IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,124

AMERICAN CYANAMID COMPANY,

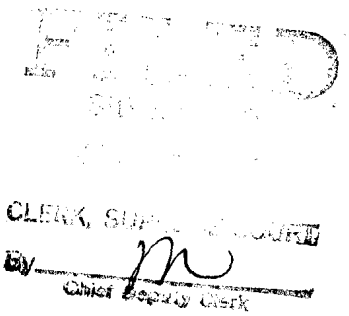
Appellant/Petitioner,

v.

LESTER K. ROY,

Appellee/Respondent.

_____/



BRIEF OF AMICUS CURIAE
THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.
IN SUPPORT OF PETITIONER, AMERICAN CYANAMID COMPANY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## STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. (henceforth "PLAC") is a nonprofit corporation.[1/] The group's principal objectives are to express the concerns of those who work in industry, and to advocate a more balanced approach to significant issues of product liability law.

This matter is of interest to PLAC as the appeal of a case of a size and character which is representative, rather than the exceptional "multi-million dollar" matter which tends to monopolize attention. Precisely because of its "ordinary" character, the case illustrates the tendency in recent years for punitive damage claims to intrude into routine product liability cases where they can fill no legitimate need.

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1/ PLAC members include American Honda Motor Company, Inc.; Black & Decker Company; The Budd Company; Chrysler Motor Corporation; Clark Equipment Company; FMC Corporation; The Firestone Tire & Rubber Company; Fruehauf Corporation; Ford Motor Company; General Motors Corporation; Great Dane Trailers Inc.; J.L.G. Industries; McGraw-Edison Company; Motor Vehicle Manufacturers Association of the United States, Inc.; Nissan Motor Corporation; Porsche Cars North America, Inc.; Saab-Scania of America, Inc.; Subaru of America, Inc.; Toyota Motor Sales, U.S.A., Inc.; and U-Haul International, Inc. Members or affiliates build over ninety-nine percent of all motor vehicles produced in the United States. In addition, they manufacture such diverse products as farm and industrial equipment, lawn and garden tractors, other agricultural equipment, construction and mining machinery, locomotives, railroad rolling stock, winches, and gasoline and diesel engines for innumerable industrial and agricultural uses.

There is virtually unanimous agreement among scholars that this trend presents a serious danger:

> [T]he risk of crushing liability as a result of punitive damages is too great. It threatens the business community with the legal equivalent of an atom bomb. It places the entire product liability system in jeopardy of runaway unregulated verdicts.

Twerski, National Product Liability Legislation: In Search for the Best of All Possible Worlds, 18 Idaho L. Rev. 411, 475-76 (1982).

> Assuming that punitive damages are proper in product liability litigation -- a dubious assumption -- steps must be taken to limit the subsequent potential for economic catastrophe.

Werber, The Products Liability Revolution -- Proposals for Continued Legislature Response in the Automotive Industry, 18 New Engl. L. Rev. 1, 45 (1982).

> A problem which has arisen to haunt the courts in the 20th century concerns the "mass disaster" litigation, in which the defendant, as for example by discharging hazardous waste or by putting a drug or a product on the market has caused injury to a very large number of persons. How often is such a defendant to be punished? Is there no limiting rule analogous to double jeopardy? And is there any order of priority among the claimants? Confronted with this problem, in Rogensky v. Richardson-Merrell, Inc., Judge Friendly, refused, in the absence of controlling authority in the New York cases, to find a basis for punitive damages at all in the misconduct of the defendants. Such questions as these have stimulated re-examination of the policies and procedures for awarding punitive damages.

Keeton, et al., Prosser and Keeton on Torts (5th ed. 1984) at 14.

And, see generally Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1 (1982).[2/]

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

PLAC adopts the Statement of the Case and Statement of Facts by the Defendant/Petitioner, American Cyanamid Company.

## ARGUMENT

### Introduction

> On reflection I believe we made a mistake in approving the award of punitive damages against appellant. The facts simply do not reflect the kind of flagrant misconduct that would justify a finding of willful and wanton disregard for the safety of persons such as the appellee.
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> Anstead, C.J., dissenting in part, American Cyanamid Co. v. Roy, 466 So. 2d 1079 (Fla. 4th DCA 1984).

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2/ One of amicus' counsel, David Owen, has published certain writings in the area of punitive damages in products liability litigation (and tort law generally). See, e.g., Prosser and Keeton on Torts (5th ed. of Prosser on Torts, West 1984, W. Page Keeton, ed.; by W. P. Keeton, D. Dobbs, R. Keeton & D. Owen); Products Liability and Safety--Cases and Materials (Foundation Press 1980, W. Keeton, D. Owen & J. Montgomery); Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1 (1982); Owen, Civil Punishment and the Public Good, 56 So. Cal. L. Rev. 103 (1982); Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257 (1976). Counsel wishes to disclose that they have cited several of these writings.

The punitive damage award in this case is not fair by any stretch of the imagination. There was nothing close to a "smoking gun" in the evidence. On the contrary, the record shows years of concern over product safety and truth in labeling on the part of Cyanamid. Further, the Plaintiff was an experienced worker (R. 140, 172) who read and understood the Defendant's warning label, but chose to disregard the warnings and instructions -- and to fail to use the protective gear available to him, shutting his eyes to inherent (and unavoidable) dangers he knew the product presented by its very nature.

Such a case might well be appropriate for the Workmen's Compensation system (R. 1265). The Plaintiff's counsel, however, has been able to expand it into a duty to warn lawsuit and then into a punitive damage claim.

In the following pages, PLAC will show that the Plaintiff's evidence on the breach of the duty to warn was weak at best, and that evidence of "malice" - an indispensable prerequisite for a punitive damage claim - was wholly lacking. We then will move to more a general consideration, i.e. that punitive damage verdicts of this type show the trial bench and the District Court of Appeal have not yet considered the implications, as to their own responsibilities, of the high standard for punitive damages which the Supreme Court has set. Finally, we will suggest some steps toward reform.

I.

THE FACTS OF THIS CASE ESTABLISH, AT MOST, A MARGINAL CLAIM FOR COMPENSATION, NOT THE "GROSS AND FLAGRANT" DISREGARD OF SAFETY WHICH THE SUPREME COURT HAS STATED TO BE INDISPENSABLE TO A PUNITIVE DAMAGE AWARD

The basis of liability in this case was not that the product was faulty or that the manufacturer did not "warn" of the unavoidable risk. The contention was only that the warning Cyanamid did give was not in the precise form the Plaintiff's expert claimed to think would be best. If trial judges and the Court of Appeal are free to treat such a showing as sufficient, the rigorous standard the Supreme Court has set for punitive damages will be a nullity in practice.

A. The Defendant did warn of dangers to the nervous system and the Plaintiff was aware of that risk

Cyanamid gave a warning which described the danger, briefly but accurately; and the Plaintiff was aware of that warning. More specifically, each bag of AM-9 bore a label which included the words "Warning" and stated that the substance may cause disturbances to the nervous system. Mr. Roy testified that he saw the labels which said the substance could be dangerous to the nervous system (R. 1223; 1277-78); so did those who worked with him (R. 174; 185; 194; 204). He also admitted that his attitude had been that "it would not happen to him" (R. 1277-78). Nevertheless he sued Cyanamid, claiming

that an extreme case of dermatitis and other symptoms he suffered showed that exposure to AM-9 had led to an injury to his nervous system.

B. The position advocated by the Plaintiff's expert ignores the obvious differences - moral and legal - between a good faith error of judgment and deliberate deception

The Plaintiff's case rests almost entirely upon the testimony of Robert Cunitz.[3/] He asserted that the Defendant's warning was a "terrible misrepresentation" (R. 1345) and this became the theme of the Plaintiff's jury speech and even his position on appeal. But, in context, the purpose of Dr. Cunitz's characterization of the warning was not "expert" analysis of the effectiveness of the warning. It was, instead, a dramatic epithet designed to give jury appeal to the presentation by the Plaintiff - his client.

His reasoning was that (1) the use of the word "warning" rather than "danger" and what he saw as other imperfections in the label meant that American Cyanamid understated the degree of the risk; and (2) that understatement is the same as a misrepresentation (R. 1345). The Plaintiff's closing jury

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3/ A "human factors" specialist (R. 1304) the witness had no training in medicine or toxicology. He stated that he spends fifty to sixty percent of his time either preparing to participate in a litigation on behalf of plaintiffs or in actually testifying on their behalf (R. 1360).

speech carried the rhethorical inflation even further - the "misrepresentation" became a "lie" (R. 1011). The obvious flaw is that Dr. Cunitz obliterates the distinction between innocent misjudgments and deliberate deception.

The question[4/] is not whether the manufacturer's employees made a mistake but whether they were guilty of a callous disregard for the safety of other human beings. Name calling by a hired witness cannot take the place of proof.

C. Dr. Cunitz's testimony was internally contradictory when he tried to deal with the fact that the Cyanamid label conformed to a standard set by an independent industry association and adopted by the federal government

Mr. Cunitz said that he had found a statement that acrylamide was a "highly toxic" substance in a manual prepared by an unidentified person at American Cyanamid (R. 1333).[5/] To him, this meant American Cyanamid breached its duty by not including the warning which the Manufacturing Chemists' Association requires for a "highly toxic" substance. Under

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4/ I.e. the issue, now on appeal, concerning punitive damages.

5/ Apparently the employee referred to the risk of acrylamide toxicity in a general way (R. 773-74). There is no evidence he or she had in mind the technical difference between "toxic" and "highly toxic" which is so important for labeling purposes or that he or she had any intention of speaking in terms of the Manufacturing Chemists' standard.

cross-examination, however, he admitted that he is not familiar with the definition of "highly toxic" in the Chemists' Association manual and the Department of Transportation regulations (R. 1368); and that this trade group and government agency classified the substance as toxic rather than "highly toxic" (R. 1370; 1374).

Confronted with that flaw in his basic premise, Dr. Cunitz merely repeated his argument that someone at American Cyanamid had referred to AM-9 as "highly toxic". We must infer that his position was that once an employee made such a statement - authorized or not - the definition of the term set by the Manufacturing Chemists' Association was no longer relevant.[6/] Yet the whole basis of Dr. Cunitz's theory was that the Defendant's state of mind could be identified as "criminal" because it had not satisfied the Association's standard.

Next, Dr. Cunitz was asked to address the fact that United States Department of Transportation regulations prohibit the use of a warning against "highly toxic" substances except under the standard defined in the Manufacturing Chemists' Association manual. His answer was that the federal standard only applied

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6/ Logically this could not be. It would mean that a mistake by any employee in one member company could change the Association's standard even though the employee was not authorized to make such a decision on behalf of the Association or even his own employer.

while the material was in transit (R. 1369). He did not explain how that standard could be appropriate while goods were moving among the states but so grossly inadequate once they came to rest that Cyanamid (and, presumably, the United States government[7/] as well) would be guilty of wanton and willful disregard for safety for using it.

D. The Plaintiff's theory ignores the special nature of the risk

The Plaintiff had an even more dubious argument - that, since AM-9 sometimes causes disturbances of the nervous system in some persons, the use of the word "may" in the Cyanamid label was misleading (R. 699). By that theory, we infer, "will" would be the only permissible word. Yet it is undisputed that while the substance does present a danger of an allergic reaction to some persons, AM-9 does not affect everyone. Several of the Plaintiff's own witnesses, for example, worked beside Mr. Roy for lengthy periods. Yet they did not claim to have suffered any ill effects. It follows

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7/ See Epstein, Modern Product Liability Law 181-82 (1980). Dr. Cunitz's views cannot be reconciled with the realities which face those who produce goods in the modern world. The manufacturer or retailer is required, by federal law, to be sure that the label is on the bags of AM-9. By his theory, however, each would have a duty either to remove the federal labels as soon as the goods "left interstate commerce" or, perhaps, to put a second label on the bag stating that it was to take effect after the goods had "come to rest."

that the label's use of the word "may" was the only accurate way to convey this information.[8/] Had Cyanamid used the word "will," it would have been misrepresenting the true risk from the substance.

E. There is no meaningful quantitative evidence as to the probability or severity of injury

The record shows little or no statistical evidence of the relationship between length of exposure to AM-9 and the type, frequency or severity of injury to individuals.[9/] On the contrary, the Plaintiff's own medical witnesses spoke of the uncertainty of much of neurology (R. 305) and the relative rarity of these cases, as well as the lack of experience of the medical profession with them.

Equally important, the witnesses for each side agreed that there is no evidence anyone ever died of "acrylamide toxicity" (R. 793; 914; 810; 851; 1450).

As to severity, while the medical literature apparently does describe some cases of permanent injuries, the "classic" pattern is that those injuries do not create paralysis and,

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8/ As to any individual, AM-9 "may" have ill effects although it does not seem to affect most.

9/ Even though the Plaintiff's expert made a point of introducing a number of medical journal articles which discussed the problem and suggested the existence of a general cause and effect relationship.

further, that they are not permanent (R. 616; 634-35). Doctors for each side testified that normally when the person's exposure to the acrylamide is ended, the symptoms gradually go away (R. 293; 616; 850). Indeed the great bulk of the medical testimony cast serious doubt on whether the Plaintiff's problems were connected with the product at all.[10/]

F. There is no evidence of a causal link between the warning "defect" and injury

Although the Plaintiff's counsel argued that the warning violated Mr. Roy's right to decide whether to work with AM-9 with knowledge of the risks, there was no evidence that the Plaintiff was "deprived" of that right in any meaningful way.

The Plaintiff never denied that he understood the substance could cause some form of injury to the nervous system.[11/] Further Mr. Roy never said the subtle difference

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10/ The appellate court is bound by the jury's determination of the conflicting evidence as to causation, of course. Note, however, that there was strong medical testimony to the effect that Mr. Roy's symptoms did not correspond to the normal course of acrylamide toxicity (R. 285-86), suggesting that his illnesses were attributable to vascular disease and other causes not the fault of AM-9 or American Cyanamid. The point is that medical knowledge on this subject is limited and that Cyanamid did not ignore a body of knowledge or clear-cut medical safeguards. Further, the jury had only the shakiest basis for the first step - the finding of causation. All the other steps which led to the punitive damage award depended upon that weak foundation.

11/ Further the record is silent as to another basic difficulty. The "over-warning" Plaintiff demands might have

Footnote Continued

between "will" or "may" in the printed warning would have mattered to him; and common sense says that such a semantic change in the label would not have affected his conduct or his basic attitudes toward safety and risk.

Perhaps the strongest evidence the Plaintiff has on this point is his statement that he would have understood a label bearing the word "poison" or one with a skull and crossbones as meaning that the reader should "stay away" from the product (R. 1292). Yet Mr. Roy did not say that he would have refused the job if the bags actually had borne such markings. On the contrary he admitted that the actual label had told him there was a danger and the evidence is clear that he did not stay away. Instead he accepted the risk, hoping that "it would not happen to him" (R. 1277-78).

G. The attack on the Company's motivation is based upon speculation

Realistically, the Plaintiff's case on punitive damages had little to do with evidence. It depended, instead, on the skillful way his counsel and a hired expert used rhetoric and

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> frightened Mr. Roy or other workers at first but the nature of the job required that they work on the same truck, week after week, month after month. They would see the warning constantly and its effectiveness would wear away.

emotion to create the impression that the Company cared for nothing but profit.12/

Time and again the Plaintiff asserted that Cyanamid was utterly indifferent to safety and that it cared for nothing but profit (R. 1005, 1011).13/ Yet there was no evidence that Cyanamid's profit was increased in any way by the use of the warning label required by the Manufacturing Chemists' Association and DOT regulations, rather than some hypothetical "better" warning. Nor was there evidence - or even any suggestion - that the difference in warnings could have had any effect upon the sale of AM-9, particularly in the absence of a substitute which would have done the work while not presenting the same risk.

In fact there is evidence in the record pertinent to the question of corporate "attitude" - but it supports the Defendant.

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12/ We offer no criticism of counsel. Were the positions reversed we can only hope that we could represent a plaintiff as effectively as he did. But a lawyer's skill in exploiting the weaknesses of the system is not a reason for permitting those weaknesses to continue to exist.

13/ In a general way, it is undoubtedly correct that Cyanamid was attempting to make a profit. The same is true of the members of PLAC, and most other firms in our free enterprise system. That is not proof of wrongdoing, however. The question is not whether a company is trying to make money but whether it has done something "flagrantly" improper.

The defense, for example, offered testimony which established - without contradiction - that Cyanamid set up a high level committee some forty years ago to deal with the problem of effective labeling and that the group has continued to function ever since (R. 739-40). Logically, that is evidence of concern for safety and a serious and thoughtful effort to handle a difficult problem.

Indeed there is a "Catch-22" quality to the whole attack on Cyanamid. Far from being indifferent to safety, the Company financed the earliest investigation of the potential danger of acrylamide.[14/] Yet rather than being commended for social concern, the Company has been branded as having a "quasi-criminal" state of mind; and the rationale, in large part, is that the very safety research which Cyanamid financed served to give it "notice" of a danger (R. 1007).[15/]

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14/ The defense presented uncontradicted evidence that the unavoidable dangers of acrylamide were discovered while it was still in the process of laboratory development and that the American Cyanamid Company (along with the Carnegie-Mellon Foundation) financed the Hazelton studies which first called the risk to attention of the public (R. 1340; 1392).

15/ Similarly when the defense offered a clinical researcher in the field, the Plaintiff's response was the usual cross-examination and closing speech insinuations, i.e. that the doctor was a liar who testified for money or, at the least, that someone had "got to him" (R. 1068). Yet the basis for that accusation was the fact that Cyanamid had provided money for safety research Dr. Schaumberg had conducted.

Emotional attacks on "greedy corporations" and the debaters' points scored at trial cannot conceal the simple facts. The label the Defendant put on the bags of AM-9 provided a good general warning of the basic danger; the company paid for safety research by highly reputable outside experts; and Cyanamid even set up a permanent staff dedicated to the provision of safety warnings years before that became a matter of interest to product liability lawyers. None of this can be reconciled with the charge of "conscious indifference" to safety, of an "entire want of care."16/

To the amicus and others who must deal with the practical problems involved in the mass production and distribution of goods, the situation seems clear. The technical criticism of the label may be valid, although we disagree. But the Defendant obviously tried hard to achieve safety and to obey the law. If the Supreme Court meant what it has said over the years, this punitive damage award cannot stand.

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16/ The standard set in White Construction Co. v. DuPont, 455 So. 2d 1026 (Fla. 1984).

II.

## THE ACCEPTED POLICY ARGUMENTS FOR PUNITIVE DAMAGES ARE REASONABLE IN THE ABSTRACT BUT IRRELEVANT TO THE CIRCUMSTANCES OF THIS CASE

In some instances, punitive awards do achieve a valid social purpose. This, however, is not one of them.

To be sure, not all the facts favor Cyanamid. While the danger of a substance such as AM-9 was exaggerated in the Plaintiff's jury speeches, there is no denying that a risk exists. Further the Plaintiff was injured and the Court may feel that he should not be left to his fate. But this does not mean Mr. Roy is entitled to punitive damages. The large compensatory award was meant to make good his actual losses. There is no reason to think it will not achieve that objective[17/] or that Mr. Roy, as an individual, needed more.[18/]

Nor is there any reason to conclude that a punitive damages assessment could be justified by a more general "public" purpose in this case.

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17/ This is particularly true when one considers the likelihood that he received compensation from other sources.

18/ Even if he did, punitive damages would have no bearing on the point since the award would not be tailored to need or even based on it in a general way.

The traditional argument for such awards is that they deter manufacturers from marketing defective products. But should Cyanamid be "deterred" from selling AM-9? There was no such argument at any point in the case. It was undisputed that the product serves a useful social purpose -- notwithstanding its inherent hazards. There was no suggestion that there is any substitute for it; or that a hypothetical substitute would not present comparable -- or even greater -- risks.

In the special context of defective warnings claims, the argument might be that the manufacturer would be "deterred" from selling products with inadequate warnings. But there is no evidence in this case of deliberate "under-warning." Further, the existence of the federal regulation adopting the MCA standard meant that Cyanamid could not properly put a "highly toxic" warning on the AM-9 even if it were motivated by desire to avoid further punitive damages (R. 765).

Realistically, there is a tendency in this or any other "duty to warn" case to think that a more dramatic warning "could have done no harm" so that the process of balancing risk and utility necessarily leads to a finding against the manufacturer in every instance. The answer[19/] is that

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19/ To put the same basic point less abstractly, it would have been unfair and illogical to require the manufacturer to overstate the risk in this case. A label which said that

Footnote Continued

overstating one warning necessarily will detract from the impact of another:

> Those who argue for warning as the judicial solution to latent defect cases labor under a naive belief that one can warn against all significant risks. The truth is that such a marketing scheme is not feasible. The warning process, in order to have impact, will have to select carefully the items which are to become part of the consumer's mental apparatus while using the product. Making the consumer account mentally for trivia or guard against risks that are not likely to occur imposes a very real societal cost. Even when the risks are significant, one must consider whether the consumer will perceive them as significant. If the only way to ensure that the consumer will consider them significant is to oversell the warning by increasing its intensity, one may again face the problem that all warnings will come into disrepute as overly alarming.

Twerski, et al., The Use and Abuse of Warnings in Product Liability - Design Defect Litigation Comes of Age, 61 Cornell L. Rev. 495, 514 (1976) (emphasis supplied).

The argument also might be that Cyanamid should be "encouraged" to eliminate the dangers of the product by some technical innovation. Yet there was never any suggestion, much

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> AM-9 would kill people might have made Mr. Roy decide not to go to work for the City of Hollywood or his former employer, Penetryn, but it would not have been true. The medical witnesses for each side agreed that even those persons who do suffer allergic reactions to AM-9 do not die of it or, normally, even experience permanent injuries.

less evidence, during the course of the trial that any feasible change could have eliminated the risk.[20] On the contrary, the risk was classically "unavoidable."

Is the suggestion that Cyanamid should be "encouraged" to advise Mr. Roy and other City employees not to work with AM-9 because it is too dangerous? The idea presents several difficulties. The unhappy reality is that if Mr. Roy decided not to work with the product, someone else would have had to do it.[21] It is true that he and every other worker is entitled to a chance to make the decision as to whether the benefits of a job justify the risk. But the evidence is that Cyanamid did try to give Mr. Roy that choice, i.e. it placed a label on every bag which said that the product may affect the nervous system.

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20/ There was one cross-examination question in which the Plaintiff's lawyer spoke of packing the material in pellets (R. 792) but the witness refused to accept the suggestion and there was no evidence whatsoever that approach would be effective. The Manufacturing Chemists' Association does not require that technique and the fact the Department of Transportation does not require it militates against the suggestion even more strongly. In any event, whether it would work or not is pure speculation on this record.

21/ If Cyanamid should be free to market the product (a point the Plaintiff never disputed), the City of Hollywood and other purchasers will have to pay employees to apply it.

It is a matter of speculation whether different writing on the bag, or a manual or anything else could have summarized the complicated facts of neurology and toxicology presented by this case in such a way as to make them significantly more clear to the ordinary person. But the answer to the "choice" argument is more fundamental. If, arguendo, the warning was not sufficient, there is a basis for the compensatory award but it does not follow that Cyanamid was "criminal", i.e. that it's state of mind was equivalent to the callousness required for manslaughter (as the Court emphasized in White Construction Co. v. Dupont, 455 So. 2d 1026 (Fla. 1984)).

Finally, it might be argued that although the utilitarian or "deterrence" arguments for punitive damages do not apply in this instance, the award still could rest on a moral judgment. But how can society be entitled to retribution against the manufacturer for using a warning label that complied with the standard set by a federal agency which is answerable to a democratically elected government?

## III.

## IF THE HIGH STANDARDS THE SUPREME COURT HAS ARTICULATED ARE TO BE RESPECTED AT THE TRIAL LEVEL, THE LOWER COURTS NEED BOTH GENERAL GUIDANCE AS TO THEIR RESPONSIBILITIES AND SPECIFIC RULES TO APPLY

Thus far PLAC's goal has been to satisfy the Court that there was no meaningful basis for the punitive award in this case and that it must be reversed. Unfortunately, however, it

is not realistic to think the Court will be able to review each and every punitive damage case; and isolated or episodic reversals will not change the practices prevailing below.

The Supreme Court has established a high standard for punitive damages: (1) gross and "flagrant" misconduct, or (2) an entire want of care [showing] conscious indifference to the dangers to the public. White Construction Co. v. DuPont, 455 So. 2d 1026 (Fla. 1984)(reiterating the Carraway standard). Clearly the Court has recognized that serious social costs can result from extending a good rule too far. It is important that the Court stick to its guns and that it not allow the lower courts to "water down" the standard. Indeed to set a high qualitative standard, as the Supreme Court did in White Construction, but to permit that standard to be satisfied by nominal evidence is self-defeating and, in a way, unworthy of a serious court.

The loose standard for punitive damages set by the District Court of Appeal conflicts with the requirements the Supreme Court has articulated. Indeed, it would permit punitive damage awards in virtually every products liability -"duty to warn" case.

The history of Carraway v. Revell, 116 So. 2d 16 (Fla. 1959) is instructive. There the Supreme Court set a meaningful standard. For punitive damages to be permissible the plaintiff

must show that the defendant's state of mind was equivalent to that necessary for the crime of manslaughter. The lower courts, however, persisted in upholding verdicts based upon evidence that was nominal at best. As a result, the Court found it necessary, by 1984, to use White Construction, supra, as the vehicle for a renewed warning that Carraway meant what it said -- that the wrong must truly be "flagrant" or, in the alternative, sufficient to indicate a conscious and complete lack of concern for safety -- an entire want of care.

In spite of the clarity of that holding the District Courts of Appeal once more have gone down the path they followed after Carraway -- lip service to the standard set by the Supreme Court but holdings that the ostensibly severe test is satisfied by evidence which may not even support a claim for compensatory damages.

The result the Fourth DCA reached in this very case is a glaring example of that erosion.

### A. The strict standard of White Construction should be reaffirmed and enforced in practice

The lower courts apparently need to be reminded once again that this Court meant what it said in defining a solid and strict basis for punitive damages liability in White Construction and Carraway. The key definitional portion of that opinion, ironically quoted (and blatantly misapplied) by the Fourth DCA in its opinion in this case, is this:

> The character of negligence necessary to sustain an award of punitive damages must be a "gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them."

When - as in this case - the lower courts assume that this standard is satisfied by any evidence which would justify a routine liability finding, they undermine the Supreme Court's explicit ruling and its constitutional role as well.

B. The judiciary must be willing to grant directed verdicts against claims based on emotion and speculation

Even though its message is grasped intellectually, White Construction will be a mockery until trial judges also recognize that they must analyze the facts to identify those situations where there is no basis for jurors to reach a conclusion that the negligence was "wanton and willful."

The standard cannot enforce itself. By its very nature a punitive damage claim has a unique appeal to emotion. It is based, after all, on the jury's sense of "outrage."[22/] And, as

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22/ In this context, the emphasis that the lower court placed on a passing reference to laboratory animals is

Footnote Continued

we suggested earlier, the propriety of such a claim in a given case often will depend upon judgments as to public policy rather than the straightforward fact question which is the traditional province of the juror. Thus the trial courts and the District Court of Appeal must assert stricter control in these cases than they might in the more typical controversy.

To be sure, it is not a simple matter to reconcile active supervision with the necessary respect for the jury's power. The tradition of restraint and broad latitude for the jury has deep roots in constitutional practice. But the courts created punitive damages and they are capable of distinguishing the exceptional situation, where they are justified, from those where such awards can achieve nothing but the expression of emotion or prejudice.

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Footnote Continued from Previous Page

> significant because it illustrates the danger that even judges can be affected by irrational emotion in such cases. The opinion below refers to the testimony of one of the defense doctors that rats which were used in experimentation ultimately would die of starvation if their hind quarters were paralyzed and they could not reach food in their cages. The reader, however, is left at a loss as to what that testimony had to do with punitive damages or any other issue of the case. There is no testimony that anyone starved to death because of AM-9 or even that anyone ever was paralyzed. The testimony was not even that the rats were left to die but that this would happen to them, theoretically. Further, American Cyanamid did not conduct any of these experiments. They were done by physicians and toxicologists working at universities and foundations.

On a more practical level, if the lower courts continue to overlook the obligation White Construction places upon them, the result will be ever-increasing punitive damage claims and an intolerable burden on Florida's system of justice.[23/]

Independent scholars urge that reform is essential:

> As soon as possible after discovery has been completed, courts should rule on whether there is sufficient evidence to establish a prima facie case for punitive damages. If the claim survives a motion for summary judgment, the court should carefully assess the evidence presented at trial. If the evidence is insufficient to justify a punitive award, the court should direct a verdict on the issue. This will ensure that only serious punitive damages claims will be considered by juries.

Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37, 89 (1983).

More generally, see Twerski, Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts, 57 N.Y.U. L. Rev. 521 (1982).

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23/ As long as the trial courts continue to permit punitive damage claims to go to the jury, the conscientious lawyer almost has a duty to resort to name calling in an effort to get his or her client a windfall and, as well, the benefit of the prjudicial impact on the liability issue which such material necessarily has in practice if not in theory.

C. The lower courts should be instructed to give greater weight to compliance with objective standards

This case also gives the Supreme Court an unusually good opportunity to achieve more concrete reforms by establishing guidelines for some situations which are likely to occur frequently. While not a complete solution, this guidance would bring meaningful judicial supervision of punitive damages closer to reality.

There is a need, for example, for a holding that evidence the manufacturer met standards set by a recognized trade association and the government raises at least a presumption of "some" care so that punitive damages are not permissible.24/ Scholars already have called for just that codification of common sense:

> In a typical case compliance with a universal industry custom should be held conclusively to establish good faith against a punitive damages claim. Rarely will an entire industry act with flagrant impropriety against the health and safety of the consuming public, and running with the pack in general should shield a manufacturer from later punishment for conforming to the norm.

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24/ The "knee jerk" answer that it is possible that some trade associations will not set meaningful standards and that some government regulations will be too lenient so that the courts should abdicate, leaving the entire matter to the jury. It seems more logical, however, to recognize these possibilities and to say that if the Plaintiff succeeds in pointing to objective and substantial evidence that the standard is too low in a given case, he should be held to have overcome the presumption.

* * *

> [P]articularly if many in the industry have come to treat the provision as the proper safety norm, proof of compliance with the regulation or statute ordinarily should be deemed conclusive proof of good faith and hence a conclusive defense to a punitive damages claim.

Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 40-42 (citations omitted)(emphasis added).

> Even if a product that complies with both common practice and statute may be found defective, it is wholly inappropriate to assert that a party who has complied with the only fixed standards for conduct should be treated as reckless, or worse, for doing so. To expose such defendants to punitive damages . . . is not only to attack the defendant for his conduct, but by the same token to impugn everyone associated with the formulation of products standards, including the federal government, with the same degree of reckless indifference. If, to be sure, it could be shown that the defendant in question influenced the formation of the applicable standards by submitting fraudulent information to governmental bodies, then of course the question of damages becomes relevant, but only if the firm's position influenced the setting of the standard in a way which in fact enhanced the risk of injury to the particular plaintiff in question. Apart from this narrow exception, conformity with applicable standards must be an absolute defense to all punitive damage claims.

R. Epstein, Modern Product Liability Law 181-82 (1980).

D. The lower courts need guidance as to the necessity for meaningful proof of the severity of the risk

Another basic step would be to focus the attention of the lower courts upon the necessity, in some cases at least, for meaningful quantitative evidence concerning the risk which is asserted to be the basis for a duty to warn and punitive damages.

The adequacy of a warning depends upon the severity of the risk. Tampa Drug Co. v. Wait, 103 So. 2d 603 (Fla. 1958). Logically, that severity must itself be a function of the gravity of the injuries to be expected and their frequency. If one person in a thousand died or one in a hundred were paralyzed, the risk would be a major one in any responsible person's view. On the other hand, if all that is known is that some unknown minority of persons might get dermatitis and other symptoms and that some of those cases, like Mr. Roy's, would be serious, the risk is still meaningful but it is far less severe.

If the jurors are to make a rational decision as to the degree of the risk, they need this sort of basic information. We have already seen that they did not have it in this case.25/

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25/ Nor, for that matter, is there any evidence in the record that medical science has advanced to such a point that Cyanamid or anyone else has any reliable information on those issues.

E. The lower courts should recognize the necessity of proof of an effective alternative warning

Along the same lines, if the jurors are to be permitted to base a punitive damage award on their belief that the warning should have been "different", logic says the plaintiff should have to propose an alternative "better warning" that would have (1) provided the plaintiff with information both important and true as to the product's hazards and (2) prevented the plaintiff's injuries.

There was little testimony in this case as to such a hypothetical alternative label except for the assertions that Cyanamid should have used (1) a skull and crossbones, (2) the word "poison," or the word "will." Yet, as we have suggested, all three of these "improvements" in the warning would have given the Plaintiff and every other user information about the product's risks which was false or, at least, highly debateable and subjective. Further, there is no evidence that even such an exaggerated or untrue "over-warning" would have made any difference to the Plaintiff.[26/]

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26/ In Conti v. Ford, 743 F.2d 195 (3d Cir. 1984) the United States Court of Appeal for the Third Circuit observed that a duty to warn claim is only logical where there is evidence that the stronger warning would have "made a difference." In a punitive damage case, based on the duty to warn, that point is even more compelling.

## CONCLUSION

The Court may well reject some of the reforms we propose or decide that others would be more effective. There is significant support, for example, for a higher burden of proof or the bifurcation of the trial of liability and punitive damage issues. The precise choices are less important, however, than the necessity that the Court speak out. The high standard set in Carraway v. Revell and reaffirmed in White Construction has been ignored both at the trial level and in the DCA.

Amicus urges that the standard should be stated, once again and, in addition, that some meaningful steps be taken to establish guidelines. The Florida courtrooms are not lotteries; it is degrading to the system of justice for important aspects of product liability cases to be tried on the basis of rhetoric and emotion rather than law and fact.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Motion for Leave to File Amicus Brief has been furnished by mail to: EARLE LEE BUTLER, Butler & Pettit, P.A., 1995 East Oakland Park Boulevard, Suite 100, Fort Lauderdale, Florida 33306 and DON LACY, ESQ., 2916-B Battle Mountain Way, Tallahassee, Florida 32301-3657, Attorneys for Plaintiff/Respondent, Lester K. Roy; and PAUL R. REGENSDORF, ESQ., Fleming, O'Bryan & Fleming, P.O. Drawer 7028, Fort Lauderdale, Florida 33338, Attorneys for Defendant/Petitioner, American Cyanamid Company, this 30th day of December, 1985.

Edward T. O'Donnell