SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : PART 50

- X

IN RE: NEW YORK CITY ASBESTOS LITIGATION :

: Index No.:

THIS DOCUMENT RELATES TO : To Be Assigned

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ALL ASBESTOS CASES :

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- X

Peter H. Moulton, J.S.C.

This Decision and Order accompanies the Case Management Order signed by the Court on today's date. The Case Management Order governs various pre-trial and trial procedures in the New York City Asbestos Litigation ("NYCAL"). All asbestos personal injury and wrongful death cases with a nexus to New York City are lodged in NYCAL, which from its inception has been located in the First Judicial District.[1] A case management order governing how asbestos cases are processed and tried has long been a fixture in NYCAL. Prior case management orders have been amended from time to time.

The Case Management Order signed today arises from a motion brought by defendants in 2015, and is a product of more than a year's discussion between the Court and the plaintiffs' and defendants' bars that regularly appear in NYCAL.

The purpose of the instant Decision and Order is to describe the process that led to the issuance of the new Case

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[1]The First Judicial District encompasses New York County, i.e. Manhattan.

Management Order, and to explain some of the changes made to the prior, now superceded, case management order.[2] A brief recitation of the recent history of NYCAL is useful in understanding both the Court's discussions with the NYCAL bar, and the results of those discussions as embodied in the Case Management Order signed today.

I. A BRIEF HISTORY OF THE NEW YORK CITY ASBESTOS LITIGATION

NYCAL began with an Administrative Order dated October 23, 1987, issued by the Hon. Milton L. Williams, who was then the Deputy Chief Administrative Judge for the Courts of New York City. The longevity of NYCAL, and other similar dedicated asbestos courts in federal and state jurisdictions, reflects the fact that asbestos litigation is the nation's longest-running mass tort.

The longevity of asbestos litigation in the United States arises from several factors. Prominent among these factors is the omnipresence of asbestos in the economic life of the nation in the late nineteenth century and particularly in the first three quarters of the twentieth century. During the latter period particularly, asbestos was intensively mined, and it was used in a in a broad array of products as a fire and heat retardant.

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[2]The Case Management Order signed on today's date will be designated herein by capitalization. Where this Decision and Order refers to a superceded case management order, that order will appear in lower case. The acronym CMO used herein refers generically to case management orders.

Asbestos is a general term for several types of mineral silicates. Because of its insulating and fireproofing properties, asbestos has been used as a binding agent in thousands of building products, including cement, wall board and vinyl floor tile. It was used as an insulator for boilers and valves of all kinds, and as a component of friction products such as car brakes and clutches. These examples are not exhaustive. Even after the deployment of asbestos began to decline in the 1970s, the various products that historically contained asbestos remained in the nation's residential and commercial buildings, ships, product inventories, and other locations.[3]

A second reason for the persistence of asbestos litigation is that the diseases that arise from asbestos exposure have long latency periods; symptoms may not appear until thirty or more years after exposure. The diseases and injuries caused by asbestos are mesothelioma, other cancers, asbestosis and pleural abnormalities. Mesothelioma, which is always fatal, is a cancer of the lining of the chest or abdomen for which asbestos is virtually the only known cause. Lung cancer is the other frequently claimed cancer in asbestos litigation, although there are connections between asbestos and other forms of cancer as well. Asbestosis is

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[3] Indeed, asbestos is still used legally in a few products in the United States. An outright ban was considered at the federal level, and then abandoned in the early 1990s. For a description of this episode, see Fatal Deception, Michael Bowker, 2003, at 145-49.

chronic lung scarring caused by the inhalation of asbestos. Pleural plaques, pleural thickening, and pleural effusions all refer to abnormalities of the pleura, the membrane that lines the inside of the chest wall and covers the outside of the lung. Pleural abnormalities may or may not develop into serious illnesses.

A third reason that asbestos litigation persists is because other types of compensation schemes for victims of asbestos exposure have either proven inadequate, or have never been attempted in this country.[4]

The ubiquity of asbestos, the drawn out etiology of asbestos-caused disease, and the absence of compensation alternatives resulted in what the U.S. Supreme Court has called the "elephantine mass of asbestos cases." (Ortiz v Fireboard Corp., 527 US 815, 821 [1999].) NYCAL, with its case management orders and the common law that has been developed by its judges, is an attempt to manage the portion of the "elephantine mass" of cases that have a nexus to New York City. Justice Helen Freedman, an innovative and hardworking jurist, was the first Coordinating Judge of NYCAL. It is a tribute to her that she conceived and implemented many of the case management tools still used today in NYCAL to ensure an orderly process of preparation of cases for

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[4]For a case study of one such legislative effort, see Dust Up, Asbestos Litigation Reform and the Failure of Commonsense Policy Reform, Barnes, 2011.

settlement and trial. Among the choices made by Justice Freedman, in consultation with the plaintiffs' and defendants' bars, was to categorize cases by the severity of a plaintiff's disease. Cases where the plaintiff had been exposed to asbestos, but had not developed symptoms of serious disease, were placed on an inactive docket, so that plaintiffs who were suffering from serious disease could be heard. Various other case management tactics were deployed and set forth in the operative case management order. Many of these procedures were different than the usual procedures for discovery, motion practice, and trial preparation set forth in the CPLR.

After some experience as NYCAL's Coordinating Judge, Justice Freedman came to conclude that punitive damages should not be allowed in the litigation. In 1996 she "deferred" all punitive damages in NYCAL claims indefinitely. As she herself has said, this was "tantamount to dismissal" of all punitive damages claims. (See Freedman, Selected Ethical Issues in Asbestos Litigation, 37 SW. U. L. Rev. 511, 528.) Justice Freedman instituted the deferral for several reasons, including what she considered the inefficacy of imposing punitive damages to change corporate behavior that had occurred, in some cases, thirty to fifty years before. Additionally, the deferral was imposed at a time of mounting numbers of bankruptcies of companies that mined and manufactured asbestos. Punitive awards, it can be argued, might deplete a

corporation's resources to such an extent that there would not be sufficient money to pay compensatory damages for thousands of plaintiffs in the litigation pipeline whose claims are yet to be heard, to say nothing of thousands of other potential victims whose claims are inchoate. The deferral was a policy choice by a conscientious and creative judge in charge of managing an unruly caseload. The laws of this state confer no explicit judicial power to categorically "defer" a type of damages claim.

In 2013, plaintiffs moved to modify the CMO to allow punitive damages claims. Defendants opposed the motion and sought to continue the deferral. They also cross-moved to vacate and declare inapplicable the entire CMO.

In April 2014, the plaintiffs' motion was granted, and the defendants' cross-motion denied, by then-Coordinating Judge Sherry Klein Heitler. Plaintiffs were thus enabled to seek punitive damages. (See Matter of New York City Asbestos Litigation, 2014 WL 10714009 [referred to herein as the "April 2014 Decision"].) In the immediate wake of the April 2014 decision, no trial judge in NYCAL granted a plaintiff's application to assert a punitive damages claim.

The defendants' bar claimed that the April 2014 Decision threw out of balance the compromises made by both sides embodied in the Case Management Order. Defendants argued that they had agreed to live with a Case Management Order that allowed for expedited

procedures to process numerous cases in return for a deferral of punitive damages. Defendants accordingly appealed the April 2014 Decision.

On March 2, 2015, while the appeal was pending, I was appointed Coordinating Judge of NYCAL upon Justice Heitler's appointment as head of the Office of Court Administration's Office of Policy and Planning. The defendants' bar sent me a letter welcoming me to NYCAL. Defendants' letter also sought to initiate a complete overhaul of the case management order. Plaintiffs also sent me a letter welcoming me to NYCAL. In their letter plaintiffs stated that the CMO required at most some minor touch ups, and not the major surgery contemplated by defendants' letter.

Soon thereafter, defendants moved for a stay of all NYCAL litigation for sixty days, with exceptions made for certain cases where the plaintiff had a terminal disease. Defendants' purpose in proposing a stay was to allow time for a thoroughgoing renegotiation of the existing case management order.

On July 9, 2015, while this motion for a stay was pending before me, Justice Heitler's April 2014 decision was affirmed as modified by the First Department. (Matter of New York City Asbestos Litigation, 130 AD3d 489.) The First Department found that the Coordinating Judge in NYCAL had the power to amend the CMO to allow for the assertion of punitive damages, but held that defendants were entitled to more notice and discovery of a

plaintiff's claim for punitive damages than provided by the April 2014 decision and subsequent decisions. The First Department stayed any claim for punitive damages pending further modification of the CMO to provide for "procedural protocols by which plaintiffs may apply for permission to charge the jury on the issue of punitive damages." (Matter of New York City Asbestos Litigation, supra, 130 AD3d at 490.)

The First Department's affirmance of the April 2014 decision did not explicitly state that plaintiffs in NYCAL have a right to punitive damages. Rather the decision focused on the power of the Coordinating Justice to reintroduce punitive damages. The First Department states near the end of the decision:

> [We] ... remand the matter to the Coordinating Justice for a determination of procedural protocols by which plaintiffs may apply for permission to charge the jury on the issue of punitive damages. We note, however that this decision does not preclude the Coordinating Justice, after consultation with the parties, from reconsidering other aspects of the April Order, including the determination whether to permit claims for punitive damages under the CMO, in the exercise of the court's discretion, either upon application or at its own instance.

(130 AD3d at 490.)

The First Department affirmed that portion of the April 2014 Order that dismissed defendants' cross-motion to vacate the CMO.

In a Decision and Order dated August 28, 2015 ("the

August 2015 Order"), I denied the defendants' motion for a stay of proceedings in NYCAL, but I agreed to "participate with the parties in a thoroughgoing reevaluation of the Case Management Order." (Matter of New York City Asbestos Litigation, 2015 WL 10889996 at 1 (2015).

> The court will attempt to gain consensus of plaintiffs and defendants in any change to the Case Management Order. While the court's goal will be to craft a new Case Management Order that is wholly consented to by both sides, there may be too great a division between the two sides on certain issues to reach that goal. It may also be that a consent document will be impossible to attain given the diversity of opinion *within* the defendants' or the plaintiffs' respective camps. In any event, the reevaluation of the Case Management Order with the plaintiff and defense bars will inform the court's understanding of the parties' varied positions, and will assist the court, if necessary, in drafting a Case Management Order in the absence of complete unanimity among the parties.

(Id.)

II. CONSULTATION WITH THE NYCAL BAR

The August 2015 Order set forth a framework for discussions. In a litigation with so many parties, an initial challenge was how to negotiate in a way that gave voice to the diversity of opinion among parties in NYCAL. Because it "is not possible to meet and have a coherent discussion with hundreds of participants" I determined that the plaintiffs' and defendants' bars would each have four "CMO representatives" that would act as

point persons in our discussions. (Id.) I chose the four liaison counsel who have long served in that capacity in NYCAL: Jordan Fox and Charles Ferguson for plaintiffs and Judy Yavitz and Bob Malaby for the defendants.[5] I anticipated, correctly, that these four people, who have an excellent reputation in the litigation and deep institutional memory of NYCAL, would be invaluable. I instructed the parties to choose two more representatives each. The defendants chose Kristen Fournier and Peter Dinunzio and the plaintiffs chose Jerry Kristal and Bob Komitor. As an alternative CMO representative, should one of the primary representatives be unable to attend a meeting, the plaintiffs chose Brian Early. Mr. Early ended up attending most of my meetings with the CMO representatives, but no one objected to his presence or the fact that plaintiffs' representatives numbered five at most meetings to defendants' four.

The nine CMO representatives, all experienced members of the NYCAL bar, negotiated with great integrity and creativity. They engaged with the interests of the other side. As summarized below they spent cumulatively weeks in discussion with the Court and each other. Their contributions to the process were invaluable.

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[5]The CMO has long provided for liaison counsel in NYCAL, who "facilitate communications among the Court and counsel, minimize duplication of effort, coordinate joint positions, and provide for the efficient progress and control of this litigation." (Case Management Order § VIII.A.)

The August 2015 Order set forth a provisional schedule which was quickly abandoned by the Court and by the CMO representatives. Instead, the CMO representatives met in the Fall of 2015 to prepare for discussions with me with me and engaged in preliminary negotiations overseen by NYCAL's Special Master, Shelley Rossoff Olsen.[6]

The CMO Representatives and I began to meet in February 2016.

After several negotiating sessions, the CMO representatives and I began to explore the possibility of trying to engraft an early settlement protocol into the CMO. To see if fostering early settlement was a realistic goal, between March 17 and June 2, 2016, I held eight all-day settlement conferences for cases in the October 2015 in extremis trial cluster. These cases were not yet scheduled for trial.[7]

The settlement conferences did not result in many settlements. Certainly the first settlement conference days were too ambitious and attempted to address too many cases. On two of

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[6]Ms. Olsen has been an great asset to NYCAL as Special Master and her insights proved invaluable during the course of the CMO discussions.

[7]The "in extremis" designation is NYCAL's term for a trial preference as these cases are defined by the plaintiff's severe illness. Clusters of such cases are sent to NYCAL trial judges in April and October under the prior case management order. This practice is continued in the Case Management Order signed on today's date. The term "accelerated" has been substituted for "in extremis," in the new Case Management Order, but the ordering of this type of case remains the same.

the early dates, some defendants' counsel went unseen and therefore wasted an afternoon or more. On other occasions negotiations went well past six o'clock. However, even when I altered the format of the negotiations, few settlements were effected. The parties diverged significantly in their valuations of claims, and in the discount that should be afforded for early settlement.

As with the CMO that it supercedes, the new Case Management Order signed on today's date contemplates regular settlement discussions with the Court and the Special Master "at such times and upon such conditions as the Court or the Special Master deems appropriate." However, from the relatively ineffectual settlement experiment described above, I concluded that including a detailed early settlement protocol in the CMO would have little utility, and that settlements in NYCAL, at least at this time, would largely be driven by the imposition of firm trial dates. It may be that a new Coordinating Judge will have greater success in creating a culture of early settlement in NYCAL.

After this early settlement experiment I resumed negotiations with the CMO representatives and we continued to meet in the Summer and Fall. I circulated drafts based on our discussions on June 13, June 24, August 18, and September 26, 2016. The September 26 draft included various optional sections, referred to as "plug ins," that concerned the biggest points of disagreement. The object of breaking out these plug ins was to see if the plaintiffs and defendants would be willing to trade certain

items. For example, plaintiffs' counsel were very concerned that Justice Heitler's order on punitive damages be enforced. Defendants' counsel opposed the restoration of punitive damages, but sought limitations on joinder of plaintiffs' cases, and other changes to the CMO. Plaintiffs, of course, did not want these items sought by defendants.

The CMO draft and plug ins were widely circulated among the defendants' and plaintiffs' bars. The question was: would the parties be willing to trade some of these items in order to arrive at a new CMO that would attract the consent of all or most of the parties in NYCAL? In an email dated December 21, 2016, the defendant CMO representatives informed the Court that the answer to that question was "no," they could not agree to any combination of the proposed plug ins. The plaintiffs did not unequivocally say whether they would agree to any combination of the plug ins, but they made it clear to the Court that they were very concerned by several of the plug ins.

We returned to our discussions to see if the parties' concerns could be addressed. I circulated a draft on January 26, 2017, and subsequently met with a large group of defendants' counsel at the law firm Wilson Elser on February 1, 2017. A frank exchange of views ensued. Later that same day I met with a smaller group of plaintiffs' counsel, resulting in a similarly frank exchange of views. I invited counsel to send me written correspondence if they felt that they were unable to get their

points across at these meetings. Several of the defendants' firms did so.[8]

On February 28, 2017, I posted a further modified draft CMO on the NYCAL website for notice and comment. The parties were given until April 19 to submit written comments. Plaintiffs submitted a single combined letter, and a separate letter from one plaintiff's firm. Defendants' firms representing a large number of NYCAL defendants sent a total of ten letters. On May 9, 2017, I convened a public "Town Hall" at the courthouse at 60 Centre Street for any lawyers working in NYCAL to provide further comments on the draft CMO. Finally, I had two conference calls on both June 6 and 8, with plaintiffs' and defendants' CMO representatives, respectively.

During the later stages of our discussions I informed the parties that I was not going to hold a vote to gauge the parties' consent. On April 4, 2017, I emailed the CMO representatives:

> I have decided not to hold a vote where the parties indicate, up or down, consent to the document. There are three related reasons that I have come to this decision.
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> First, after discussing how to craft a new CMO for more than a year with the parties in NYCAL, I am convinced that there are numerous parties, possibly a

[8]In general, during the course of these fifteen months of discussions with the Court, the defendants' bar displayed a greater diversity of opinion than did the plaintiffs' bar, reflecting their differing products, defense strategies and/or insurance coverage.

majority, who will not consent to a draft CMO that is close to a reasonable middle ground. Because the plaintiffs and defendants are so far apart, I am concerned that making consent the primary goal would necessarily privilege one side or the other. In other words, we can only end up with a CMO to which the defendants (or some defendants) consent, or, conversely, with a CMO to which the plaintiffs (or some plaintiffs) consent. As far as I can see, we will not end up with a document that garners significant support from both sides.

Second, consent is a legal fiction in this context, and it loses whatever force it has in the absence of unanimous, or near unanimous, buy-in by the parties. How can consent in Spring of 2017 bind a party for all time? We don't know yet how the new provisions of a CMO will play out in practice, and once a party sees how the CMO works in practice that party may want to withdraw (or bestow) its consent. Also: When new parties come into NYCAL, do they have to give their consent before they will be governed by the CMO?

Third, consent of the parties is not required before a coordinating judge can issue a Case Management Order.

I still think that seeking broad-based consent was a worthwhile effort. Thank you for all of your work to achieve a consent CMO. If all or a supermajority of current parties in NYCAL were able to give their consent that would be an important indication that we would all begin the next phase of NYCAL litigation with some unanimity about how to conduct the litigation. However, while consent might have been desirable, it is not necessary. It is more important to issue a CMO that is fair to both sides and that is what I will do once we complete this final phase.

The result of the discussions described above is the Case Management Order signed on today's date.

III. THE CASE MANAGEMENT ORDER SIGNED ON TODAY'S DATE

Case management orders are issued in coordinated proceedings, such as New York City's Asbestos Litigation, pursuant to New York's Rules for Trial Courts section 202.69(c)(2). CMOs are commonly used to regularize and streamline pleadings and discovery, and, in mass torts, to prioritize cases for trial. As noted above, a case management order has been in place in NYCAL since soon after its inception and has been amended from time to time.

In their comments on the draft CMO, and at the May 9, 2017, Town Hall meeting, counsel for a number of defendants contended that consent of the parties is necessary before a court may issue a case management order that differs from the CPLR. The instant Case Management Order, as was the case with all its predecessors, certainly differs from the CPLR. Additionally, the Case Management Order contains a provision allowing for plaintiffs' assertion of punitive damages -- with due process protections as required by the First Department's modification of Justice Heitler's April 2014 Order. In letters submitted during the notice and comment period, a considerable number of defendants' firms stated that their clients would not consent to any CMO that

contained a provision allowing for a plaintiff's assertion of punitive damages. Therefore, these defendants argue that the instant Case Management Order is a nullity as it is not clothed in unanimous consent.

This argument fails for several reasons.

First, this argument has been considered, and rejected, by Justice Heitler and the First Department. Justice Heitler, in her April 2014 decision lifting the deferral of punitive damages in NYCAL, denied defendants' cross-motion to vacate the CMO. She considered defendants' argument that withdrawal of consent invalidated the CMO, and she rejected the argument. She held that she had "the authority to issue case management orders upon consultation with the parties, and [was] not required to obtain their consent to the CMO as a whole or for any of its parts for it to be a valid order of the court." (Matter of New York City Asbestos Litigation, 2014 WL 10714009 at 6.) This denial of the cross-motion was affirmed by the First Department. The First Department's affirmance on this point is binding precedent.

Second, section 202.69(c)(2) states that a coordinating judge may "periodically issue case management orders after consultation with counsel." (Emphasis added.) It says nothing of any requirement of consent.

Third, the animating purpose of section 202.69, which governs the coordination of related actions pending in more than one judicial district, is to allow the court system to address an

intractable case management problem. In such circumstances, the usual means of processing cases, via the CPLR, just isn't going to work. Accordingly, section 202.69 recognizes that the usual procedural rules that apply to most cases will have to be modified in order to provide plaintiffs and defendants their day in court in a high volume litigation.

Accordingly, CMOs in NYCAL have always differed from the CPLR in numerous ways. Here is a non-exhaustive list: Multi-plaintiff complaints are barred. Plaintiffs can amend complaints without leave of court in certain circumstances not contemplated by CPLR 3025. Standard form interrogatories may be answered once by a defendant who frequently appears in NYCAL and will serve in other plaintiffs' cases where that defendant is named. Discovery is routinely allowed -- indeed, it is presumed to continue -- after filing of a note of issue. Plaintiffs agree to use prior depositions of corporate representative and forgo taking EBTs in each case. The parties can bring summary judgment motions on the eve of trial.[9] These departures from the CPLR, and many others, which have long been included in NYCAL case management orders, attempt to address issues that permeate asbestos litigation, including the fact that many plaintiffs are dying, rapidly, and need to get to trial, and the fact that defendants have a legitimate interest in avoiding needlessly repetitive discovery.

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[9]In practice, only defendants bring summary judgment motions in NYCAL.

While consent of the parties to a new Case Management Order is not necessary, consultation between the Court and counsel is. After consulting with counsel as described above I have made certain changes that are embodied in the new Case Management Order. The major changes are summarized below. This list does not exhaust all of the changes made to the CMO, and concerns mostly the areas of greatest disagreement among the parties.

A. Limitations on Joinder

One tool that asbestos courts have long used is joinder of numerous plaintiffs' cases for trial. In the early days of asbestos litigation, scores, even hundreds of cases, were joined for trial. Asbestos judges gradually moved away from such mega trials. (See Freedman, Selected Ethical Issues in Asbestos Litigation, 37 SW. U. L. Rev. 511, 528; Schwartz, A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress over the Past Decade and Hurdles You Can Vault in the Newt, 36 Am. J. Trial Advoc. 1, 13-14.) In recent years, courts in NYCAL have tended to join ten or fewer cases for trial, and the trend has continued to move downward. Some NYCAL trial judges currently join no more than two or three cases, and trials of a single plaintiff's case are not uncommon.

In recent years, the First Department has generally allowed NYCAL trial courts broad discretion in joining cases for trial. (E.g. Matter of New York City Asbestos Litigation

(Konstantin/Dummitt, 121 AD3d 230, 241-3 [2014] [affirming consolidation of seven plaintiffs' cases].) Plaintiffs cited this authority in arguing that any limitation on joinder was unwarranted.

Defendants contend that joinder of numerous plaintiffs' cases for trial results in unwieldy and unfair trials where the jury is overwhelmed with information specific to each defendant and is charged with differentiating each plaintiff's claims against an array of defendants. They also contend that multi-plaintiff joinders inevitably result in lengthy trials, and lengthy voir dires. Defendants contend that limiting joinder will actually resolve more cases because each trial and voir dire will be shortened, freeing up trial time for other cases.

Based on my own observation in NYCAL over more than two years, which included presiding over two asbestos trials, there is some merit to defendants' arguments. As noted above, NYCAL judges in recent years have largely come to limit the number of plaintiffs' cases that they join. Accordingly, the Case Management Order signed on today's date provides that the number of trials that may be joined will be limited to two, or a maximum of three upon plaintiff demonstrating certain criteria.[10] I come to this conclusion even though NYCAL trial judges have done an excellent

[10]Additionally, any case where a plaintiff asserts punitive damages at the time joinder motions are entertained by a trial judge must be tried as a single plaintiff case and cannot be joined to any other case.

job using various techniques to help jurors navigate multi-party cases and such techniques have been approved by the First Department. (See Matter of New York City Asbestos Litigation (Konstantin/Dummitt, 121 AD3d 230, 241-3.)

However, defendants' contention that limitations on joinder will actually increase the number of trials that will be resolved remains untested. For that reason, there is a new section in the CMO that allows trial parts to be opened in other counties upon the entry of the Appropriate Administrative Order. This provision provides a potential safety valve to ensure that NYCAL is able to process cases with sufficient speed.

B. Punitive Damages

For the reasons stated in Justice Heitler's well-reasoned April 2014 decision, I adhere to her determination to allow the assertion of punitive damages in NYCAL and decline to reinstitute a deferral of punitive damages. As discussed at greater length in her decision, the right to assert a claim for punitive damages upon a proper showing is one that is afforded all personal injury plaintiffs in New York State.

However, pursuant to the First Department's direction, the Case Management Order signed on today's date gives due process protection to defendants in the form of discovery and various pre-trial decision points that provide notice as to whether a plaintiff will be asserting punitive damages against a given defendant.

Defendants have the right under New York Law to move for summary judgment dismissing claims for punitive damages. (E.g. Britt v Nestor, 145 AD3d 544 [2016].) Because cases where a plaintiff asserts punitive damages may not be joined with any other plaintiff's case, joinder motions will provide final definitive notice concerning whether a plaintiff will be proceeding with a punitive damages claim.

C. The Limited Use of Hearsay for Article 16 Purposes

During the CMO discussions, defendants argued at length that they have a difficult time demonstrating that a non party should be on the verdict sheet for Article 16 purposes. Frequently, corporate representatives for such nonparty witnesses are difficult to locate, or to produce at trial. Such witnesses may even be non-existent. Given the longevity of asbestos litigation, discussed above, many corporate representatives with personal knowledge about a company's asbestos-related products, and the warnings, if any, given to the users of such products, have either retired or died. Accordingly, defendants sought to relax hearsay rules to admit some types of information that might otherwise be barred by strict adherence to New York State's rules of evidence. In our discussions, defendants argued that they should be allowed to use both interrogatory answers and depositions of nonparties to prove that nonparties should be included on the verdict sheet for Article 16 purposes.

Defendants note that plaintiffs use defendants' answers to interrogatories at trial. Therefore, defendants reason, these interrogatory answers are sufficiently reliable to be used by other defendants, at least for the limited purpose of demonstrating that a nonparty sold a product that contained or used asbestos, and failed to warn about the dangers of asbestos.

The Court agrees that this limited Article 16 relief is warranted given the age of asbestos litigation and the difficulty defendants face in proving that other nonparty entities should be considered by the jury as potential causes of a plaintiff's disease. Interrogatory answers concerning product identification are reliable in that it is against the answering entity's interest to admit that its product contained asbestos, or required that asbestos be used to further the product's purpose. An admission concerning a failure to warn is similarly against interest. Defendants in NYCAL generally are required to answer the standard form interrogatories contemplated by the CMO only once. The interrogatory answers are then used in all NYCAL cases. NYCAL trial judges have on occasion allowed the admission of nonparty interrogatory answers for these limited purposes. During our discussions, the plaintiffs' CMO representatives expressed some flexibility toward this proposal. Plaintiffs never explicitly consented to the use of interrogatory answers in this manner, but it was something they indicated that they would be willing to consider in order to reach a consent document. Certainly,

plaintiffs preferred this proposal by a wide margin to the proposal, discussed below, allowing nonparty depositions to come into evidence. For these reasons, the Case Management Order signed on today's date allows for the use of interrogatory answers as described above.

I ultimately decided that I did not have the power, in the absent consent of the parties, to relax hearsay exceptions for deposition testimony. Of course, a settled defendant's deposition testimony can be admissible in certain circumstances for Article 16 purposes under CPLR 3117(2). However that section applies only to settled defendants, and contains other requirements. To expand the use of depositions at trial, the Court and the CMO representative discussed at length the possibility of engrafting into the CMO the provisions of the Federal Rules of Evidence, specifically FRE 804(a)(b)(1), 807. These sections can significantly relax the usual rules of hearsay to allow for the admission of deposition testimony of nonparties, not just settled nonparties, if the deposition testimony is deemed sufficiently reliable by a trial judge. Plaintiffs were vehemently opposed to this proposal. I understood the defendants' argument for inclusion of FRE 804(a)(b)(1), 807, and I added language to the draft CMO encompassing these rules. The proposal had a certain "off the shelf" quality, since NYCAL trial courts would be able to rely on Federal Courts' interpretation of these evidentiary rules. Using the Federal Rules, rather than a categoric admission of certain

documents, would also preserve judges' roles as evidentiary gatekeepers.

Despite the potential merit of the proposal, I ultimately decided that I could not include the proposed language in the absence of consent to the CMO by the parties in NYCAL. Such broad-based consensus would be necessary because the Court of Appeals has not looked favorably on any judge-made attempts to expand hearsay exceptions. (E.g. Nucci v Proper, 95 NY2d 597 [2001].) Indeed the Third Department has considered, and rejected, the use of FRE 807 in state court, at least in the context of a criminal prosecution. (See People v Wiasiuk, 32 AD3d 674 [2006].) As it became clear during our discussions that there was no possibility of achieving consent, I abandoned the Federal Rules proposal.

4. Bankruptcy Trust Claims

One result of asbestos litigation is that many companies that mined or manufactured asbestos have gone into bankruptcy in response to mounting personal injury and wrongful death claims. During the initial Johns-Manville Chapter 11 bankruptcy in 1982, the Bankruptcy Court and counsel created a trust for compensation of victims of asbestos exposure to Johns-Manville's products. The trust assumed the debtor's present and future asbestos liabilities and a "channeling injunction" directed all asbestos personal injury and wrongful death claims to seek compensation from the trust. Provisions for the creation of such trusts was later codified in

section 524 of the Bankruptcy Code. By 2000 there were sixteen asbestos bankruptcy personal injury trusts; by 2011 there were nearly sixty. More trusts have been created since then.

The trusts have some differences in their procedures, modes of proof, and compensation levels, but generally a claimant submits a proof of claim setting forth facts tending to show that he or she qualifies for trust compensation. Frequently, entitlement to asbestos bankruptcy trust compensation does not require proof that exposure to a particular product was a substantial factor in causing the claimant's disease. The trusts pay a percentage of the historical amounts the bankrupt entity paid while still a defendant in the tort system, via settlement or verdict, for its share of plaintiffs' exposure. Trusts do not pay "full value" of these historic amounts. Instead they pay a percentage. The percentage varies widely among the various trusts. In general, the value of trust claims are substantially lower than the amounts plaintiffs could obtain from the bankrupt entity when it was still subject to tort liability. Current tort awards against viable asbestos defendants also tend to be a great deal higher than what a plaintiff can obtain from bankruptcy trusts.

Concurrent pursuit of bankruptcy trust compensation and tort system compensation is sometimes mischaracterized as "double dipping." That is a misnomer. Rather, the existence of the two means of compensation reflects that workers who contract an asbestos-related disease often had a work history that included

various jobs and worksites and exposures to numerous products that contained or used asbestos. Some potential defendants have gone bankrupt, some have not.

The CMO in NYCAL has long required that plaintiffs file all intended bankruptcy trust claims prior to trial, according to certain deadlines. The Case Management Order signed on today's date retains that language. The materials used by claimants to seek compensation from bankruptcy trust are generally discoverable in NYCAL. (See Matter of New York City Asbestos Litigation, 37 Misc3d 1232[A] [2012].)

NYCAL Defendants have an interest in plaintiffs' applying to as many bankruptcy trusts as possible for at least two reasons. First, the amounts recovered may be used to set off damages awarded in a judgment after trial. Second, the existence of bankruptcy trust claims may lead to evidence that helps a defendant at trial place a bankrupt defendant on a jury verdict sheet for Article 16 purposes.

Defendants in asbestos litigation nationwide have long been concerned that plaintiffs did not timely make bankruptcy trust claims because the plaintiffs wanted to avoid set offs and the use of bankruptcy trust materials to create more "shares" on jury verdict sheets. This concern came to the fore in a decision published in 2014 by the Bankruptcy Court in the Western District of North Carolina. (Matter of Garlock Sealing Technologies, LLC, 504 BR 71.) In that decision the court had to determine how much

money should be placed in the bankruptcy trust of Garlock Sealing Technologies, a manufacturer of various asbestos-containing products and a long-time defendant in asbestos litigation around the country. The Bankruptcy Court ordered discovery which the Court found demonstrated that plaintiffs asserting tort claims against Garlock often delayed filing bankruptcy trust claims so that Garlock would not have information about other potential shares. For the fifteen settled asbestos cases where the Bankruptcy Court ordered targeted discovery, the Court found that Garlock demonstrated that exposure evidence concerning bankrupt entities was withheld in every case. Plaintiffs in these cases made claims against bankruptcy trusts only after settling with Garlock. The Bankruptcy Court found that this practice prejudiced Garlock in the tort system and caused it to overpay in settlements and verdicts. The Bankruptcy Court therefore funded the trust at a much lower level than recommended by the claimants' committees in the bankruptcy litigation. (Id.)

While some commentators found that the record in Garlock did not, in fact, show the kind of claim "suppression" decried by the Bankruptcy Court (see, e.g. Penington, "A Look at the Record in Garlock's Celebrated Estimation Order" Mealey's Abestos Bankruptcy Report, July 2014), others found that Garlock had lifted the veil from a widespread fraudulent practice that had harmed asbestos defendants and required greater transparency in the asbestos bankruptcy claims process (see, e.g. Abelman, "A Look Behind the

Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co." Mealey's Asbestos Bankruptcy Report, November 2015.) Defendants' firms around the country have proposed an array of procedures to ensure that all potential bankruptcy trust claims are filed by plaintiffs before trial. Some states have enacted statutes embodying such changes. Some asbestos courts have modified their case management orders to do so. (E.g. Shelley, Cohn & Arnold, The Need for Further Transparency Between the Tort System and Section 534(G) Asbestos Bankruptcy Trusts, 23 Widener L.J. 675. [2014].)

During the course of my negotiations with the CMO representatives, asbestos bankruptcy trust issues were discussed but were not a point of emphasis. Changes to the CMO requiring earlier submission of trust claims, and greater exchange of information about potential trust claims that a plaintiff had decided to forgo, constituted one of the "plug ins" considered by the parties. However, defendants were more concerned in negotiation about plug ins that concerned limitations on joinder and Article 16 relief. During the notice and comment period, and during the Town Hall, some defendant firms did state their position that there should be greater transparency concerning Bankruptcy Trust issues. Again, other issues such as defendants' contention about the necessity of consent to the CMO, limitations on joinder, desire for Article 16 relief, changes to discovery, opposition to the return of punitive damages, etc. received greater emphasis from

the defendants' bar. This is not to say that defendants gave up on bankruptcy trust issues, only that such issues were not at the forefront.

In addition to defendants' interest, the Court itself has an interest in assuring that the two systems of compensation for asbestos exposure do not run athwart each other. However, a number of procedural changes urged by defendants' advocates around the country in response to Garlock would stop NYCAL litigation dead in its tracks. For example, some proposals include staying the litigation while the parties argue about whether a given bankruptcy trust claim is in fact a viable option for a plaintiff. Such roadblocks are unwarranted in a litigation where plaintiffs often die before they get their day in court.

Instead, the Case Management Order signed on today's date continues the deadlines for submitting intended asbestos bankruptcy trust claims, and contains new language requiring plaintiffs to report to the court and defense counsel any post-deadline abestos bankruptcy trust claims, and confer with the court before filing such claims. That will enable the Coordinating Judge to monitor any behavior that could indicate that plaintiffs are seeking to hide such trust claims.

The Case Management Order signed on today's date embodies a balancing of plaintiffs' and defendants' interests. The termination of the deferral of punitive damages claims in 2014,

while wholly supported by the law, was a change that threw NYCAL off of equipoise. It was a change that negatively affected the defendants. Some of the changes made in the Case Management Order signed on today's date are designed to balance the return of punitive damages with changes to the CMO that benefit the defendants.

CONCLUSION

The existing case management order shall remain in place until July 20, 2017, the effective date of the Case Management Order signed on today's date. This constitutes the Decision and Order of the court.

Dated: New York, NY
June 20, 2017

Hon. Peter H. Moulton
JSC