No. 116, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, ILLINOIS, INDIANA, IOWA, LOUISIANA, MAINE, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, and WYOMING,

Plaintiffs,

—against—

W.R. GRACE & COMPANY, NATIONAL GYPSUM COMPANY, UNITED STATES GYPSUM COMPANY, USG CORPORATION, AMERICAN BILTRITE, INC., ARMSTRONG WORLD INDUSTRIES, INC., AZROCK INDUSTRIES, INC., BASIC INCORPORATED, CAREY-CANADA, INC., THE CELOTEX CORPORATION, CERTAINTEED CORPORATION, CROWN CORK & SEAL COMPANY, INC., EAGLE-PICHER INDUSTRIES, INC., FIBREBOARD CORPORATION, THE FLINTKOTE COMPANY, GAF CORPORATION, GEORGIA-PACIFIC CORPORATION, H.K. PORTER COMPANY, INC., KEENE CORPORATION, KENTILE FLOORS, INC., OWENS-CORNING FIBERGLASS CORPORATION, OWENS-ILLINOIS, INC., PFIZER, INC., RAYMARK INDUSTRIES, INC., SPRAYED INSULATION, INC., and TURNER & NEWALL PLC,

Defendants.

ON PLAINTIFFS' MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF OF DEFENDANT W.R. GRACE & COMPANY IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE COMPLAINT

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QUESTIONS PRESENTED

1. May the plaintiff States invoke this Court's original jurisdiction in a proposed action against, *inter alia*, their own citizens?

2. Does the plaintiffs' facile device of an alternative pleading, purporting to frame the proposed action as only between such parties as may be diverse, meet the requirement of complete diversity in original actions brought by States against "Citizens of another State"?

3. Even if this Court should conclude that its original jurisdiction extends to the proposed action, does this case warrant the exercise of that jurisdiction in view of the extraordinarily individualized and technical factual issues involved, the diverse common law of twenty-nine separate states that would have to be applied, and the availability of other fora to hear these claims?

PARTIES TO THE PROCEEDING

Pursuant to Rule 24.1 of the Rules of this Court, the Court is advised that the proposed parties to the proceeding are identified in the caption of the case. By motion filed April 2, 1990 the State of New Jersey moved to intervene as a party plaintiff.

Pursuant to Rule 29.1, the Court is advised that W.R. Grace and Company is a publicly traded company with no parent company. Other than wholly-owned subsidiaries, subsidiaries of W.R. Grace and Company (or its subsidiaries) are Del Taco Corporation, Del Taco Restaurants, Inc., Grace Energy Corporation, Grace Drilling Company and Grace Environmental, Inc.

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Defendants.

ON PLAINTIFFS' MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF OF W.R. GRACE & COMPANY IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE COMPLAINT

This brief is respectfully submitted on behalf of defendant W.R. Grace and Company ("Grace") in opposition to plaintiffs' motion for leave to file the Complaint.

JURISDICTIONAL BASES ASSERTED

Plaintiffs attempt to invoke this Court's jurisdiction pursuant to Article III, Section 2 of the Constitution and pursuant to 28 U.S.C. § 1251 (1982). As discussed more fully below, it is defendant's position that this Court lacks jurisdiction to entertain this action and that, even if jurisdiction could be said to lie, this Court should decline to exercise it.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE III, Section 2 of the Constitution provides in pertinent part:

> SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a 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.

Section 1251(b)(3) of the Judicial Code (28 U.S.C. § 1251(b)(3) (1982)) provides:

> The Supreme Court shall have original but not exclusive jurisdiction of . . .
>
> * * *
>
> (3) All actions or proceedings by a State against the citizens of another State or against aliens.

STATEMENT OF THE CASE

The Attorneys General of twenty-nine States seek to invoke the original jurisdiction of this Court to pursue tort claims against twenty-six former manufacturers of a broad variety of building products which contained asbestos. Plaintiffs explain that they have taken the extraordinary step of requesting this Court to try their asbestos-in-buildings claims in an effort to mitigate "the national crisis presented by the presence of asbestos-containing materials in public buildings" (Proposed Complaint, Introduction at 1-2)—a crisis that neither Congress nor the responsible federal regulatory agencies seem to recognize.[1]

The States also suggest that this proposed action would somehow mitigate, if not solve, "the asbestos litigation prob-

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1 For example, in its 1988 Report to Congress, the Environmental Protection Agency noted that its air sampling study of forty-three government buildings with asbestos-containing materials showed asbestos fiber counts no higher than those in the ambient air outside those buildings. *EPA Study of Asbestos-Containing Materials in Public Buildings: A Report to Congress* at 12 (U.S.E.P.A. February 1988) ("1988 EPA Report to Congress"). In his letter transmitting that report to Congress, Environmental Protection Agency Administrator Lee M. Thomas recommended *against* requiring inspection for, or removal of, asbestos-containing materials in public and commercial buildings. A copy of the report, including Administrator Thomas's transmittal letter, has been lodged with the Court by plaintiffs.

lem" (States' Br. at 23).[2] There is no question that courts across the country are devoting significant attention to tens of thousands of personal injury actions brought by shipyard workers and others claiming serious illness resulting from prolonged occupational exposure to asbestos fibers in high doses. In contrast, asbestos-in-buildings actions, such as that proposed here, number in the hundreds nationwide and raise issues that are quite different. In short, the proposed action would do nothing to solve the "problem" to which plaintiffs refer. Instead, plaintiffs are asking this Court to devote a substantial portion of its time to resolving one small aspect of a much different issue concerning asbestos-containing materials (or "ACM") in buildings—an issue that is presently, and properly, the province of Congress, various regulatory agencies, state legislatures and the lower courts.

The suggestion that this Court must turn its immediate attention to asbestos-in-buildings litigation is reflective of the kind of asbestos phobia that has led some owners of buildings which include ACM to contend, by extrapolating from long-term, high-dose industrial exposures, that the much lower asbestos fiber levels in buildings—typically no higher than those naturally occurring in the outside ambient air—are cause for serious concern.[3] No empirical data supports the extrapolation. Moreover, the absence of scientific support for such concern has recently been demonstrated in articles appearing in the *New England Journal of Medicine* and *Science* and in papers read at a symposium of experts conducted at Harvard University.[4]

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2 References to "States' Br." are to appropriate pages of plaintiffs' "Brief in Support of Motion For Leave to File Complaint."

3 Asbestos is a naturally occurring mineral and is ubiquitous. Natural outcroppings from rock formations, as well as releases from brake linings, contribute to its presence in the outside ambient air. The "official rock" of plaintiff California is "serpentine" which is laden with chrysotile asbestos.

4 Mossman, Bignon, Corn, Seaton & Gee, *Asbestos: Scientific Developments and Implications for Public Policy*, 247 Science 294 (January 19, 1990); Mossman & Gee, *Medical Progress: Asbestos-Related Diseases*, 320 New England Journal of Medicine 1721 (June 29, 1989) ("*New England*

The United States Environmental Protection Agency ("EPA"), the agency that has had principal responsibility for asbestos-related issues for more than 17 years, has emphasized that:

> The presence of asbestos in a building does not mean that the health of building occupants is endangered. If asbestos-containing material (ACM) remains in good condition and is unlikely to be disturbed, exposure will be negligible.[5]

Just last week, an EPA official testifying before Congress explained that

> the mere presence of a hazardous substance, such as asbestos on an auditorium ceiling, no more implies disease than a potential poison in a medicine cabinet or under a kitchen sink implies poisoning.[6]

There is no federal mandate for the removal of asbestos. Nor does current scientific and medical knowledge justify the removal of asbestos from buildings in most circumstances. A recent article in the *New England Journal of Medicine* concluded:

> 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

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Journal"); *Proceedings: Symposium on Health Aspects of Exposure to Asbestos in Buildings*, December 14-16, 1988 (Harvard University, Energy and Environmental Policy Center, December 1989). Copies of the Harvard Symposium Proceedings have been lodged with the Court.

5 *Guidance For Controlling Asbestos-Containing Materials in Buildings* 1-1 (U.S.E.P.A. 1985); *see also 1988 Report to Congress* at 6.

6 Statement of Linda J. Fisher, Assistant Administrator for Pesticides and Toxic Substances, U.S.E.P.A., Before the Subcommittee on Health and Safety of the Committee on Education and Labor, U.S. House of Representatives at 11 (April 3, 1990).

> unprecedented expenses on the order of $100 billion to $150 billion that could result from asbestos abatement.[7]

The States allege that "Congress has found that there is no scientifically accepted 'safe level' of asbestos exposure . . . and has legislated a comprehensive system of federal environmental and public health requirements which affect the States" (States' Br. at 16). The EPA itself has explained that the fact that no safe level has yet been promulgated does not represent an affirmative finding that there is no safe level; instead, it reflects the cautious assumption adopted by regulatory agencies towards all substances that are carcinogenic at high levels of exposure. 1988 EPA Report to Congress at 5. Contrary to plaintiffs' rhetoric, EPA's position remains that "[i]ntact and undisturbed asbestos materials generally do not pose a health risk."[8] Against this backdrop it can hardly be said that it is of the "strictest necessity" that plaintiffs seek the intervention of this Court. *See Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 505 (1971).

Plaintiffs' decision to request the Court to entertain this action is also extraordinary in light of who it is they wish to sue and what it is they wish to sue about. As the Complaint makes clear, twenty of the twenty-six proposed defendants are citizens of one of the plaintiff States, plainly divesting this Court of original jurisdiction. Furthermore, the real property interests plaintiffs seek to protect are all within their respective borders and subject to their respective laws. Even if a "national tribunal" were available to plaintiffs, there is no national or even interstate issue involved here. Plaintiffs may turn at any time to their own state courts as have their eight sister states—Kentucky, Maryland, Minnesota, Mississippi, Pennsylvania, South Carolina, Virginia and West Virginia—who have already done so.

The States respond to this fact by urging that it would be more simple or more convenient to try all of their claims

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7 *New England Journal*, *supra* n.4 at 1729 (footnote omitted).

8 *The ABCs of Asbestos in Schools* at 4 (U.S. E.P.A. 1989).

together—a proposition that is self-evidently incorrect. Liability for ACM in buildings depends upon building-specific, product-specific and plaintiff-specific facts including, for example, the condition of the ACM as installed in each building (*i.e.*, whether it is releasing inhalable asbestos fibers into the air at a dangerous level). Plaintiffs also suggest that only this Court can "equitably apportion" defendants' assets and spare the States from a race to judgment (States' Br. at 12). The implication that liability is preordained is somewhat curious: W.R. Grace, for example, has prevailed in each of its last three asbestos-in-buildings trials.[9] Indeed, out of all twenty-three asbestos-in-buildings cases tried against all ACM manufacturers to date, fourteen have been won by defendants.[10]

In short, this is a case where plaintiffs plead a claim of questionable legal viability, involving only one phase of larger issues that have been and are being considered by legislators, regulators and lower courts. It is also a case that poses no question of federal law, serious or otherwise, and presents complexities of a sort never before considered by the Court. Even assuming that jurisdiction could be said to lie, for more than four decades this Court has refused to exercise its non-exclusive, original jurisdiction to entertain much simpler cases between "States and citizens of another State."[11] This proposed action is not one that should move this Court to embark on a new era as trial court.

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9 *Methodist Health Systems, Inc.* v. *W.R. Grace & Co.-Conn.*, No. 85-2553-GA (W.D. Tenn.) (jury verdict for defendant rendered February 15, 1990); *The 3250 Wilshire Boulevard Building* v. *Metropolitan Life Insurance Co.*, No. 87-06048 WMB (GHK) (C.D. Cal.) (jury verdict for defendant rendered November 20, 1989); *Mt. Lebanon School District* v. *W.R. Grace & Co.*, C.D. No. G.D. 83-13686 (Pa. Ct. C.P. Alleghany Co.) (jury verdict for defendant rendered October 12, 1989).

10 *See* National Journal of Asbestos-In-Buildings (February 23, 1990) at 7; *Methodist Health Systems, Inc.* v. *W.R. Grace & Co.-Conn.*, *supra.*

11 To our knowledge the last time this Court entertained an action brought by a state (or states) against private citizens alone appears to be *Georgia* v. *Pennsylvania R.R. Co.*, 324 U.S. 439 (1945). In contrast to this proposed action, that case involved federal claims under the antitrust laws.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction over the proposed action because there is no diversity between the plaintiff States and the citizens of these same States named as defendants. Although the Court has interpreted the Constitution's grant of jurisdiction to the federal district courts in actions "between Citizens of different States" as not requiring complete and absolute diversity in every instance, it has made clear that complete diversity is constitutionally required for original actions between "States and citizens of other States". Plaintiffs cannot evade this jurisdictional requirement by an alternative pleading which seeks to "dismiss" the non-diverse defendants—not from the proposed action entirely, but only as against the corresponding non-diverse plaintiffs. Such "dismissals" would only withdraw certain plaintiffs' claims against certain defendants and would add yet another complication to this proposed action without curing the jurisdictional defect.

Even if jurisdiction can be said to lie, all of the factors this Court has considered in deciding whether to exercise its jurisdiction in cases such as that proposed here counsel against exercising jurisdiction. In particular, plaintiffs' claims are premised on a largely untested 1937 *Restatement of Restitution* description of the state-law "emergency assistance doctrine" which presents no issue of federal law and which would require the Court to apply the common law of twenty-nine states to building-by-building adjudication of a multiplicity of complex factual issues. Alternative fora with expertise in local law and conditions are available, and this Court should, in view of its primary responsibilities as the nation's supreme appellate court, decline to take the place of those lower courts.

ARGUMENT

I

THIS COURT LACKS JURISDICTION OVER THE PROPOSED ACTION

A. Because Complete Diversity Is Lacking, This Court Is Without Subject Matter Jurisdiction Over The Proposed Action

The plaintiff States have framed this action as one against at least twenty defendants which are, as pleaded by plaintiffs themselves, citizens of the plaintiff States. It is settled law, however (reflected in the decisions of this Court and rooted in the text of the Constitution), that complete diversity between the parties is required where a State invokes the original jurisdiction of this Court in an action against private citizens.

This Court has uniformly interpreted Article III, Section 2 to prevent a state from invoking its original jurisdiction in a suit which includes its own citizens as defendants. *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 495-96 (1971) ("[t]hat we have jurisdiction seems clear enough . . . [because, *inter alia*,] [d]iversity of citizenship is absolute"); *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 463 (1945) ("Georgia may not of course invoke the original jurisdiction of the Court in a suit against one of her citizens").[12]

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12 *Accord Louisiana* v. *Cummins*, 314 U.S. 577, 577 (1941) (*per curiam*) ("[l]eave to file the complaint is denied for want of jurisdiction, it appearing that one of the named parties defendant is a citizen of Louisiana"); *Texas* v. *ICC*, 258 U.S. 158, 163 (1922); *New Mexico* v. *Lane*, 243 U.S. 52, 58 (1917); *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199, 247 (1902) ("our constitutional jurisdiction would not extend to the case if [citizens of the plaintiff State] were made parties defendant"); *California* v. *Southern Pacific Co.*, 157 U.S. 229, 262 (1895) (Supreme Court's original jurisdiction cannot "be held to embrace a suit between a State and citizens of another State and of the same State"); *Pennsylvania* v. *Quicksilver Mining Co.*, 77 U.S. (10 Wall.) 553, 556 (1871).

The very purpose for establishing original jurisdiction in this Court over actions brought by States against private citizens disappears but for the requirement of complete diversity.

> The object of vesting in the courts of the United States jurisdiction of suits by one State against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid 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. Federalist, No. 80; Chief Justice Jay, in *Chisholm* v. *Georgia*, 2 Dall. 419, 475; Story on the Constitution, §§ 1638, 1682.

Wisconsin v. *Pelican Insurance Co.*, 127 U.S. 265, 289 (1888). States wishing to sue their own citizens in their own courts did not at the time of the enactment of the Constitution and do not now require an impartial national tribunal to escape provincialism.

Plaintiffs make a single halfhearted argument to the contrary (States' Br. at 27-28). Relying on this Court's holding in *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U.S. 523, 530-31 (1967), that minimal diversity is sufficient for the purposes of statutory interpleader under 28 U.S.C. § 1335 (1982), plaintiffs essentially request that this Court revisit and revise a long-settled area of the law. They offer no sound reason for doing so and their argument depends on a fundamental misperception of the difference between two clauses of Article III, Section 2.

Neither this Court's decision in *State Farm Fire & Casualty Co.* v. *Tashire* nor its subsequent decision in *Owen Equipment and Erection Co.* v. *Kroger*, 437 U.S. 365, 373 n.13 (1978) (relying on *Tashire* for the dictum that "complete diversity is not a constitutional requirement"), interpreted the constitutional provision at issue here. In both *Tashire* and *Kroger* this Court was concerned with that portion of Article III, Section 2 that vests federal courts with jurisdiction over controversies "between Citizens of different States". That

clause, implemented by 28 U.S.C. § 1332 (1982) to vest federal district courts with diversity jurisdiction, has no bearing on this Court's original jurisdiction over controversies "between a State and Citizens of another State".

This Court has expressly rejected arguments that these two constitutional clauses are analogous for purposes of determining whether complete diversity is required in original actions before this Court. *California* v. *Southern Pacific Co.*, *supra*, 157 U.S. at 259-62. In *Southern Pacific*, plaintiff argued that the "controversies between Citizens of different States" clause embraced "controversies between a citizen of one State and a citizen of another State joined with a citizen of the plaintiff's State" and that the same test of diversity should be applied to "controversies between a State and citizens of another State." *Id.* at 259-60. Without reaching the merit of the first premise, the Court rejected the argument that the two clauses are in any way analogous. It held that the "controversies between Citizens of different States" clause concerns the federal judicial power generally and not the Supreme Court's original jurisdiction. *Id.* at 257-58, 261. Indeed, as the Court noted, such suits are excluded from the Supreme Court's original jurisdiction. *Id.* This being so, prior interpretations of the "controversies between Citizens of different States" clause were irrelevant to the issue presented in *Southern Pacific* (as it is here). Having so found, the Court ruled that "[s]uits between a State and its own citizens are not included within [the Court's original jurisdiction] by the Constitution," and concluded that "our original jurisdiction cannot be thus extended" (*id.* at 261-62).[13]

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13 Although it is somewhat unclear, plaintiffs also seem to suggest that Article III, Section 2, clause 2 vests the Court with original jurisdiction in this case. That clause—providing that this Court shall have original jurisdiction in cases "in which a State shall be a Party"—has consistently been held to "distribute[ ] the jurisdiction conferred upon the Supreme Court in [clause 1] into original and appellate jurisdiction; but does not profess to confer any." *Pennsylvania* v. *Quicksilver Mining Co.*, *supra*, 77 U.S. (10 Wall.) at 556. *Accord Georgia* v. *Pennsylvania R.R.*, *supra*, 324 U.S. at 463-64; *California* v. *Southern Pacific Co.*, *supra*, 157 U.S. at 257.

It could hardly be clearer that this Court lacks jurisdiction over the proposed action.

B. Plaintiffs Cannot Create Jurisdiction By Their Alternative Pleading Theory

Apparently wary of this Court's likely resolution of the question of its jurisdiction over the proposed action as captioned, plaintiffs have pleaded an alternative jurisdictional theory. As they put it, this alternative pleading "permit[s] the voluntary dismissal of non-diverse defendants as to particular states in the event the Court would require complete diversity for retention of jurisdiction" (States' Br. at 28). This facile tactic cannot create jurisdiction where none exists.

Passing the question of whether alternative allegations regarding diversity jurisdiction are permissible as a pleading matter,[14] it is clear that plaintiffs are not requesting dismissal of certain of the defendants as that term is ordinarily understood. Instead, they conditionally request the Court to "dismiss" twenty of the defendants only to the extent of the non-diverse plaintiff States' claims against these defendants. Plaintiffs here confuse dismissal of parties and withdrawal of claims. They do not propose to dismiss any defendant from this action entirely; the six plaintiffs non-diverse from some of the defendants merely volunteer not to assert a claim against their citizens. This they are free to do under the Federal Rules of Civil Procedure. But so amending the Complaint does not cure the absence of complete diversity; the proposed action would continue to be between exactly the same plaintiffs on the one hand and exactly the same defendants on the other.

Plaintiffs' alternative pleading, like their primary pleading, runs afoul of the fundamental rule that "diversity jurisdiction does not exist unless *each* defendant is a citizen of a dif-

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14 The First Circuit has held that while multiple bases for federal jurisdiction may be pleaded in the alternative, alternative allegations of fact, on one of which diversity jurisdiction would exist and on the other not, are insufficient when the only asserted basis of jurisdiction is diversity of citizenship. *Keene Lumber Co.* v. *Leventhal*, 165 F.2d 815, 818 n.1 (1st Cir. 1948).

ferent state from *each* plaintiff." *See Owen Equipment and Erection Co.* v. *Kroger*, *supra*, 437 U.S. at 373 (emphasis in original); *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806). *See also* 3A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 20.07[1], at 20-41 (2d ed. 1989) (under Fed. R. Civ. P. 20 governing permissive joinder of parties, "[i]f jurisdiction is predicated upon diversity or alienage all the plaintiffs must be able to sue all the defendants").

Even if the "dismissal" plaintiffs alternatively seek were held adequate to cure the threshold jurisdictional problem, this Court will not dismiss or decline to join parties where they are indispensable to the action, even if such orders will destroy the Court's jurisdiction. *See Georgia* v. *Pennsylvania R.R.*, *supra*, 324 U.S. at 463 ("[i]f either of the defendants who assert this defense is a citizen of Georgia and is a necessary party, leave to file would have to be denied").[15]

Plaintiffs can hardly contend that the non-diverse defendants are anything but indispensable, given their vigorous argument that they filed this proposed action here because of the Court's supposedly unique ability "to grant comprehensive and uniform" relief and the plaintiffs' alleged "inability to join defendants in one convenient forum" other than this Court (States' Br. at 22). Whatever the truth of these allegations, they must be credited in the context of this motion. *See Erie Machine Products, Inc.* v. *Mazak Yamazuki Machinery Corp.*, 574 F. Supp. 1056, 1058 (E.D. Wis. 1983) (where

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15 *Accord Texas* v. *ICC*, *supra*, 258 U.S. at 163 ("if [non-diverse parties'] citizenship be such that they cannot be brought into this suit consistently with the limitations on our original jurisdiction, this does not justify us in proceeding in their absence"); *New Mexico* v. *Lane*, 243 U.S. 52, 58 (1917) ("[t]o make him a party would oust this court of jurisdiction, if he is a citizen of New Mexico"); *Minnesota* v. *Northern Securities Co.*, *supra*, 184 U.S. at 246-47 (when it "appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, for the court to grant leave to amend would be useless"); *California* v. *Southern Pacific Co.*, *supra*, 157 U.S. at 262 ("the bill must be dismissed for want of parties who should be joined, but cannot be without ousting the jurisdiction").

"plaintiff has vigorously urged that [a particular party] must be retained as a party" and that party destroyed complete diversity, dismissal of action proper). In any event, in the absence of certain claims of the non-diverse plaintiffs, this Court's alleged ability to grant comprehensive relief would surely be compromised.

II

EVEN ASSUMING THAT THIS COURT HAS JURISDICTION OVER THE PROPOSED ACTION, THIS COURT SHOULD DECLINE TO EXERCISE IT

Even if it could be said that this Court has jurisdiction over this action, that jurisdiction is not exclusive. U.S. Const. art. III, § 2; 28 U.S.C. § 1251(b)(3) (1982). The Court has clearly cautioned that it exercises its nonexclusive original jurisdiction "sparingly." *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972); *Utah* v. *United States*, 394 U.S. 89, 95 (1969) (*per curiam*).

In determining whether such jurisdiction should be exercised, the Court has considered the following factors: (1) "the seriousness and dignity of the claim"; (2) the complexity of the case; (3) "the availability of another forum"; (4) whether "competent adjudicatory and conciliatory bodies are actively grappling with [the relevant issues] on a more practical basis"; and (5) the likely impairment of "sound judicial administration" in general and of the Court's ability to administer its appellate docket in particular.[16] *Washington* v. *General Motors Corp.*, 406 U.S. 109, 113 (1972); *Illinois* v. *City of Milwaukee*, *supra*, 406 U.S. at 93-94; *Ohio* v. *Wyandotte Chemicals Corp.*, *supra*, 401 U.S. at 503-05. Consideration of each of these factors demonstrates that this is not an

16 The leading law review commentary on this Court's original jurisdiction also cautions that the Court must be "cognizant of the fact that suits within the original jurisdiction might be politically inspired; filing claims before the Supreme Court may give the appearance of significant activity to local constituents." Note, *The Original Jurisdiction of the United States Supreme Court*, 11 Stan. L. Rev. 665, 695 (1959).

appropriate case for the exercise of this Court's nonexclusive original jurisdiction.

A. The Claim Does Not Raise Any Significant Issue of Federal Law and Its Viability Under the Diverse State Laws That Would Have to Be Applied Is Questionable at Best

Like the claim of the State of Ohio in *Ohio* v. *Wyandotte Chemicals Corp.*, plaintiffs' claim raises no serious or important issue of federal law; indeed it raises no issue of federal law at all. The substantive issues raised do not differ in any way from any of the many asbestos-in-buildings litigations already pending and proceeding before the state and lower federal courts. As this Court stated in *Wyandotte Chemicals*:

> [I]t is vitally important to stress that we are not called upon by this lawsuit to resolve difficult or important problems of federal law and that nothing in Ohio's complaint distinguishes it from any one of a host of such actions that might, with equal justification, be commenced in this Court. Thus, entertaining this complaint not only would fail to serve those responsibilities we are principally charged with, but could well pave the way for putting this Court into a quandary whereby we must opt either to pick and choose arbitrarily among similarly situated litigants or to devote truly enormous portions of our energies to such matters.

Ohio v. *Wyandotte Chemicals Corp.*, 401 U.S. at 504.

Although they hint at some overriding federal interest and imply that common principles of state law might be said to govern this case (neither of which propositions is correct), plaintiffs plead that their claim is based on the so-called "Public Assistance Doctrine"—usually referred to as the emergency assistance doctrine—described in Section 115 of the *Restatement of Restitution* (1937).[17] That is a flawed foundation for a claim in this Court.

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17 To our knowledge, no court has ever referred to the doctrine as the "Public Assistance Doctrine". Plaintiffs' new label is apparently intended to

Section 115 provides:

> 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.

Whether a right to restitution exists—either similar to or separate from that expressed by Section 115 of the *Restatement*—is a matter of state law to be determined on a state-by-state basis. *See Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2922 (1989); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 818 (1985). Accordingly, this Court is here being asked to explore the laws of each of the twenty-nine plaintiff States in order to determine, in the first instance, whether or not plaintiffs' claims are worthy of consideration at all, let alone whether they merit this Court's attention.

Only a few courts among the plaintiff States have considered whether to recognize or adopt the doctrine described in Section 115. Alabama, for example, does not seem to recognize it at all. *See Franklin County School Board* v. *Lake Asbestos of Quebec, Ltd.*, No. 84-AR-5435-NW, 1988 U.S. Dist. LEXIS 12779 (N.D. Ala. February 13, 1986). Contrary to the theory the Attorneys General of Illinois, New Hampshire and Tennessee urge in their Complaint before this Court, courts in Illinois, New Hampshire and Tennessee have flatly rejected Section 115 restitution claims in asbestos abatement actions holding that there is no duty to abate under

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deflect attention from the fact that there is no "emergency" involved here—as is confirmed by the conclusions of the Environmental Protection Agency and plaintiffs' own failure to act. See discussion at pp. 18-19, *infra*.

those states' laws. *Board of Education* v. *A, C and S, Inc.*, 131 Ill. 2d 428, 465-66, 546 N.E.2d 580, 596-98 (1989); *Town of Hooksett School District* v. *W.R. Grace and Co.*, 617 F. Supp. 126, 134 (D.N.H. 1984); *In re Asbestos School Litigation*, MF No. 83-0268, 1990 U.S. Dist. LEXIS 3051 (E.D. Pa. March 20, 1990) (available on Lexis) (applying and reviewing Tennessee law); *City of Greeneville* v. *National Gypsum Co.*, No. Civ.-2-83-294 (E.D. Tenn. December 21, 1983) (LEXIS, Genfed library, Dist. file). In contrast, courts in North Dakota and New York have permitted plaintiffs the opportunity to prove a common law duty to abate asbestos as a basis for restitution. *See Hebron Public School District No. 13* v. *U.S. Gypsum*, 690 F. Supp. 866 (D.N.D. 1988), *appeal docketed*, No. 89-5565 ND (8th Cir. November 8, 1989); *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 mem.*, 129 A.D.2d 1019, 513 N.Y.S.2d 1004 (1st Dep't 1987).

However, as to the overwhelming majority of plaintiff States, the claim advanced in this proposed action has either not been considered at all or its contours have not been explored,[18] the result of which is to leave to this Court the task of divining whether such a claim would be recognized by those states and what its elements would be in order to determine whether a claim is stated at all. That is hardly a task suited to this Court.

Even assuming that plaintiffs could overcome the hurdle of demonstrating that Section 115 of the Restatement accurately articulates the law of each of their states, their claims fail to fall within the requirements of the emergency assistance doc-

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18 To the best of our knowledge the emergency assistance doctrine expressed in Section 115 has not been considered in any reported decision in Arizona, Arkansas, California, Connecticut, Delaware, Florida, Iowa, Louisiana, Maine, Missouri, Montana, Nebraska, North Carolina, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, Utah, Washington or Wyoming. The doctrine has been discussed in Indiana and Vermont, but the specific elements of the claim have not been articulated. *See generally Board of Commissioners* v. *Greensburg Times*, 215 Ind. 471, 20 N.E.2d 647 (1939); *University of Vermont* v. *W.R. Grace & Co.*, 565 A.2d 1354 (Vt. 1989).

trine itself. Plaintiffs concede that they primarily seek to recover for future costs of removal (States' Br. at 12, 18), yet a right to restitution arises only *after* a benefit has been conferred, which in this case would require that removal have already been accomplished.[19] *See, e.g., State* v. *Schenectady Chemicals, Inc.*, 103 A.D.2d 33, 39, 479 N.Y.S.2d 1010, 1014 (3d Dep't 1984) and *University of Vermont* v. *W.R. Grace & Co., supra.*

Plaintiffs' failure to act also demonstrates that no emergency exists to justify restitution. Yet emergency intervention is the hallmark of Section 115 (*see* comment a).[20] While plaintiffs cite a host of federal legislative and regulatory activities involving asbestos that date back to 1977 as evidence of the claimed emergency (States' Br. at 14-18), they offer no explanation for their delay in taking action—which continues to date. Even more importantly, plaintiffs' delay reflects the underlying truth that asbestos-in-buildings does not present an imminent risk that requires immediate action. Indeed, even as regards schools—which have been the principal focus of most of EPA's regulatory attention—EPA

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19 It is particularly puzzling that plaintiffs claim that they have "no adequate remedy at law" given that damages are the principal relief that they seek. We can only speculate that plaintiffs attempt to bring the proposed action in equity to avoid defendants' Seventh Amendment guarantee of the right to a jury trial. While such a trial in this Court would doubtless be burdensome, Supreme Court jury trials are not unprecedented. *See Georgia* v. *Brailsford*, 3 U.S. (3 Dall.) 1 (1794). In the event the Court grants plaintiffs' motion, we respectfully reserve our right to a jury trial. *See* 28 U.S.C. § 1872 (1982).

20 This Court implicitly recognized the critical element of crisis when it referred to Section 115 in *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 204 (1967), stating that the "facts . . . constitute a classic case in which rapid removal by someone was essential." If there is no emergency, the doctrine does not apply, because the critical need for immediate intervention is absent. *See Corporation of Mercer University* v. *National Gypsum Co.*, 24 Env't Rep. Cas. (BNA) 1953 (M.D. Ga. 1986) (restitution claim dismissed because abatement was not promptly undertaken and thus was not immediately necessary under Section 115). Thus, when a party provides services that are not "immediately necessary," he acts as a volunteer and is not entitled to restitution. *See* Restatement § 114 comment b.

advises that "[m]ost asbestos-containing material can be properly managed where it is. In fact, asbestos that is managed properly and maintained in good condition appears to pose *relatively little risk* to students and school employees. Accordingly, the AHERA schools rule rarely requires the removal of asbestos materials." *The ABCs Of Asbestos In Schools* 6 (U.S.E.P.A. 1989) (emphasis in original).

Although it is not appropriate to canvas each of the alleged deficiencies of the proposed Complaint in the context of this motion—an exercise that would require a comprehensive review of the laws of twenty-nine states—at the very least the foregoing analysis illustrates that the viability of the alleged claim is dubious under ordinary legal standards. Yet this Court has imposed "an unusually high standard of proof" in cases brought under its original jurisdiction. *Ohio* v. *Wyandotte Chemicals Corp.*, *supra*, 401 U.S. at 501.[21] The proposed claim, based as it is on a Restatement provision which, if available at all, is inapplicable to this Complaint on its face, is surely untenable under the heightened standard applied in this Court and is a poor premise indeed for the exercise of this Court's original jurisdiction.

B. The Staggering Complexity of the Proposed Action Warrants Denial of the Motion

The proposed action is, in any event, of a complexity never before contemplated by this Court. As the Court has itself acknowledged, given its limited resources, other responsibilities and limited competence as a fact-finding body, it "has found even the simplest sort of interstate pollution case an

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21 The solution finally grasped [by the Court] was to saddle the party seeking relief with an unusually high standard of proof and the Court with the duty of applying only legal principles 'which [it] is prepared deliberately to maintain against all considerations on the other side,' [*Missouri* v. *Illinois*, 200 U.S. 496, 521 (1906),] an accommodation . . . the Court has found necessary to maintain ever since.

Ohio v. *Wyandotte Chemicals Corp.*, *supra*, 401 U.S. at 501 (footnote omitted). *See also Colorado* v. *New Mexico*, 459 U.S. 176, 187 (1982) (requiring "clear and convincing evidence"); *Colorado* v. *Kansas*, 320 U.S. 383, 393 (1943) (case must be "fully and clearly proved").

extremely awkward vehicle to manage." *Ohio* v. *Wyandotte Chemicals Corp.*, *supra*, 401 U.S. at 504. The burden plaintiffs seek to impose on the Court here is staggering in comparison to the dispute this Court declined to adjudicate in *Wyandotte Chemicals.*

The States attempt to downplay the complexity inherent in their proposed action by arguing that there is some kind of generic "hazard" created by all asbestos products and some kind of generalized "duty to warn" which gives rise to liability. In doing so plaintiffs suggest that the mere presence in a building of a product containing some amount of some kind of asbestos, regardless of its condition, acts to "contaminate" the building and create a "life-threatening exposure" to building occupants (States' Br. at 11, 26). The real issues, however, are not so simple. As the EPA has emphasized,[22] the mere presence of asbestos in a product does not make the product either defective or hazardous. The unproven theoretical possibility of disease to building occupants does not make every ACM "unreasonably dangerous". Nonetheless, even if the elements of "liability" could be proven, individual defenses such as contributory or comparative negligence, assumption of the risk and statute of limitations would require resolution as well. In fact, there are simply no meaningful generic aspects of these cases. Rather, from A (the very act of identifying the product) to Z (the computation of damages) the issues are complex and building-specific; they require extensive discovery as well as detailed, and often highly technical, proofs at trial.

The complexity arises from the need to assess building-specific facts including identification of which products of which manufacturers are present in each building,[23] the loca-

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22 *See* notes 5-7 and 8 *supra* and accompanying text.

23 For example, product identification was a hotly contested issue in four relatively recent trials: *Wesley Theological Seminary of the United Methodist Church* v. *United States Gypsum Co.*, No. 85-1606 (D.D.C.) (May 1988 defense verdict on, *inter alia*, product identification after five-week

tion, condition and quantity of the product, physical properties of the product (including the extent to which asbestos fibers are locked into the product's physical structure) and whether fibers are being released into the air of the building at significant levels.

Damage issues in asbestos-in-buildings cases do not turn on any simple formula or arithmetical calculation but require an evidentiary hearing on each individual building. The evidence on damages in these cases has typically involved proof of the quantity and condition of the ACM actually in the building and the need for and reasonable cost of the particular action taken. The need for removal or encapsulation, for example, and the reasonable costs of such measures will vary from installation to installation, and their proof is detailed and time-consuming.

From a pure case management standpoint, experience has taught that even much simpler cases (involving far fewer parties and buildings) are ill-suited to consolidated treatment. Instead, these cases have been more efficiently processed by dividing the issues into discrete subparts, such as product identification[24] or statute of limitations issues.[25] Some courts

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trial); *Reorganized Church of Jesus Christ of Latter Day Saints* v. *U.S. Gypsum Co.*, No. 85-0322-CV-W-6 (W.D. Mo.) (August 1988 defense verdict on product identification after eight-day trial); *Cinnaminson Township Board of Education* v. *United States Gypsum Co.*, No. 80-1842 (D.N.J.) (November 1988 defense verdict on, *inter alia*, product identification, after two-week trial); *Benton Harbor Area Schools* v. *National Gypsum Co.*, No. 85-3008-NZ-Z (Mich. Cir. Ct. Berrien Co.) (March 1989 general defense verdict after trial involving, *inter alia*, disputed product identification).

24 *Sisters of St. Mary* v. *AAER Sprayed Insulation*, No. 85-CV-5952, Scheduling Order No. 4 (Wisc. Cir. Ct. Dane Co. July 31, 1989) (App. 69a); *State* v. *Keene Corp.*, C.A. No. 1108600, Pretrial Order No. 7 (Md. Cir. Ct. Anne Arundel Co. January 12, 1988) (App. 77a). References to "App." are to appropriate pages of the Appendix to this brief in opposition.

25 *Los Angeles Unified School District* v. *Owens-Corning Fiberglas Corp.*, No. C440317, Notice of Rulings (Cal. Super. Ct. L.A. Co. May 9, 1984) (App. 2a); *Utica Community Schools* v. *W.R. Grace & Co.*, No. 85-523463-NZ, Order (Mich. Cir. Ct. Wayne Co. August 3, 1988) (App. 103a).

have preferred to try cases on the basis of product groups,[26] or defendant by defendant,[27] or a select group of buildings in which a number of defendants' products are said to be present.[28] The common thread is that cases have been organized so that building-specific issues can be resolved in a rational and efficient sequence which pares down the parties and products involved.

The States recognize that "manageability problems could preclude the certification of a class action in state courts" (States' Br. at 24). While we agree, the States offer no explanation of how a consolidated action in this Court has any fewer manageability problems or why those problems would not be exacerbated by consolidation.

Consideration of just such factors have led, almost uniformly, to denial of certification of multi-state products liability class actions. *See, e.g., Blake* v. *Chemlawn*, Civ. A. No. 86-3413, 1988 WESTLAW 6151 at 4 (E.D. Pa. January 26, 1988); *Osborne* v. *Subaru of America, Inc.*, 198 Cal. App. 3d 646, 654-59, 243 Cal. Rptr. 815, 819-22 (1988); *Raye* v. *Medtronic Corp.*, 696 F. Supp. 1273 (D. Minn. 1988). A most important decision in the area, set forth in a thoughtful opinion by Judge Nowakowski in *Sisters of St. Mary* v. *AAER Sprayed Insulation*, No. 85-CV-5952 (Wis. Cir. Ct. Dane Co. 1987) (App. 16a-68a), *aff'd*, 151 Wis.2d 708, 445 N.W.2d 723 (Ct. App.), *review denied*, 449 N.W.2d 275 (Wis. 1989), declined to certify a nationwide class of hospitals seeking relief against most of these same defendants with respect to the same range of asbestos-containing construction products as are involved here. The court held that the diversity of state laws and the inability of one court to resolve the

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26 *State* v. *Keene Corp.*, C.A. No. 1108600, Pretrial Order No. 7-A (Md. Cir. Ct. Anne Arundel Co. August 8, 1988) (App. 94a).

27 *School District of Philadelphia* v. *Owens-Corning Fiberglas Corp.*, No. 146 (May Term), Pre-Trial Order No. 1 (Pa. Ct. C.P. Phila. Co. September 7, 1989) (App. 5a).

28 *University of South Carolina* v. *W.R. Grace & Co.*, C.A. No. 85-CP-40-3789, Transcript of Hearing at 31 (S.C. Ct. C.P. Richland Co. August 28, 1989) (App. 101a).

class members' claims rendered certification improper, finding that the "presentation of the evidence would consume many months, and perhaps years," and that "the burden on the court would be immense" (App. at 51a-52a).[29]

Plaintiffs have offered no sound reason for imposing such a burden on this Court. The Court should decline to shoulder it.

C. Similar States' Claims Are Presently Being Litigated in the State Courts

That alternative fora are available to plaintiffs is most tellingly demonstrated by the fact that just such actions have already been instituted by eight sister states—Maryland, Minnesota, Pennsylvania, Virginia, Kentucky, Mississippi, West Virginia and South Carolina—none of which are plaintiffs here.[30] Two of the eight litigations have been disposed of—one by summary judgment in favor of defendants and the other by settlement.[31] Five others are being aptly managed by

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29 Only one multi-state class action involving asbestos-in-buildings has been certified, *In Re Asbestos School Litigation*, 104 F.R.D. 422 (E.D. Pa. 1984), *aff'd in part and vacated in part*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852, 915 (1986). After seven years of litigation the district court still has not developed any method to deal with state law variations. Defendants' application to the Third Circuit for a writ of mandamus to review the district court's denial of a motion for decertification is currently *sub judice*.

30 *State* v. *Keene Corp.*, Civil Action No. 1108600 (Md. Cir. Ct. Anne Arundel Co.); *In re State and Regents Building Asbestos Cases*, Nos. 99081 and 99082 (Minn. Dist. Ct. Dakota Co.); *Commonwealth* v. *Congoleum Corp.*, No. 45, Misc. Docket 1990 (Pa. Commonw. Ct.); *Commonwealth* v. *Owens-Corning Fiberglas Corp.*, LJ-414-3 (Va. Cir. Ct. City of Richmond), *aff'd*, 238 Va. 595, 385 S.E.2d 865 (1989); *Commonwealth* v. *United States Gypsum*, Civil Action No. 85-CI-915 (Ky. Cir. Ct. Franklin Co.); *State* v. *Flintkote Company*, No. 89-5138(2) (Miss. Cir. Ct. Jackson Co.); *In re State Public Building Asbestos Litigation*, Civil Action No. 86-C-458 (W. Va. Cir. Ct. Monongahela Co.); *South Carolina* v. *W.R. Grace & Co.*, Civil Action No. 3:87-2879-0 (D.S.C.). The South Carolina action was filed by the State in state court; it was later removed to federal court by a foreign defendant.

31 *Commonwealth* v. *Owens-Corning Fiberglas Corp.*, *supra*; *In re State and Regents Building Asbestos Cases*, *supra*.

the state judiciary; in Maryland's case, for example, with the aid of four special masters. Although the cases are concededly complex, the state judiciary has been resourceful in managing such cases obviously assisted by the fact that in each case they are only required to apply one body of state law. Apparently these eight States have recognized their courts' expertise in local law and the "practical necessity" of considering appropriate court action "in the context of localized situations," *Washington* v. *General Motors Corp.*, *supra*, 406 U.S. at 116. Deferring to alternative state fora is equally appropriate as to plaintiffs here.

This Court is "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim," *United States* v. *Nevada*, 412 U.S. 534, 538 (1973), and has not hesitated to dismiss actions brought under its original jurisdiction in favor of adjudication by state courts.[32] *Ohio* v. *Wyandotte Chemicals Corp.*, *supra*. Plaintiffs acknowledge this but counter that "there is no one state forum that can adequately obtain jurisdiction over all of the parties" (States' Br. at 23). Even assuming that is so, adjudication of all the *claims* raised may be had elsewhere—and far more efficiently. *Arizona* v. *New Mexico*, 425 U.S. 794, 797 (1976) (*per curiam*) (declining to exercise jurisdiction where a pending state-court action, albeit among different parties, provided "an appropriate forum in which the issues tendered here may be litigated" (emphasis in original)).[33]

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32 Plaintiffs are correct in asserting (States Br. at 22) that the lower federal courts lack diversity jurisdiction over the proposed action. *See Ohio* v. *Wyandotte Chemicals Corp.*, *supra*, 401 U.S. at 498 n.3.

33 In *United States* v. *Nevada*, *supra*, the United States brought suit against California and Nevada. The Court declined to take jurisdiction of the action in favor of the lower federal courts of Nevada, notwithstanding the Court's express recognition that "the United States will not be able to join California as a defendant in a suit in Nevada." 412 U.S. at 538. The Court noted that it was satisfied that "[a]ny possible dispute with California . . . can be settled in the lower federal courts in California." *Id.* at 539-40. Here, too, the issues posed by the proposed action can be fully and fairly litigated in the state courts, whether such litigation takes place in one or more states.

Nonetheless, plaintiffs assert that, in view of defendants' "limited pool of assets" (States' Br. at 24), this Court is the only appropriate forum to grant comprehensive relief. Putting aside the brazenly premature assertion that the wholesale partitioning of twenty-six substantial American corporations is inevitable (even before this Court has decided to exercise jurisdiction, much less entered a finding of liability), plaintiffs are plainly mistaken in their view that this Court could grant comprehensive relief here. In the first place, twenty additional states have not been heard from. They doubtless have claims of the same nature as those of the plaintiff States.[34] Yet the plaintiffs are apparently unconcerned that the judgment in this action might "deplet[e] the funds available for restitution" to their absent sister States and thus "undermine the fundamental principles of comity and federalism" which are "the loftiest goals of our federal system" (States' Br. at 24, 26). Neither do the plaintiffs show discernible concern for private owners of buildings who may have similar claims, or for personal injury plaintiffs. This Court cannot fashion the "comprehensive relief" plaintiffs describe even were it an appropriate forum for doing so.

D. Given This Court's Paramount Role As The Nation's Supreme Appellate Court And The Ongoing Involvement Of Numerous Federal And State Agencies In Issues Directly Related To Those Sought To Be Raised Here, This Court Should Decline To Exercise Jurisdiction

For the last two decades, asbestos has been the subject of a plethora of laws, regulations, and guidance documents issued

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34 On April 2, 1990 the State of New Jersey filed a motion to intervene as a party plaintiff in this action together with a supporting brief. Motion of the State of New Jersey to Intervene as a Party Plaintiff and Brief in Support of Motion. In support of its motion to intervene, New Jersey argues that its ability to protect its interest "may be substantially impaired should this matter be disposed of without the State's participation" (*id.* at 8), and concludes that "it is indisputable that the State of New Jersey's interests are not adequately represented by the plaintiffs" (*id.* at 9).

by various federal, state,[35] and municipal authorities.[36] At least five different federal agencies have regulatory jurisdiction over asbestos: EPA, the Occupational Safety and Health Administration ("OSHA"), the Food and Drug Administration, the Consumer Product Safety Commission, and the Mine Safety and Health Administration.

In 1973 pursuant to the Clean Air Act, EPA issued its first set of National Emissions Standards for Hazardous Air Pollutants ("NESHAPS") that applied to asbestos, beryllium and mercury, 38 Fed. Reg. 8820 (April 6, 1973) (codified at 40 C.F.R. Part 61 (1989)). Since the issuance of its first "guidance document" in 1979, suggesting how school authorities should address the issue of ACM in school buildings,[37] the EPA has issued a number of additional guidance documents providing advice to all building owners on issues regarding asbestos-in-buildings.[38]

In 1986 Congress enacted the Asbestos Hazard Emergency Response Act ("AHERA"), 15 U.S.C. § 2641-54 (1988), pursuant to which EPA was directed (i) to promulgate regulations for schools prescribing procedures for ascertaining the presence of ACM and for taking appropriate corrective action where necessary; and (ii) to issue a report to Congress about potential asbestos exposure in public and commercial buildings and to recommend to Congress whether AHERA school building type regulations should be extended to public and commercial buildings.

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35 National Conference of State Legislatures, *State Asbestos Programs Related to the Asbestos Hazard Emergency Response Act, A Survey of State Laws and Regulations: An Update* viii-ix (March 1989).

36 *See, e.g.*, N.Y.C. Admin. Code §§ 24-141 *et seq.* (1989).

37 *Asbestos Containing Materials in School Buildings: A Guidance Document* (U.S.E.P.A. 1979).

38 *Guidance for Controlling Friable Asbestos-Containing Materials in Buildings* (U.S.E.P.A. 1983); *Guidance for Controlling Asbestos-Containing Materials in Buildings* (U.S.E.P.A. 1985); *The ABCs of Asbestos in Schools* (U.S.E.P.A. 1989).

In its 1988 Report to Congress, EPA recommended against the expansion of AHERA regulations or any new legislation specifically applicable to public and commercial buildings. Since the publication of this report, EPA has been engaged in regulatory proceedings, *Petition of Service Employees International Union*, 54 Fed. Reg. 13632, 13634-35 (April 4, 1989), litigation, *S.E.I.U.* v. *Riley*, No. 89-851 (D.D.C.), and in sponsoring informal discussions with various affected constituencies regarding whether any regulatory actions concerning ACM in public and commercial buildings ought to be forthcoming. *See* 54 Fed. Reg. 13632 (April 4, 1989); Asbestos Abatement Report (BNA), Nov. 27, 1989, at 1. In connection therewith, Congress has already appropriated four million dollars, with another two million dollar appropriation expected, which is to be matched by the private sector and applied by EPA towards research on the key disputed issues concerning the effect of ACM in buildings. Asbestos Abatement Report (BNA), March 19, 1990 at 5. Such a three-year research project is currently under way under the auspices of the Health Effects Institute in Cambridge, Massachusetts, *id.* at 5-6.

As the foregoing description of a sample of legislative and regulatory activity amply reflects, asbestos-in-buildings issues have been and continue to be the object of broad-based and extensive legislative and regulatory activity. In light of this, plaintiffs' request that the Court commit its "resources to the task of trying to settle a small piece of a much larger problem that many competent adjudicatory and conciliatory bodies are actively grappling with on a more practical basis," *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. at 503, should be rejected, as it was in *Wyandotte Chemicals.*

In sum, whatever the merits of the proposed action, this Court is clearly the wrong forum in which to resolve the issues it presents. This Court should not be called upon "to assume a burden which the grant of original jurisdiction 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." *Massachusetts* v. *Missouri*, 308 U.S. 1, 19 (1939). The burden the proposed action would impose on the Court cannot be exaggerated. The toll on the nation's legitimate expectations of this Court in its "paramount role as the supreme federal appellate court" would be at least as great. *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. at 505.

Plaintiffs, as in *Wyandotte Chemicals*, have failed to demonstrate the necessity, strict or otherwise, that this Court exercise its discretionary jurisdiction to try the proposed action. The Court should decline to do so.

CONCLUSION

The motion for leave to file the Complaint should be denied.

Respectfully submitted,

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April 12, 1990

APPENDIX

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SHIELD & SMITH
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LIAISON COUNSEL

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

CASE NO: C440 317

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Plaintiff,

—VS—

OWENS-CORNING FIBERGLAS CORPORATION, etc., et al.,

Defendants.

NOTICE OF RULINGS

TO: THE PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 8, 1984, the Honorable Christian E. Markey, Jr. ruled and ordered as follows:

1. The Demurrers to the First, Second and Fourth Causes of Action of the Third Amended Complaint were overruled. The Demurrers to the Third Cause of Action of the Third Amended Complaint were sustained without leave to amend. No dismissal of the Third Cause of Action of the Third Amended Complaint will be filed at this time.

2. This action was declared to be complex litigation pursuant to Section 19, *Standards of Judicial Administration.*

3. Unless otherwise granted and individual exception thereto, each defendant heretofore appearing or joining in

this matter shall be deemed to have answered the unverified Third Amended Complaint by a general denial and to have joined in alleging the affirmative defenses to be filed by Liaison Counsel and the Defendants' Steering Committee. Defendants shall have twenty days from May 8, 1984 within which to file with the Court and serve the general denial and affirmative defenses with a complete listing of all defendants participating and joining therein.

On or before May 17, 1984, each defendant shall advise J. Lawrence Judy of Shield & Smith, Liaison Counsel, of that defendant's correct name and capacity. Any defendant wishing the inclusion of an affirmative defense in the defendants' answer shall forward a draft thereof to J. Lawrence Judy of Shield & Smith, Liaison Counsel, on or before May 17, 1984.

4. The Court severed the First and Second Causes of Action of the Third Amended Complaint and the prospective issue of Statute of Limitations relating thereto. All other proceedings, including the filing of Cross-Complaints remain stayed. No Cross-Complaints shall be filed without Order of Court first obtained or until further Order of Court.

5. As to the issue of the Statute of Limitations, discovery and trial shall proceed in accord with the following schedule, unless modified for good cause shown:

(a) Interrogatories: Plaintiff shall respond to all pending interrogatories on or before June 15, 1984. Defendants, through Liaison Counsel, may propound additional interrogatories to the Plaintiff on or before July 1, 1984. No additional interrogatories may be served by any defendant without Order of Court first obtained.

(b) Depositions: Depositions shall be conducted herein between August 1, 1984 and January 31, 1985. No more than two depositions per day may be scheduled by the defendants.

(c) Naming of experts: Experts shall be designated on or before December 3, 1984.

(d) Status-Settlement Conferences: Status-Settlement Conferences shall be conducted in Department 26 of the Los

Angeles County Superior Court commencing at 9:30 a.m. on August 15, 1984, November 15, 1984 and January 15, 1985.

(e) Trial Setting Conference: A Trial Setting Conference shall be conducted for this matter on January 15, 1985 at 9:30 a.m. in Department 26 of the Los Angeles County Superior Court.

(f) Trial: The Trial of the issue of the Statute of Limitations is set for March 1, 1985 at 9:30 a.m. in Department 26 of the Los Angeles County Superior Court.

(6) All prior orders relating to abatement proceedings remain in effect.

DATED: May 9, 1984

By /s/
J. LAWRENCE JUDY
LIAISON COUNSEL

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
MAY TERM, 1982
No. 146 CIVIL DIVISION

SCHOOL DISTRICT OF PHILADELPHIA,

Plaintiff,

v.

OWENS-CORNING FIBERGLAS CORP., et al.

Defendants.

PRE-TRIAL ORDER NO. 1
(Case Management Order)

AND NOW, this 7th day of September, 1989, upon consideration of defendants' motion for a case management order and discovery schedule, it is hereby ORDERED as follows:

I. *CONTROLLING PROCEDURAL RULES*

A. Unless otherwise provided for in this Order or any order subsequently entered by this Court, the Pennsylvania Rules of Civil Procedure shall apply to this action.

B. The provisions of the Pennsylvania Rules of Civil Procedure are hereby modified as follows:

> All uncontested motions shall be accompanied by a certificate of counsel that such motion is uncontested. All contested motions shall be accompanied by a brief or memorandum of law containing a concise statement of the legal contentions and authorities relied upon in support of said motion. On all contested motions the parties shall endeavor to agree upon a briefing schedule subject to the approval of the Court. In the absence of

such agreement or order of the Court, the following schedule shall apply: The opposing parties shall have thirty (30) days from the date of service to file a brief or memorandum in opposition thereto ("response brief"). The moving party shall have fifteen (15) days from service of the response brief to file a reply brief.

II. *ORGANIZATION OF DEFENDANTS' COUNSEL*

A. Upon consent of all defendants, the firm of Montgomery, McCracken, Walker & Rhoads and Ralph W. Brenner, Esquire, and the firm of Hoyle, Morris & Kerr and Lawrence T. Hoyle, Jr., Esquire, are designated as co-liaison counsel. Liaison counsel or their duly designated representative are authorized to receive orders, notices, correspondence and telephone calls from the Court and Clerk of the Court on behalf of all defendants and shall be responsible for notifying all defense counsel of all communications received from the Court.

B. Notwithstanding the appointment of liaison counsel, each defense counsel shall have the right to participate in all proceedings before the Court as fully as such defense counsel deems necessary.

C. Subject to the right of any defendant to present individual or divergent positions or to take individual action, defendants' liaison counsel are vested by the Court with the following responsibilities and duties:

(1) to coordinate the briefing of motions;

(2) to coordinate the argument of motions;

(3) to coordinate the initiation and conduct of discovery procedures, including, but not limited to, coordination of the preparation of joint written interrogatories, joint requests to admit and joint requests for the production of documents, where applicable;

(4) to coordinate the examination of witnesses in depositions;

(5) to coordinate the selection of counsel to act as spokesperson at pre-trial conferences;

(6) to call meetings of defense counsel, or to coordinate such a meeting on behalf of any defense counsel wishing to call such a meeting; and

(7) to perform such other duties as may be expressly authorized by further order of this Court or agreed to among defense counsel.

D. Defendants' liaison counsel shall maintain complete files of all depositions transcripts and documents filed by or served upon defense counsel. All such files shall be reasonably available for inspection and copying by counsel for all defendants. All parties shall send a separate copy of all pleadings, motions and other court filings to liaison counsel for archive purposes. All papers in the archive shall be made available to any defendant at the expense of the requesting defendant.

E. The Court recognizes that the role of liaison counsel is to coordinate and facilitate communications. Liaison counsel shall not be expected, nor have the right, to bind any party except liaison counsel's own respective client as to any matter without the consent of counsel for such other party.

III. *COMMUNICATIONS WITH THE COURT; FILING AND SERVICE OF PLEADINGS AND OTHER PAPERS*

A. Pleadings and other papers filed by any party and copies of any written communication to the Court shall:

(1) be served upon all parties or their representatives;

(2) reflect the means of delivery to the Court and to those persons receiving copies, e.g., "by hand," "by Express Mail," "by U.S. Mail," etc.; and

(3) reflect whether any enclosures provided the Court have also been provided to all parties.

B. A service list will be jointly prepared, maintained and updated when necessary by defendants' liaison counsel and by plaintiff's counsel. When this list is prepared, it shall be forwarded to all parties. When necessary, updated lists shall be prepared by plaintiff's and defendants' liaison counsel and forwarded to all counsel. After preparation of this list, it shall be sufficient in an affidavit or certificate of service to state that service was made upon all counsel or unrepresented parties designated on the service list dated _____.

C. Where a motion by a plaintiff is directed against all defendants, defendants may join in a single responsive pleading. Any defendant may file a separate responsive pleading. Documents or communications affecting less than all the defendants shall state specifically those defendants affected. At a hearing on the motion, any defendant may argue individually on behalf of his client so long as such argument is not duplicative.

D. Any party who has not joined in a motion, pleading or other document, may join, adopt or incorporate in its entirety as though filed and served by that party any motion, pleading or other document by filing with the Court a "Statement of Adoption and Incorporation" which shall clearly identify the motion, pleading or document involved. The answer or response of the opposing party to the motion, pleading or other document shall be deemed to be an answer or response to all parties joining the original motion, pleading or other document, or as an answer or response to that part incorporated by the party who filed the Statement of Adoption and Incorporation.

E. All proposed orders and stipulations submitted to the Court shall be entitled "Pretrial Order No. _____" or "Stipulation No. _____."

F. All communications from the Court shall be directed to defendants' liaison counsel and plaintiff's counsel. Defendants' liaison counsel shall be responsible for notifying promptly all defense counsel of all communications from the Court.

IV. *ADMISSION OF ATTORNEYS*

Each attorney not a member of the bar of this Court who is acting as counsel for any party named in this action shall be deemed admitted *pro hac vice* to practice before this Court in connection with these proceedings.

V. *DISCOVERY*

A. *Request for the Product[ion] of Documents*

(1) All documents produced by defendants pursuant to a request for documents or in answer to interrogatories may be produced as kept in the ordinary course of business or in a document depository established by a defendant.

(2) Each party shall retain the originals of any documents produced by such party.

B. *Depositions*

(1) Except under special circumstances, at least ten (10) days written notice of the taking of each deposition shall be given to all parties in this action.

(2) The defendants shall agree among themselves regarding counsel (not to exceed two) who shall have the primary role in conducting any examination and cross-examination in whole or in part, but no counsel shall be excluded from participating in the examination or prevented from exploring more fully lines of questions previously pursued, provided that counsel shall not engage in unnecessary repetition.

(3) Liaison counsel shall make available copies of the transcript of each deposition taken and transcribed. The liaison party taking each such deposition shall promptly furnish liaison counsel with a copy of each such deposition for this purpose.

(4) Interrogation for all parties represented by counsel at the taking of a deposition shall be concluded prior to adjournment of the deposition pursuant to subparagraph (6) hereof. A deposition may be recessed for good cause shown prior to the adjournment.

(5) Upon the completion of interrogation by all parties represented by counsel at the taking of the deposition, the deposition of the witness will be adjourned to a date about twenty (20) days later, on which date, unless previously excused, the witness will appear for such further oral or written interrogation, if any, as may be authorized pursuant to subparagraph (6) hereof.

(6) On or before ten (10) days following the transcript being made available to all parties, any party or counsel not represented at the deposition who desires further interrogation of the witness may interrogate the witness upon serving a notice of additional deposition on all parties. This interrogation shall not be duplicative of the prior deposition. The witness shall be produced for additional deposition on the date and at the time and place listed on the notice of additional deposition. Taxable costs of such witness shall be borne by the party requesting the additional questioning.

(7) In the absence of service of a notice of further deposition within the time provided therefor in subparagraph (6) hereof, no further interrogation by any party that received notice of the deposition will be permitted, except upon further order of this Court.

C. *General Provisions*

(1) Nothing contained in this Order shall prohibit any party from obtaining discovery from non-parties.

(2) The filing by a party of a motion for a protective order with respect to any discovery shall operate as an automatic stay of the discovery as to which the order is sought until said motion has been heard and decided.

(3) No motion to compel discovery shall be brought prior to counsel first requesting a conference of plaintiff's counsel and involved counsel. Defendants' co-liaison counsel may participate in such conferences.

(4) Deposition transcripts shall not be filed with the Court unless specifically ordered by the Court.

(5) No discovery requests or responses thereto shall be filed although copies of all interrogatories and responses thereto shall be served on counsel of record for each party.

(6) Parties serving requests for admissions concerning documents shall attach copies of the subject documents.

(7) Any motion contesting the sufficiency of a discovery response, motion for summary judgment or partial summary judgment, or any other motion wherein reference is made to any discovery response shall include such portions of the discovery response or a synopsis or listing of the same which shall be relied upon in arguing for a ruling on that particular motion. In the event that a party chooses to list the relevant discovery material, that party shall file copies of the listed material with the Court so that a proper determination can be made.

VI. *DISCOVERY AND TRIAL SCHEDULE*

A. Non-expert discovery by defendants against plaintiff relevant to issues that may be raised similarly by all defendants, shall be completed by December 15, 1989, subject to the right of any party to conduct non-duplicative, supplemental discovery for a period ending no later than two weeks before the trial against that defendant.

B. On a continuing basis and no later than December 15, 1989, with respect to defendant, W.R. Grace & Co.; March 15, 1990 with respect to the remaining surface treatment defendants; and June 15, 1990 with respect to all pipe and boiler defendants, for each individual building at issue in this litigation, plaintiff shall provide to counsel for each such defendant and to co-liaison counsel for defendants a final statement of all information and produce all documents described in this paragraph. Such final statement shall contain all evidence on the issues of product identification and abatement activity upon which plaintiff intends to rely at the time of the trial and shall include the following information:

(1) All facts on which it intends to rely in proving product identification including the following:

(a) Type of product (e.g., pre-formed pipe insulation, corrugated pipe insulation, sprayed-on fireproofing, etc.) and its trade or brand name;

(b) The identity of its manufacturer;

(c) The identity of the person from whom it was purchased and other alleged responsible defendants;

(d) Specifically as to each manufacturer's product identified, the date on which it was delivered to plaintiff and/or installed in plaintiff's building(s);

(e) Specifically as to each manufacturer's product identified, the identity of plaintiff's building in which it was installed, the identity of the contractor or subcontractor which installed the product, the structure and/or surface of the building on which it was installed, and the precise location where it was installed;

(f) As to each building, the dates of construction, dates of all repairs, additions or alterations involving the removal or installation of asbestos-containing material at issue and the names of prior owners of the building with dates of ownership;

(g) The approximate quantity of all asbestos-containing materials at issue in place in the building in square or linear feet;

(h) Specifically as to each manufacturer identified in subsection (2) above, the approximate quantity of each identified product in place in the building stated in square or linear feet and by product type;

(i) The approximate quantity of all non-identified asbestos-containing products at issue in the building in square or linear feet and by product type;

(j) Specifically as to each manufacturer's product identified, the results of any analysis made by or on behalf of plaintiff as to the content of the material, along with the name and address of the person or persons who removed the sample and analyzed it and by product type;

(k) The identity of any documents or other sources containing information pertinent to the foregoing items;

(l) The name and present address of any person including expert witnesses having any knowledge of the facts in the foregoing items, specifying the item which each such named person has knowledge of. Each person identified shall be made available to defendants for deposition within thirty (30) days of such identification.

(2) All facts on which it intends to rely in proving abatement activity including the following;

(a) Specifically as to each manufacturer's product identified, the date of the abatement activity, if any;

(b) Specifically as to each manufacturer's product identified for which abatement activity has occurred, the identity of the contractor or subcontractor and any consultant involved in the abatement;

(c) Specifically as to each building, the specific location of any and all abatement activity and the results of any analysis made by or on behalf [of] plaintiff before, during or after the abatement;

(d) Specifically for each abatement action for which plaintiff claims damages, the basis and reasons for the action;

(e) The identity of any documents or other sources containing information pertinent to the foregoing items;

(f) The name and present address of any person including expert witnesses having any knowledge of the facts in the foregoing items specifying the items which each such named person has knowledge of. Each such person identified shall be made available to defendants for deposition within thirty (30) days of such identification.

C. Any defendant not identified by the dates enumerated in paragraph B. above shall be granted dismissal from the case or partial summary judgment as to those buildings in

which it is not identified. If the parties cannot agree as to whether plaintiff's product identification raises a question of material fact sufficient for consideration by the finder of fact, either party may move for summary judgment as to that issue.

D. Notwithstanding this discovery schedule, any individual party may bring a motion for summary judgment or motion in limine at any time.

E. Trial against W.R. Grace & Co. shall commence on April 1, 1990.

F. Trial against the remaining surface treatment defendants shall commence on June 1, 1990.

G. Trial against all pipe and boiler defendants shall commence on December 4, 1990.

VII. *REVISIONS OF SCHEDULE*

If any adjustments to the schedule set forth in this Order are required, they shall be made by subsequent order of the this Court or agreement of the parties.

VIII. *COMMUNICATION AMONG COUNSEL NOT DEEMED WAIVER*

The Court recognizes that cooperation by and among defendants is essential for the orderly and expeditious resolution of this litigation. The communication of information among plaintiff's counsel, among defense counsel and among defendants shall not be deemed a waiver of the attorney-client privilege or the protection afforded by the attorney work product doctrine, or any other privilege to which a party may be entitled. Any cooperative efforts above shall not in any way be used against any of the parties, shall not constitute evidence of conspiracy, concerted action or any wrongful conduct, and shall not be communicated to the jury. The exchange of information or documents by counsel will not by itself render such information or documents privileged.

IX. *PRESERVATION OF EVIDENCE*

A. All parties herein and the respective officers, directors, agents, servants, employees, attorneys, staff of such attorneys, and all persons acting pursuant to their direction are prohibited from destroying or causing the destruction of, or permitting the destruction of, any document or other objects or things including but not limited to bulk samples and air sample filters relating or relevant to any issue raised by the pleadings in this action, except upon agreement of counsel or upon prior approval of the Court obtained by application showing cause therefore with notice to all parties of such application providing them an opportunity to be heard by the Court as to the merits of the application. In addition to sanctions available to a party protesting violation of this provision, the Court may preclude as inadmissible all evidence relating to any information contained in any document or other items destroyed in violation of this provision.

X. *SERVICE OF ORDER*

Copies of this Pretrial Order No. 1, all subsequent Pretrial orders and all Stipulations approved by the Court shall be served upon all subsequently joined parties together with the complaint.

SO ORDERED.

/s/ _____
Murray C. Goldman, J.

CIRCUIT COURT
STATE OF WISCONSIN
DANE COUNTY
Branch 13

Case #85CV5952

SISTERS OF ST. MARY, et al.

Plaintiffs,

—vs—

AAER SPRAYED INSULATION, et al.

Defendants.

MEMORANDUM DECISION

The Sisters of St. Mary, a non-profit Missouri corporation, with divisions operating hospitals in Missouri, Illinois, Wisconsin and South Carolina, brought this action against 52[1] named and other presently unknown defendants who it is alleged "have at all times relevant hereto been engaged in the manufacturing, processing, compounding, promoting, selling, distributing, supplying and/or installing of asbestos, materials containing asbestos[2], and other asbestos products which were used in the construction and/or maintenance of the Hospitals." (Complaint, par. 4) They have sought compensatory and punitive damages from the defendants on a number of grounds described below. The matter is before the court now on the plaintiffs' request for certification of a class generally described as all hospital entities in the United States.

1 Since commencement of this action, some of the defendants have been dismissed from the case.

2 Hereafter asbestos containing materials will be referred to as ACM.

INTRODUCTION

The plaintiffs' original complaint sought compensatory and punitive damages under four[3] distinct substantive theories of recovery: Strict Liability, Negligence, Misrepresentation, and Nuisance. These claims are a part of a nationwide explosion of litigation concerning asbestos. Asbestos is a substance found naturally which was mined and then used in the manufacture of a variety of products largely because of its insulating and fire retardent qualities. Over time it became increasingly apparent that human exposure to asbestos fibers was associated with substantially increased risks of several diseases. It is now beyond serious question that exposure may cause asbestosis, lung cancer, and mesothelioma, among others.

Initial litigation regarding asbestos was exclusively for recovery on account of personal injuries. It began in the context of worker compensation claims and evolved to third-party actions brought against the manufacturers of asbestos products and the suppliers of the asbestos fiber itself. In nearly all of these cases the claimants were individuals who had been exposed to asbestos in their jobs. As of July, 1985, it was estimated that there were 33,000 asbestos personal injury cases pending in state and federal courts in the United States. *Asbestos in the Courts*, Institute For Civil Justice (1985), p. 24. That same study cited other reports which estimate that in the next 30 years there will be as many as 200,000 additional cases filed on behalf of the "traditional" asbestos plaintiff, the industrial worker.

As the health risks of asbestos became better known, concern arose that persons outside of the workplace who were exposed to asbestos were also contracting disease from this exposure. As part of the response to those health dangers, federal and state authorities began to develop regulations concerning the presence of asbestos products in buildings and the methods for their removal.

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3 Neither Conspiracy nor Risk Contribution are independent bases for liability. *Segall v. Hurwitz*, 114 Wis. 2d 471 (Ct. App. 1983); *Goldman v. Bloom*, 90 Wis. 2d 466 (1979).

The federal government has been particularly active. The Environmental Protection Agency (EPA), under the authority of the Clean Air Act, in 1984 enacted regulations entitled "National Emission Standards for Hazardous Air Pollutants" (NESHAPS). One subpart of these regulations deals with asbestos and prescribes for all but relatively small projects that where a renovation project will disturb friable[4] asbestos, certain steps must be followed which are unique to renovations involving ACM. While it is true that some hospital renovation projects involving buildings with ACM have not resulted in higher costs because of the presence of ACM (Agg. As. No. 68)[5], for almost all projects covered by NESHAPS there will be and have been significant additional costs associated with renovation because of compliance with these regulations. EPA had also been instructed by Congress in the Asbestos Hazard Emergency Response Act of 1986 to report on whether the regulations pertaining to inspection and abatement actions for school buildings should be extended to other public and commercial buildings. Moreover, OHSA regulations come into play to require certain actions to protect employees[6] where the level of asbestos in a particular building exceeds the "action level" of the rules. Finally, a number of states have enacted or are in the process of enacting regulations in the field of "asbestos in buildings". The cost of compliance with all of these regulations

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4 This is generally asbestos which is in a condition that the individual fibers may be or are being released in the surrounding air.

5 This citation form will be used hereafter to refer to a compilation of undisputed factual statements developed jointly by the parties for use only in the class certification phase of this case entitled Agreed Assertions. This was a part of the process by which the directive that trial courts engage in thorough fact-finding to make the necessary findings on a request for class certification was satisfied. *O'Leary v. Howard Young Medical Center*, 89 Wis. 2d 156, 172-3 (Ct. App. 1979).

6 "Except for proposed class members owned by the United States, a State or a political subdivision of a State, virtually all of the proposed class members are 'employers' within the meaning of the Occupational Safety and Health Act of 1970. 29 U.S.C. § 652(5)." Agg. As. No. 39.

can safely be estimated to be millions, if not billions, of dollars for hospitals.

While the personal injury cases continued to be filed in large numbers, a new dimension of the asbestos litigation explosion emerged in the early 1980's with the filing of cases by building owners. The case before this court is but one of an ever increasing number of lawsuits in which these building owners seek to recover from the "manufacturers" of asbestos products the costs of complying with the government regulations as well as the costs associated with similar activities undertaken "voluntarily" to meet their perceived common law duty to provide a safe place for patients, employees and the general public.

Courts faced with the complex issues posed by asbestos litigation and the sheer numbers of cases have had to grapple with the tension between providing *individual* justice to the parties in a particular case and the systemwide demands of processing these cases so that *any* justice will be provided those parties. The Wisconsin Supreme Court has clearly indicated its belief in the flexible nature of the substantive common law:

> " '. . . the common law is susceptible of growth and adaptation to new circumstances and situations, and that courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule . . . The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions.' *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935)," *Schwanke v. Garlt*, 219 Wis. 367, 371, (1935).

Moreover, when the equity jurisdiction of the Wisconsin courts is invoked, it has been pointed out that, "The court of equity has always had a traditional power to adapt its remedies to the exigencies and the needs of the case," *American Med. S., Inc. v. Mutual Fed. S & L*, 52 Wis. 2d 198, 205 (1971). "A court of equity is by definition flexible," *Amos v. Board of Directors of City of Milwaukee*, 408 F. Supp. 765, 823 (1976).

The very concept of the class action arose from this flexible tradition of equity powers.

> "The representative or class suit arose in equity out of necessity. It was devised to simplify litigation, to make more convenient the administration of justice both for the parties and the court, and to avoid a multiplicity of suits in those cases where the rights and liabilities of many persons similarly affected or interested could be fairly determined in the action." *Pipkorn v. Brown Deer*, 9 Wis. 2d 571, 577 (1959).

Both before and since *Pipkorn* reported decisions in Wisconsin have emphasized the equitable nature of class suits in approving unique procedures and remedies adopted by trial courts faced with such cases. *Mercury Records v. Economic Consultants*, 91 Wis. 2d 482, 495 (Ct. App. 1979).

Flexibility, however, is not license. The broad expanse in which trial courts have been permitted to move in fashioning class action remedies is not boundless. The limit is most certainly reached when to take the next step crosses the line to invade the territory defined by the constitutional fairness of due process or its siblings. It most assuredly is also reached when to certify a class would require that established rules defining the substantive rights and liabilities of persons under our common law be ignored or seriously interfered with. These territorial boundaries are not marked by clear beacons in all cases. The task of locating them is compounded by the sometimes hollow claim of the opposing party whose picture of gloom is more theoretical than practical. It is with all of this background that I proceed to consider the plaintiffs' request.

PLAINTIFFS' PROPOSAL

The plaintiffs propose a three phase proceeding. The initial litigation would culminate in a class trial in which some, but not all, of the issues of the defendants' liability would be determined. They go on to describe the further proceedings

that would be involved, should they prevail on this first stage, to complete the ascertainment of liability and the assessment of damages.

At the class trial, the only theories under which the plaintiffs would proceed would be strict liability and negligence. They suggest that notice to putative class members would advise that any hospital which wishes to pursue damages on the other theories pled (misrepresentation and nuisance) or any other theories available to it in their own state jurisdiction should "opt out" of this case; because if they remain in this case, their right to relief would be limited to that available under strict liability and/or negligence.

At a class trial, the fact finder would resolve (1) whether each of the defendants was negligent, (2) whether each of the products at issue was defective, (3) whether a "state of the art defense" was available to some or all of the defendants for some or all of the products at some or all points in time, (4) at what dates a reasonable hospital should have had sufficient information available to (a) decide to stop using ACM in its buildings and (b) discover that it was injured by the presence of ACM, and (5) whether the defendants' conduct entitles the plaintiffs to punitive damages.

At this trial, plaintiffs assert that as to negligence the law upon which the jury will be instructed is the single, uniform reasonable person standard regarding the duty to investigate and the duty to warn. They further contend that a single standard can be used for the "state of the art" issue. As to strict liability, the plaintiffs argue that Wisconsin law should be utilized; but if it is not, that the variations between different state law can be addressed through the creation of four subclasses representing the four groupings of states into their four distinct approaches to the issue of "unreasonably dangerous".

After the conclusion of the class trial, if the plaintiffs prevail, they envision a second stage of proceedings to set up and to establish the funding of a Claims Facility. Plaintiffs point to the Property Damage Trust created as a part of the Johns Manville bankruptcy proceeding as a model for the development of this Facility. They suggest that the level of

funding (all of which will come from the defendants) will be based on "objective evidence" (Plaintiffs' Brief, p. 43) exclusively concerned with estimating the total cost for all class members of all inspection, operation and maintenance, and abatement expenses. This level would be established through a jury trial. All of the details[7] of how this Facility would be constituted and operated are not fully spelled out but are left for later determinations after the initial class trial has been completed.

The final phase of the litigation they propose would involve the individual damage recovery steps. Any class member seeking compensation would file an affidavit with the Claims Facility addressed to four issues: (1) the amount claimed including supporting documentation, (2) the date on which the hospital actually obtained the requisite degree of knowledge to begin the running of the applicable statute of limitations, (3) the date on which the hospital obtained the requisite degree of knowledge that thereafter any use of ACM would constitute contributory negligence, assumption of risk or the like, and (4) the extent to which the specific manufacturer of the specific products in that hospital can or cannot be identified. For each of the last three, the affidavit would need to include certification by the duly authorized affiant that diligent inquiry of specified records had produced the information given.

The burden would then shift to the defendants to either accept or attempt to establish that there is a factual dispute as to any one or more of these issues for that particular hospital. The usual discovery techniques under Wisconsin law would be available to the defendants in this latter regard. If they were successful in demonstrating that a real factual dispute existed through a summary judgment proceeding in Wisconsin, resolution of that dispute through trial would occur in the courts of the state where the hospital was located (if

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7 Such questions as the makeup of the administration of the Facility, the proportion of the initial or any subsequent contributions to be made by each defendant, the operating guidelines it will employ, to name a few, are left unanswered at this stage.

the defendants did not agree to an alternative procedure). If the hospital prevailed at this trial, presumably the judgment from that case would be presented to the Claims Facility for payment.

Under the plaintiffs' proposal, affidavit claims could only be submitted for projects and/or activities already completed. If a hospital were successful in its first claim on all issues, a subsequent claim would involve only the question of the reasonableness of the expenses claimed and perhaps product identification. It should also be noted in this summary of the plaintiffs' proposal that they urge that this court certify a *Collins* class. This would involve a determination that the Wisconsin Supreme Court decision in *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166 (1984) would govern the claims of all class members, Wisconsin and non-Wisconsin hospitals alike, in addressing the product identification question. Other features of the plaintiffs' proposal will be discussed below.

CLASS CERTIFICATION

This action was brought in the Circuit Court for Dane County, Wisconsin. As a result, it is governed by the Wisconsin Rules of Civil Procedure, including the Wisconsin statute on class actions. Sec. 803.08. Since the adoption of Wisconsin's current Rules in 1975, our courts have repeatedly recognized that in many respects the Wisconsin Rules were patterned after the Federal Rules of Civil Procedure. To the extent this was true, it has been the consistent position of our appellate courts that federal decisions construing the procedural counterparts to the Wisconsin Rules are persuasive, but are not controlling. *Wilson v. Continental Insurance Cos.*, 87 Wis. 2d 310, 316 (1979). Sec. 803.08 is one of the few instances where the substantially rewritten Wisconsin Rules remained unchanged. As the Judicial Council Committee's Note of 1974 points out, "This section is essentially identical to the class action provision found in s. 260.12."

In a Wisconsin case decided prior to the effective date of the new Wisconsin Rules, the Supreme Court noted, "It

should also be pointed out that the interpretations of the federal statutes in respect to class actions are not necessarily controlling with respect to class actions brought under the state law." *Browne v. Milwaukee Bd. of School Directors*, 69 Wis. 2d. 169, 183 (1975). Nonetheless, our statute, while derived from the Field Code, embodies similar underpinnings to those of Federal Rule 23. Where those similarities exist and Wisconsin courts have not acted on the precise questions presented by application of Sec. 803.08 to the facts of this case, there is no impediment to the use of federal decisions whose reasoning is persuasive.[8] Thus in the discussion which follows, this court has relied on decisions of the federal courts applying Rule 23 where to do so does no violence to the language of our statute and is helpful in resolving the issues raised in this action.

As a further preliminary matter, it should be noted that the plaintiffs' request for certification of a class composed of non-Wisconsin hospitals is not barred by the fact of the nonresidence of the majority of the putative class members. Our Supreme Court recognized this in *Schlosser II* supra at 241-3 relying on the Kansas Supreme Court's decision in *Shutts v. Phillips Petroleum Co.*, 567 P. 2d 1292 (1977). This aspect of the Kansas court's decision, holding that a state court has jurisdiction over unnamed, nonresident plaintiffs in a class action if notice and representation are adequate, was affirmed by the U.S. Supreme Court at 472 U.S. 797, 814 (1985).

A. Wisconsin Law

As noted above, Wisconsin procedure regarding class actions is found in Wis. Stat. 803.08 which provides,

> "When the question before the court is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable

8 In fact, our courts have relied on Federal Rule 23 and federal cases addressing it to approve of procedural determinations made by Wisconsin trial courts in class action cases. *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 243 (1978) (hereafter *Schlosser* II), *Mercury Records*, supra at 492-4.

> to bring them all before the court, one or more may sue or defend for the benefit of the whole."

The ability to maintain a class action rests solely on whether the criteria of Sec. 803.08 have been met. *Schlosser v. Allis-Chalmers Corp.*, 65 Wis. 2d 153, 168 (1974) (hereafter *Schlosser* I). Those criteria have been identified as: "(1) the named parties 'must have a right or interest in common with the persons represented'; (2) the named parties 'must fairly represent the interest or right involved so that the issue may be fairly and honestly tried'; and (3) it must be 'impracticable to bring all interested persons before the court'." *Schlosser* I, at 169.

It is necessary that all criteria be present before a class may be certified, but a determination of their presence in a particular case does not end the inquiry for the ultimate determination of whether to certify must be assessed in the context of the "basic problem" identified by the *Schlosser* I Court:

> " 'The court must determine whether the advantages of disposing of the entire controversy in one proceeding are outweighed by the difficulties in combining divergent issues and persons. It is a question of the balance of convenience whether the court will settle all the issues in one suit; or will settle only the common question in one suit and then allow the independent questions to proceed in separate equity suits; or not settle the controversy at all in a single suit.' " 65 Wis. 2d at 172, quoting I. Chafee, *Some Problems in Equity*, p. 193 (1950).

In short, the focus is on whether it is manageable to proceed as a class action to gain the advantages of judicial economy that may be present in the particular case. With this in mind, let me consider the criteria seriatim.

1. Common Right or Interest

This criterion is the very heart of the class action, for it creates the justification for avoiding the general requirement that a party appear in an action before that party may benefit from the relief obtained or be bound by the judgment.

Wisconsin decisions have established only the broadest of guidelines in assessing the presence of common interests in a particular case. The basic test was described in *Browne*, supra at 181 as "whether all the members of the purported class desire the same outcome of the suit that their alleged representatives desire". This was later refined when the Court stated,

> "It is not necessary that the position of each member of the class be identical; it is necessary only that there be 'a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body.' " *Goebel v. First Federal Savings & Loan Assoc.*, 83 Wis. 2d 668, 684 (1978) (citations omitted).

As noted above, the criterion itself speaks of whether the named parties have "*a* right *or* interest in common", not whether they have *all* rights *and* interests in common. This point was recently recognized by the Court of Appeals: "This court has held that all members of a class need not share all interests, but all must share a common interest." *State ex rel. Jones v. Gerhardtstein*, 135 Wis. 2d 161, 171 (Ct. App. 1986).

Thus even a single common interest or right may be sufficient to support class certification, although it will still be necessary to consider "whether the issues common to the named plaintiffs and the class members are outweighed by the issues particular to the individual class members." *Goebel*, supra at 684.

Certain Defendants[9] argue, by reference to Wis. Stat. 805.05(2), that a class action cannot be maintained where the trial of the case will not resolve all issues necessary to enter judgment on the plaintiffs' claims. Specifically, they assert that bifurcation of trial proceedings between liability and damages is impermissible in light of Sec. 805.05(2).

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9 For ease of reference, the brief filed by Certain Defendants will hereafter be referred to as CD Brief, the brief of GAF and Owens-Illinois as GAF Brief.

Defendants cite no authority for this proposition, and in fact no case in Wisconsin has directly confronted it. It is a well settled rule of statutory construction that statutes are not to be read in a way which makes one portion superfluous or which creates inconsistency between two provisions. *Wisconsin Dept. of Revenue v. Milwaukee Refining Corp.*, 80 Wis. 2d 44 (1977); *State v. Gould*, 56 Wis. 2d 808 (1973). If at all possible, statutes are to be construed so as to harmonize, and thus give effect to the principal purposes behind them. *State v. Schaller*, 70 Wis. 2d 107 (1975). Sec. 803.08 refers to "the question before the court" while Sec. 805.05(2) relates to "claims". To read Sec. 805.05(2) as applying to class actions and, in effect, to create a *per se* rule that no class action will be permitted where it would require separate trials of liability and of damages would conflict with the language of Sec. 803.08 and its principal purpose. The latter does not say "When the claim before the court . . ." and to read it in that way would undercut the usefulness of the class action concept to avoid a multiplicity of litigation by confining its use to only the very narrowest of circumstances. As the language from *State ex rel. Jones* cited above makes clear, absolute identity of interest is not necessary.

It is true, as the defendants argue, that bifurcation has been permitted by our courts only in cases where the issue of damages is largely uncontested and the individual parties' damage amounts can be determined by reference to a formula and/or to records in the defendant's possession. *Schlosser I*, supra; *Mussallem v. Diners' Club, Inc.*, 69 Wis. 2d 437 (1975); *Goebel*, supra; *Milwaukee Fire Fighters Assoc. v. Milwaukee*, 50 Wis. 2d 9 (1971); *Hicks v. Milwaukee County*, 71 Wis. 2d 401 (1976). However, the fact that bifurcation was permitted at all undercuts the defendants' suggestion that Sec. 805.05(2) creates a *per se* rule. Moreover, the language quoted by the defendants from *Schlosser I* and *Mussallem* (CD Brief, p. 130) do not support such a rule. On the contrary, the language is phrased "may not be appropriate" and "may be of a nature . . . that class action . . . would be inappropriate" respectively. This choice of permissive phrase-

ology suggests that if our Supreme Court were directly confronted with the defendants' argument, it would conclude that Sec. 805.05(2) poses no automatic bar to a class action where individualized damage evidence would need to be presented. Instead, that fact would need to be assessed carefully and would be but one, albeit one important, factor to be considered in weighing whether the benefits to be derived from the class action procedure outweigh the difficulties attendant to it in a particular case. It is in this way that this court reads and thereby harmonizes these two statutory provisions.[10]

The named plaintiffs suggest a number of common questions which they argue can be addressed in the class trial they propose. (Plaintiffs' Brief, pp. 67-69) More generally, they also argue in the words of *Browne* that all putative class members desire the same outcome, namely compensatory damages for the costs of inspecting, abating and replacing ACM in their hospitals.

As noted above, the named plaintiffs propose that the claims of hospitals based on strict liability and negligence would be the only theories of recovery litigated in this case. While it is true that under the body of law pertaining to actions based on strict liability in tort there are a number of peripheral, although often critical, issues which arise (eg. nature of damages recoverable, affirmative defenses available, exclusivity of the remedy, "useful life" considerations),

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10 The Supreme Court has provided another basis on which to conclude that Sec. 805.05(2) is no impediment to maintaining a class action which would require separate trials of liability and of damages, even if the statutory language itself could not be read to be free of conflict. In *Schlosser I* at 160, the Court acknowledged that the case before it was one where "neither the class members nor their claims may be joined under secs. 260.10 or 263.04, Stats. (the general joinder statutes)." Nonetheless, the Court found the case to properly be handled as a class under the rule that "where two statutes deal with the same subject matter, the more specific controls." The Court concluded its discussion on statutory interplay with the general admonition, "We conclude that ability to maintain a class action hinges solely upon meeting the criteria of sec. 260.12, Stats." *Id.* at 168. See also *Mussallem* supra at 440-443. (Sec. 138.06(3) no bar to class action).

the central focus of attention under this theory of recovery is on the product itself.[11] Here the record discloses that there are over 400 and perhaps as many as 650 separate products at issue. They vary in terms of their functional purpose, the years in which they were manufactured, the type of asbestos in them (chrysotile or amosite), the amount of asbestos in them and their friability. Nonetheless, for each product, whether it is defective as manufactured presents a common question as to each hospital in which that product is found. The core of facts which would be presented on this question would, among other things, address the general health hazards of asbestos and whether there is in fact any safe level of exposure to asbestos fibers.[12] Proof would be common in the sense that it would be the same for each hospital containing the product and as to this element of the strict liability claim no proof specific to any one hospital would be necessary. While the individual circumstances and actions of a particular hospital may be relevant to certain affirmative defenses available to the defendants under strict liability, they are neither necessary elements of proof nor pertinent to the questions under strict liability which the plaintiffs propose be answered in the initial class trial. That proof would almost exclusively focus on the various ACMs themselves and on the defendants' actions in regard to it, and this permits this court to conclude that the questions presented by the plaintiffs' "*prima facie case*" on strict liability are common to the class.[13]

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11 This statement does not ignore the fact that the standard by which measurement of this attention is made varies under the laws of various jurisdictions. See discussion infra.

12 Much effort was devoted by both sides in this case to proving their respective positions on this issue, e.g. Testimony of Dr. Kevin Browne 5/13/87, affidavits of Dr. Henry Anderson. In this context, the court need not resolve this factual dispute. It is sufficient to note that it is a subject on which there is a significant dispute.

13 In the GAF brief, defendants argue that strict liability (and negligence) presents no common question because to establish liability it is necessary to show that the ACM in a particular building is actually creating a

In addition to the question of the general health hazards of asbestos, the federal District Court for the Eastern District of Pennsylvania identified three other common questions presented by a similar case brought on behalf of school districts throughout the country:

> "(b) defendants' knowledge or reason to know of the health hazards of asbestos;
>
> (c) defendants' failure to warn/test; and
>
> (d) defendants' concert of action and/or conspiracy involving formation of and adherence to industry practices." *In re Asbestos School Litigation*, 104 F.R.D. 422, 429 (1984).

The plaintiffs here also urge this court to reach similar conclusions. Defendants argue that these questions are not really common to the proposed class members and more generally that the elements of the plaintiffs' claim in negligence present no common questions.

The essence of the plaintiffs' negligence claim is that the defendants had a duty to use reasonable steps to learn about the safety of their products and to exercise reasonable care to inform or warn users of the products of the dangers associ-

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health hazard in that hospital at a particular time. This misses the mark of what the plaintiffs allege in this case. The costs for which compensation is sought are ones which the putative class members must incur regardless of whether the ACM in a particular hospital is causing a hazard at the time of a renovation project. No such determination is necessary before the requirements of NESHAPS are imposed. If the regulation's thresholds are reached, the expenses must be incurred. In this case, NESHAPS is not being used to establish the tortious conduct of the defendants (and the cases cited where such use was not permitted are distinguishable), but rather proof of NESHAPS goes to causation and damages. The underlying common question of whether a particular ACM product is or is not unreasonably dangerous remains capable of resolution without resort to proof of the individual setting of each hospital. As for the "voluntary" abatement activities of the hospitals, the general functional purposes of hospitals and the presence of patients with a generally greater need for uncontaminated air are matters of proof which are common to show whether it is reasonable that a hospital administration be more cautious in taking steps to alleviate sources of potential danger than other building owners.

ated with it which the defendants knew about or should have known about. It is then alleged that the defendants breached these duties. The proof of these contentions will be evidence of what the defendants did or failed to do and the reasonableness of their actions. It is true, as the defendants argue, that the products involved here were manufactured over a long time by a number of different companies which vary in their size and market, among other features. They also point out that medical knowledge of the dangers of asbestos has changed markedly over the time the products have been sold. But as the Third Circuit Court of Appeals properly noted, "The focus, however, must be on whether the fact to be proved is common to the members of the class, not whether it is common to all defendants." *In re School Asbestos Litigation*, 789 F.2d 996, 1010 (3rd Cir. 1986) (citation omitted). Because of the changing state of medical science, a given defendant might be determined to may have been negligent with respect to a given product as to inspection and/or warning after a certain date but not before. But this determination will be the same for each hospital in which that product is found, and will require no evidence peculiar to any single or even group of hospitals. The same may be said for the inextricably intertwined concept of state of the art, whether it is viewed as an affirmative defense or as evidence bearing on the reasonableness of a defendant's acts.

The sufficiency of any warning that a defendant gave concerning one of its products must be assessed at the time it was given as to the product for which it was given. Likewise, such a temporal circumstances assessment must be made for those products where no warning was provided. This does not, however, translate to a "building-by-building" analysis as the defendants argue (CD Brief, p. 19). The adequacy of the warning can be made without any proof of individual hospital circumstances. This is said with full appreciation for the fact that proof on the adequacy of warnings may include proof of the obviousness of danger to potential users. The evidence on this point will already be a part of the initial class trial since it is proposed that the "should have known" dates for contributory negligence and statute of limitations

purposes will be determined in this trial. But in the warnings context this evidence will go to what should have been obvious to a reasonable hospital, and will thus be an objective standard.

The fact that some defendants gave warnings for some products at some times (Agg. As. Nos. 36-38) does not make the adequacy of those warnings any less common to the hospitals that used those products, since the only warnings the defendants suggest were given were printed on the products or packaging materials, not warnings given in some specialized fashion to a particular hospital. If the warning was adequate in its content and form, the defendant would not be negligent, and no proof of whether a particular hospital or its architects or contractors saw the warning would be material.

The variations in the type and size of the company and the extent of its market may properly be considered in evaluating whether its actions were unreasonable in any of the respects claimed.[14] This can be accomplished through the framing of instructions to the jury. But evidence which any party presents as to this factor will be the same across the entire class, and will not change from one hospital to the next.

In short, this court joins with the District Court in the *In re School Asbestos Litigation* in identifying the questions noted above as common in this litigation. As a result, the named plaintiffs have met their burden in establishing the first criterion necessary for a Wisconsin class action, that they have a "right or interest" in common with the persons represented.[15]

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14 The court in *Cleveland Board of Education v. Armstrong World Industries*, 476 N.E. 2d 397 (Ohio Common Pleas 1985) at 405 cites this category of defendant differences as an "uncommon factor", but does not explain how it varies as between the individual class members.

15 The fact that not all hospitals will have a claim against all defendants is not fatal to the common question analysis. Pittsburg Corning which makes the contrary argument cites no Wisconsin or federal decision to support its position. See also GAF Brief at pp. 75-77.

2. Adequate Representation

No party has cited a Wisconsin case where this requirement was the deciding factor. Yet this requirement that the named plaintiffs fairly represent the interests of the absent class members is a necessary element of the due process which constitutionally permits a state court to resolve in binding fashion the claim of a non-Wisconsin hospital in a class suit. *Shutts*, supra 472 U.S. at 811-2. Two primary ingredients have been consistently identified in assessing whether the criterion has been met:

> "Adequate representation depends on two factors: (a) the plaintiffs' attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to the class." *Wetzel v. Liberty Mutual Insurance Co.*, 508 F. 2d 239, 247 (3rd Cir. 1975).

As to the first of these ingredients, even the defendants make no serious challenge. This court adopts as its own finding the representations of plaintiffs' counsel at page 55 of their Brief: "Class counsel have broad experience in complex litigation, including asbestos litigation. Moreover, class counsel has been extensively involved in the Manville Reorganization Plan, and in negotiating and implementing the resolution of the property damage claims in that proceeding." In addition, this court's experience with class counsel in this case has been a consistent pattern of dealing with attorneys who were well prepared, knowledgeable on all aspects of the factual and legal issues presented by the case, and "litigating zealously" *Schlosser I*, supra at 170, the interests of the named plaintiffs and of hospitals generally.

On the second ingredient, the defendants pose a number of arguments designed to demonstrate (1) the antagonism between the named plaintiffs' positions in this case and the interests of putative class members or (2) other legal impediments they see to finding adequate representation. Some of these are no more than restatements of the defendants' contentions that there are no common questions and will not be

discussed separately here. Others are efforts to show that the Sisters of St. Mary hospitals are not typical of the hospitals of putative class members. Since "typicality" is not a requirement under the Wisconsin class action statute, there is no need to address them. The argument in the GAF Brief that the class definition of "all hospitals" presented by the plaintiffs defeats adequate representation because it is undisputed that some hospitals do not now and never did contain ACM is easily addressed by noting that if a class is certified, this court will define the class and could easily restrict it to hospitals containing ACM or which have removed it. Moreover, it is hard to understand how inclusion of a hospital which has no ACM and thus could make no claim has any bearing on whether the named plaintiffs are adequate representatives. Finally in this regard, the difficulties in the class definition because of building ownership issues and possible changes, lease obligations, and overlap with other class suits are real concerns but they are not material to this inquiry and more properly are addressed to the balancing analysis undertaken below.

The defendants also argue that the named plaintiffs' position that Wisconsin law be applied "to determine the outcome of all claims of all class members" (CD Brief, p. 62) demonstrates that they cannot fairly represent the class because the laws of other states may be more beneficial to some class members. In the first place, this misses the point, for the plaintiffs have taken no such global position. They have acknowledged that the various states' laws on comparative/contributory negligence (the first example cited by the defendants) would be used during the third phase of the litigation. (Reply Brief, p. 10, 19)[16]. In the second place,

16 The defendants' contention concerning the "irreconcilable conflict" in the named plaintiffs' position on the application of *Collins* is far more theoretical than practical. If this court were to make a definitive determination on the ability to use *Collins* at all, the extent of its use, and the states whose hospitals would enjoy its benefits, there is no persuasive reason cited by the defendants why the named plaintiffs and class counsel could not fairly

if a class is certified, this court, not the plaintiffs, will determine which law applies to the various elements of each class members' claim. To the extent that this court's determination on one or another issue in this regard appeared to be disadvantageous to certain class members in certain states and was made at an early stage, this could be the subject of the notice given so that such hospitals could evaluate for themselves the degree of potential disadvantage in making the determination on whether to opt out. This raises a further point. The putative class members here are not unsophisticated individuals. They are business organizations which may vary in size, but it can safely be assumed they all have legal counsel who will be consulted to review any notice related to this case. They will thus have a reasonable basis from which to evaluate whether a class proceeding, if certified, is their own assessment of the competence of class counsel as well as the impact on them of any choice of law determination made by this court in describing the class proceedings.

Finally, the defendants argue that many American hospitals are owned by States or their subdivisions, the U.S. government or its departments, or municipalities and that under the law most public entities such as these can only be represented by the Attorney General or other public counsel. From this they reason that the named plaintiffs lack authority to represent this category of putative class member. From a review of the laws cited, this court would agree. However, this is not fatal to a determination that the named plaintiffs may fairly represent the interests of other class members. A requirement that a public hospital explicitly "opt in" to the class by showing it had complied with applicable law to permit another to represent the public's interest in a particular case (such procedures are present under many, but not all, of these Attorney General laws) would cure this problem. Sec-

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represent the interests of hospitals for whom Collins was available and those for whom it was not. Admissions or arguments made with respect to one group have no greater chance of "haunting" (GAF Brief, p. 74) them in representing the other than do admissions or arguments made by a defendant in litigation [of] both *Collins* and non-*Collins* plaintiffs' claims.

ondly, the cure might involve excluding such hospitals from the class definition altogether. Neither the problem itself nor either of the alternative solutions would bar a class proceeding.

This litigation is being "sponsored" by the American Hospital Association (AHA). 77.7% of the proposed class members are members of this organization. (Agg. As No. 104) Class counsel have worked closely with counsel for AHA in many phases of the case. This is not the commonly found class action situation where a single plaintiff or small group brings an action on behalf of hundreds or thousands of individuals with whom there is no relationship other than the common right or interest in the litigation itself. The community of interest on an ongoing basis among the named plaintiffs and the putative class members both in this litigation and otherwise is a factor which strongly supports the conclusion that the named plaintiffs here can fairly and adequately represent the rights and interests of the unnamed plaintiffs. Especially is this so where what is contemplated is generally an opt-out class.

3. Impracticability

This requirement has generally been discussed in reported cases in terms of the numerical size of the class. No extended discussion or citation is necessary to support the conclusion that a class of approximately 6,000 hospitals all over the United States satisfies what the *Schlosser I* Court meant by being impracticable to bring all interested persons before the court.

B. CHOICE OF LAW

Plaintiffs' primary position is that Wisconsin law on all substantive issues in the first phase class trial can and should be applied to the claims of all members of this proposed nationwide class. (Plaintiffs' Brief, p. 104). It might accurately be said that this court need not of necessity address this issue at this time and could leave it for determination in

a context where the particular substantive rule of law were called into question (eg. motion to dismiss, motion for summary judgment, motion in limine, or jury instruction formulation, etc.) Especially might this be appropriate since choice of law considerations are to be made on an issue by issue basis, not for the lawsuit as a whole. *Air Products & Chemicals, Inc. v. Fairbanks*, 58 Wis. 2d 193, 201 (1973). However, here the parties have developed an adequate record on the subject and have spent an extensive amount of time and paper in articulating their respective positions on it. More importantly, the court's preliminary observations on this issue are necessary to make a reasoned assessment of the manageability of the proposed class proceedings.

This court's authority to apply Wisconsin law to the claims of a nationwide class of hospitals is bounded by the constitutional limits recently enunciated by the United States Supreme Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Those limits were described as the Court simultaneously upheld the jurisdictional authority of state courts to entertain class actions where the class included out-of-state residents with no apparent contacts with the forum state. *Shutts* was a suit filed in Kansas state court on behalf of gas royalty owners residing in all 50 states who owned an interest in leases of land in 11 states where the gas was produced. The suit sought interest on increased royalty payments which had been delayed by the company pending federal approval of price increases. The Kansas courts upheld the application of Kansas law to the dispute on the basis that "the law of the forum should be applied unless compelling reasons exist for applying a different law" 679 P.2d 1159, 1181 (1984). The Supreme Court disapproved of this standard for constitutional purposes and reversed, concluding, "We think that the Supreme Court of Kansas erred in deciding on the basis that it did that the application of its laws to all claims would be constitutional." *Shutts*, supra at 818. It went on to describe

the proper analysis to be undertaken by the Kansas court on remand,[17] and prescribed a two-step approach.

> "We must first determine whether Kansas law conflicts in any material way with any other law which could apply. There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit." *Id.* at 816.

If conflicts are found, the Due Process Clause and the Full Faith and Credit Clause require,

> " 'that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.' " *Id.* at 818, citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981).

In determining whether conflict exists between Wisconsin law and the law of any other state which could be applied[18], no effort will be made to survey every conceivable issue which might arise during the course of this litigation. Instead, the focus will be only on the substantive law which will be central to the class trial of the plaintiffs' "*prima facie case*" and their proposal that the *Collins* doctrine can be utilized classwide. As noted above, the class trial would be conducted with questions under strict liability and common law negligence to be determined by the jury.

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17 Contrary to plaintiffs' contention, the Kansas court on remand did not conclude "that Kansas law should be applied across the board." Rather, they found that federal law could be used to determine Phillips' liability, but that the laws of 5 different states needed to be used in calculating the amount of interest to be paid. 732 P. 2d 1286, 1313 (1987).

18 Putative class members are located in all 50 states. It needs no citation to point out that the laws of each of those states could be applied to the claims of the hospitals located in them.

A material conflict between the law of two states exists when the choice of one as compared to another will determine the outcome of a material aspect of the case. *Hunker v. Royal Indemnity Co.*, 57 Wis. 2d 588, 598 (1973).[19] Here the plaintiffs concede that the formulation of the elements necessary to make out a claim under strict liability differ among the various states. They suggest that the jurisdictions fall into five distinct categories:

(1) Those applying a "pure" consumer-expectation version of the unreasonably dangerous concept of Sec. 402A, Restatement (Second) of Torts (21 states, including Wisconsin),

(2) Those using the product-oriented "risk utility" version of Sec. 402.A (8 states, including New York),

(3) Those rejecting the Sec. 402A requirement of unreasonably dangerous as a necessary element (6 states, including California).

(4) Those which have adopted the "unreasonably dangerous" element of Sec. 402A but have not chosen between risk utility or consumer-expectation articulations of its meaning (11 states, including Maryland), and

(5) Those which do not recognize any form of strict liability (7 states, including Massachusetts).

The defendants point to the further permutations of these broad categories found in a number of states as a result of legislative action or common law nuances[20] but at this junc-

19 Plaintiffs' original argument (Plaintiffs' Brief, p. 92) that a difference in two state's laws is a conflict so long as the underlying policy of the two states is not in conflict, even where the difference is outcome determinative, is without merit. Such an exception to the widely recognized definition of conflict would permit a court to choose forum state law by begging the entire constitutional analysis required by *Shutts*.

20 Considerable argument was centered on who possesses the burden of proof as to the presence or absence of conflicts. It is unnecessary to resolve this dispute, since the presence of conflict has so clearly been demonstrated

ture further refinement is unnecessary. The plaintiffs not only concede that these differences exist but also now concede that these differences are not "false conflicts" (Reply Brief, p. 20). This could hardly be disputed. While it is theoretically possible that a particular ACM product might be found unreasonably dangerous under all standards or under none and thus the choice of which standard was used may prove not to be outcome determinative, this is far from what could be safety anticipated. Certain evidence would be relevant and admissible under one standard but not under another. Certain proof would be necessary under one but not another. It is entirely conceivable that after a trial, the jury would find *prima facie* liability under one but not another as to a particular product. Material conflict clearly exists as to strict liability law.

With respect to common law negligence, the plaintiffs also concede that differences exist between the various states on what constitutes a *prima facie* case of liability for failure to warn. Here they suggest that the law falls into three categories:

(1) Those which have expressly adopted the elements of Sec. 388, Restatement (Second) of Torts, (39 states, including Wisconsin),

(2) Those which impose liability on common law negligence principles (some of remaining 11), and

(3) Those which do not recognize this theory of recovery but deal with it only as a strict liability claim (rest of remaining 11).

The defendants cite further differences, for example, that certain states do not permit recovery in negligence of the type of damages sought by the plaintiffs in this case (Illinois and Missouri) while another state does (South Carolina). Suffice

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through the extensive briefing done by all parties. Cf. *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C. Cir. 1986) ("Appellees, as class action proponents, must show that it [their claim of relevant variations in state laws] is accurate.")

it to say that material conflicts between the laws of different states on the negligence questions also exist.[21] Plaintiffs all but concede that when they suggest that three sets of instructions in this subject would be given to the jury. (Reply Brief, p. 25).

Finally, there can be no doubt that the Wisconsin *Collins* rule is in conflict with the laws of other states. To the extent that this court were to conclude that this burden shifting rule on causation was available for some or all of the ACM in this case, such a determination would run directly up against the laws of other states which have failed to adopt it or expressly rejected it.[22] No clearer instance of outcome determination can be identified, and thus a conflict requiring the further *Shutts* analysis is presented.

Although admitting that conflicts exist, the plaintiffs nonetheless argue that Wisconsin has sufficient contacts with and

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21 Other conflicts cited by the defendants relating to affirmative defenses, such as the differing treatment of contributory/comparative negligence issues, are not addressed at this point because of the court's preliminary limitation on the choice of law analysis to be undertaken in the context of class certification noted earlier. This should not be construed as any indication that a *Shutts* analysis is unnecessary as to such issues. Were a class to be certified, such an analysis would be necessary at an appropriate time.

22 *Zafft v. Eli Lilly & Co.*, 676 S.W. 2d 241 (Mo. 1984); *Mizell v. Eli Lilly & Co.*, 526 F. Supp. 586 (D.S.C. 1981); *Morton v. Abbott Laboratories*, 538 F. Supp. 593 (M.D. Fla. 1982) all involve cases where courts have refused to adopt any type of market share or alternative liability rules in DES cases, the same context in which the Wisconsin Supreme Court enunciated the *Collins* rule. Plaintiffs attempt to distinguish these cases on the basis (1) that they were personal injury cases while this is a property damage case and (2) that they were single plaintiff cases while this is a class action. A thorough review of the entire range of factors on which each of these courts rejected a *Collins*-type rule strongly suggests that these courts would not have adopted a *Collins* approach in either a property damage case or a class action.

Furthermore, plaintiffs' suggestion that other jurisdictions confronted with the facts of this case would likely adopt Collins because all jurisdictions have accepted the alternative liability theory first set forth in *Summers v. Tice*, 33 Cal. 2d 80 (1948) is not persuasive. First, they have not done so thus far and this theory has existed for nearly 40 years. Secondly, the *Summers* rule is rooted firmly in factual settings where it is clear that all possible tortfeasers are before the court. See *Collins*, 116 Wis. 2d at 184. This is not the case here.

interests in the litigation to permit application of Wisconsin law to the claims of all class members. The Wisconsin interests which they cite are not distinguished in their applicability to any particular issue of substantive law[23], but, instead, are presented as the support for the use of Wisconsin law on all three of the issues discussed above. There also is no evidence to suggest or argument made that those interests are any greater with reference to the hospitals in one particular state than they are to other states. In summarized form, those interests are

(1) Wisconsin residents are referred by Wisconsin doctors to out-of-state hospitals which may contain ACM.

(2) Wisconsin residents often receive emergency medical care in out-of-state hospitals when they are away from home.

(3) Because of (1) and (2), Wisconsin has an interest in seeing that asbestos abatement costs are not borne by out-of-state hospitals, thereby increasing medical service costs or reducing the level of care for patients.

(4) Wisconsin has a further interest in seeing that these abatement costs are not borne by the hospitals themselves because this will reduce their ability to provide indigent medical care which may increase the demand on Wisconsin hospitals to provide it with the resulting additional costs to Wisconsin hospitals and taxpayers.

(5) The interest reflected in Wisconsin tort law and recent governmental action to provide compensation to the victims of tortious conduct.

(6) The interest of Wisconsin in cooperating with other states to provide an efficient and cost effective

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23 One exception to this is the reliance of the plaintiffs on the Wisconsin constitutional doctrine of providing a "Remedy for Wrongs" in the context of *Collins* issues. See discussion infra.

forum to litigate common issues in a single proceeding.

The interests of the forum state which support application of its own laws arise out of contacts with the forum state. The contacts which are of constitutional significance are those connected with "the claims asserted by such member of the plaintiff class," *Shutts*, supra at 821. In a somewhat more expansive perspective, the Supreme Court in *Allstate Ins. Co. v. Hague*, 449 U.S. at 313 focused on the forum's "contacts with the parties and the occurrence giving rise to the litigation." The quality and quantity of the contacts is considered in reference to the Due Process Clause concern that the choice of forum law not be fundamentally unfair to a litigant and to the Full Faith and Credit Clause concern that it respect the sovereignty and legitimate interests of other states. Neither concern, however, requires that the interests of the forum be weighed against those of another state whose law could be applied to the controversy, *Carroll v. Lanza*, 349 U.S. 408 (1955), for it is clear "that a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction." *Allstate Ins.*, supra at 307.

Here no question exists as to a Wisconsin court's ability to apply Wisconsin law to the claims of Wisconsin hospitals. The inquiry is related solely to the claims of out-of-state hospitals (which represent over 97 percent of the proposed class). Wisconsin has a legitimate interest in the quality of cost of medical care its citizens receive while away from Wisconsin. But this interest can only be implicated with respect to a hospital which in fact treats Wisconsin citizens. It is undisputed that some members of the class have never treated a Wisconsin resident (Agg. As. 72(a)), and among the putative class members 35 percent do not treat any out-of-state patients. (Hearing Tr., Blount p. 179)[24]. Thus a large number of the

24 It is true that this percentage comes from the data acquired in a survey of a limited number of hospitals. However, it is reasonable to infer that similar results would be reached from a wider sample. In fact, the demographic information on the patients cared for in the hospitals of the named plaintiffs is not inconsistent.

class members have had no contact of the type the plaintiffs here assert implicates Wisconsin interests. *Shutts* requires that the contacts be with the claims asserted by *each* member of the plaintiff class.[25] Moreover, this contact with Wisconsin even for the hospitals which have treated Wisconsin residents is not constitutionally significant. First, in a quantitative sense it is *de minimis* either as a share of the total of patients served in a given hospital or as a share of the hospital care received by Wisconsin residents. Second, in a qualitative sense the nature of the contact makes it insufficient. It can safely be assumed (plaintiffs do not contend otherwise) that the residents of other states also receive care in hospitals out of their states to the same degree that Wisconsin residents do. While the constitutional analysis of *Shutts* does not require that the forum state's contacts be greater than another state's, it does require that the contacts be significant. Where, as here, the contact relied upon is one that is as present in reference to every other state as it is with the forum, this quality of the contact suggests that it lacks constitutional significance.

On the cost factor, the facts do not support the plaintiffs' contentions. First, for many hospitals any increase in their rates from abatement costs will not be felt by Wisconsin residents because Wisconsin residents are not among their patients. Second, the impact of abatement costs on increased rates charged to patients is hardly clear. Rate setting varies from one state to another (Agg. As. No. 73(a)), and there are other sources for reimbursement of capital expenditures of the type involved in an abatement project (Agg. As. Nos. 76 and 77(a)) than to increase rates. It is also undisputed that some hospitals have not raised their rates after performing abatement activities (Agg. As. No. 81(a)). Third, the amount

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25 It is this court's view that this requirement of *Shutts* is not intended to be applied with absolute rigidity. Thus in a case where a relatively small number of putative class members had no contacts with the forum but the overwhelming majority had significant contacts or aggregation of contacts with the forum application of forum law to the entire class would be permissible. This is not the case here.

of asbestos in a hospital varies widely between hospitals and some have no ACM at all (Agg. As. No. 101). For those with relatively small amounts, the abatement costs will be so insignificant in comparison to their operating budgets that it could have no effect on rates charged. Finally, while it can be assumed that there are some hospitals where, rate setting laws permitting, the costs of abatement will be so large that an increase in patient rates will result, this fact is not constitutionally significant. Even a large cost will be spread over the rates charged to many patients and thus will be relatively small. This small increment, in turn, will be charged to a very small number of Wisconsin residents. For those it is charged to, the increment will be a very small part of their medical service cost for care in that hospital and an even smaller part of their overall health care costs.

As noted earlier, *Shutts* speaks of "significant" contacts. If increased medical costs for Wisconsin residents is a contact at all, its miniscule nature in *any* relative setting clearly establishes that it lacks the significance to permit the application of Wisconsin law to the claims of hospitals in other states.

Much of the foregoing also is applicable to the plaintiffs' claims regarding indigent care impacts. In addition, the entire factual premise for this argument is lacking. If abatement costs will reduce the ability of hospitals to provide indigent care, this will as surely happen for Wisconsin hospitals as for others. How then Wisconsin hospitals could be "called upon to pick up the slack and provide more such care" (Plaintiffs' Brief, p. 101) escapes this writer.

It is true that Wisconsin has a long recognized policy of providing compensation to the victims of tortious conduct. But this state interest is not a contact between Wisconsin and the parties to this litigation or the occurrences giving rise to it. If such a policy were deemed constitutionally sufficient to justify application of Wisconsin law to foreign transactions, there would be no choice of law bar to any injured person filing suit in Wisconsin on any alleged tort and enjoying the perceived benefits of Wisconsin law in adjudicating their claim.

The last interest relied on by the plaintiffs and noted in the list above offers no greater support to their position. This is also not a contact with Wisconsin. Where exactly this interest is derived from in the jurisprudence of Wisconsin has not been demonstrated, but assuming that it is true, to invoke it to support the application of conflicting Wisconsin law fails to grant proper respect to the differing laws of other jurisdictions. Such an interest could be asserted by any plaintiff seeking class certification of a multi-state class in any state. To recognize it would ignore the warning of *Shutts* at 820, that " 'the invitation to forum shopping would be irresistible' " (citing with approval the language from the dissenting opinion in *Allstate Ins.*, supra at 337). Application of Wisconsin law on a classwide basis for this reason given by the plaintiffs would indeed be arbitrary.

The plaintiffs also argue that in a tort case, as distinguished from contract or property cases, there can be no expectation of the parties as to which state's laws will govern future litigation[26]. Relying on language in *Shutts*, at 822, which identified this expectation interest as an "important element", they argue that to apply forum law in a tort case would do no violence to due process concerns. The premise of their reasoning is attractive and appears to be supported by the record, for there is no evidence to suggest that any defendant acted or failed to act with respect to the ACM put in hospitals in reliance on the law of any particular jurisdiction. However, the conclusion that this permits the application of Wisconsin law to the claims of the entire nationwide class of hospitals does not follow. First, as *Shutts* points out, the expectation of the parties is an "important" element; it is not the determinative or sole element. Constitutionally significant contacts must be affirmatively demonstrated. It is not enough to merely demonstrate the absence of a substantial countervailing factor. Second, the consideration of this expectation factor arises solely in the context of the due process concern for fairness. It has no bearing on the Full Faith

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26 This is because parties do not plan to be negligent or to commit torts in reliance upon any particular rules of law. *Hunker v. Royal Indemnity Co.*, 57 Wis. 2d 588, 600 (1975); *Heath v. Zellmer*, 35 Wis. 2d 578, 596 (1967).

and Credit Clause concern for comity where the need for forum contacts remains regardless of any lack of expectation.

Finally, in particular reference to the *Collins* issue, the plaintiffs point to Wisconsin's constitutional Remedy for Wrongs Clause[27] to support their argument that *Collins* may be applied classwide.[28] In essence, they argue that if *Collins* is not adopted classwide, those hospitals which are unable to identify the specific manufacturer of the ACM in their facilities will be injured but will be unable to recover from any of the defendants for that injury. Since the Remedy For Wrongs Clause protects citizens of Wisconsin and non-citizens alike, *Arteaga v. Literski*, 83 Wis. 2d 128, 133 (1978), and since this inability to recover would violate the Clause, in a Wisconsin class action all hospitals in all states should be allowed to proceed under *Collins*.

The plaintiffs correctly point out that *Collins* was expressly decided in reliance upon the Remedy For Wrongs Clause. 116 Wis. 2d at 182. However, *Collins* presented no constitutional choice of law issues. Nonetheless the plaintiffs would read

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27 Art 1, Sec. 9 Wis. Const.: "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the law."

28 The discussion of *Collins* in this context is not intended to indicate its universal applicability to ACM even in Wisconsin hospitals. This has been the subject of considerable argument, but the record does not permit nor does the issue before the court require that it be resolved at this time. Suffice it to say that the Court in *Collins* at 191 made it clear ". . . that this method of recovery could apply in situations which are factually similar to the DES cases." But that same court relied on "facts" pertaining to DES which are primarily product factors—its generic form (no clear shape, color or markings to identify its manufacturer), all DES has identical chemical formula, and as many as 300 producers. *Id.* at 180. Here the ACM installed in hospitals is of many types, and all members of the class could identify the manufacturer of at least some types in their hospitals (Agg. As. No. 47). It seems equally clear that for other types it cannot be identified. This difficulty of identification is here, more than with DES, a result of circumstances of individual plaintiffs than solely the generic nature of the product. This raises a question of whether the *Collins* doctrine is applicable or, if not, whether its coverage would be extended.

the adoption in *Collins* of a substantive rule of law[29] as capable of extension to meet the constitutional mandate of *Shutts*. In effect they argue that because they propose a nationwide class of plaintiffs in an action brought in Wisconsin, Wisconsin constitutional principles allow the federal constitutional principles of *Shutts* to be relaxed. Compelling as their equitable claims may be, this is not permissible.

The idea that a state court adjudicating a nationwide class action has much greater latitude to apply forum law was expressly rejected as "bootstrapping" in *Shutts*, 472 U.S. at 820-1. The Supreme Court rather clearly said that "significant contacts" with the forum were still necessary in a class action before forum law could be utilized. "But the constitutional limitations laid down in cases such as *Allstate* and *Home Ins. Co. v. Dick*, supra must be respected even in a nationwide class action." *Id.* at 823.[30]

While *Shutts* addressed the federal constitutional limitations on the use of state common and statutory law, there is no reason why the same rules would not also apply in reference to state constitutional law. Here the Wisconsin Constitu-

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29 Plaintiffs in passing urge that *Collins* is not really substantive but is a rule of evidence, and, therefore, as the law of the forum, it should be applied to all claims of all hospitals. In effect, they argue that no choice of law issue as to *Collins* is even presented (Reply Brief, p. 49). The Wisconsin Supreme Court in *Collins* supra at 181-2 quite clearly viewed the issue as one of substantive law involving a necessary element of the plaintiffs' cause of action.

30 Plaintiffs also cite Judge Weinstein's decision in *In re Agent Orange Product Liability Litigation*, 597 F. Supp 740 (S.D.N.Y. 1984) as support for the proposition that some form of alternative liability is more readily available to be applied to a non-resident plaintiff in a class action than in an individual plaintiff case. Although his reasoning is not without significant logic, the question here is not whether alternative liability is a sensible theory in a class action but whether it is a theory which can be applied classwide in the face of conflicting determinations in other states under the constitutional principles of *Shutts*. See fn. 21 supra. Judge Weinstein himself expresses doubt on this subject. 597 F. Supp. at 748 and in an earlier opinion in the same case had acknowledged that each plaintiff would be confronted with a choice of law issue that might be resolved adversely to him. 580 F. Supp. 690, 693-701 (E.D.N.Y. 1984). The skepticism on this subject was joined in by the Court of Appeals, 818 F. 2d 145, 173 (2nd Cir. 1987).

tion on which *Collins* was grounded might well be capable of application to non-Wisconsin hospitals under Wisconsin's choice of law rules, but this would only be true if the threshold of *Shutts* could be satisfied so that it was constitutionally permissible to even reach an analysis under those rules. *Shutts* requires contacts with the forum, and the Remedy For Wrongs Clause is no substitute, nor does it suffice as a contact within the meaning of *Shutts*.[31]

From the foregoing discussion, the only conclusion that can be drawn is that material conflicts exist between the law of Wisconsin on negligence, strict liability and *Collins* and the law of other states where putative class members are located. Upon examination, neither the claims of those non-Wisconsin hospitals, the hospitals themselves, nor the occurrences giving rise to the claims have constitutionally substantial contact or aggregation of contacts with Wisconsin to permit the application of the Wisconsin law on these subjects to those claims. Instead, the record establishes that over 97 percent of the proposed class are non-Wisconsin hospitals; that over 90 percent of the transactions involving ACM and members of the proposed class were consummated without any involvement of Wisconsin, its residents, citizens and hospitals (Agg. As. No. 110); that all of the claims involved in this case are for property damages to buildings and real estate, the vast majority of which is not in Wisconsin; that no mining, manufacturing or processing facility of any of the defendants is located in Wisconsin; and that no defendant has its headquarters or principal place of business in Wisconsin. Under such circumstances, it would constitute officious intermeddling for Wisconsin to apply its law to the claims of the non-Wisconsin class members. This being so, there is no

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31 Plaintiffs' reliance on *Beard v. J.I. Case Co.*, 823 F. 2d 1095 (7th Cir. 1987) is misplaced. In *Beard*, the Court did not conclude that Wisconsin's Remedy For Wrongs Clause required that Wisconsin law on the disputed issue be applied rather than Tennessee law. The case was decided on statutory construction principles without reaching the constitutional question. It is interesting to note that both the District Court and the Circuit Court of Appeals made clear that Tennessee law on liability was to be applied in a product liability action arising from a Tennessee accident but brought in federal court in Wisconsin under diversity jurisdiction.

need to conduct the detailed qualitative analysis under Wisconsin's choice-influencing considerations. *Hunker*, supra at 598; *Gavers v. Federal Life Ins. Co.*, 118 Wis. 2d 113, 118 (Ct. App. 1984); *Burns v. Gere*, 140 Wis. 2d 197, 200 (Ct. App. 1987). In summary, on those three identified substantive issues it would be necessary to apply the law of the state in which a hospital is located to the claims of that hospital raised by this litigation.[32]

C. WEIGHING THE BENEFITS

As the earlier discussion (Sec. A(1)-(3)) concludes, each of the threshold requirements for maintenance of a class action in Wisconsin have here been met. The Supreme Court has noted, "In *Schlosser* [I], we concluded that it was in the public interest as declared by the legislature to permit class actions in those cases which meet the criteria established by sec. 260.12, Stats." *Mussallem*, supra at 445. Nonetheless, it remains necessary that the court determine whether the benefits to be derived from such a procedure outweigh the inherent difficulties of a single action combining divergent issues and persons. *Nolte v. Michaels Pipeline Const. Inc.*, 83 Wis. 2d 171, 177 (1978). *Schlosser II.* supra at 233-4.

The named plaintiffs argue that the primary benefit to be gained by certification of this class is that it will permit a single trial of the issues which otherwise would be a part of potentially over 6,000 individual cases. Such a result, they assert, will save money for the parties in litigation expense and otherwise, preserve judicial resources, and provide a forum for plaintiffs whose claims are so small that it would not be feasible to pursue them individually. These, of course, are prototype rationales presented in support of every class action. The task before this court is to evaluate in the context of this case the extent to which these benefits are likely to be realized and at what cost.

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32 No effort was made to suggest that the law of any other particular state on any of the three subjects should be applied classwide.

From the preceding choice of law discussion, the contours of the "class trial" can be seen. Plaintiffs have demanded a trial by jury. It will be necessary that the jury make findings concerning several hundred different products[33] under the substantive law on strict liability and negligence of each of the 50 states where the class members are located. Plaintiffs point out that this task can be simplified considerably by the use of sub-classes divided according to distinct groupings of states into a small number of categories according to a limited number of possible variations (5 for strict liability and 3 for negligence).[34] Such a trial is possible, but it would involve significant difficulties.

First, the magnitude of the enterprise would greatly impair the ability of the jury to perform their function properly. The presentation of evidence would consume many months, and perhaps years.[35] Much of that evidence would be able to be received only with limiting instructions that confined its relevance to one or some of the variations on the theories of recovery under which they would be expected to answer a

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33 It is acknowledged that most of these products fall into approximately nine functional categories, eg. pipe coverings, acoustical plasters, ceiling tiles, etc. However, within these broad generic types, there are many variations in the amount and type of asbestos used, the degree of friability, the years in which the particular product was marketed, whether any warnings accompanies the product, and if so, the nature of the warnings. This court is unable to envision that evidence of these differences would not be admitted at trial thereby requiring jury verdict questions as to at least each product where a material difference had been shown.

34 See listing in Section B above. This subclass approach was approved in *In re Asbestos School Litigation*, supra at 434.

35 Trial time would of necessity be much longer given the number of defendants, each represented by separate counsel and each with the right of (and interest in because of separate product considerations) cross-examination. This raises the very real concern of how could this court find enough people to serve or in good conscience ask them to serve on a jury for months on end. See discussion on *Schaffer v. Chemical Bank*, 339 F. Supp. 329, 337 (S.D.N.Y. 1972).

special verdict.[36] Placing this circumstance into the already complicated and technical nature of the evidence a jury would hear will greatly enhance the probability of confusion or as some defendants observed with reference to the efficacy of limiting instructions, "[they] would soon be reduced to the significance of elevator music." (GAF Brief, p. 224). It is true that even a single plaintiff's case would be complex, but the nature of this class trial would exacerbate that complexity to the point where a serious doubt would exist over whether the jury verdict were a product of properly remembering and applying lengthy and complicated instructions to the evidence or of arbitary guesswork. Justice to the parties would be seriously threatened.

Second, the burden on the court would be immense. A Circuit Court Judge in Dane County, Wisconsin would need to acquire a working knowledge of several bodies of law with which he had no prior experience. The prospect of error in evidentiary rulings, not to mention pretrial motions, would be increased. Such error might cause the need for a retrial if

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36 The tale of horrors described by the defendants (GAF Brief, pp. 236-9) in this regard is seriously exaggerated, but the view of plaintiffs' counsel at oral argument (Tr. pp. 28-30) seems far too simplistic. A further complicating factor is that the defendants are not all identical in their position with respect to ACM. Some were manufacturers of specific products, some were providers of raw or processed asbestos and others were installers. The duties of each may well vary under different formulations of the theories of recovery pursued by the plaintiff, or may be effected by specific contracts which they had as contractors with the hospital.

Plaintiffs' suggestion that the problems of differing rules of substantive liability law and resulting differences in the relevancy of evidence can be cured or minimized by their agreement to address discovery, etc. to the strictest standard does not cure the problem. First, there is no easy or uniform answer which is the "strictest" standard. Depending on the factual defense posture taken by a particular defendant regarding a particular product, an easier standard may become stricter. Second, to the extent that the plaintiffs' suggestion were carried to trial (which they have not agreed to), hospitals in those states with a less strict standard would rightfully question whether they wished for their claims to be ajudicated under a higher standard of proof. This, in turn, would provide a greater incentive to opt out with the disadvantages to a class associated with that. See discussion, infra in text accompanying note 43. If it was not carried to trial, it would not solve the trial problems.

it occurred. While this court would undertake the legal challenge of the task with diligence, with all due modesty, the reality of the difficulties of that task need to be recognized.

Third, the immensity of the undertaking of this class trial would itself foster delay. As one of the counsel for the plaintiffs observed on oral argument, this case is against the entire asbestos industry. That is a very apt description. The consequence of it, though, is that the parties will certainly devote enormous time and resources to the battle. There is a Motion to Dismiss pending which would have to be decided under the various state rules described earlier. Each side can be expected to call large numbers of experts and to seek introduction of volumes of exhibits. Discovery will, therefore, be extensive and protracted. Other pretrial steps can likewise be expected to be prolonged. A trial date will need to be set well into the future to permit completion of this process and to find time on the court's calendar. There is little doubt that a trial would not only be very lengthy itself but would not begin for several years.

By comparison, an individual plaintiff's case with presumably fewer defendants and a limited number of ACM products could be fully tried in Dane County in a much shorter time.[37] The delay is not in itself a fatal factor to a class procedure, for this is probably present in nearly all class actions, although here it would certainly be longer than average. Nonetheless, it is a cost of the process that must be recognized and taken into account.[38]

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37 This, of course, will not be true in every jurisdiction to the same extent, and in some courts it would be longer and in some shorter.

38 Under the plaintiffs' proposed class procedure, this delay factor takes on greater weight. No plaintiff will obtain any judgment as a result of the first class trial or even after the second trial dealing with the funding for the Claims Facility. Only at the third stage which considers affirmative defenses and individual damages would compensation become a possibility. To the extent this third phase is retained in this court (rather than being left for separate actions to be filed in the home jurisdiction of each class member), one judge with other case responsibilities will have to handle all the motions for summary judgment and the trials which remain. This will

It must also be recognized that the results of this class trial would be verdict answers by a jury which would not resolve a single plaintiff's claim, except negatively if a defense verdict were returned. Clearly this latter circumstance would reduce a multiplicity of litigation by foreclosing the claims of all class members. However, for purposes of class certification, this court can hardly base its determination on the prediction of a defense verdict any more than of a plaintiffs' verdict. Especially would this be inappropriate in light of the success of plaintiffs in other asbestos property damages cases to date. If the verdict were favorable to the plaintiffs as to some or all products under some or all of the variations of substantive law, the surviving claims of class members would be subject to further litigation over affirmative defenses and damages. The proposal for treatment of these issues is that they would be handled individually for each class member. This fact standing alone does not defeat the use of a class procedure.[39]

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involve application of the laws of all 50 states with which the court will need to become familiar. (Even the plaintiffs do not suggest that vagaries of state law on affirmative defenses are as easily susceptible to a small number of subclasses.) The further cause for delay is obvious.

If the cases are dealt with in other jurisdictions, the potential for collateral attack on the declaratory findings of this court is presented. No opinion is being expressed on the viability of such attacks in other states, but the potential cannot be ignored that the class trial findings may prove to be of no value to class members in one or more states. Adding to this potential problem are questions of whether all the defendants in this case must be joined in the other state's case, whether all can be joined because of personal jurisdiction issues, whether any third parties not parties to this case may be joined at all (especially if they were not susceptible to personal jurisdiction in Wisconsin, including those already dismissed from this case on that basis), whether the findings from the class trial are appealable in Wisconsin or only after final judgment elsewhere, and if the latter, what is the effect of inconsistent rulings by different states in the subsequent proceedings.

39 See discussion at Section A(1) above. However, the Supreme Court in sustaining a trial court's denial of class certification did attach significant weight to this factor,

> "[T]he difficulties which would attend the determination of damages in this case—including, perhaps, the calling of the class members themselves to testify as to the damage sustained by them—distinguishes this

However, where such an individualized procedure itself would cause difficulties not present in the case of separate litigation on behalf of each plaintiff, this is a strong indication that class treatment would be inappropriate. That is the case here. It is true that affirmative defenses and damages would be issues involved in separate litigation in any event. But one of the affirmative defenses raised by the defendants is contributory negligence.[40] If a plaintiff is found contributorily negligent in causing the harm for which it seeks compensation, with a variety of formulations and effects, the laws of many jurisdictions (including Wisconsin) require a comparative negligence analysis to be performed by the jury. Such an analysis requires evidence of both parties actions to be considered so that the jury may properly compare the relative culpability of each. This would necessitate that the same evidence as was introduced at the first trial (at least as to the

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case from previous cases in which a class action for money damages has been sustained." *Nolte*, supra at 179 (citations omitted).

This factor takes on some additional weight by virtue of geography. Class members presenting evidence of their damages would be coming from all over the country to Madison, Wisconsin rather than to their local courthouse.

See also *Windham v. American Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977) where the Court found that a class proceeding which would require separate "mini-trials" of damages in overwhelming numbers would be contrary to the predominance requirement of Fed. Rule 23. Predominance of common questions is not a requirement for Wisconsin class actions; but where the proceedings concerned with individual issues would be extensive, or more so, as the proceedings concerned with common questions, this is a factor which can be taken account of in evaluating the benefits of a class procedure. *Goebel v. First Federal Savings & Loan Assoc.*, 83 Wis. 2d 668, 684 (1978). Given the plaintiffs' description of the second and third phases of the class they propose and the large number of putative class members, such a factor is present here. Not only would there be individual consideration of affirmative defenses, such as contributory negligence and statute of limitations, and damages of each hospital, but there would also be individual issues of product identification for each hospital, even those in Wisconsin where *Collins* may be applicable.

40 Over 40 separately stated affirmative defenses have been raised in the pleadings filed to date.

general health hazards of asbestos and as to the particular ACM found in the particular hospital) be presented again. This would undercut the usefulness of the first trial in reducing the repetitious use of the same experts, etc. which was sought to be avoided.

The plaintiffs admit that this is a problem but argue it is not serious because (1) the court will in most cases be able to find as a matter of law that the hospital was not contributorily negligent and did not assume the risk, and (2) that for those hospitals where this issue cannot be disposed of by summary judgment, there will only be a few trials involving this repetition of the first trial evidence before the learning and experience of counsel will lead to negotiated resolutions of the rest.

Neither of the plaintiffs' arguments fully withstand closer scrutiny. The issue of contributory neglience on the part of the hospitals has not been briefed or subjected to any discovery thus far. But it is fair to suggest that the general themes which have emerged on this subject point to at least arguable jury questions. It is clear that the greater the friability of the ACM (more fibers being released), the greater the health risk and the more likely that the more expensive abatement techniques will be needed. To the extent that the actions of an individual hospital in their method of installation, maintenance or improper use exacerbated the normal friability of the particular ACM, this could be a basis for a finding of some responsibility on its part. It is here undisputed that some hospitals have improperly maintained the ACM in them (Agg. As. No. 59(a)). A second thrust of the defendants' claims is that hospitals chose to continue to use ACM after its hazards were sufficiently known that it can be said they assumed the risk. The class trial will answer the question of when the reasonable hospital should have known of the risk from information generally available. But unlike schools or other entities, the nature of hospitals makes it at least possible that some can be attributed with sufficient knowledge at an even earlier date prior to some continued use of ACM. Knowledge of the hazards of asbestos and ACM was derived from research in which doctors were principal participants

(Agg. As. No. 4). Many of those same doctors served at one time or another on the staff, governing boards, medico-administrative committees, and safety committees (Agg. As. Nos. 4, 10(a), 16(a), 24) of hospitals. Some hospital governing boards were warned as early as 1969 not to install ACM (Agg. As. No. 32(a)) by doctors on their staff. Judge Kelly in his decision in the *In Re Asbestos School Litigation* case does not address any negative potentials from the presence of a contributory negligence affirmative defense. The unique diferences between school personnel and hospital personnel in this regard may well explain his failure to attach any significance to it. It cannot be ignored by this court.[41]

The likelihood that second trials would be obviated through negotiated settlement of the issue of contributory negligence is very difficult to gauge. There is some attraction to the plaintiffs' position derived from general litigation experience where few cases go to trial. Confidence in this being the result here is not as easy to have. The defendants have to date vigorously litigated every aspect of this case, and numerous (and costly) hearings and discovery proceedings on class issues have been the rule not the exception. Moreover, the stakes are high. Even a single abatement project at a single hospital can cost in excess of a million dollars. The incentive for further, vigorous litigation is thus present. In short, the prospect for peaceful resolution of this issue is not so great that this court can dismiss from consideration the very real costs of having the class trial evidence repeated in a number of individual mini-trials.

Plaintiffs tenaciously emphasize the cost savings which would accrue from this class proceeding. It cannot be doubted that asbestos trials are characterized by the repeated introduction of the same types of evidence on liability ques-

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41 The foregoing discussion should not be construed as intimating any belief by this court of the strength of the defendants' arguments. On the contrary, if the plaintiffs are able to prove the allegations of their complaint, any responsibility on the part of the hospitals would pale in comparison. That comparison, however, would nonetheless have to be made by a jury after a second trial.

tions over and over again, often through the same experts giving the same opinions. These trials are expensive, both in legal fees and witness costs.[42] From these facts, the plaintiffs' basic position is best stated as, "No matter how the issue is approached, it is substantially more expensive to pay more attorneys to handle more lawsuits than it is to pay fewer attorneys to handle one lawsuit." (Plaintiffs' Brief, p. 71). The accuracy of the truism is beyond attack, but the question this court must answer is how applicable is it to the facts of this case.

The basic strength of the plaintiffs' proposition rests on the degree to which it is true that the class trial will be a substitute for many other trials involving the same claims. The greater the likelihood that other such trials will be held in any event or the smaller the number of potential viable claims that the class members *could* litigate through separate suits, the less the weight that can be accorded this factor. Here it must be remembered that this is proposed to be, and under the jurisdictional holding of *Shutts* must be, at least an "opt-

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42 According to a study of the costs of asbestos personal injury litigation, 77 percent of all funds expended went to litigation costs of both plaintiffs and defendants. This same study reported that as of 1983 approximately one billion dollars has been expended by the asbestos industry on asbestos litigation, $600 million of which was for defense costs. *Costs of Asbestos Litigation*, The Institute for Civil Justice, Rand Corporation (1983), pp. 43-4.

Defendants, GAF Corporation and Owens-Illinois, Inc., moved to strike references to this study, and a number of other matters relied on by the plaintiffs, from the record before the court. Great effort was expended by the court and counsel to develop a fair, but efficient and expeditious procedure for making a factual record for purposes of class certification. Some of the materials objected to constitute matters outside of what that procedure explicitly or implicitly envisioned would become part of the record if prior notification was not provided. The study cited above falls in this category. Others of the materials are matters that this court could judicially note, at least as to their authenticity, (such as EPA records and Federal Register entries and the Attorney General's Report to Congress). In those instances where this court has relied on any of the former (such as in the preceding paragraph), it has been done on the basis that the submission was sufficiently reliable for illustrative purposes that there was no substantital prejudice to the defendants from their lack of advance notice of its intended use and resulting failure to subject the source to discovery or to introduce countervailing evidence. As a result, the motion to strike is denied.

out" class. Predictions on the number of putative class members who will elect to go it alone is a dangerous venture, but the nature of the class procedure here suggests that the number will not be insignificant. The plaintiffs' refinement of the parameters as to theories of recovery and elements of damages will lead hospitals in certain states to seriously consider whether they might be better off under the laws of their home jurisdiction.[43] Secondly, a large share of the hospitals in this country are publicly owned and subject to "Attorney General Laws".[44] Even allowing for their membership in the class through an "opt-in" procedure, the laws of some states would prohibit this, and it is reasonable to assume that others will not participate out of concern for interests of independence and the prerogatives of sovereignty or out of a reasoned analysis of the risks of having their claims litigated away from the friendly and familiar confines of their own state courts. Thirdly, many class actions are attended by the "good case" phenomenon where the putative members who have better liability cases and/or larger damage claims choose not to submit them to class consideration out of fears of dilution or compromise in this setting. See discussion in *In re Agent Orange Liability Litigation*, 818 F.2d 145, 165-6 (2nd Cir. 1987). To the extent this is present here, it is exacerbated by the legitimate concerns that a good case hospital will have over the delay that participation in this class would have in the processing of a claim for millions of dollars in expenses already incurred.[45] Finally, several hospitals have already

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43 Especially is this so in light of the form of the notice the plaintiffs propose to avoid the possibility of a hospital which loses or is only partially successful in this case filing a separate action under different theories or for different damages. See preceding discussion under Plaintiffs' Proposal.

44 See discussion above at Section A(2).

45 It might be argued that this class is not as susceptible to the typical "good case" problem because the putative class members are more related than in the typical case as shown by the sponsorship of this litigation by the AHA. This may be true, but it must be remembered that (1) a sizeable minority (22.3%) are not members of AHA and (2) the refinements in the scope of the class described earlier which have been made in a good faith effort by class counsel to solve problems as they have arisen may well lead even some AHA members to rethink the benefits for them of this class.

filed individual suits or are a part of a proposed class in another case,[46] some of which have already gone to trial. These cases will likely continue. In summary, this class would not be a substitution of one case for the many; a significant number of individual cases will be tried even if this class were certified.[47]

The second disease which infects, although it is not fatal to, the plaintiffs' proposition is that the factual and legal record before this court points out that there are a number of hospitals who *could* bring no independent action in any event. First, it is undisputed that some have no ACM and that others have only ACM manufactured by Johns-Manville Corp., a non-party to this case (Agg. As. No. 106(a)). Second, it is clear that some are unable to identify the manufacturer of the ACM in their buildings. In those states which recognize no doctrine of similar import to *Collins*, this fact will be fatal to any claim. Third, some hospitals listed in the current AHA Guide (the plaintiffs' class definition) lease some or all of their buildings from non-hospital entities under leases which have various provisions concerning the responsibility for costs of remodeling or other capital improvements (Agg. As. No. 96). Such provisions may mean that an entity other than the hospital class member is the only one who may have a claim of the sort the plaintiffs have alleged in their complaint, and the class member has no claim.

Finally, some trial court decisions, which may have statewide effect if affirmed on appeal, have held that a building

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46 *Clemson University and the College of Charleston v. W.R. Grace & Co.*, No. 2: 86-2055-2 (D.S.C.). This raises the unique issues involved in situations of overlapping classes of class shopping, double participation with the chance for double recovery and inconsistent adjudications. See generally Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 23-26 (1986). These are not insurmountable problems but they add a feature to the case which would otherwise not be present in a separate suit.

47 Apart from the impact on cost considerations, this fact minimizes the benefit of a class procedure in accomplishing another recognized purpose for its use, avoiding inconsistent results.

owner may not recover for the type of damages sought here under any of the theories of recovery found in the plaintiffs' original complaint.[48] All of this only suggests that the consequence of non-certification is not 6,000 separate cases but considerably less.

Plaintiffs would still argue that for those hospitals which do have viable claims and which do not opt out[49] considerable savings can still be realized through the class procedure. They point, for instance, to the data suggesting that the average class action takes only two to four times the judicial time commitment as the single case. From this it might reasonably be argued that the ratio of litigation expense would be of the same magnitude or slightly higher. This class action, however, would not be average. The magnitude of the enterprise has already been discussed in reference to its inherent difficulties. That same discussion also would suggest that the enterprise would be enormously expensive, both in real terms and relative to the single case. Joining considerations of so many products and so many defendants in one trial is likely to multiply the overall cost well beyond what are admittedly high costs of single plaintiff litigation to an extent greater than the average class action.[50] One further point bears men-

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48 *Board of Education of Chicago v. ACSS, Inc.*, No. 85 CH99811 (Cook County, Ill. 2/26/86): *Mullen v. Armstrong World Industries, Inc.*, (Contra Costa County, Cal. Sup. Ct. 12/3/86). Other courts in other states have obviously recognized an asbestos property damage cause of action.

49 The immediately preceding discussion should not be construed as a finding that the number of hospitals which would fall in this category is not significant. It was merely a finding that in weighing benefits the proper comparison is not 1 vs. 6,000 but considerably more than 1 vs. considerably less than 6,000.

50 If the plaintiffs' alternative of relegating the individual cases on affirmative defenses and damages to separately filed actions in the hospital's home forum were implemented, this cost factor would be further exacerbated. Each hospital would need to retain local counsel at great expense because each of those attorneys would need to spend considerable time in getting "up to speed" by familiarizing themselves with what has already transpired in Wisconsin in addition to the complex factual questions of

tion in this regard. Some of the defendants in this case occupy a very modest place in the asbestos "industry" (for example, ACands is an insulation contracting company which installed ACM in a limited and definable number of the class members' hospitals). For them, in terms of their individual litigation expenses, it may well be that the cost of participating in this wide-ranging case will in fact exceed the combined costs of defending the individual cases that may be brought against them.

Plaintiffs generally urge this court to learn from the lessons of the asbestos personal injury case experience and to certify a class here as the solution to its identified problems. In particular they point to the very real burden that the multitudinous numbers of these cases has placed on the judicial system. This burden has drained judges' ability to attend to other types of cases and clogged courts with so many asbestos cases that even through the use of a variety of innovative case assignment techniques and the devotion of considerable judicial resources to them long delay to the litigants is the rule not the exception. However, one feature of the personal injury cases which is not present here contributed a great deal to the burden. The personal injury cases have been concentrated in only a few state and federal courts where asbestos exposure was common and became a large share of their overall caseloads. *Asbestos in the Courts*, supra at 24. The case-by-case adjudications of the hospitals' claims which would be necessary if a class is not certified would be spread more evenly across the country thereby relieving at least this aspect of the burden. It must also be remembered that one of the solutions the plaintiffs have proposed for the tremendous burden of having the claims of all members of this entire class handled by one Dane County Circuit Court Judge is to leave the individualized determinations of each hospital's claim for separate actions in their home state. In addition to

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asbestos litigation generally. This would make illusory the claimed benefit to "small claim" hospitals of providing a forum where otherwise pursuing their claim would not be feasible. Likewise defendants would have the added expense of retaining local counsel for all of these cases.

the other problems associated with this suggestion discussed earlier, the reality is that this involves the same number of new cases being filed in all of these courts as would be filed if no class is certified.[51] The problems for the courts from asbestos litigation have been immense. If certification of this class offered a true answer, this court would enthusiastically embrace it and provide its small assistance to the common efforts of judges everywhere to see that justice is done. Reluctantly, I must conclude that it does not work.

Several additional points need to be addressed. Plaintiffs have cited the fact that several companies have already filed bankruptcy in the face of the financial consequences of asbestos litigation. The Wayne County Circuit Court also relied on this fact for support in certifying a class in an asbestos property damage case by reasoning,

> "Those individual plaintiffs who are able to get their cases tried first may be able to get judgments paid while those who reach trial later may find defendants uncollectable. Class action handling makes it possible to spread this risk among all the plaintiffs and to thus treat

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51 As referenced earlier in the description of the plaintiffs' proposal, they have suggested that a Claims Facility be established. This is envisioned to perform a number of functions, including the ability to centralize a uniform system for analysis of product samples for purposes of manufacturer identification and to provide a paper processing system for individual claims. It is not clear whether the Claims Facility would be used only if the individual claims are retained for determination in Wisconsin or would also be used in some way if they are left for separate case filings in other courts. In any event, the functions described above and certain others would serve to simplify and economize the individual claim consideration, but, absent consent of the defendants, the use of the Claims Facility could not take from the defendants their rights to jury trials on the principal issues of each hospital's claim—damages, affirmative defenses and product identification under the laws of the hospital's home jurisdiction.

The Claims Facility is also envisioned by the plaintiffs to be funded by the defendants after the second phase class trial. Defendants have vigorously objected that such a procedure would be unconstitutional under due process notions found in *Sniadach v. Family Corp.*, 395 U.S. 337 (1969) and *Fuentes v. Shevin*, 407 U.S. 67 (1972) and is without any recognized authority of the court. In light of the decision reached on class certification, there is no need to address this issue.

each more equitably." *Board of Education of the School District of the City of Detroit v. Celotex*, No. 84-429634 NP (Wayne County, MI Cir. Ct., 9/6/85).

Little weight can be accorded this rationale. As plaintiffs themselves point out, as many as 733,000 non-residential buildings in the United States contain asbestos. The collectibility of any judgments obtained by the 6,000 hospitals will be far more a factor of what occurs in all the property damage cases brought by building owners generally (as well as the personal injury cases) than of how the small percentage of those cases involving hospitals would be resolved if this were a class action.

The Wayne County decision also relied on a factor which the plaintiffs here have not explicitly argued but which they have made veiled references to, namely the enhanced possibility of settlement if a class is certified. The real world of litigation experience where the vast majority of cases are settled between the parties short of trial has been alluded to earlier. It cannot be ignored. While there is some logic to the view that settlement would be more likely in a class setting were a greater number of claims may be disposed of by a single settlement, there is no evidence in the record to empirically support this view. One feature of the personal injury case experience offers some guidance on how this logic may play out in the class procedure proposed here. Unlike other types of litigation in which settlement is often reached at various stages of pretrial preparation, the individual asbestos personal injury cases are almost never settled until the case is about to go to trial, according to the Rand Corporation study. *Asbestos in the Courts*, supra at XVIII. The three-phase procedure envisioned by the plaintiffs here puts off the ultimate trial when an actual award might be made to a hospital to the third phase. In doing so, it invites the defendants to go through the first phase class trial, even with all the costs involved, because it gives them "two kicks at the cat" without significant net risk. On the one hand, if the defendants are largely successful in this first kick, they have avoided liability altogether or at least in large measure. On

the other hand, if the plaintiffs are largely successful in making out their *prima facie* liability case, the defendants have lost little. While the leverage of the plaintiffs is increased through this "victory", the defendants retain the substantial negotiating benefit of threatening to litigate each individual claim, their second kick. At the same time they have bought for themselves the same benefit which they have secured in the personal injury cases but to a larger degree—delay. In short, this class proceeding may well discourage settlement short of the first trial rather than encourage it. No such finding can be made by this court at this time, for the factors influencing settlement strategy are myriad; and the above scenario touches on only a few. The point, however, is that this court would be foolhardy to go forward with a class solely in the belief that this would lead to settlement. In any event, the difficulties and potential for fundamental unfairness associated with this class and identified in the earlier discussion cannot be overcome by even a finding that settlement might be more likely, assuming this court could make it, which it cannot.

CONCLUSION

The plaintiffs' proposal for a nationwide class of hospitals has certain attractions. Their strength or lack thereof has been discussed in the particular context of what this case would entail. It must also be recognized that this case offers the potential[52] for certain small claim hospitals to have their claims heard which would not be feasible if they are left to entirely separate case litigation. However, in balancing these benefits against the serious and fundamental difficulties that this class would involve, the court cannot conclude that a nationwide class action would be manageable, fair or more

52 See discussion at note 50 which demonstrates that this factor is only a potential and far from a certainty.

convenient. Accordingly, the plaintiffs' request must be denied.[53]

One of the attorneys for the plaintiffs at oral argument described this as a case of social necessity. In one respect, he was absolutely correct. It is beyond dispute that asbestos is a substance that has killed thousands of our citizens and left thousands more suffering from debilitating and permanent disease. The efforts of federal, state and local governments to minimize further threats to the health of our nation by mandating certain abatement steps for the owners of buildings containing asbestos will cost those owners billions of dollars. Additional costs will be borne by owners who, although not absolutely required by government regulation to do so, will choose to take abatement measures to insure the greatest possible protection for the occupants and frequenters of their buildings. Hospitals, of course, can make an especially compelling case of their doing so. In the absence of legislative action, courts are asked to answer the question "Who should pay?" Should the owners themselves absorb all these costs? Should taxpayers? Should the industry that produced the products? This question will not go away but rather it will continue to be asked more often and more loudly. Until legislative bodies are prepared to face up to it and attempt to find innovative solutions that equitably assign responsibility, the courts of this country will most assuredly do their part to

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53 Although not requested by the plaintiffs, this court has considered the propriety of a class involving only Wisconsin hospitals. This concept is likewise rejected. First, while plaintiffs' counsel at oral argument did not reject this idea, they did not affirmatively express any interest in it. Many factors go into the calculus of a plaintiff's decision to pursue a class action. This decision is one that should peculiarly be left for plaintiffs to make and not be foisted upon them by the court. Second, and equally important, weighing the benefits of a Wisconsin class does not produce the conclusion that the difficulties attendant to it are overcome. It is true that significant complexities and confusion of the class trial would be reduced by elimination of the *Shutts* produced problems. This, however, would be offset by the fact that less than 3 percent of the nation's hospitals are in Wisconsin and whatever relative costs savings the plaintiffs argued were present in a nationwide class would be reduced accordingly. Moreover, many of the non-*Shutts* problems of a class action of this kind identified above would remain intact or would be reduced only nominally by a Wisconsin only class.

provide answers. But courts are subject to considerable limitations not faced by the legislative branch. They can only deal with the parties in the cases they hear. In most cases, they are governed by the bodies of law developed over many years often in entirely different setttings than that presented by the facts of the case before them. They are also bounded by constitutional constraints designed to insure that fairness is the hallmark of judicial action. Wisconsin courts have a tradition alluded to earlier in this decision of acting within this arena to find new solutions to new problems. But they have also recognized that the arena has walls and that in finding those new solutions, courts are not free to travel the full expanse of the sea beyond. That the problems of asbestos are so compelling makes the invitation to do so in this case that much more attractive and difficult to decline. But decline it this court must, for to accept it would take us not just to uncharted waters but to areas the past pronouncements of our Supreme Court have indicated are not to be sailed.

The filing of this case generated a great deal of public attention. Hospitals, both in Canada[54]and the United States, may well have refrained from filing suit in the belief that any claim they had would be dealt with in this case. Under the United States Supreme Court's decision in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974), the pendency of this action may have an impact on the tolling of the statute of limitations on the claims of putative class members. In the interest of fairness to these hospitals and to avoid uncertainty for all parties and courts hearing separate cases brought by hospitals, it is this court's belief that notice of this decision denying class certification should be provided to both Canadian and American hospitals. The exact form of that notice and the manner in which it is to be provided are not decided at this time. Counsel for the plaintiffs and the defendants shall submit their proposals in this regard with supporting memoranda within 30 days of the date of this

54 The plaintiffs' original complaint sought certification of a class which also included Canadian hospitals, but this was narrowed to solely American hospitals at a later stage in the proceedings.

decision. If counsel are able to reach agreement on this matter, a written stipulation may be filed in lieu of the proposals. Liaison counsel for the defendants shall submit a proposed order denying class certification to the court with copies to other counsel within 30 days, and other counsel shall have 10 days thereafter to express any objections they may have to the form of the order in writing. The proposed order shall include a provision requiring notice to putative class members in a manner approved by the court. Any motion for a stay of the court's order denying class certification to permit an interlocutory appeal shall be filed within 30 days of the date of this decision.

The effect of this decision is not to dismiss the claim of any of the named plaintiffs or to preclude any putative class member from filing an action on their own behalf. In the interests of prompt adjudication of the named plaintiffs' claims, the matter will be set for a further Scheduling Conference on February 25, 1988 at 9:00 a.m. This decision will serve as notice of that Conference.

Dated this 17th day of December, 1987.

BY THE COURT:

/s/ MICHAEL NOWAKOWSKI
Michael Nowakowski,
Circuit Court Judge
Dane County, Wisconsin

CIRCUIT COURT
STATE OF WISCONSIN
DANE COUNTY

Case No. 85-CV-5952

SISTERS OF ST. MARY, et al., individually and on behalf of all others similarly situated,

Plaintiffs,

—v.—

AAER SPRAYED INSULATION, et al.

Defendants.

SCHEDULING ORDER NO. 4

A scheduling conference was held on June 30, 1989. The parties appeared by counsel and the court heard argument and was advised of the positions of the parties. For good cause shown, and in order to efficiently and economically resolve which defendants belong in this case and to advance the disposition of this action, IT IS HEREBY ORDERED AS FOLLOWS:

I. *PLAINTIFFS' PRODUCT IDENTIFICATION*

As provided by Paragraph 2 of Scheduling Order No. 3, on or before October 2, 1989, the plaintiffs shall provide the defendants with the information required by Section IV(a) through (e) of Scheduling Order No. 2. The witnesses disclosed on that date shall include all expert witnesses relied upon by plaintiff for product identification purposes.

II. *PRODUCT IDENTIFICATION DISCOVERY*

A. The stay on discovery in this case imposed by Section III of Scheduling Order No. 2 shall be continued, with *only* the following exceptions:

(1) Beginning October 2, 1989, or upon receipt by the defendants of the information described in Section I above, whichever date is earlier, any party may take discovery directed to the identification of the manufacturer, mining company, installer or other identification matters concerning any asbestos-containing materials alleged to be at issue in this case.

(2) Such discovery may include, without limitation, inspections of the hospitals where the asbestos-containing materials are alleged to be located. The inspection by defendants shall include the right to conduct the activities described in the Inspection and Testing Order, previously entered in this case. The plaintiffs shall permit the defendants to inspect those buildings subject only to reasonable notice, and a requirement that the defendants attempt to coordinate their visits so that plaintiffs are not subject to an unreasonable number of inspections in any particular building.

(3) Any party may serve written discovery (interrogatories, requests to produce, requests to admit) on product identification before or after October 2, 1989. However, the period of time for responding to requests served prior to October 2, 1989, shall be deemed to begin running on October 2, 1989, or on the date the plaintiffs provide the information described in Paragraph I above, whichever date is earlier.

(4) Any defendant shall be entitled to representative samples of those products that plaintiffs claim contain that defendant's materials. After plaintiffs' October 2, 1989 disclosure, within 30 days of a request for representative samples by a defendant, plaintiffs shall provide that defendant access to samples. If an agreement cannot be reached within that 30 day period as to how representative samples will be provided, the requesting defendant may move the court for an order directing the sampling procedure.

(5) If any party feels the need to take discovery in addition to, or at a time different than that specifically authorized by this section, or if any party feels that it needs protection from discovery purported to be authorized under this section, that party may make an appropriate motion to the court to either lift the stay, issue a protective order, or grant such other relief as is appropriate.

B. All product identification discovery, with the exception of *Collins*-related discovery described in Paragraph VI below, is to be completed on or before June 11, 1990. This means any written discovery must be served sufficiently in advance of the discovery cut-off so that the responding party has the time allowed by the rules of procedure to respond before the discovery completion deadline.

III. *SUMMARY JUDGMENT ON PRODUCT IDENTIFICATION GROUNDS*

A. On or before February 19, 1990, any party wishing to file a motion for summary judgment on the issue of product identification shall submit its motion, memorandum, and supporting papers.

B. Responses to motions for summary judgment filed on or before February 19, 1990, in accordance with Paragraph III A above, are due on April 2, 1990.

C. Replies in support of the summary judgment motions filed on or before February 19, 1990, in accordance with Paragraph III A above, are due on April 30, 1990.

IV. *DEFENDANTS' PRODUCT IDENTIFICATION EXPERT WITNESSES*

A. On or before April 2, 1990, the defendants shall provide a list of the expert witnesses on whom they will rely for product identification testimony at the Product Identification Evidentiary Hearing described in Paragraph V below. Said list shall include the names and addresses of the experts and a

brief description of each witness' area of expertise as it relates to the Product Identification Evidentiary Hearing. However, on or before February 2, 1990, any defendant who moves for summary judgment under section III above must disclose the names, addresses and a brief description of the area of expertise of each expert witness on whom it will rely in support of its summary judgment motion.

B. The parties recognize that in order to prepare for the Product Identification Evidentiary Hearing the plaintiffs will need to know those elements of the plaintiffs' October 2, 1989, product identification information which the defendants' experts will dispute so that the plaintiffs can take appropriate discovery. The parties also recognize that under the terms of this Order the defendants have much less time than the plaintiffs had in which to develop their evidence on product identification, and that some of the evidence on which defendants' experts may rely is in the possession of the plaintiffs. To reconcile these competing concerns, the defendants shall also do the following:

(1) On April 2, 1990, or as soon thereafter as the information is obtained and assembled, each defendant shall disclose to the plaintiff the following:

(a) Those portions of the plaintiff's October 2, 1989 product identification disclosure under Section I above which any of its experts will dispute or question.

(b) All documents that its experts will rely upon at the evidentiary hearing to dispute or question the plaintiff's October 2, 1989 product identification disclosure.

(c) All tests of products or samples that will be relied upon by its experts at the evidentiary hearing.

(2) This order recognizes and contemplates that all of the described information in Paragraphs IV. B. 1(a)-(c) will not be available on April 2, 1990, and the production of that information will be a "rolling process."

Accordingly, if any defendant does not produce the described information sufficiently before the June 11, 1990 discovery cut-off so that the plaintiffs have a reasonable opportunity to take discovery about it, the plaintiffs may move to preclude that defendant from offering that information at the Product Identification Evidentiary Hearing.

(3) In determining whether a defendant afforded the plaintiffs a "reasonable opportunity" to take discovery, the court shall consider all relevant factors, including, without limitation, the date of actual disclosure, the nature of the information which was finally disclosed, the reason it was not disclosed earlier, the type of discovery plaintiffs reasonably need to respond to the information, the reason plaintiffs offer for being unable to complete their desired discovery before the discovery cut-off, the hardship to the defendant if the information is excluded, and the possibility of fashioning an order or procedure that meets the plaintiffs' needs while still admitting the evidence. In addition, any information disclosed by a defendant on or before May 15, 1990, is automatically deemed to have been disclosed sufficiently in advance of the discovery cut-off so that the plaintiff has a "reasonable opportunity" to respond to it.

V. *PRODUCT IDENTIFICATION EVIDENTIARY HEARING*

A. Pursuant to paragraph 4 of Scheduling Order No. 3 and the stipulation of the parties, on June 18, 1990, beginning at 9:00 a.m., the parties shall try any remaining disputes over product identification, with the exception of any *Collins*-related disputes described in Section VI. below, to The Honorable Michael J. Nowakowski. The sole issue to be decided is whether the products identified in plaintiffs' October 2, 1989, submission are in fact in the buildings where they are alleged to be.

B. Findings will be made by the court on a building-by-building, product-by-product basis by answering the following question for each product identified by plaintiffs on October 2, 1989:

"Is product _____(A)__ in building ____(1)___ ?
Yes ____ No ____"

The information to be inserted as "(A)" in the question will be the identification of the product by defendant, i.e., product "X" manufactured or distributed by defendant "Y" or product "X" containing asbestos mined by defendant "Y".

C. Trial of these questions to the court is conditioned upon all the evidence actually being heard by and all the issues actually being resolved by The Honorable Michael J. Nowakowski. The findings by the court shall be binding on all parties to the same extent as if they had been made by a jury at trial of the merits. In the event Judge Nowakowski personally is unable to hear all the evidence and decide all the issues, this Section V of Scheduling Order No. 4 and any preliminary decisions that may have been rendered at the Hearing pursuant to this section, shall be vacated.

VI. *THE COLLINS CLAIM*

A. The plaintiffs have raised the question of whether the *Collins* "risk contribution" theory applies to all or part of this litigation. It is not intended that the applicability of the *Collins* theory to this case be the subject of, or be resolved at, the June 18, 1990 Product Identification Evidentiary Hearing. At the June 18, 1990 Hearing, no defendant or plaintiff shall introduce evidence, nor shall findings be made, concerning whether the plaintiffs have established the factual predicate to entitle them to pursue a *Collins* theory. (These forbidden subjects would include, without limitation, such issues as whether plaintiffs exercised sufficient diligence in trying to identify defendants; if so, whether plaintiffs' inability to identify was through "no fault of their own"; whether plaintiffs were "wholly innocent" plaintiffs; whether the public policy calculus that justified shifting liability to the

DES manufacturers applies where the plaintiffs are corporations with the ability to bear costs and spread risks; whether asbestos containing materials are "factually similar" to DES products; and whether this case is, in all respects, "factually similar" to the *Collins* DES case).

B. The parties contemplate that when the plaintiffs make their October 2, 1989 disclosure under Section I. above, the plaintiffs may claim that as to certain products in certain buildings plaintiffs cannot identify the manufacturer of the product, the mining company that supplied the asbestos in the product, the distributor or installer of the product, or otherwise connect a specific entity to the product and, as a result, that *Collins* should apply. The court anticipates holding a proceeding to resolve the *Collins* issue beginning on October 1, 1990. The court believes that some discovery which the parties will take in preparation for the June 18, 1990 Product Identification Hearing may also be applicable to the *Collins* issue. To the extent that *Collins*-related discovery can be taken in conjunction with discovery needed for the June 18, 1990 Hearing, the parties are encouraged to do so when reasonably practicable.

VII. *ANSWER OF DEFENDANTS*

A. The defendants are granted until July 31, 1989 to serve a response to the plaintiffs' first amended complaint.

B. In light of the court's previous rulings on the defendants' motions to dismiss and the plaintiffs' motion to certify a class, the defendants are not required to answer or otherwise respond to the following paragraphs in the plaintiffs' first amended complaint:

1. Paragraphs 21 through 24.
2. Paragraphs 25 through 29.
3. Paragraphs 49 through 51.

VIII. *APPLICABILITY OF WISCONSIN LAW TO CLAIMS OF FOREIGN HOSPITALS*

The court has not ruled that causation relaxation principle set forth in *Collins* applies to any of plaintiffs' claims. The court has ruled, however, that regardless of whether *Collins* is applied to the Wisconsin hospitals' claims, *Collins* will not be applied to claims of non-Wisconsin hospitals. If the plaintiffs want the court to reconsider its previous ruling that *Collins* could not constitutionally be applied to the claims of non-Wisconsin hospitals, the plaintiffs must bring a motion to that effect at any time on or before February 2, 1990. The briefing schedule on such a motion will adhere to the same time intervals allowed for briefing summary judgment motions, as set forth in section III, above.

IX. *PROCEDURES*

The provisions of Sections VII, VIII and XI of Scheduling Order No. 1 regarding motions, service and filing of papers, and the calculation of time, shall apply to proceedings under this Order, except as expressly varied by the terms of this Order.

Dated this 31st day of July, 1989.

BY THE COURT:

/s/ MICHAEL J. NOWAKOWSKI
The Honorable Michael J. Nowakowski
Circuit Court Judge, Branch 13

IN THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY

Civil Action No. 1108600
JANUARY 19, 1988

STATE OF MARYLAND,

Plaintiff,

—v.—

KEENE CORPORATION, et al.,

Defendants.

PRETRIAL ORDER NO. 7
TRIAL MANAGEMENT PLAN

I. *Purpose and Application*

A. This order sets forth procedures by which the parties in this case may submit for resolution by a special master the issues of product identification and abatement costs[1] as those terms are described below. Each party participating in the procedures described herein shall submit for decision by a special master the issues of product identification and abatement costs with respect to each building in which a participating defendants products have been placed at issue in the case.

B. This order is entered with the understanding that all parties shall be required to participate in special masters pro-

1 This Order shall not be construed to limit or enlarge the State's claims whether those claims seek recovery from a single manufacturer, marketer or seller or seek joint recovery from more than one manufacturer, marketer or seller. Nothing contained in this Order shall enlarge, limit or affect the elements of proof which a party will have to establish in order to prevail on the several issues to be submitted to the special masters.

ceedings as provided for herein except for defendants to the extent that they have been sued as miners and defendants who file with the Court an election not to participate within 10 days of the date thereof. All defendants shall be subject to the schedule established by Paragraph VI.

The Discovery and Pretrial activities relating to the hearings before the special masters set forth in Paragraph III.B herein and the Discovery and Pretrial Events relating to the jury trial set forth in Paragraph II.A are premised on the participation of all manufacturing defendants in these special master proceedings. If less than substantially all manufacturing defendants elect to participate, the State may withdraw from the special master proceedings by written election filed with the Court on or before February 5, 1988. On or before February 19, 1988, the State and participating defendants shall amend Paragraphs III.B, IV.A and VI.A as appropriate depending on the number of defendants who participate in these proceedings.

C. Except upon leave of Court for good cause shown, the procedures outlined in the order shall be binding and irrevocable upon the State and upon all defendants who have signed this document as well as upon any additional defendant permitted to participate pursuant to Paragraph I.B.

II. *Appointment of Masters*

A. Within 90 days of the entry of this order, the participating defendants and the State shall exchange lists of proposed special masters, with each proposed master's salary requirements and summaries of each proposed master's relevant qualifications or copies of their current curriculum vitae. Each of the two lists shall nominate no more than six individuals. Within 20 days of exchange of the lists each side may exercise peremptory veto of no more than two individuals nominated by either side. Each side shall make its nominees available for an interview by the other side within 15 days of exchange of lists.

B. As to any individual proposed to be nominated for whom a waiver is sought pursuant to Paragraph II.D. below, the proposing side shall submit a written request within 60 days of the entry of this order and make the individual available for an interview within 20 days of receipt of the request. The other side shall grant or deny the waiver within 20 days of receipt of the request unless upon agreement of the parties an extension is granted; failure to grant or deny the waiver shall constitute a grant of the waiver.

C. The parties shall make a good faith effort to agree upon special masters to submit to the Court for appointment. Failing agreement within 120 days of the entry of this order, the parties shall submit their respective lists, as shortened by the opposing side's peremptory vetoes, along with any written objections which either side may have as to the appointment of any individual nominated by the other side, to the Court for selection among the remaining nominees.

D. Candidates for special masters shall be evaluated and appointed based upon the following qualifications:

1. Experience as an attorney is necessary;
2. A background in construction matters germane to asbestos containing materials would be helpful;
3. Experience in mineral/chemical characterization and analysis would be helpful;
4. Experience in construction litigation or dispute resolution would be helpful;
5. Unless waived by defendants, except for retired members of the Maryland bench, any individual shall be disqualified from serving as a special master if that individual is a present or former employee of the State of Maryland or if a member of the individual's immediate family is a present employee of the State of Maryland;
6. Unless waived by the State, any individual shall be disqualified from serving as special master if that individual is a present or former director, officer,

employee or present stockholder of any defendant or defendant's insurer with a potential interest in any property damage matters pertaining to asbestos exposure or asbestos containing materials or if a member of the individual's immediate family is a present director, officer, employee or stockholder of any defendant or of defendant's insurer as described above.

E. The Court shall appoint three special masters, and in addition shall select one alternate special master, from the lists submitted by the parties.

F. The special masters shall decide the factual issues of product identification and abatement costs in accordance with the written instructions provided by the Court, including instructions on burden of proof. The State and any defendant(s) may agree to the submission to a Special Master of issue dispositive motions with respect to any hearing; such motions shall be responded to within fifteen (15) days, shall be heard promptly upon request of a party and shall be decided by the special master within twenty (20) days of the filing of the response. The Special Masters shall be authorized to establish the schedules for and procedural rules governing the hearings held by them consistent with this Order and any further orders of the Court. Nothing herein shall be deemed to preclude any party from raising with the Court directly appropriate legal motions (including motions for summary judgment) at any time consistent with any applicable scheduling order issued by the Court. Rulings upon legal motions which shall be submitted to the Court for determination, shall not be governed by this order.

III. *Subgroups, Discovery and Other Prehearing Events*

A. All discovery undertaken in this litigation shall be equally applicable to proceedings before the special master. Discovery disputes shall be resolved by the Court except where they are submitted to the special masters by agreement of the parties. To the extent possible, discovery shall be coor-

dinated so as to correlate as efficiently as possible with the schedule of hearings before the special masters as well as any discovery order of the Court generally applicable to the case. Where discovery or a filed motion is limited to the issues to be decided by the special masters, the response times shall be governed by the applicable Maryland Rules and Pretrial Order No. 1 shall not apply. However, for purposes of determining the number of depositions a party may take of the same individual pursuant to Maryland Rule 2-411(b), each subgroup shall be treated as a separate action. The provisions of Paragraphs III.B.6 and III.B.7 of Pretrial Order No. 1 shall not apply to these proceedings.

B. Discovery and Pretrial activities relating to the issues to be submitted to the special master shall proceed in accordance with the following schedule:

1. Except upon leave of Court for good cause shown, defendants complete inspections of all buildings to be included in the Subgroup A hearings as provided by Pretrial Order No. 4.	150 days after entry of order and 210 days prior to first hearing in Subgroups "A".
2. Defendants complete inspections of all buildings in the Subgroup B, C and D hearings as provided by Pretrial Order No. 4.	210 days prior to first hearing in each subsequent subgroup.
3. For each building, each defendant which is alleged to be responsible in the Notice of Building at Issue and Alleged Manufacturer of Product (NBI), as may have been amended or supplemented by no later than 210 days prior to the first hearing in the subgroup, shall treat the following allegations in the NBI as a request to stipulate as to each:	180 days prior to first hearing in each subgroup.

(a) the identification of its products placed at issue;

(b) the quantity of each product;

(c) cost of removal and replacement of each product; and

(d) cost of operations and maintenance, if indicated. If a defendant declines to stipulate, then it shall either furnish the State with a list of those witnesses and attach the documents, if any, upon which it relies, or set forth clearly and precisely the basis for its unwillingness to so stipulate. These requests for stipulation shall not be treated like requests for admissions under the Maryland Rules.

4. The State shall provide defendants a preliminary list of all witnesses and exhibits upon which the State expects to rely to prove its case before the special masters.

120 days prior to first hearing in each subgroup.

The State shall file any motions for good cause pursuant to Pretrial Order No. 4 for leave to amend its NBI if it seeks to change the product or manufacturer for any product type at issue in that building scheduled for hearing in that subgroup. The State shall serve upon defendants any amend-

	ments as to the amount of damages sought from each defendant for each product or product application. If no amendment is made and if no such motion is filed and granted by the Court, the State's allegations in its NBI with respect to the identification of each product and responsible defendant placed at issue in each building, the quantity of each product and the specific amount of damages sought from each defendant for each product or product application shall be final. Thereafter, the State shall not be permitted to serve claims against any participating defendant for any product not so identified as to the product type at issue in that building scheduled for hearing in that subgroup.	
5.	Each Defendant shall provide to the State a preliminary list of all witnesses and exhibits upon which it expects to rely in the proceeding before the special master.	90 days prior to first hearing in each subgroup.
6.	Discovery cut-off, except for discovery pertaining to witnesses or exhibits that appear for the first time on any party's witness and discovery lists.	60 days prior to first hearing in each subgroup.

7. State submits its final witness and exhibit list.	45 days prior to the first hearing in each subgroup.
8. Defendants submit their final witness and exhibit lists.	30 days prior to first hearing in each subgroup.

IV. *Proceedings Before the Special Masters*

A. There shall be three defendant/building trial groups, each of which shall be divided into three or more subgroups, for submission of product identification and abatement cost issues to three special masters pursuant to Maryland Rule 2-541 and this order. A chart illustrating three trial groups and including all defendants and products alleged to be at issue as of June 1, 1987 is attached hereto as Exhibit A; Exhibit A does not include certain products and buildings which were added to the case after June 1, 1987, and the parties recognize that further refinement concerning the order of proceeding is necessary. Exhibit A and the division into subgroups assume the participation of all defendants in these special master proceedings. On or before February 19, 1988, the parties shall agree to any necessary modifications of Exhibit A, shall agree to its division into subgroups and shall submit this final Exhibit A to the Court.

B. The following issues shall be submitted for resolution by the special masters as to each participating defendant[2] on a building by building basis:

1. The identification of each product for which the State claims damages;
2. The identification of the manufacturer(s) and/or marketer(s) and/or seller(s) of such products;

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2 Special masters shall not issue any findings as to non-participating defendants and no findings shall have any effect on non-participating defendants. Special master or other forms of proceedings with respect to the liability of miners of asbestos fiber shall not be a part of these proceedings and shall be governed by future orders of the Court. No findings hereunder shall have any effect on mining defendants.

3. The specific quantity (measured in square feet, linear feet, bags or other appropriate measure) of the product present in the building;
4. The specific locations in the building where each such product is located;
5. The reasonable cost incurred or to be incurred by the State in carrying out abatement of, or resulting from, each product;
6. The reasonable cost of any alternate form of abatement which the defendant believes should be or should have been undertaken if abatement were appropriate;
7. The reasonable cost, if any, for operations and maintenance of the product prior to its removal.

C. The State believes that certain cost issues are amenable to resolution by the special masters for general application in all hearings. The defendants disagree. These cost issues are:

1. Standard abatement and replacement costs for each product type (e.g., boiler cover, tank cover, pipe insulation, ceiling tile, plaster, fireproofing, etc.)
2. Special costs factors that increase or decrease standard abatement costs (e.g., excessive ceiling height, steam tunnels, economy of scale for large building size, location of building; use and type of building; accessibility of product, etc.);
3. Estimated costs for operations and maintenance.

Within 15 days of completion of all hearings in subgroups "A", the parties may submit memoranda to the special masters stating their position as to whether any or all of the above cost issues are amenable to standardization and general application and, if so, the appropriate costs or cost factors. En banc, the special masters shall conduct a hearing if requested at which argument shall be heard and evidence may be introduced by any party, and shall issue a ruling as to the

issues submitted. If the masters conclude that one or more cost issues are amenable to standardization, then they shall determine and apply any standard costs as they may find are appropriate to the findings to be issued for the hearings already concluded in Subgroups A and to be conducted in Subgroups B, C, and D. The parties shall retain the right to present evidence at the hearings that the particular circumstances of any building require deviation from the standard abatement costs.

D. The findings of the special masters shall be transmitted to the Circuit Court by the special masters as recommended findings of the Court and shall become final in the absence of a request for further review by the Court or a jury pursuant to subparagraphs D.1. or D.2. hereof, respectively. Within 30 days of the approval of this order, each defendant which elects review by process D.2. shall file a written election with the Court; and each defendant which does not do so shall automatically be subject to review by process D.1. Pursuant to the election of each defendant, the special masters' findings as to a particular defendant's product in a particular building will be subject to review pursuant to the procedure set forth in subparagraph D.1. or D.2. below. The election of each defendant shall govern review by that defendant and the State in opposition to it, except as provided in subparagraph D.3.

1. The following review procedure shall apply when a defendant does not choose review by a jury, and is thereby subject to review by the Court, except as provided in subparagraph D.3: The parties shall have 10 days from issuance of the findings of product identification or abatement cost by the special masters within which to file with the Court a notice of intention to file exceptions to specified findings of product identification or abatement cost as to a particular defendant's product in a particular building and to order a transcript of the relevant proceedings. The other parties shall have 10 days from service of such notice to file with the Court a notice specifying any findings as to that product in that building that will be the subject of cross-exceptions. Any

party noting exceptions shall have 30 days from receipt of the transcript to file with the Court written exceptions as to the findings of the special master, together with the record and transcript of the proceedings, and any opposing party shall have 15 days from service of the exceptions in which to respond to exceptions filed by the other side and to file cross-exceptions. The excepting party shall have 15 days from service of a response or cross-exception in which to file a reply. The findings of the special masters shall be either accepted by the trial judge or amended or revised for reasons expressed in a written memorandum or opinion and order. The Court may decide exceptions without hearing, unless a hearing is requested with the exceptions, response to exceptions, cross-exceptions, or reply. The exceptions shall be decided on the evidence presented to the master unless: (1) the excepting party sets forth with particularity the additional evidence to be offered and the reasons why the evidence was not offered before the master, and (2) the Court determines that the additional evidence is material and there was a good reason for the failure to offer the evidence in the proceeding before the special master. If additional evidence is to be considered, the Court may remand the matter to the master to hear the additional evidence and to make appropriate findings or conclusions, or the Court may hear and consider the additional evidence.

2. a. As to those defendants who elect jury review pursuant to this section, the State may appeal by selecting review either by the Court as provided in D.1. or by the jury as provided in D.2.; however, review of cross-appeals filed by the State as to any appeal pursuant to D.2. shall be heard before a jury according to the procedure set forth herein. Defendants selecting review by jury trial, upon obtaining the State's consent prior to the time by which the notice of intention to file exceptions is required under paragraphs D.1. and D.2. herein, may waive jury review and proceed with review by the Court pursuant to paragraph D.1. above. The parties shall have 10 days from issuance of the findings by the special masters within which to file with the Court a notice of

appeal for a trial before a jury of specified findings of product identification or abatement costs as to a particular defendant's product in a particular building and to order a transcript of the relevant proceedings. The other parties shall have 10 days from service of such notices to file cross-appeals as to that product in that building. The appealing party shall have 15 days from service of a response or cross-appeals in which to file a reply. Any findings appealed to a jury shall be resolved in a trial before a jury or juries other than the jury or juries which will hear the jury trial due to commence on June 1, 1990 and shall be scheduled in accordance with paragraphs IV.H and I below.

b. The Maryland Rules of Civil Procedure and the rules of evidence shall apply to all jury trials held pursuant to this section. Transcribed testimony of witnesses before the special master may be read to the jury as evidence in the jury proceedings. The parties shall be limited to calling the witnesses (or using the transcript of testimony before the special master of one or more such witnesses) and introducing the exhibits identified pursuant to III.B. The participating parties shall conduct their presentation before the special master in a manner intended to allow the masters to fully and fairly adjudicate the issues in that proceeding. Upon a failure of any party to so conduct their presentation, the Court, upon motion of any party, may preclude the introduction of any witness(es) or exhibits(s) identified in III.B but not presented to the special master. Findings of the special masters shall not be communicated to the jury on appeal.

c. Review by jury trial pursuant to this section (subparagraph D.2.) shall be subject to the following limitations: (a) any party who by appeal initiates jury review and who fails to obtain a more favorable decision from the jury shall pay to the other parties participating in the jury review the liquidated cost of a total of $2,000.00 per day of master hearings or part thereof that was held that pertained to the product and building that is the subject of the appeal, such amount to be divided equally among each of the other parties participating in the jury review and (b) any defendant may not file

appeals for jury trial review as to more than one-half of the building units tried in the special master proceedings in which it was a participant. Where jury review occurs following the State's refusal to consent to a requested waiver of jury review, the appeal shall not be treated as jury review as to the party requesting waivers for purposes of this paragraph D.2.c.

3. In the event an appeal taken pursuant to subparagraph D.2. and exceptions filed pursuant to subparagraph D.1. involve product(s) as to which the State seeks joint recovery against more than one defendant, such appeals and exceptions shall be joined for consolidated review.[3] The forum in which the consolidated review will be heard shall be determined by the Defendants no later than the date by which any reply of the appealing party is required to be filed pursuant to subparagraphs D.1. and D.2. In the absence of a timely determination by the Defendants, the forum shall be determined by the State within 10 days from the date by which the reply is due. Where appeals and exceptions are joined for consolidated review, the consideration of additional evidence shall be governed by the provisions of subparagraph D.2.b.

E. The findings of the special masters, as accepted or revised by the trial judge or having become final by the absence of exception or an appeal to a jury, and the findings of the jury on appeal pursuant to Paragraph D.2. herein, shall be final and binding as to the participating defendants and the State subject only to the normal rights of appeal from final adjudications under Maryland law. The participating parties and the Court recognize the possibility that, due to the fact that not all defendants may participate in these proceedings, some issues of product identification or abatement costs may be litigated pursuant to the special master proceedings herein by the participating defendants and before a jury by the non-participating defendants. In that circum-

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3 Defendants dispute the applicability, under the facts of this case, of any theory of (1) joint recovery or (2) alternate liability, and intend to seek further guidance from the Court on these issues prior to commencement of special master proceedings.

stance, and regardless of any inconsistency with any subsequent finding of a jury as to the non-participating defendants, any final findings of the special masters or of the jury on appeal shall be binding on any participating defendant as to any other participating party and on the State as to any participating defendant. The special masters shall not render any findings as to any non-participating defendants. The parties also recognize that due to the fact that not all parties participating in these proceedings will appeal or file exceptions to the special masters findings, special masters findings as to some issues of product identification and abatement costs may become final by the absence of exception or an appeal to a jury and may become final as accepted or revised by the trial judge or upon jury appeal as to other parties. In that circumstance, and regardless of any inconsistency between those final findings, any findings of a special master made final by the absence of exception or appeal to a jury shall be binding on all non-appealing or non-excepting parties. Following completion of review pursuant to subparagraph D.1., D.2. or D.3., any finding that a product is not (is) the product of a particular defendant shall preclude the State from asserting to the contrary that that product is (is not), respectively, that particular product of that defendant against any non-participating mining defendant in any other proceeding.

F. The strict rules of evidence under Maryland law shall apply to the admission of evidence in proceedings before the special master.

G. Burdens of proof in proceedings before the special master and in appeals pursuant to subparagraph D.2. shall rest on the same parties that bear those burdens at a trial to the court or jury.

H. The jury trial phase of this litigation, other than any jury trial appeal pursuant to the subparagraph D.2. review process, shall not commence until all hearings before special masters have been completed and the findings have become

final either in the absence of review or upon the completion of review, except as provided in Paragraph IV.I. below.

I. Special masters shall schedule hearings in accordance with Exhibit A and Paragraph III.B. herein so as to permit completion of all hearings and review proceedings no later than December 31, 1989. In the event that all such hearings and proceedings cannot be completed by that date, then the Court, with the cooperation of the affected parties and any special masters before whom matters may still be pending, shall promptly schedule all such remaining hearings and proceedings to occur at the earliest practicable time and to be completed no later than February 28, 1990. In the event any hearings or proceedings cannot be completed by that date, they should be heard following the jury trial scheduled to commence on June 1, 1990.

J. In the event that additional buildings or additional product types within buildings are added to Exhibit A with the Court's approval pursuant to Pretrial Orders 4 and 6, the Court shall make such further orders as may be required to revise the expected completion date of all special master hearings and the pretrial and trial schedules set forth in Paragraph VI below.

V. *Miscellaneous*

A. Nothing in this order shall preclude any party from making discovery on issues other than product identification and abatement costs.

B. The Court shall make such further orders from time to time as it deems appropriate to govern discovery and trial of all issues not resolved by the special masters.

C. The defendants have proposed that there should be a separate proceeding in this case for the purpose of determining whether punitive damages should be assessed against any defendants found liable for compensatory damages and, if so, in what amount. That proceeding would obviously follow the determination of liability and compensatory damages.

The defendants believe that time should be allowed between these two proceedings and that they need not be before the same jury. The State does not find such a separate proceeding advisable, or possible, unless both proceedings are held before the same jury, but is agreeable to a separate proceeding only if its concerns about avoiding unnecessary duplication of testimony and trial time can be satisfactorily addressed without diminishing its right to full jury consideration of all evidence relevant to all issues of liability and damages either by using the same jury or in some other fashion which addresses the State's concerns in a way satisfactory to both the State and the defendants. The parties agree to defer consideration of how to best address those concerns until a later date.

D. All costs of proceedings before the special masters charged to the parties shall be borne by the State and the participating defendants on a pro rata basis according to the number of parties participating in all or any part of the proceedings before the special masters on each day.

E. All findings of the special masters made on issues set forth in Paragraph IV.B and adopted by the Court shall be communicated to the jury in terms of stipulations of fact without reference to the special master proceeding.

VI. *Discovery, PreTrial and Trial Schedule For Remaining Issues*

A. *Discovery and PreTrial Events*

1. State submits list of potential fact and expert witnesses.	February 1, 1989
2. Defendants submit lists of potential fact and expert witnesses.	April 1, 1989
3. Completion of all non-expert discovery.	August 1, 1989

4. Completion of all expert discovery.	September 1, 1989
5. Motions for summary judgment.	November 1, 1989
6. State files its list of trial witnesses and exhibits.	December 1, 1989
7. Defendants file list of trial witnesses and exhibits.	January 1, 1990
8. Motions in limine.	February 1, 1990

B. *Summary Jury Trial*

1. Summary Jury Trial on Liability and Remaining Issues if and to extent agreed by the parties or ordered by the Court.	March 1, 1990

C. *Trial*

1. Status conference or Pretrial Order and for settlement discussions.	April 1, 1990
2. Final pretrial conference.	May 1, 1990
3. Jury selection begins.	June 1, 1990

IT IS SO ORDERED, this 12th day of January, 1988.

/s/ R.G. THIEME
Circuit Court Judge

[Exhibits Omitted]

IN THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
Civil Action No. 1108600

STATE OF MARYLAND,

Plaintiff,

v.

KEENE CORPORATION, et al.,

Defendants.

PRETRIAL ORDER NO. 7-A

I. *Introduction.*

This Court has previously entered Pretrial Order No. 7, establishing a Trial Management Plan which provides for a series of hearings to be held before special masters for the purpose of adjudicating certain issues in this action. This Order is intended to provide for certain procedural and other matters relative to the special master proceedings to be conducted in accordance with Pretrial Order No. 7.

II. *Establishment of Schedule for Special Master Proceedings.*

Attached as Exhibit A to Pretrial Order No. 7 was a tentative schedule identifying the order in which various products and product groupings within particular buildings would be heard by the special masters in their respective courtrooms. That schedule set forth the order of these proceedings by identifying building numbers and the particular defendants whose products or alleged products would be at issue on the various hearing days. That tentative schedule now can be finalized in light of the Court's disposition of the State's Sec-

ond and Third Good Cause Motions. Accordingly, the schedule of special master proceedings contained in Exhibit A to this Order is hereby established in lieu of Exhibit A attached to Pretrial Order No. 7. Exhibit A to this Order provides for 3 hearing rooms, the first of which has four subgroups within it (A-D), and the second and third of which have three subgroups each (A-C). Attached as Exhibit B is a schedule establishing the date on which the subgroup A proceedings are projected to commence in each of the three hearing rooms, and establishing dates for the projected start of proceedings in all successive subgroups. The dates for the start of these subgroup hearings are tentative, and subject to further change in the discretion of the special masters, who generally will determine the scheduling and rescheduling of all proceedings conducted by them. Within any subgroup, the parties may stipulate to, or upon motion, the special master may order, any change in the sequence of presentation of evidence as long as such change does not delay the hearing completion date for that particular subgroup. The projected starting dates for all special master hearings may also be adjusted in the discretion of the Court or upon motion of any party. The starting date of subgroup B, C and D hearings may be delayed if the hearings in the preceding subgroups have not been completed according to the time table contemplated by the parties. Any request for a delay of more than two weeks in the start of any subgroup proceeding, apart from those delays necessitated by delays in completion of prior subgroup hearings, whether requested by a party or a special master, shall require Court approval. While the individual masters are responsible for determining the precise schedule of the proceedings to be conducted by them, no master may establish or alter a schedule so as to delay the completion of all hearings in his subgroups past December 31, 1989, without the approval of the Court.

The deadlines established by paragraph III B of Pretrial Order No. 7 for discovery and pretrial activities have been established with reference to the starting dates for the various subgroups and are set forth in the schedule filed as Exhibit B to this Order. Whenever the start of the hearings for a partic-

ular subgroup are altered by the Court or the responsible special master, all remaining discovery and pretrial activity deadlines for that subgroup automatically shall be recalculated to conform with the new starting date(s) unless the special master or the Court specifically provides to the contrary.

Notwithstanding anything to the contrary in Pretrial Order No. 7 or in Exhibit B hereto, any defendant or its agent or representative may conduct a visual inspection of a building at issue at any time up to sixty (60) days prior to the commencement of the subgroup hearings at which that defendants product(s) in that building are at issue. Ten (10) days prior written notice shall be provided to the State's designated representative, and the visual inspection shall otherwise be conducted in accordance with those provisions of Pretrial Order No. 4 applicable to the conduct of visual inspections.

III. *Appointment and Compensation of Masters.*

The Court hereby appoints the following individuals to serve as special masters, with these individuals to preside in the Hearing Rooms and subgroups indicated:

Stephen E. Crable, Esquire
(Hearing Room No. 1, Subgroups A and C)
3 Aqueduct Court
Potomac, Maryland 20854

The Honorable Edward B. Finch
(Hearing Room No. 3)
4013 Band Shell Court
Chesapeake Beach, Maryland 20732

Professor Frederick J. Lees
(Hearing Room No. 2)
2219 Traies Court
Alexandria, Virginia 22306

The Honorable Solomon Liss
(Hearing Room No. 1, Subgroups B and D)
3207 Fallstaff Road
Baltimore, Maryland 21215

The masters shall have the powers and responsibilities set forth in Pretrial Order No. 7 and where not in conflict, in Maryland Rule 2-541.

The compensation of the special masters shall be at the rate of $900.00 per 8 hour hearing day, or $113.00 per hour for partial hearing days and other services performed. Masters shall be provided with office space at the location of the hearings, with necessary equipment and supplies, and with secretarial, clerical and other assistance as determined by the Court, with input from the masters and the parties. Masters shall not be entitled to reimbursement for meals or travel to and from the hearing location. The masters shall submit itemized expense reimbursement requests for Court approval. The masters shall submit appropriate billing statements for the number of hearing days and additional hours spent during the billing period. The submissions shall specify separately and according to each building and product group heard the time spent on (a) prehearing matters, (b) hearings, and (c) decisional and post-hearing matters. The submissions shall be made at least monthly. Payments will be made following review and approval of the submissions by the Court.

IV. *Physical Facilities and Support Services.*

The Anne Arundel County Circuit Court Administrator, counsel for the State and liaison counsel for the Defendants shall cooperate on the arrangements for the completion of the hearing facility on Dorsey Road. They also shall submit for Court approval a plan for appropriately staffing and managing the hearing office to efficiently conduct the special master hearings and to retain all of its records. They shall write to the Court within thirty (30) days with their final proposal(s) for the administration and funding of the necessary support staff for the office.

V. *Sequence for Building-Specific Discovery.*

Paragraph III.A. of Pretrial Order No. 7 provides that discovery of building-specific issues to be determined by the special masters "shall be coordinated so as to correlate as

efficiently as possible with the schedule of hearings before the special masters. . . .'' So that discovery responses are required and furnished so as not to disrupt or delay the schedule of the hearings, the responses to all interrogatories and requests to produce relative to products (and the buildings they are in) at issue in a particular subgroup shall not be due until the later of (a) 30 days after service of the interrogatory or request to produce or (b) 240 days prior to the scheduled commencement of the hearings for that subgroup.

VI. *Depositions.*

The scheduling, noticing and taking of depositions relative to building-specific issues to be tried by the masters shall be governed by the following provisions where the depositions are noticed after the date of this Order:

a. Depositions of parties or persons under the control of parties pertaining to issues to be tried in a particular special master subgroup may not be taken more than 240 days prior to the scheduled commencement of the hearings for that subgroup without the consent of the person being deposed; in the case of depositions of persons not parties or under the control of parties, the party noting the deposition, by letter accompanying the deposition notice and otherwise, shall attempt to secure the agreement of the deponent to any sequential and multiple deposition schedule occasioned by the foregoing limitations, but shall be free of such limitations if the deponent will not agree.

b. Before any defendant serves a deposition notice, he or she shall advise counsel for the other defendants whose products are at issue in that same building and scheduled to be heard in that same subgroup of that intention. Counsel shall coordinate their plans relative to such depositions to the extent reasonably possible.

c. Each deposition notice potentially affecting multiple defendants shall indicate, to the extent known by the

party noting the deposition, whether and to what extent the deponent may have knowledge relative to other products or other buildings at issue in the same subgroup.

d. Promptly upon receipt of a notice of deposition of a named individual State agent or employee, and in any event before the expiration of half the number of days between the receipt of the notice and the scheduled date of the deposition, the State shall serve a written notice on all defense counsel (a) confirming or setting out agreed or proposed changes of the date, time and place of the deposition and (b) at its option, expanding the scope of the deposition to include other defendants, or products and buildings in the relevant subgroup by informing the defendants as to all products, buildings or other matters at issue in that subgroup of which the named individual has or may have knowledge. The purpose and effect of the State's notice is not to limit unilaterally the areas about which the deponent can be questioned or to preclude trial testimony, but to inform all counsel of record of depositions of potential interest to them. Failure of the State's notice to indicate the deponent's knowledge of a particular subject will not automatically authorize a second deposition of the deponent with respect to that subgroup, but shall be considered in determining whether such a second deposition will be permitted, provided that failure of the notice to indicate that the witness has knowledge pertaining to a particular building or product shall be sufficient grounds to permit a further deposition of the witness about that building or product. At its option, the State may also apply the provisions of this subsection to other witnesses expected to testify on its behalf.

e. Each Rule 2-412(d) "designee" deposition notice shall be filed at least fifteen (15) days before the date of the deposition. Whenever a party receives a designee

deposition notice, it will serve a written notice upon all counsel (a) confirming or setting out agreed or proposed changes of the time, date and place of the deposition and the identity of the individual(s) being designated, and (b) at its option, indicating any additional areas not specifically covered in the "designee" notice about which the designee possesses knowledge and will be available to testify at the deposition as the party's designee. This notice shall be provided at least seven (7) days prior to the date scheduled for the deposition. A subsequent designee deposition notice of a party will not be automatically precluded simply because the area of inquiry was covered in whole or in part by a prior designee notice served by another party or "expanded" by counsel for the party being deposed, but such a prior notice may be taken into account in considering a future protective order request.

f. At the beginning of each deposition, the party noting the deposition shall attempt to establish which buildings the deponent has knowledge of, and which products or other matters the deponent has knowledge of. Before the deposition questioning turns to the substance of the deponent's knowledge, any other counsel in attendance may ask further questions of the deponent designed to establish the scope of the deponent's knowledge.

IT IS SO ORDERED this 8th day of August, 1988.

/s/_____
Raymond G. Thieme,
Circuit Court Judge

[EXHIBITS OMITTED]

COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

August 28, 1989
Colleton County Courthouse
Walterboro, South Carolina

UNIVERSITY OF SOUTH CAROLINA

—vs.—

W. R. GRACE & CO., et al.

EXCERPT FROM TRANSCRIPT OF HEARING

Before:

The Honorable JOHN HAMILTON SMITH, *Circuit Judge.*

[30] * * *

THE COURT: Well, as I indicated to all of you months ago,—And its not going to come as any surprise to anybody.—that if we could do what Mr. Duffy proposes, have product i. d. in all these buildings in a very expeditious fashion, everybody would know where we are. I could then sit down with the chart and figure it up and just group it by Defendants. But it's not going to happen that way. This litigation is going to go on for another six or seven or eight years, I'm convinced, if we take that approach.

The Plaintiffs for whatever reason have had a very difficult time establishing product identification. We have fought about the expert—the Court's expert. Everybody agreed on it. Then everybody—Then one side decided to waffled. And then the other waffled, and that became just a fiasco. And I'm convinced we're not going to get anything resolved until we just take certain buildings and try them. And that was

the, uh,—what I indicated to you the last time when we were together and, uh, try those Defendants, whether its spray or pipe and boiler—put them all in the same lawsuit, set up a discovery [31] schedule date and then just work toward that in those seven buildings and just proceed with those until they are completed.

I wish we could do it the other way. I think it would be easier. But I just think it would just be interminable to—to continue the way the litigation has been going. I think that's what we need to do.

Now, in these seven buildings have the Defendants been notified in regard to who is in the buildings, and who is in the lawsuit and who isn't in the lawsuit? Has that been done?

MR. DUFFY: Not only that. We don't know which seven buildings he's talking about.

THE COURT: That's—That's what we need to determine. Let's get the seven buildings, let's get the Defendants involved, and then let them concentrate on that. And then the rest of the buildings—the rest of the 18 or so you can just put those files in the back of the office and just concentrate of these seven.

MR. WESTBROOK: Your Honor, I can give them the names now or give them to them in a letter. Whichever you prefer.

MR. DUFFY: We'd like them now, Your Honor.

MR. WESTBROOK: Okay. Hagood Administration, Business Administration in Columbia, Capstone, Columbia Hall, the Law Center, Patterson Hall, the Physical Sciences Building.

THE COURT: All right. That's the buildings. Now, who are the Defendants? I mean which one have you gotten product identification on?

* * *

IN THE CIRCUIT COURT
STATE OF MICHIGAN
FOR THE COUNTY OF WAYNE

Case No. 85-523463-NZ
Hon. James E. Mies

UTICA COMMUNITY SCHOOLS,

Plaintiff,

—vs.—

W. R. GRACE & CO., et al.,

Defendants.

This Order Applies to All Parties

ORDER ESTABLISHING A SEPARATE TRIAL ON THE STATUTE OF LIMITATIONS

At a session of Court, held in Detroit, Michigan on August 3, 1988.

PRESENT: The Honorable James E. Mies

This matter having come before the Court on Defendants' Motion for Summary Disposition based on Defendants' claim that the applicable limitations period elapsed before Plaintiff filed this action, the Court having determined that there is a factual dispute as to when Plaintiff knew or should have known that it had a possible claim against Defendants, and the Court having received Briefs and heard argument regarding a separate trial on the issue,

NOW, THEREFORE, IT IS ORDERED that a separate trial shall be conducted to determine whether Plaintiff's claims are barred by the statute of limitations. The trial shall be con-

ducted before a jury separate from the jury which will try issues related to liability and damages.

All parties shall submit motions and briefs, and suggested *voir dire*, to the court by August 8, 1988. Trial shall commence on August 10, 1988, at 2:00 p.m., with jury selection to begin on August 11, 1988, at 9:00 a.m.

/s/ _____
Hon. James E. Mies

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