SUPREME COURT OF FLORIDA

No. 92, 963

OWENS CORNING,
APPELLANT,

V.

DEWARD BALLARD,
APPELLEE

BRIEF OF MEMBER COMPANIES OF THE CENTER FOR CLAIMS RESOLUTION AS AMICI CURAE IN SUPPORT OF APPELLANT

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INTEREST OF AMICI CURIAE [1/]

The member companies of the Center for Claims Resolution[2/] are defendants in tens of thousands of asbestos personal injury cases pending in state and federal courts nationwide, including over 2,500 cases in Florida. There are several states -- including Florida -- in which plaintiffs, for purely tactical reasons, file such claims even though the claims have no connection whatsoever to the forum: the claimants are not residents of the forum and their asbestos exposure did not occur there. This practice of forum shopping by out-of-state plaintiffs has grown significantly in recent years. The CCR member companies, accordingly, have a significant interest in the decision in this case, which presents an important and recurrent issue as to the application of the doctrine of forum non conveniens in asbestos litigation.

The CCR member companies also have a significant interest in the punitive damages issue presented by this appeal. Virtually every case against the CCR member companies seeks punitive

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1/ A Motion for Leave to File Brief as Amici Curiae in Support of Appellant is being filed concurrently with this brief.

2/ The companies signatory to this amicus brief are: Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; NGC Settlement Trust (formerly Asbestos Claims Management Corp.); CertainTeed Corp.; C.E. Thurston and Sons, Inc.; Dana Corp.; Ferodo America, Inc. (formerly Nuturn Corp.); Flexitallic, Inc.; GAF Corp.; I.U. North America, Inc.; Maremont Corp.; National Service Industries, Inc.; Nosroc Corp.; Pfizer Inc.; Quigley Company, Inc.; Shook & Fletcher Insulation Co.; T&N plc; Union Carbide Corp.; and United States Gypsum Company.

damages. Those punitive damages claims impair the ability of the CCR member companies to evaluate these claims and reach reasonable settlements, and place the CCR member companies at risk of irrational verdicts. The CCR member companies, thus, are very concerned about the grossly excessive punitive damages award in this case, as well as the procedural and substantive standards for review of punitive damages awards in all Florida cases.

STATEMENT OF THE CASE

Amici adopt the statement of the case presented by appellant Owens Corning.

SUMMARY OF ARGUMENT

This appeal raises two important issues that are of particular concern in the asbestos litigation in Florida and in courts nationwide: (1) the doctrine of forum non conveniens, and (2) the standards for the award of punitive damages. Both of these issues were wrongly decided by the trial court and the Fourth District Court of Appeal.

First, the trial court denied as untimely Owens Corning's motion to dismiss the complaint under the doctrine of forum non conveniens, as articulated in Kinney System, Inc. v. Continental Insurance Co., 674 So. 2d 86 (Fla. 1996), and the Court of Appeal affirmed that ruling. Kinney directed the trial courts to dismiss such pending cases unless the parties had "substantially

completed discovery or [were] ready for a Florida trial." Id. at 94. In this case, which was one of thousands of pending asbestos cases, Owens Corning filed its motion to dismiss at the appropriate time: before the development of the factual record and when all the parties were first beginning to focus on this claim. The trial court's ruling was thus erroneous and, if left standing, threatens to undermine the result that the Kinney Court explicitly sought to achieve, that is, relieving the clogged Florida state courts from pending claims that bear no relation to, and have no connection with, the State of Florida. Indeed, such an approach would fundamentally undermine the application of the doctrine of forum non conveniens in many of the vast numbers of asbestos cases brought by out-of-state claimants now pending in the Florida state courts, and that will be brought in those courts in the future.

Second, the trial court and the Court of Appeal refused to overturn a $31 million punitive damages award in this case that was more than 17 times the amount of the compensatory award. This award is grossly excessive under the Florida Tort Reform and Insurance Act of 1986 and violates Owens Corning's due process rights. In failing to reduce the award, the courts below failed to give it close scrutiny, as required by the Act, and failed to examine many of the relevant factors that bear on the determination as to the excessiveness of the award. Had the

relevant law been properly understood and applied, the courts below would have concluded that the plaintiff here had plainly failed to satisfy his burden of showing by clear and convincing evidence that the staggering award in this case is appropriate.

ARGUMENT

I. THE REFUSAL TO DISMISS THIS CASE ON FORUM NON CONVENIENS GROUNDS IS CONTRARY TO THIS COURT'S DIRECTIVE IN KINNEY SYSTEM, INC. v. CONTINENTAL INSURANCE CO.

The seminal case governing the law of forum non conveniens in Florida is Kinney System, Inc. v. Continental Insurance Co., 674 So. 2d 86 (Fla. 1996). In Kinney, this Court significantly departed from prior forum non conveniens jurisprudence, finding a "strong public necessity requiring [the Court] to revisit [an earlier] decision" that had made forum non conveniens dismissals difficult if not impossible. 674 So. 2d at 88. The Kinney Court was concerned that Florida had become a dumping ground for cases "where the litigation's connection to Florida interests [was] tenuous at best," and observed that "[n]othing in our Constitution compels the taxpayers to spend their money . . . for the rankest forum shopping by out-of-state interests." Id. at 93.

Given this compelling public policy concern, the Court in Kinney adopted the federal doctrine of forum non conveniens. This doctrine requires a balancing of public and private factors

in deciding whether to hear a case, taking account of the principle that while Florida has an interest in resolving matters "with a strong nexus to Florida[]," that interest "wane[s] to the degree such nexus is lacking." Id. at 90. Most importantly for present purposes, the Court expressly ruled that this new doctrine was to be effective immediately and applied to pending as well as future cases. Thus, the Court specifically held that the new rule was to be applied to "all actions not yet final at the trial level." Id. at 94. Only where the parties "have substantially completed discovery or are now ready for a Florida trial" should courts retain the pre-Kinney rule. Id.

The decision by the trial court in this case, affirmed by the Court of Appeal, contravenes both the policy concerns and explicit direction of the Kinney Court. The trial court below held that Owens Corning's motion to dismiss under the doctrine of forum non conveniens was untimely because the company had waited over three years to file its motion. The Court of Appeal refused to review this determination on the ground that it was "constrained by the limited record at bar." The record in this case is more than sufficient, however, to support a reversal of the trial court's ruling, because the record shows that the parties had by no means "substantially completed discovery" and that the case could not sensibly be characterized as "ready for trial" at the time the motion was filed. Rather, the parties

were just beginning to identify and develop the relevant facts at that time.

The pertinent events, as set forth more fully in the Brief of Owens Corning, can be simply stated. In December 1993, a form complaint was filed by the plaintiff alleging that he suffered from asbestosis as a result of exposure to defendants' products. The form complaint provides no information on product identification, the plaintiff's residence, or the work sites where exposure was alleged to have occurred. In May 1994 the plaintiff responded to a first set of interrogatories, identified certain products and work sites, and revealed that he was not a Florida resident. The case, however, remained inactive until August 1996, when it was placed on the trial calendar for January 1997. On October 1, 1996, Owens Corning moved to dismiss on forum non conveniens grounds, prior to any depositions being taken or any further discovery or other activity occurring in the case.

The record is in fact clear, therefore, that the parties did not begin the process of preparing the case for trial until after the motion had been filed. Thus, it was not until after the motion was filed that, most significantly:

- The plaintiff first advised the defendants and the Court that he had mesothelioma rather than asbestosis and sought an expedited trial;

- The plaintiff filed an amended exposure sheet significantly changing the work sites and states where exposure was alleged to have occurred; and

- The deposition of plaintiff and his expert occurred.

In short, discovery and trial preparation did not begin in this case until after the forum non conveniens motion was submitted. Neither the medical diagnosis nor the critical exposure information had been disclosed at the time of filing. No depositions had taken place -- nor could they have since the plaintiff had not disclosed the basic information necessary for further discovery to proceed. Thus, there was simply no basis for the trial court to conclude that this case fell into the narrow exception carved out in Kinney for cases where a dismissal would result in a waste of "resources already expended." 674 So. 2d at 94.[3/]

[3/] Had the trial court analyzed the motion to dismiss under the federal standard -- as Kinney instructed -- the court would similarly have had to conclude that the motion should be granted. Under federal principles, motions to dismiss for forum non conveniens may be timely even though submitted years after a case is filed, so long as "extensive discovery on the merits" has not taken place and so long as the court has not yet "expended significant resources on the case." 17 James Wm. Moore et al., Moore's Federal Practice § 111.90 (3d ed. 1998). See also Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G., 955 F.2d 368, 372-73 (5th Cir. 1992) (upholding decision of trial court to dismiss third party action on forum non conveniens grounds more than 8 years after initial case was filed, in spite of the fact that considerable work had already been done in the case in that forum); Mercier v. Sheraton Int'l, Inc., 981 F.2d 1345, 1356 (1st Cir. 1992) (forum non conveniens dismissal upheld

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The litigation pattern described above is not anomalous. To the contrary, this is the manner in which most, if not all, asbestos litigation is resolved in Florida. The volume of asbestos cases in Florida is enormous and growing. For example, over 9,000 claims have been filed and resolved against CCR member companies in the past, and there are over 2,500 claims now pending in Florida courts against the member companies of the CCR. Many of these pending claims were filed more than two years ago and have remained inactive since then.[4/] Only 511 claimants have trial dates, and their cases were filed as far back as 1988. It is often impossible to determine whether a case that has been filed involves Florida residents or not, or whether the alleged exposure took place here or out-of-state.[5/] These issues do not take shape until the case becomes active, which typically occurs only once the case is placed on a trial list. Thus, of the

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3/ (...continued)
where the court concluded that the taking of two depositions did not constitute "substantial merits discovery").

4/ As a result of the injunction issued in Georgine v. Amchem Products, Inc., 878 F. Supp. 716 (E.D. Pa. 1994), rev'd sub nom. Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231 (1997), Georgine class members were enjoined from suing CCR member companies until the injunction was lifted in 1997. Accordingly, in 1997 over 1200 claims were filed against CCR member companies in Florida, and most of these claims added CCR member companies as defendants in pre-existing cases.

5/ Indeed, the complaints in older cases do not even mention the plaintiff's state of residence. Moreover, the exposure sheets provided by plaintiffs' counsel are often incomplete.

approximately 2,500 claims now pending against CCR members, the state of residence of the plaintiff is unknown with respect to almost 1,000 claims. In other words, in this litigation, the motion to dismiss on forum non conveniens grounds was timely made, even though submitted years after the case was originally begun, since it is the trial setting and not the filing of the complaint that triggers the expenditure of resources by the parties and the courts.

Asbestos litigation represents a significant part of the problem that the Kinney Court sought to address -- cases of out-of-state claimants clogging the Florida courts, causing considerable backlogs, and resulting in the imposition of unreasonable burdens on Florida taxpayers.[6/] The Kinney Court was clear that it intended its new rule to deal with this backlog, as well as future filings, by applying its decision to "all actions not yet final at the trial level." 674 So. 2d at 94. The decision of the trial court below ignores this directive and by doing so saddles the courts of this state with thousands of asbestos cases, which have no connection to Florida, for years and years to come. Allowing this decision to stand would

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[6/] Indeed, around the time that Kinney was decided, CCR members defended a case in Florida involving Alaskan residents who alleged asbestos exposure in Alaska and Washington. The case took several weeks of trial court time, and involved an appeal to the Florida appellate courts. See Snoozy v. U.S. Gypsum Co., 695 So. 2d 767 (Fla. 3d DCA), rev. denied, 700 So. 2d 688 (Fla. 1997).

significantly undermine Kinney and largely eviscerate the important new forum non conveniens rule articulated there. The decision is inconsistent with the only other post-Kinney case that addresses this issue, Sun & Sea Estates, Ltd. v. Kelly, 707 So. 2d 863 (Fla. 3d DCA 1998) (holding that the trial court abused its discretion in denying motion to dismiss in the absence of meaningful discovery), and contrary to the underlying policy concerns enunciated by the Kinney Court. For these reasons, the decision to retain this case in Florida should be reversed.[1/]

II. THE PUNITIVE DAMAGES AWARD IN THIS CASE IS EXCESSIVE UNDER FLORIDA LAW AND THE UNITED STATES CONSTITUTION.

The punitive damage award in this case -- $31 million to a single individual plaintiff, in addition to $1.8 million in compensatory damages -- is impermissibly excessive under both Florida law and the Due Process Clause of the federal constitution. We believe that this Court need not reach the

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1/ Because the long-term implications of the trial court's decision are so significant for so many cases, the fact that this case has already been tried should not bar this Court from reconsidering the decision at this time. In Kinney, this Court explicitly directed that future court rulings not frustrate the purposes for which the Court adopted the more restrictive federal forum non conveniens doctrine. 674 So. 2d at 93-94. Heeding that directive, and recognizing that the ruling in this case will bear directly and weightily on the very type of litigation that concerned this Court in Kinney, the Court should reconsider the lower court's decision. Cf. id. at 88 ("This is a proper concern for us to address pursuant to our inherent authority to modify the common law when demanded by fundamental right or public necessity.") (footnote omitted).

constitutional issue, however, because the punitive damage award -- equal to more than 17 times the compensatory damage award -- is plainly impermissible under § 768.73 of the Florida Statutes, which imposes a heavy presumption against any punitive damages award that is more than three times the compensatory award. In refusing to enforce that statutory limit, the courts below erred both in the process they used to review the award and in the substance of their excessiveness ruling.

A. Florida's Statutory Cap on Punitive Damages Represents a Necessary Partial Solution to the Problem Presented By Unbridled Punitive Damages Awards and Needs To Be Enforced by the Courts.

1. The Problem of Unrestrained Punitive Damages.

Over the past 15 years, punitive damage awards have developed into an enormous public policy problem. Courts and commentators throughout the country have recognized that the potential harms caused by indiscriminate punitive awards include: "a chilling effect on the research and development of new products, excessive and socially wasteful precautions by potential defendants, deterrence of socially desirable activities, removal of useful products from the market, and manifest individual injustice and violations of constitutional liberties."[8/] There is considerable

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[8/] Developments in the Law -- The Civil Jury, 110 Harv. L. Rev. 1408, 1514-15 (1997) (footnotes omitted).

evidence, moreover, that the incidence of arbitrary and excessive punitive damage awards has been increasing.[9/]

The problem is particularly acute in the context of mass tort litigation, including asbestos litigation. Mass produced goods can be distributed to thousands, if not millions, of users. An allegedly defective product can lead to numerous suits against its manufacturer, each of them seeking both compensatory and punitive damages. The asbestos case load, for example, is measured in the tens or even hundreds of thousands of claims. As of the last week of 1997, thus, pending claims against some asbestos defendants exceeded 100,000, and numbered in the tens of thousands against others.[10/] New filings, moreover, continue unabated.[11/]

9/ See, e.g., Cass R. Sunstein et al., Assessing Punitive Damages (with Notes on Cognition and Valuation in Law), 107 Yale L. J. 2071, 2076 & n.16 (1998) (citing "systemic evidence" of unpredictability and growth of punitive awards); Kimberly A. Pace, Recalibrating the Scales of Justice Through National Punitive Damage Reform, 46 Am. U. L. Rev. 1573, 1586-87 (1997) (citing "out-of-control" punitive awards and finding that "juries are awarding unjustified and excessive punitive damages with increasing frequency").

10/ Mealey's Litig. Rep.: Asbestos, Vol. 13, No. 7, p. 12 (May 1, 1998). Indeed, Owens Corning reportedly had over 170,000 pending claims as of the end of 1997. Id.

11/ In 1997, for example, Owens Corning reported that it had received over 35,000 new claims, only a slight drop from the approximately 36,000 new claims that it received in 1996. Mealey's Litig. Rep.: Asbestos, Vol. 13, No. 7, p. 12 (May 1, 1998).

In such circumstances, punitive damage award raise extremely serious problems both for public policy and for the defendants' constitutional rights. First, in mass tort litigation, the sums awarded in compensatory damages alone can be enormous. In the asbestos litigation as a whole, billions of dollars have been and will continue to be expended just to defend and to settle the claims for compensatory damages.[12/] Such compensatory damages are by themselves enough to punish the defendants for their allegedly wrongful conduct and to deter them and others from similar conduct in the future.[13/]

Second, punitive damage awards threaten the availability of funds to pay compensatory damages to future plaintiffs. Indeed, the cumulative effect of such awards has already driven numerous asbestos producers into bankruptcy.[14/] The simple fact is that

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12/ One estimate in 1991 was that $7 billion had been spent to date on settlement of asbestos claims. Christopher F. Edley, Jr. & Paul C. Weiler, Asbestos: A Multi-Billion-Dollar Crisis, 30 Harv. J. on Legis. 383, 390 & n.12 (1993) (citing Suzanne L. Oliver & Leslie Spencer, Who Will the Monster Devour Next?, Forbes, Feb. 18, 1991, at 75, 79). The last seven years, moreover, have added considerably to that sum.

13/ As Professors Edley and Weiler put it: "Seven billion dollars of tort punishment meted out in the past decade is more than enough to express society's outrage about any misdeeds that may have taken place a half century ago and to create a powerful deterrent against similar misdeeds in the future." Edley & Weiler, supra note 12, at 396.

14/ Since the commencement of this litigation in the mid-1970s, at least 20 asbestos defendants have filed for protection under the U.S. bankruptcy laws, including Advocate Mines of Canada,

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"[p]unitive damages compete with compensatory damages for the increasingly scarce resource of asbestos defendants and their insurers. * * * [D]istribution of punitive damages to current claimants creates a risk of exhausting funds before potential claimants discover their injuries."[15/] Present claimants who seek compensation for their injuries should not be permitted to receive windfall punitive damages at the price of precluding future claimants from obtaining even compensatory damages.[16/]

Finally, multiple claims for punitive damages create a significant potential for aggregate punitive awards that far exceed what is "reasonably necessary to punish and deter" the allegedly wrongful conduct. Pacific Mutual Life Insurance Co. v.

14/ (...continued)
Amatex, Brunswick Fabricators, Carey-Canada, Celotex, Continental Producers, Eagle-Picher Industries, Forty-Eight Insulations, H.K. Porter, Hillsborough, Keene, Johns-Manville, M.H. Detrick Co., Nicolet, North American Asbestos, Pacor, Raymark Industries, Raytech Corp., Standard Insulation and Unarco (as well as its parent company UNR Industries). See, e.g., Edley & Weiler, supra note 12, at 390 & n.13 (partial list of bankrupt defendants).

15/ Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary, 102d Cong., 2d Sess. 132-33 (1992) [hereinafter Hearings] (statement of Hon. William W. Schwarzer); see also Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (Mar. 1991) [hereinafter Rehnquist Comm. Rep.] at 32-33.

16/ Punitive damages are a "windfall to a fully compensated plaintiff" and are, by design, not intended to compensate the plaintiff. E.g., City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981).

Haslip, 499 U.S. 1, 22 (1991).[17] In the asbestos litigation, thus, the hundreds of thousands of claims all seek to punish the same alleged misconduct -- that the defendants allegedly knew, or should have known, of a possible link between asbestos and health hazards, but did not warn users of such dangers.[18] Nevertheless, multiple awards of punitive damages totaling hundreds of millions of dollars have been assessed against a number of asbestos defendants as punishment for their alleged misconduct.[19]

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[17] See, e.g., Hearings, supra at 136-37 (statement of Hon. William W. Schwarzer); Rehnquist Comm. Rep. at 32-33; Dennis N. Jones et al., Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process, 43 Ala. L. Rev. 1, 1-3 (1991); Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice, American College of Trial Lawyers, at 20-26 (Mar. 3, 1989); John C. Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 147 (1986); Richard A. Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37 (1983); David G. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 50 (1982).

[18] Moreover, these punitive damages have been repeatedly awarded against asbestos defendants decades after the allegedly wrongful conduct occurred, thereby punishing only officers who did not participate in such conduct and shareholders who did not benefit from it.

[19] A brief review of published data shows that, even as early as 1982, punitive damages awards in asbestos cases had become staggering. A survey included in an appendix to the opinion in Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314 (5th Cir. 1985), showed that, by the end of 1982, in trials of 147 asbestos cases, a total of $39.47 million in punitive damages had been awarded to 21 plaintiffs. Id. at 1338. In more recent years, punitive damages awards have grown even higher. For instance, in 1990, the Celotex Corporation stated in affidavits that, between

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This Court, indeed, has recognized "the potential for abuse when a defendant may be subjected to repeated punitive damage awards arising out of the same conduct." W.R. Grace & Co. -- Conn. v. Waters, 638 So. 2d 502, 505 (Fla. 1994). Other courts too have recognized these various dangers.[20/]

2. Measures to Reform Punitive Damages Awards. The problems presented by unrestrained punitive damage awards have been recognized and addressed by a growing number of states and courts across the country. An array of states have enacted laws to restrain punitive damages awards.[21/] Such laws generally

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[19/] (...continued)
September 1988 and March 1989, over $10 million had been awarded against it for punitive damages, compared to $15 million in judgments for compensatory damages during the same period. Edwards v. Armstrong World Indus., Inc., 911 F.2d 1151, 1155 (5th Cir. 1990). Thereafter, a $6.1 million punitive award against Celotex was upheld in Glasscock v. Armstrong Cork Co., 946 F.2d 1085 (5th Cir. 1991), and Celotex then filed for bankruptcy. Recent punitives verdicts in the asbestos litigation dwarf even these high amounts. Indeed, Owens Corning submitted an affidavit prior to trial in this action demonstrating that punitive judgments totalling $112 million had been entered against Owens Corning through January 1996.

[20/] See, e.g., In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 751 (E. & S.D.N.Y. 1991), vacated on other grounds, 982 F.2d 721 (2d Cir. 1992), on rehearing, 993 F.2d 7 (2d Cir. 1993); In re Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 419 (J.P.M.L. 1991) (In asbestos litigation, "'exhaustion of assets threatens and distorts the process,'" and "'future claimants may lose altogether'"); In re Asbestos Prods. Liab. Litig. (No. VI), 1996 U.S. Dist. LEXIS 13850, at *5 (E.D. Pa. Sept. 16, 1996) (same).

[21/] See, e.g., Ala. Code § 6-11-21 (limiting punitive damages to $250,000 in most cases); Colo. Rev. Stat. § 13-21-102
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impose caps on the size of the award (for example, $250,000 or $350,000), on the ratio between punitive and compensatory damages (such as two or three times actual damages), or on the number of awards for the same course of conduct.

In the same vein, courts have adopted rules designed to mitigate the dangers presented by punitive damage claims in the mass tort context. For example, Judge Charles R. Weiner, who is the transferee judge in MDL No. 875 -- the multidistrict litigation involving all asbestos personal injury claims in the federal courts -- has for several years deferred resolution of punitive damages claims in all federal court asbestos cases that he has remanded for trial.[22/] The Judicial Panel on Multidistrict

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[21/] (...continued)
(limiting punitive damages to the amount of actual damages in most cases; allowing trial court to raise the amount to three times actual damages if certain factors are present); Conn. Gen. Stat. § 52-240(b) (limiting punitive damages to twice the among of compensatory damages); Ga. Code Ann. § 51-12-5.1(e) (providing that only one punitive damage award may be recovered from a defendant in an action arising from the same product liability allegations, regardless of the number of causes of action which may arise from a defendant's act or omission); 735 Ill. Comp. Stat. 5/2-1115.05 (limiting punitive damages to three times economic damages); N.J. Stat. § 2A:15-5.14 (limiting punitive damages to five times the compensatory damages or $350,000, whichever is greater); Va. Code Ann. § 8.01-38.1 (limiting punitive damages to $350,000 per plaintiff).

[22/] E.g., In re Asbestos Prods. Liab. Litig. (No. VI), MDL No. 875 (E.D. Pa. March 30, 1993) (noting that "the issue of punitive damages must be resolved at a further date with regard to the entire MDL action, and therefore any claims for punitive or exemplary damages are hereby ORDERED severed from those cases and retained by the Court within its jurisdiction.").

Litigation, moreover, has repeatedly affirmed Judge Weiner's practice.[23/] Similarly, in state court in Philadelphia, punitive damages claims in asbestos cases are deferred to be tried, if at all, at some later date when all compensatory claims have been resolved.

Section 768.73 of the Florida Statutes fits squarely within these nationwide efforts to address the problems created by unrestrained punitive damages awards.[24/] The Florida law was enacted as a part of the Tort Reform and Insurance Act of 1986, 1986 Fla. Laws ch. 86-1 60, § 1 et seq. Section 768.73 establishes a presumption that any punitive award more than three times the amount of the compensatory award is excessive, and provides that a defendant is entitled to remittitur of any amount in excess of the limitation "unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact." § 768.73, Fla. Stat.

23/ E.g., In re Asbestos Prods. Liab. Litig. (No. VI), MDL No. 875 (J.P.M.L. May 18, 1993) (ordering, in a Conditional Remand Order, that "all claims in the above-captioned actions except the severed claims for punitive or exemplary damages be remanded").

24/ Likewise, the U.S. Supreme Court in recent years has recognized both procedural and substantive restraints on punitive damages awards. E.g., Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994), cert. denied, 517 U.S. 1219 (1996); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20-24 (1991); BMW of North America, Inc. v. Gore, 517 U.S. 559, 568, 574-75 (1996).

This cap on punitive damage awards was one of many changes designed to "remedy deficiencies in Florida's tort law" and "balance the competing interests of injured parties and their need for compensation against society's willingness and ability to pay."[25/] The bill's staff analysis summarizes the purposes of the Act as, inter alia, "to ensure that injured persons recover reasonable damages and to encourage the settlement of civil actions prior to trial."[26/]

In short, § 768.73 constitutes part of a nationwide trend toward imposing meaningful limits to check excessive awards of punitive damages. As remedial legislation designed to fix this problem, moreover, § 768.73 should be liberally construed in order to make sure that, as implemented by the courts, it in fact achieves that intended purpose. Delta Air Lines, Inc. v. Ageloff, 552 So. 2d 1089, 1092 (Fla. 1989); Morrow v. Duval County Sch. Bd., 514 So. 2d 1086, 1088 (Fla. 1987).

25/ Pamel Burch Fort et al., Florida's Tort Reform: Response to a Persistent Problem, 14 Fla. St. U. L. Rev. 505, 555 (1986).

26/ House of Representatives, Committee on Health Care and Insurance, Staff Analysis of Ch. 86-160, Laws of Florida (July 16, 1986) (reproduced by Florida State Archives) at p. 3. An analysis of tort reform prepared by the Florida Senate Committee on Commerce in 1986, moreover, specifically addresses the difficulties posed by punitive damage awards. Florida Senate Committee on Commerce, A Review of Historical Analysis -- Current Perspectives of the Doctrine of Joint and Several Liability and A Review of Tort Reform (March 1986), at 33-50 (Interim Report Tort Reform).

As we now show, the lower courts in this case failed to apply the Florida statute consistent with its terms, much less its remedial purpose, and the judgment below should therefore be reversed.

B. The Punitive Damages Award Here Is Excessive.

The $31 million punitive damages award here -- more than 17 times the actual damages -- is plainly excessive under both Florida law and the due process clause of the federal constitution. In failing to set it aside, the courts below failed both (1) in the process they employed to review the award, and (2) in their substantive analysis of the relevant facts and circumstances.

1. The Courts Below Failed to Give "Close Scrutiny" to the Award and To Examine the Relevant Circumstances. The courts below made two principal procedural errors in this case: they failed to give close enough review to the jury's award, and they failed to consider many of the relevant factors bearing on the excessiveness of the award.

First, both the trial court and the Court of Appeal improperly gave enormous deference to the jury's verdict. There are at least two indicia in the statute that such deference is inappropriate. First, § 768.74(3) unambiguously sets forth "the intention of the Legislature that awards of damages be subject to close scrutiny by the courts and that all such awards be adequate

and not excessive."[27] Section 768.73(1)(c), in turn, makes it clear that this "close scrutiny" is fully applicable to awards of punitive damages, not just compensatory sums. Second, § 768.73 imposes a mandatory duty on the reviewing courts to reduce the amount of the award in excess of the cap unless the plaintiff proves the amount justified by "clear and convincing evidence" -- the highest evidentiary standard of proof that applies to civil litigation.[28]

Both the trial and appeal courts utterly failed to engage in the "close scrutiny" required by these provisions. For its part, the trial court simply adopted a view of the evidence most favorable to the plaintiff and concluded that "a substantial award of punitive damages was necessary to 'hurt' but not bankrupt Owens-Corning." It did not give any consideration to any of the evidence of record favorable to Owens Corning or discuss why a punitive award within the range of the statutory cap (which could have been higher than $5 million) would not

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[27] The legislature also explained that while reasonable actions of a jury are a "fundamental precept of American jurisprudence," review of damage awards by the courts "provides an additional element of soundness and logic to our judicial system and is in the best interests of the citizens of this state." § 768.74(6).

[28] That standard is not met unless the evidence is "precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue." In re Standard Jury Instructions, 575 So. 2d 194, 196 (Fla. 1991).

adequately punish Owens Corning. In effect, the court determined only that the jury had a basis for imposing some punitive damage award.

The trial court's error was aggravated by the Court of Appeal, which subjected the trial court's overly deferential tilting of the evidence against Owens Corning to cursory review under the most deferential standard, finding simply that the trial court's failure to reduce the award was not "an abuse of discretion." The Court of Appeal justified that narrow scrutiny by citing to cases that involved challenges to punitive damage awards under the common law.[29/] But because §§ 768.73 and 768.74 were intended precisely to tighten the lenient standard of review applicable under the common law, it is clear that the Court of Appeal's reliance on that line of authority -- and its consequent failure to apply close scrutiny to the award -- was error requiring reversal here.[30/]

[29/] Siedlecki v. Arabia, 699 So. 2d 1040, 1041 (Fla. 4th DCA 1997); Bill Branch Chevrolet, Inc. v. Burkert, 521 So. 2d 153, 155 (Fla. 2d DCA 1988).

[30/] In addition to being inconsistent with the applicable statutes, the lower courts' failure to carefully scrutinize the jury's punitive award has constitutional implications. The U.S. Supreme Court has held that due process requires judicial review of the amount of a punitive damages award assessed against a defendant by a jury. Honda Motor Co. v. Oberg, 512 U.S. 415, 420, 432 (1994), cert. denied, 517 U.S. 1219 (1996). In this regard, the Supreme Court has emphasized the need for "both 'meaningful and adequate review by the trial court' and subsequent appellate review." Id. at 420. The Court was

(continued...)

Second, both the trial court and the Court of Appeal failed to consider many of the factors that bear on the excessiveness of a punitive damages award. Although § 768.73 does not enumerate the relevant facts and circumstances, a considerable number of state supreme courts from across the country have articulated lists of factors that lower courts should examine in reviewing the amount of a punitive damages award.[31] Just recently, for example, Maryland's highest court listed the following factors: the gravity of the defendant's wrong, the defendant's ability to pay, the deterrence value of the award, the size of statutory civil and criminal penalties for similar (or worse) conduct, the size of other punitive damages awards for similar conduct, the amount of punishment already imposed on the defendant, whether multiple awards are being imposed for the same conduct, the amount of the plaintiff's litigation costs, and the ratio of

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[30] (...continued)
concerned with "the possibility that a culpable defendant may be unjustly punished; evidence of culpability warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing." Id. at 429. The punitive award here has not been subjected to adequate review under this standard.

[31] See, e.g., Labonte v. Hutchins & Wheeler, 678 N.E.2d 853, 862-63 (Mass. 1997); Dixie Ins. Co. v. Mooneyhan, 684 So. 2d 574, 585-86 (Miss. 1996); Guaranty Nat'l Ins. Co. v. Potter, 912 P.2d 267, 273-74) (Nev. 1996); Grynberg v. Citation Oil & Gas Corp., 573 N.W.2d 493, 504-05 (S.D. 1997); Crookston v. Fire Ins. Exch., 817 P.2d 789, 808 (Utah 1991); Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co., 557 N.W.2d 67, 81 (Wis. 1996).

punitive to compensatory damages. Bowden v. Caldor, Inc., 1998 Md. LEXIS 407, at *25-52 (June 2, 1998).[32/]

The lower courts in this case failed to examine many of those factors. The courts did not consider, for example, whether the award would have any meaningful deterrent effect. Likewise, they did not consider the potentially applicable civil or criminal penalties for similar (or worse) conduct.

In short, the courts below failed to conduct a close review of the award in light of all of the relevant factors. These procedural errors require reversal of the judgment.

2. The Lower Courts Erred in Their Analysis of the Factors Bearing on the Excessiveness of the Award. To the extent that the lower courts in this case did consider some of the relevant facts and circumstances, those courts erred in their conclusion that plaintiff had met his heavy burden of showing, by clear and convincing evidence, that the award is not excessive.

First, the Court of Appeal, like the trial court, found that Owens Corning's degree of reprehensibility justified the $31 million award. Neither of the lower courts, however, explained

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[32/] At least some of those factors, moreover, must be examined in order to review the constitutionality of a punitive damages award. See BMW of North America, Inc. v. Gore, 517 U.S. 559, 574-75 (1996) (relevant "guideposts" include the degree of reprehensibility of the defendant's conduct, the disparity between the harm or potential harm suffered by plaintiff and the punitive award, and the difference between the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct).

why Owens Corning's conduct was qualitatively worse than conduct that would justify punitive damages in the first place -- that is, in an amount within the statutory cap. Under Florida law, a plaintiff must satisfy a very high standard before recovering any punitive damages; such damages are available only for "willful and wanton misconduct equivalent to criminal manslaughter," Como Oil Co. v. O'Loughlin, 466 So. 2d 1061, 1062 (Fla. 1985), or "conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights of others," W.R. Grace & Co. -- Conn. v. Waters, 638 So. 2d 502, 503 (Fla. 1994). Owens Corning has argued that plaintiff was not entitled to any punitive damages under Florida's high standard,[33/] given that there was no evidence that Owens Corning acted with actual malice and the intent to harm people.[34/] In any event, however, the conduct alleged in this case was not significantly different from conduct that Owens Corning has been charged with in thousands of asbestos cases, including a large number of cases in Florida that

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[33/] See Jeep Corp. v. Walker, 528 So. 2d 1203, 1205 (Fla. 4th DCA 1988) ("It would appear that the Florida Supreme Court has all but eliminated punitive damage awards in products liability cases."); Chrysler Corp. v. Wolmer, 499 So. 2d 823, 826 (Fla. 1986) (leaving open the question of whether punitive damages could be imposed upon manufacturer of an inherently dangerous product that knows that the product is likely to cause injury or death but nevertheless continues to market it).

[34/] See Owens Corning's Initial Brief to Court of Appeal at pp. 37-44.

have never led to the imposition of a punitive damage award approaching this level. In short, the lower courts had no basis to conclude that Owens Corning's conduct was so reprehensible that it justified a punitive award in an amount that the Florida legislature has found to be presumptively excessive.

Second, the Court of Appeal admitted that the $31 million award is "facially disproportionate to the amount of compensatory damages awarded," but held that a high ratio was justified by the high degree of the "actual harm" done to the plaintiff. The Court of Appeal, in other words, found that a punitive award may greatly exceed a compensatory award if the compensatory award is high enough.

This reasoning is directly contrary to the U.S. Supreme Court's reasoning. In Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991), the court stated that a punitive damages award of "more than 4 times the amount of compensatory damages" might be "close to the line" of constitutional impropriety. 499 U.S. at 23-24. And while the Court rejected a "mathematical bright line" at that number, id. at 18, it has suggested that significantly higher ratios may comport with due process only in cases involving low compensatory awards -- "if, for example, a particularly egregious act has resulted in only a small amount of economic damages" or cases "in which the injury is hard to detect or the monetary value of noneconomic harm might

have been difficult to determine." BMW of North America, Inc., v. Gore, 517 U.S. 559, 582 (1995). In short, contrary to the decision below, the high compensatory award in this case justifies a smaller rather than a larger ratio of punitive to compensatory damages.

Third, the Court of Appeal took comfort in the fact that the award in this case "was less than 2% of Owens-Corning's net worth." We note that Owens Corning vigorously contests this conclusion. But even if this had been proven true by "clear and convincing evidence," it in fact would strongly confirm that the award is grossly excessive. A punitive award constituting 2% of Owens Corning's net worth would permit the company to pay comparable sums to only 50 more plaintiffs before going bankrupt -- and yet Owens Corning presently faces many thousands of claims (not to mention future claims), all of which allege virtually the same conduct that was alleged by the plaintiff here. Such a result would deprive the vast majority of asbestos claimants of the chance to obtain any compensation from Owens-Corning.[35/]

[35/] The Supreme Court has recognized that the "'impact [of a punitive award] on innocent third parties'" is a relevant factor for a court to consider in reviewing a punitive award. Haslip, 499 U.S. at 20 (citing with approval Hammond v. City of Gadsden, 493 So. 2d 1374, 1379 (Ala. 1986). As explained above (supra at pp. 13-14 & n.13-15), numerous courts and commentators have recognized the danger that unbridled and repetitive punitive damage awards against the diminishing number of solvent asbestos defendants will, by depleting the assets available for recovery, preclude future asbestos claimants from obtaining even compensatory damages for their injuries.

In short, to the extent the courts below addressed the pertinent factors, they erred in their analysis. The factors not considered by the courts also strongly suggest that the award here is grossly excessive. For example, the punitive award here far exceeds the penalties imposed by the State of Florida or the Federal Government upon a manufacturer for failing to adequately warn consumers about the hazards associated with a particular product or upon an employer for failing to comply with applicable standards for workplace safety.[36/] Likewise, the punitive damages award in this civil case is much larger than the maximum fines that Florida imposes for criminal violations of its statutes.[37/] Second, as noted above, the punitive award in this case is excessive in comparison to other punitive damages awards in the asbestos litigation, which do not begin to approach the $31 million punitive verdict imposed by the jury here.[38/] Third, the

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[36/] See § 442.123, Fla. Stat. (allowing a civil penalty of up to $1,000 for an employer's failure to make available safety data sheets on toxic materials present in the workplace); 29 U.S.C. § 666 (a)-(b) (allowing a civil penalty of up to $70,000 for a willful or repeated violation of OSHA regulations, including those which require employers to inform employees of chemical hazards in the workplace).

[37/] See, e.g., § 542.21(2), Fla. Stat. (violations of antitrust laws by corporation are punishable by a fine not exceeding $1 million); § 893.20, Fla. Stat. ($500,000 fine for continuing criminal enterprise conviction): § 775.083(1), Fla. Stat. (standard fines for felony convictions ranging from $5,000 to $15,000).

[38/] According to Owens Corning, these punitive awards have (continued...)

award plainly goes far beyond any meaningful deterrent, given both that the sums already paid by Owens Corning dwarf its small profits from the product in question,[39] and the fact that the disputed conduct occurred so long ago.[40]

When all of the relevant facts and circumstances are considered, it is clear that the plaintiff here cannot carry his burden of justifying by clear and convincing evidence, an award of more than three times the compensatory damages -- much less an award of $31 million. As such, there should be no need for this Court to reach the point that the award is also plainly excessive as a matter of due process.[41]

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[38] (...continued)
averaged about $1.7 million per plaintiff. Owens Corning's Initial Brief to Court of Appeal at p. 54.

[39] Owens Corning showed at trial that the total profits it earned from sales of Kaylo were only $1.4 million, whereas it has spent more than $300 million of its own funds on the asbestos litigation and expects to spend more than $1.7 billion in the future to resolve other asbestos claims. See Owens Corning's Initial Brief to Court of Appeal at p. 47 (citing 1/21/97 Tr. 90-91, 108-10). The U.S. Supreme Court has suggested that "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss" and "the existence of other civil awards against the defendant for the same conduct" are relevant factors in reviewing these awards. Haslip, 499 U.S. at 22.

[40] Maryland's highest court, thus, has specifically held that "'deterrence is . . . less a factor inasmuch as the three defendants involved with the punitive damages issues have not sold asbestos products for more than twenty years.'" Bowden, 1998 Md. LEXIS 407, at *32-33 (citation omitted).

[41] See n.32 supra, citing BMW.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

J. Bruce Welch /djm

J. Bruce Welch, Florida Bar No. 071102
Hawkins & Parnell, LLP
4000 Sun Trust Plaza
303 Peachtree Street, N.E.
Atlanta, GA 30308-3243
(404) 614-7400

John D. Aldock
Richard M. Wyner
Dana J. Martin
Shea & Gardner
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Lawrence Fitzpatrick
John G. Gaul
Center for Claims Resolution
504 Carnegie Center-Second Floor
Princeton, NJ 08540

Attorneys for Amici Curiae Member
Companies of the Center for
Claims Resolution

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by U.S. mail, first class, postage prepaid, this 18th day of June, 1998, to the following:

Larry L. Simms, Esquire
Mark A. Perry, Esquire
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel for Appellant
Owens Corning

Arthur England, Jr., Esquire
Greenberg Traurig Hoffman
Liposs Rosen & Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131

Counsel for Appellant
Owens Corning

Steven R. Berger, Esquire
Berger & Chafetz
Penthouse One
Metro Bank Building
9350 South Dixie Highway
Miami, Florida 33156

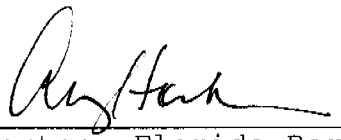
Counsel for Appellant
Owens Corning

Donna L. Harvey, Esquire
Speziali, Greenwald, Kueny & Hawkins
6925 Lake Ellenor Drive
Suite 600
Orlando, Florida 32809

Counsel for Appellant
Owens Corning

John F. Venable, Esquire
Venable and Venable, P.A.
205 So. Hoover Blvd., Ste. 403
Tampa, Florida 33609

Counsel for Appellee
Deward Ballard



Amy Horton, Florida Bar No. 0962600

Shea & Gardner
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for Amici Member Companies
of the Center for Claims Resolution