.W.2d at 727.

The final element of an asbestos-in-buildings claim is damages. Once again, the proof on this question is building-specific. *Id.* at 728. What abatement efforts, if any, are necessary in a building turn on facts unique to that building. *Id.* at 726. There is no reliable, constitutional shortcut to a damages calculation. *Id.* at 728-29.

Artificial agglomeration of the factually disparate claims of building owners does not change the fundamental nature of the individual claims. Regardless of the forum in which those claims are adjudicated, there must be, at a minimum, detailed analysis of controlling state law to determine their legal sufficiency, as well as factual findings on: (1) who manufactured the asbestos-containing material found in the buildings; (2) whether hazardous levels of asbestos fibers are, or are ever likely to be, present in the air in each building; (3) what each manufacturer of those products knew or should have known at the time of manufacture about the purported risks that in-place asbestos-containing materials might pose to building occupants decades later; (4) what each building owner knew or should have known about that same purported risk at the time of purchase and since; and (5) what damages each building owner has sustained due to the alleged wrongdoing of the defendants.

REASONS FOR DENYING THE MOTION

SUMMARY

A. Stripped to its essentials, plaintiff States' argument in favor of original jurisdiction is that only this Court can grant "comprehensive and uniform" relief. Brief at 22. Nowhere do plaintiff States address the fact that 20 other States have elected not to join in the motion for leave to file the proposed complaint. Unlike the plaintiff States, these 20 States must consider their own courts to be perfectly adequate forums and their

own laws to provide perfectly adequate relief. Indeed, Owens-Illinois, Inc. either is or has been a defendant in state court actions brought by at least six States asserting claims under state law based on virtually identical factual allegations.

Moreover, plaintiff States fail to address the practical problems presented by this case, which has more than 50 parties and concerns events over the past half century. Indeed, in the case of Owens-Illinois, Inc., the most recent event pertinent to this case took place 32 years ago, when it ceased manufacture of the products in question. Even if the proposed complaint stated a cause of action under the laws of any of the 30 relevant jurisdictions, liability and damages would turn on complex facts unique to each building, which would be local in nature. This Court is "structured to perform as an appellate tribunal," *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971), and the resolution in the first instance of these myriad legal and factual issues is inappropriate for this Court.

B. Under principles announced in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985), the Constitution requires the application of the law of individual states to claims essentially local in character, where no other state has constitutionally significant contacts with each of the claims. No plaintiff State has sufficient contacts with each of the buildings located in other states constitutionally to justify application of its own laws to all of the claims encompassed by the proposed complaint.

While it is true that application of the rule in *Shutts* applies only to the situation where an actual conflict between the various states' laws exists, the *best* plaintiff States can hope to demonstrate is that such a conflict exists here. Because the *only* state supreme court to reach this question has held that plaintiffs have no claim in restitution under these circumstances, *Board*

of Education v. A, C & S, Inc., 546 N.E.2d 580 (Ill. 1989), a finding by this Court that no conflict exists among the laws of the 30 relevant jurisdictions would require dismissal of the complaint. At a minimum, the decision by the Illinois Supreme Court establishes an outcome determinative conflict between the laws of Illinois and any state that may ultimately recognize the theory put forth by plaintiff States. For this Court to ascertain and apply the law of the 29 other States whose appellate courts have not addressed this issue would be a prodigious task.

Although not explicitly raised by plaintiffs, the creation of a new branch of federal common law in this context is no answer. This Court has consistently held that the creation of federal common law is appropriate only in those "few and restricted" instances, *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963), where either Congress has looked to the federal courts to fill the interstices of statutory law, or a federal rule of decision is necessary "to protect uniquely federal interests." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). Furthermore, considerations of federalism and comity dictate that the developing state law in this area, including the decision of the Illinois Supreme Court that is squarely adverse to plaintiff States, not be disturbed merely because claims relating to buildings located in different states have been bundled together in the proposed complaint. Therefore, this Court should decline to create a new branch of federal common law.

Plaintiff States devote six pages of their brief to an argument that their complaint sets forth a valid cause of action under § 115 of the *Restatement of Restitution.* Brief at 28-34. Owens-Illinois, Inc. does not directly respond to that argument because the prudential considerations against accepting original jurisdiction here are so strong that the Court need not and should not reach the merits of plaintiff States' legal theory. It must

be noted, however, that the Illinois Supreme Court squarely rejected that theory in *Board of Education*, where plaintiff made factual allegations virtually identical to those in the proposed complaint. This Court's decision in *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967), was properly found to be inapposite to the circumstances pleaded here. *Board of Education*, 546 N.E.2d at 597.

Leave To File The Complaint Should Be Denied Under The Principles Adopted In *Ohio v. Wyandotte Chemicals Corp.* and Other Cases

The Court's original jurisdiction under Article III, § 2 of the Constitution and 28 U.S.C.A. § 1251(b)(3) (West 1966 and Supp. 1989) is not mandatory. The Court seeks to exercise its discretionary original jurisdiction sparingly and is particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle its claim. *United States v. Nevada*, 412 U.S. 534, 538 (1973); *Washington v. General Motors Corp.*, 406 U.S. 109, 114 (1972). In *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 497 (1971), the Court rejected as "untenable"

> the view that this Court must stand willing to adjudicate all or most legal disputes that may arise between one State and a citizen or citizens of another even though the dispute may be one over which this Court does have original jurisdiction.

Ohio v. Wyandotte was a case involving the State of Ohio's claim that various defendants were responsible for the presence of mercury in Ohio's waters. The Court found that the exercise of original jurisdiction was inappropriate because of (1) the availability of alternative forums, such as state courts well-equipped to deal with the issues dependent on local law (*id.* at 497, 500, 503); (2) the complexities and novelty of the factual issues involved (*id.* at 502, 503, 504-05); (3) the Supreme Court's lack of special competence or institu-

tional ability to deal with disputes concerning local law and complex factfinding, even with the help of a Special Master (*id.* at 497-98, 504); and (4) the concern that the Court would be distracted from its appellate work if it were to take jurisdiction (*id.* at 498, 505). The Court concluded that "[s]uch 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." *Id.* at 505. Any considered examination of the factors deemed important by the Court in *Wyandotte* demonstrates why the Court should not exercise original jurisdiction in this case.

First, plaintiff States have access to their *own* courts for their claims against Owens-Illinois, Inc. and the other defendants. Indeed, at least six States have pursued claims in their own courts against Owens-Illinois, Inc. based on factual allegations virtually identical to those in the proposed complaint. Thus, the principles underlying the grant of original jurisdiction, as stated in *Wyandotte*, are not implicated here.

Second, just as with Ohio's claims in *Wyandotte*, the factual issues raised by the proposed complaint, as discussed above at pages 4 to 9, are complex and to a large extent scientific in nature.

As one example, Owens-Illinois, Inc. denies its high-temperature thermal insulation, which it ceased manufacturing 32 years ago, is present in *any* building owned by *any* plaintiff State. Adjudicating a case involving such detailed product identification issues is a difficult enough task for a state trial court, sitting in proximity to the buildings and state officials in question. It is a task for which this Court is ill-suited.

Finally, plaintiff States' proposed complaint does not call upon this Court to resolve any "difficult or im-

portant problems of federal law." *Wyandotte*, 401 U.S. at 504. Indeed, plaintiff States' claims arises under state law and, as discussed in the next section of this brief, the task of first ascertaining and then applying the law of each State to its own claims would be both burdensome and pointless in light of the availability of each State's own courts as alternative and better forums for these disputes.

In their brief, plaintiff States seek to distinguish *Wyandotte* on five grounds, none of which is persuasive. Brief at 22-23. First, plaintiff States assert, without any support, that no one state court would have jurisdiction of all defendants. Even if this assertion were true, which Owens-Illinois, Inc. doubts is the case, it does not follow that *Wyandotte* is inapplicable and original jurisdiction is appropriate simply because plaintiff States wish to pursue in a single case the 26 defendants they have selected. The "reasons of practical wisdom" that led this Court to reject the complaint in *Wyandotte* have as much force, and perhaps more, where plaintiff States seek to use this Court as the judicial vehicle for a huge and unmanageable collection of essentially separate claims.

Plaintiff States' claim that this Court could grant "comprehensive and uniform" relief, Brief at 22, is without any basis given that 20 States have declined to join with plaintiff States in this Court. Presumably, they believe that their own courts are perfectly adequate forums and their own laws provide perfectly adequate relief.

Second, plaintiff States assert that their claims are "currently" being addressed *only* through "building-specific lawsuits in the courts." How this is consistent with their opening discussion of the "National Asbestos Problem," Brief at 13-18, which emphasizes the attention Congress and the EPA have paid to this issue, plaintiff States nowhere explain. In fact, government agencies

have devoted, and continue to devote, extensive resources to this subject, a fact which militates against the exercise of original jurisdiction under *Wyandotte*.

Third, any "technical matters" have already been litigated "in many other trials," so there are no "novel issues for resolution by this Court." Brief at 23. Owens-Illinois, Inc. submits that the only relevant matter that has been settled in other cases is that its insulation products are not present in state-owned buildings. No other factual issue, novel or otherwise, has ever been litigated to conclusion against Owens-Illinois, Inc.

Fourth, plaintiff States assert that the legal issues are not "dependent upon the local law." *Id.* Owens-Illinois, Inc. proves the contrary in the next section of this brief.

Finally, according to plaintiff States, for this Court to assume original jurisdiction "may" ultimately reduce the number of asbestos-in-buildings cases that are "appealed" to this Court. *Id.* While important constitutional issues may well arise in the course of this litigation in the state courts which would warrant review by writ of certiorari in this Court, the issue is the relative efficiency of certiorari jurisdiction as opposed to original jurisdiction. The former is more efficient. Judicial economy dictates that the question of Supreme Court review be made on an issue by issue basis once the necessary factual predicates have been established in the trial courts.

This Court's other decisions on its discretionary original jurisdiction are in accord with *Wyandotte*. In *Washington v. General Motors Corp.*, 406 U.S. 109, 116 (1972), 18 States sought leave to file an original jurisdiction complaint, but this Court concluded that "the causes should be heard in the appropriate federal district courts [note omitted]." There, the proposed complaint sought wide-ranging injunctive relief, and this

Court noted that the "nature of the relief which may be necessary . . . argues against taking original jurisdiction." *Id.* at 114. Similarly here, the plaintiff States seek to have this Court "equitably" apportion defendants' "resources," Brief at 12, and the nature of this relief makes this case, just as with *General Motors*, inappropriate for original jurisdiction.

In *United States v. Nevada*, 412 U.S. 534, 538 (1973), the Court stated that it is "particularly reluctant to take jurisdiction of a suit where a plaintiff has another adequate forum in which to settle his claim," and in *Arizona v. New Mexico*, 425 U.S. 794, 798 (1976), the Court denied leave to file because of a pending state court action involving the same issues presented in the proposed original jurisdiction complaint. In *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945), a majority of this Court granted Georgia leave to file a complaint alleging a conspiracy in violation of the federal antitrust laws. The complaint was later dismissed by stipulation, 324 U.S. 439 (1945). Georgia's complaint, however, was totally unlike that of plaintiff States here, because it rested entirely on federal law and alleged that defendants had acted in concert.

Any Final Adjudication Of This Case Under The Original Jurisdiction Of This Court Would Involve Either The Application Of Differing State Law To Each Plaintiff's Claim, Or The Creation Of A New Body Of Federal Common Law

1. ***If Leave To File The Complaint Is Granted, Choice And Application Of Appropriate State Law Will Raise Burdensome, Complex And Difficult Problems For This Court***

If this Court chooses to hear this case under its original jurisdiction, it will assume the burdensome, complex and difficult problems of choosing, ascertaining, interpreting, and applying the substantive law of the plaintiff

States under the rule in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). *See Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 563 (1851); Note, *The Original Jurisdiction of the United States Supreme Court*, 11 Stan. L. Rev., 665, 680-81, 683-85 (1958-59) (noting that while the Supreme Court has not had cause to extend the *Erie* rule to cases of original review, dicta in *Wheeling* and several prudential reasons support application of *Erie* in such cases); 28 U.S.C.A. § 1652 (West 1966) (rules of decision act).

Indeed, the task of selecting and applying the proper forum's law to each claim would be necessary to protect the constitutional rights of Owens-Illinois, Inc. and the other defendants. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Kansas Supreme Court had applied its own substantive law on the award of interest on suspended natural gas lease royalties to all claims in a class action. *Id.* at 799. Most of the leases and the plaintiffs had no connection to the state of Kansas. *Id.* at 814-15. The plaintiffs resided in all 50 states and the leased land at issue was located in 11 different States. *Id.* at 799. Based on these facts, petitioner contended that application of Kansas substantive law to all claims violated the constitutional limitations on choice of law mandated by the due process clause and the full faith and credit clause. *Id.* at 816.

The Court noted that, for constitutional concerns to arise, the state law applied must actually conflict in some material way with any other law which could apply. *Id.* at 816. Petitioner claimed that Kansas law conflicted with that of several relevant states, including Texas and Oklahoma. *Id.* at 816. The Court agreed that putative conflicts did exist, *id.* 816-18, and therefore invoked the following rule:

> Kansas must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that choice of Kanssa law is not arbitrary or unfair.

Id. at 821-22 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)). The Court then held that, given Kansas' lack of interest in claims unrelated to it and the substantive conflict with Texas law, the application of Kansas law was sufficiently arbitrary and unfair to exceed constitutional limits. *Id.* at 822.

A situation similar to *Shutts* would face this Court if it assumed original jurisdiction here: plaintiff States represent 30 jurisdictions, and no one State has sufficient contacts with the buildings in any of the other States to justify constitutional application of that State's law in this case. Thus, this Court, under *Erie*, would have to ascertain, interpret and apply the appropriate law of *each* of the 30 relevant jurisdictions to *each* defendant.

To do so, the Court would have to predict whether each state would accept the form of remedy mandated by the Public Assistance Doctrine, which is the *only* legal basis for relief stated in plaintiff States' complaint. With one exception, *Board of Education v. A. C & S, Inc.*, 546 N.E.2d 580 (Ill. 1989), no appellate court in any of the relevant jurisdictions has confronted this issue. In a few instances, this Court will be required to decide a state's law from trial court cases (the majority of which have held that restitutionary relief is not available in these circumstances). *See, e.g., Franklin County School Bd. v. Lake Asbestos of Quebec, Ltd.*, No. 84-AR-5435-NW, 1988 U.S. Dist. LEXIS 12779 (N.D. Ala. Feb. 13, 1986); *Town of Hooksett v. W.R. Grace & Co.*, 617 F.Supp. 126, 134 (D.N.H. 1984); *City of Greeneville v. National Gypsum Co.*, No. CIV-2-83-294 (E.D. Tenn. Dec. 21, 1983) (LEXIS, Genfed library, Dist file). In most jurisdictions, however, the courts have not addressed this issue. Thus, this Court would have to survey the relevant law and predict each State's position on restitutionary relief under these circumstances. *See Shutts*, 472 U.S. at 796-97.

While it is true that the rule in *Shutts* applies only to the situation where an actual conflict exists between the laws of the various states, *id.* at 816, the best the plaintiffs can hope to show is that such a conflict is present here. The conflict exists between the law of those jurisdictions that reject restitutionary relief under these circumstances, *e.g.*, *Board of Education*, and plaintiff States' proposed adoption of § 115. Because the only relevant state supreme court decision *rejected* a restitutionary remedy under these circumstances, a finding by this Court that no conflict exists among the various relevant states would require dismissal of plaintiff States' complaint. At a minimum, the decision in *Board of Education* establishes an outcome determinative conflict between the laws of one plaintiff State—Illinois—and any relevant state's authority ultimately recognizing the a restitutionary remedy.

This Court has noted that it has no "special competence in dealing with the numerous conflicts between States and nonresident individuals *that raise no serious issues of federal law.*" *Ohio v. Wyandotte*, 401 U.S. at 497-98 (1971) (emphasis added). The present action raises *no* federal issues, but rather implicates only state law. Expertise in selecting, interpreting and applying law in this area resides, of course, with the state tribunals of each jurisdiction. Therefore, original jurisdiction in this Court, which would entail the detailed and burdensome analysis and application of various states' laws as required by *Shutts*, is inappropriate.

2. *Creation Of Federal Common Law Is Inappropriate And Unnecessary In This Context*

In lieu of performing the laborious task of analyzing state law, plaintiffs ask this Court to adopt § 115 of the *Restatement of Restitution* as providing remedy for abatement expenses relating to asbestos from state-owned buildings. The inevitable result of such an action by this Court would be the creation of federal common

law since the proposed remedy would supplant state law to the contrary. Interestingly, it is the highest attorneys of each state who request this Court to replace their respective state's common law. Creation of federal common law in this context is wholly inappropriate.

In contrast to the state courts, the federal courts lack the *general* power to develop their own rules of decision. *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1982); *Erie R.R. v. Tompkins*, 304 U.S. at 78 (1938). Rather federal courts, as courts of limited jurisdiction, are empowered to make only those laws authorized by the Constitution or by enactments of Congress. *Erie*, 304 U.S. at 78; *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1323 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986). Therefore, the decision whether to create new federal law in an area of national concern generally should not be made "by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *City of Milwaukee*, 451 U.S. at 313 (citing *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

Nevertheless, this Court has recognized the authority of the federal judiciary to create federal common law in certain instances. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). These instances, however, are "few and restricted," *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963), and fall into essentially two categories: those in which Congress has given the courts the power to develop substantive law and those in which a federal rule of decision is necessary 'to protect uniquely federal interests.' *Texas Indus.*, 451 U.S. at 640.

The present issues do not fall within either of these two categories. First, Congress has not created a statutory cause of action for the recovery of asbestos abatement costs, nor given the courts authority to create federal common law. Such an action by Congress would

supersede a state's interest in developing its own laws. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 503 (1987) (Brennan, J., dissenting) (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 255 (1984)). Congress has not done so but rather has taken only limited action regarding asbestos removal, as plaintiffs note. Brief at 16.

Second, the issues involved in the instant case implicate no "uniquely federal interests." Absent congressional enactments otherwise, uniquely federal interests include only "such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Indus.*, 456 U.S. at 641.

The claims made by plaintiff States here obviously do not implicate the authority and duties of the United States as a sovereign. Plaintiff States allege several interests affected here: (1) the economic burden placed on citizens of each State for the cost of the removal of the asbestos materials; (2) the allegedly separate and distinct economic burden placed on each state for the same removal; and (3) the disharmony that could flow from "interstate competition for limited resources of the Asbestos Companies." Brief at 20-21. Assuming *arguendo* that this case actually implicates these alleged interests, *none* has a direct effect on the United States as sovereign. *See Jackson*, 750 F.2d at 1325.

Even if these problems affected enough States to create a national interest in state-building asbestos abatement, this is not enough to warrant application of federal common law. *Jackson*, 750 F.2d at 1324-25. " 'Uniquely federal interests' are not merely national interests, and the existence of national interests, no matter their significance, cannot by themselves give federal courts the authority to supersede state policy." *Id.* at 1324-25 (finding that assuring compensation to persons injured from asbestos exposure by regulating punitive

damage awards in civil litigation is not a uniquely federal interest warranting imposition of federal common law); *see Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2922 (1989) (holding that where state law provides the basis of decision, the propriety of an award of punitive damages is a question of state law and not federal common law); *Texas Indus.*, 451 U.S. at 642 (holding that the right to contribution among federal antitrust wrongdoers does not implicate uniquely federal interests sufficiently to warrant creation of federal common law); *Miree v. DeKalb County*, 433 U.S. 25, 29-33 (1977) (holding that federal interest in air travel is sufficient basis for creation of federal law in action between private parties that will have no direct effect on the United States or its treasury); *National Audubon Soc'y v. Dep't of Water & Power*, 858 F.2d 1409, 1414-16 (9th Cir. 1988) (holding that an unquantified interest in protecting the nation's air quality does not affect the authority and duties of the United States as sovereign).

The single area where this Court has created federal common law in the absence of a congressional directive or a direct effect on the United States as a sovereign is interstate disputes over water rights and pollution. *See Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). Plaintiff States' proposed complaint is not within the scope of this exceptional area of federal common law. For example, in *Jackson*, defendants claimed that federal common law was necessary to limit punitive damage awards in asbestos cases, because the early recoveries in certain states would divert and deplete scarce corporate resources at the expense of future plaintiffs in other states. *Jackson*, 750 F.2d at 1324. The court distinguished this situation from that found in *Hinderlider* and *City of Milwaukee*, where the essential conflict was between states as quasi-sovereign bodies over resources shared by each:

> Clearly, if federal courts are to remain courts of limited powers as required under *Erie*, a dispute over a common fund or scarce resources cannot become 'interstate' in the sense of requiring the application of federal common law, merely because the conflict is not confined within the boundaries of a single state.

Id.; see National Audubon, 858 F.2d at 1416-17.

Furthermore, when considering whether to create federal common law, this Court acknowledges the extent to which imposition of federal common law will disrupt important and legitimate state policies. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29 (1979). Creation of federal common law by this Court modeled on § 115 of the *Restatement of Restitution* would, in effect, supplant state law. By adopting the plaintiffs' theory, the Court would usurp the role of the state courts in fashioning the scope of equitable remedies available.

Nowhere would this disruption of the principles of federalism and comity be more acute than in the state of Illinois. When faced with the same restitution claim presented here, the Illinois Supreme Court rejected a restitutionary remedy under its common law. *See Board of Education v. A, C & S, Inc.*, 546 N.E.2d 580 (Ill. 1989).

The Attorney General of Illinois, who is counsel to Illinois in this Court, sought and was granted leave to file an amicus brief in the *Board of Education* case before the Illinois Supreme Court. In his motion for leave to file his amicus brief, the Attorney General advised that Court that "the resolution [of the *City of Chicago* case] will have *enormous impact* upon all similar actions which may be pending or which may be brought in the future." Motion of Neil F. Hartigan for Leave to File Brief Amicus Curiae at 2 (April 4, 1989) (emphasis added).

Thus, the Illinois Supreme Court was aware of the interests of Illinois in this matter. Nevertheless, that

court dismissed plaintiffs' claim for restitution, holding that "the proper interpretation of § 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." 546 N.E.2d at 597. The Court 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 598 (emphasis added).

Obviously, the Illinois Supreme Court was called upon to balance competing interests—including those of the State of Illinois—in light of Illinois precedent and public policy. Plaintiff States request this Court to upset this balance by adopting a federal restitution remedy.

None of the cases cited by the plaintiff States supports such a result. Each involved the assertion of a valid cause of action premised upon the breach of a recognized legal duty; restitution was merely the form of relief sought for that breach of duty. *See Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 196-97 (1967) (implied cause of action under Rivers and Harbors Act of 1899, arising from explicit statutory duty of vessel owners to remove sunken vessels from navigable waterway); *United States v. Consolidated Edison Co.*, 580 F.2d 1122, 1127-29 (2d Cir. 1978) (quasi-contract cause of action arising from Con Ed's duty as government-regulated public service company to furnish electricity); *United States v. P/B STCO 213*, 756 F.2d 364, 368, 369-70 (5th Cir. 1985) (cause of action arising from explicit provision of Federal Water Pollution Control Act imposing on polluters the duty to clean up the waters they polluted and from Congress' intent to place the cost of cleanup on the polluter in the first instance).

In *Board of Education*, the Illinois Supreme Court found, that in circumstances such as those presented

here, asbestos manufacturers and distributors had *no* such pre-existing duty. 546 N.E.2d at 598. The plaintiffs' representations to the contrary notwithstanding, no consistent pattern has emerged from the trial court rulings in other states, although it would appear that the majority follow the Illinois rule.

Therefore, adoption by this Court of a new federal remedy based on § 115 in this area would effectively upset the balance created at the state level, and with it the process which cedes to each State the right to fashion its own common law concerning matters uniquely local in character. If this balance is to be disrupted, it should occur "by the people through their elected representatives in Congress," *City of Milwaukee*, 451 U.S. at 312-13, or by state legislatures or state courts, *see Blackston v. Shook and Fletcher Insulation Co.*, 764 F.2d 1480, 1486 (11th Cir. 1988) (holding that the federal courts should not create a federal rebuttable presumption of exposure in asbestos cases), not by the federal judiciary.

CONCLUSION

For the reasons stated above, Defendant Owens-Illinois, Inc. requests that the motion for leave to file the complaint be denied.

Respectfully submitted,

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