Civil Number **A139597**

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

ROSE-MARIE GRIGG and MARTIN GRIGG,

Plaintiffs, Respondents, and Cross-Appellants,

v.

OWENS-ILLINOIS, INC.,

Defendant, Appellant, and Cross-Respondent.

Appeal from the Alameda County Superior Court
Hon. Ioana Petrou and Jo-Lynne Q. Lee
Case Number RG12629580

AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, NFIB SMALL BUSINESS LEGAL CENTER, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF APPELLANT OWENS-ILLINOIS, INC.

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STATEMENT OF INTEREST

Amici are organizations whose members are named as asbestos defendants and their insurers. *Amici* have a significant interest in this case because a decision upholding the trial court's rulings on foreseeability and punitive damages will have unsettling consequences for the nationwide asbestos litigation landscape. This Court would stand against the vast weight of national legal authority if it failed to acknowledge that disease from take-home asbestos exposure was unforeseeable until the mid-1960s at the earliest, and more realistically later than that depending on the occupation involved, the family member's overall dose, and the potency of the specific fiber type. And this Court would defy the broad trend toward restraining punitive damages in asbestos cases—and particularly cases such as this one with no evidence of malice or oppression, no foreseeability of harm, and a longtime asbestos defendant that has already paid hundreds of millions of dollars in judgments and settlements. This trend recognizes the reality that the asbestos mass tort is not going away anytime soon, and that courts ought to adopt a more discriminating legal standard for the award of punitive damages that more effectively allocates resources and manages asbestos proceedings.

STATEMENT OF THE CASE

Amicus adopts Defendant-Appellant's Statement of the Case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

From the standpoint of broader California and national asbestos litigation, the trial court's rulings in this case are troubling. Nearly every court to take up the issue has ruled

that a corporate defendant did not have a duty to warn about take-home or spousal exposure to asbestos in the 1950s. The reason is that experts in science and medicine at the time did not know there was such a risk, even from much higher exposures than the Plaintiff, Ms. Grigg, would have received. The first study documenting actual take-home disease from heavy asbestos exposure in a factory setting was not until 1965; the federal agencies governing workplace safety did not require clothes-changing when working with asbestos until 1972; and the first study documenting disease from take-home exposure stemming from insulation work—the exposure alleged in this case—did not appear until 1978. The trial court misunderstood the nature of the developing knowledge of asbestos medicine, and as a result imposed knowledge that did not exist until the 1970s on a company's actions in the 1950s.

Amici provide below a fuller discussion of the developing history of asbestos medicine and, in particular, the risks associated with take-home exposures from insulation work. We also address the shell game plaintiffs' experts are engaged in to support a duty in these circumstances—they do so by ignoring first principles of toxicology (the dose makes the poison), by failing to acknowledge the changing landscape of knowledge of asbestos risks, and by misusing the generic notion of clothes-changing requirements in the early 20th century. This backdrop will give the court a better understanding of how far off the mark the trial court's imposition of duty was here.

The trial court's punitive damages ruling is equally troubling but unfortunately not as unusual—some California courts are allowing plaintiffs to seek punitive damages far

too freely, and in ways that actually impair the purposes of exemplary damages instead of advancing them. Many courts around the country have ceased allowing these windfall awards to inure to the benefit of a few plaintiffs and to the great detriment of others who do not yet have claims to file. California needs to reexamine the policy of applying punitive damages in asbestos cases and develop a more logical and fair approach.

ARGUMENT

I. NO REASONABLE COMPANY COULD HAVE FORESEEN THE RISK OF TAKE-HOME ASBESTOS EXPOSURE IN THE 1950S

"[The] foreseeability of danger and the ability, through a warning, to ameliorate that danger, *must be based on facts that were known or should have been known to the defendant at the time the warning should have been given*, not what was learned later." *Georgia Pac., LLC v. Farrar* (Md. 2013) 69 A.3d 1028, 1035 (emphasis added). A manufacturer of a product should not be held responsible for failure to warn of a risk that no one knew existed at the time. To hold otherwise would be to effectively punish a defendant for failing to predict the future and result in "super strict liability."

Applying this axiom to the instant case, no competent medical or occupational health evidence supports the notion that Owens-Illinois, Inc. could have foreseen during the 1950-1958 time period that a family member of a user of its products was at risk of asbestos-related disease due to take-home exposure to the products. It is undisputed, even by Plaintiffs' own experts, that risks associated with potential take-home asbestos exposures were not even *referenced* in the medical literature until 1960. *See* Ellenbecker Trial Tr. at 74-75 (RT6071-72); Horn Trial Tr. at 80 (RT6676). It is also undisputed that

the first actual study documenting incidents of take-home asbestos disease did not appear until 1965. Plaintiffs glibly conflate two unrelated strands of medical knowledge by asserting that prior to 1960, scientists were concerned about take-home exposure to *other harmful substances*, and were generally aware that asbestos was hazardous in high-exposure occupations. But there is no evidence that any concerns over a risk of take home-disease extended to asbestos; indeed, the risks of *direct* exposure to asbestos insulation were still largely unknown until the mid-1960s. The state of the art for take-home asbestos exposures is uncontested, and it shows no one foresaw the risks in the 1950s. For these reasons, the trial court was profoundly wrong in concluding that foreseeability of harm was a triable issue of fact.

A. Medical Science Had Not Yet Identified a Risk of Asbestos Take-Home Disease Between 1950 And 1958

1. The Nature of Medical Knowledge

Medical knowledge of risk is not a monolithic thing that appears all at one time and in one place, forever thereafter dictating safety precautions. Like all forms of knowledge, occupational health knowledge often develops slowly, from the first hints of potential risks, usually derived from "case reports" of a worker becoming ill, to more focused studies of the types of occupations and exposures producing disease, and only later expanding to explore less obvious potential risks such as take-home or other remote exposures.

Companies should not be held to a higher standard than the medical practitioners of the time. The literature and occupational health publications did not warn about

asbestos take-home exposures from insulation work in the 1950s, because such exposures *were not known to pose such a risk.* Courts cannot impose duties and burdens on companies that medical science did not support at the time. The discussion below provides an overview of how asbestos knowledge developed to help the Court understand how the limited exposures Ms. Grigg experienced would not have prompted a responsible company in the 1950s to prevent them.

2. General Knowledge of Asbestos Risks

Asbestos found broad use in many industries and products precisely because it had such amazing properties. Chief among them is fireproofing, a use that no doubt saved many lives as asbestos prevented or retarded fires after it was introduced into buildings and as fire retardants in fabrics and other materials. The asbestos product manufacturing setting, however, sometimes produced extensive exposures to workers who handled large amounts of raw asbestos fibers.[1] These asbestos factories were the first focus of health studies. In 1930, Merewether and Price issued their classic report on such industries in England, finding many cases of asbestosis among these workers.[2] The Merewether and Price study caused governments to impose workplace protections in asbestos factory settings, but did not focus on different settings not yet known to be a source of disease.[3]

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1 Frederick L. Hoffman, *Mortality From Respiratory Diseases in Dusty Trades*, U.S. Dept. of Labor – Bureau of Labor Statistics (1918) at 176-180.

2 E.R.A. Merewether & C.W. Price, *Report on Effects of Asbestos Dust on the Lungs and Dust Suppression in the Asbestos Industry* (1930) H.M. Stationery Ofc.

3 *Id.*; *see also* Compensation Act to be Extended to Asbestosis, JAMA (1930) 94:2078.

Studies in the 1930s and 1940s investigated similar settings such as shipyards, where extensive ship insulation produced significant exposures—but that body of work did not conclude that such exposures were always dangerous.[4] To the contrary, the knowledge at that time indicated that shipyards were generally safe,[5] and that only exposures exceeding 5 million particles per cubic foot ("mppcf") would be considered dangerous.[6] Many states adopted this 5 mppcf standard as a legal requirement and expected that exposures below this level would not produce disease.[7] The state of knowledge at this point had thus developed to the point that—as plaintiffs like to say—"asbestos is hazardous." But not all uses and exposures were encompassed in that knowledge—only certain high exposure occupations. There is no record in this case that either end-use insulation work (Ms. Grigg's husband's profession) or asbestos take-home exposures were believed to be hazardous at this time.

The state of knowledge did not change dramatically in the 1950s, with the exception that lung cancer became identified with heavy asbestos exposures—*i.e.*, in the

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4 *See, e.g.,* Walter E. Fleischer, *et al.*, *A Health Survey of Pipe Covering Operations in Constructing Naval Vessels*, J. Ind. Hyg. & Toxic. 9-16 (1946)

5 *Id.* at 16.

6 Waldemar C. Dreessen, *et al.*, *A Study of Asbestosis in the Asbestos Textile Industry*, U.S. Pub. Health Servs. ("USPHS") (1938) at 117; *see also* Proceedings of the Eighth Annual Meeting of the American Conference of Governmental Industrial Hygienists (1946) at 55. The level of 5 mppcf is roughly equivalent to 300 times the current OSHA standard of 0.1 f/cc (at a conversion factor of 6 to 1 from the old "impinger" method that measured dust in particles per cubic foot to the more modern membrane method that measured fibers per cubic centimeter). *See Threshold Limit Values of Airborne Contaminants Adopted by ACGIH* (1968) (finding that 6 f/cc is equivalent to 1 mppcf)

7 *See, e.g.,* Brownson & Ballou, *Current and Historical American Asbestos Regulations* (2012 Update) at 17 (describing Minnesota's early 5 mppcf limit).

same industries that had produced asbestosis in earlier studies.[8] The 5 mppcf standard remained in place and was believed to be sufficient to prevent both asbestosis and lung cancer.[9] Once again, the medical literature of this time identified neither insulation work nor take-home exposures as a known source of asbestos disease, including lung cancer.

In the mid- to late-1960s, the state of knowledge of asbestos risks changed rapidly. It was not until 1960 that the first study appeared suggesting that asbestos exposure could cause mesothelioma.[10] In addition, further shipyard studies began to document disease below the 5 mmpcf threshold previously thought to be safe.[11] Those studies prompted advisory entities like the American Conference of Governmental Industrial Hygienists ("ACGIH") to recommend a lower standard of 12 fibers per cubic centimeter ("f/cc").[12] A few years later, in 1971, the new Occupational Safety and Health Administration ("OSHA") adopted the 12 f/cc standard—and lowered it again to 5 f/cc in 1972.[13] These

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8 *See, e.g.,* Richard Doll, *Mortality from Lung Cancer in Asbestos Workers* (1955) Brit. J. Indus. Med. 12:81.

9 In 1951, Congress amended the Walsh-Healy Act to codify the 5 mppcf legal threshold for safe asbestos exposure. 41 U.S.C. § 35 *et seq.*

10 *See* J.C. Wagner, *et al.*, *Diffuse Pleural Mesothelioma and Asbestos Exposure in the North Western Cape Province* (1960) Brit. J. Ind. Med. 17:260–271.

11 *See, e.g.,* William T. Marr, *Asbestos Exposure During Naval Vessel Overhaul* (1964) Am. Ind. Hyg. Assn. J. 25:264; P.G. Harries, *Asbestos Hazards in Naval Dockyards* (1964) Ann. Occup. Hyg. 11:135.

12 *Threshold Limit Values of Airborne Contaminants Adopted by ACGIH* (1968). The method of measuring for asbestos exposure had changed in the 1960s, from impinger method to the new membrane method. ACGIH switched to the new methodology with its 1968 recommendation. *Id.* ACGIH's recommended level of 12 f/cc equated to about 2 mppcf. *Id.*

13 OSHA, *Emergency Standard for Exposure to Asbestos Dust* (Dec. 7, 1971) 36 Fed. Reg. 23207-8; OSHA, *Standard for Exposure to Asbestos Dust* (June 7, 1972) 37 Fed. Reg. 11318-22.

changes, however, occurred more than ten years after Ms. Grigg's last claim of take-home exposure.

3. Knowledge of Exposure from Installation of Asbestos Insulation

The hazards of installing asbestos-containing insulation—i.e., Ms. Grigg's husband's occupation—were not a focus of significant research until the 1960s. Indeed, a 1946 study concluded that installation of shipyard insulation was "not a dangerous occupation."[14] In the 1960s, through the work of Irving Selikoff, asbestos disease in insulation workers moved to the forefront of investigation. Selikoff's research into the members of the insulating union produced a groundbreaking conference in 1964. The conference was followed by Selikoff's seminal article in 1965, documenting for the first time that insulation work could produce disease just as the earlier dusty trades did.[15] Thus, the first study linking *insulation workers* (such as Ms. Grigg's husband) to potential increased risk of mesothelioma did not appear until 1965.[16]

The *reason* this work was so groundbreaking is the very reason Owens-Illinois should not be subject to liability here – the medical profession had not identified insulation work as a dangerous occupation until Selikoff's work in the 1960s. Considering that even the risks of *direct exposure* to asbestos insulation were not

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14 Fleischer, *supra*, at 16.

15 *Id.*

16 *See* Irving J. Selikoff, *et al.*, *The Occurrence of Asbestosis Among Insulation Workers in the United States* (1965) Ann. N.Y. Acad. Sci. 139-155.

appreciated until well after the 1950-1958 time period, it is unsurprising that Ms. Grigg's *indirect exposure* risks were not known either.

4. Knowledge of Take-Home Asbestos Exposure

Take-home asbestos exposures also appeared on the medical profession's radar screen for the first time in the 1960s. In 1965, seven years after Ms. Grigg's last claimed exposure, researchers in England led by Muriel Newhouse investigated an asbestos factory in London and found a significant level of disease in persons living near the plant.[17] Newhouse found nine persons with mesothelioma whose only identified exposure was living in the same home as a relative who worked with asbestos.[18] The relatives worked in high-exposure occupations such as spinners and foremen at asbestos factories (mostly involving the highly potent fiber type known as crocidolite); boiler coverers in a ship engine room; and railway workers who lined compartments with asbestos sheeting.[19] Newhouse identified the washing of clothes as the likely cause of these cases, and concluded: "There seems little doubt that the risk of mesothelioma may arise from both occupational and domestic exposures to asbestos."[20] Even here, however, Newhouse only cites a series of case reports, and does not attempt to perform an epidemiological analysis that might have confirmed a causative link. Numerous court

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17 Muriel L. Newhouse, & Hilda Thompson, *Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area* (1965) Brit. J. Ind. Med. 22:261–269.

18 *Id.* at 261.

19 *Id.* at 268.

20 *Id.* at 266.

cases nonetheless cite Newhouse as the first ever take-home exposure study. *See Farrar*, 69 A.3d at 1037-38 ("The study that experts from both sides regarded as more significant was one by Muriel Newhouse and Hilda Thompson in 1965."); *Hoyt v. Lockheed Shipbuilding Co.* (W.D. Wash. June 26, 2013) 2013 WL 3270371, *7 ("The first case study of non-occupational asbestos exposure was published by Newhouse and Thompson in 1965."), *aff'd* (9th Cir. 2013) 540 F. App'x 590; *Martin v. Cincinnati Gas & Elec. Co.* (6th Cir. 2009) 561 F.3d 439, 446 ("Plaintiff's expert report concedes that the first studies of bystander exposure were not published until 1965."); *Alcoa, Inc. v. Behringer* (Tex. Ct. App. 2007) 235 S.W.3d 456, 461 ("The first case study of *non-occupational* asbestos was published in 1965.").[21]

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[21] Plaintiffs' expert cites Wagner (1960) as the first possible reference to take-home asbestos exposure in the medical literature, although this study could not and did not draw any conclusions on take-home risks. *See* J.C. Wagner, *et al.*, *supra*. The Wagner study reported 33 cases of mesothelioma in the asbestos mining area of Cape Province, South Africa, an area peppered with waste piles and other sources of exposure other than take-home fibers. *Id.* at 260. Of the 33 cases, the authors concluded that 28 had "some association with the Cape asbestos field and four cases had been exposed to asbestos in industry." *Id.* Although some of the women in the study experienced domestic exposure, none of them had *only* domestic exposure. *Id.* at 270; *see also Farrar*, 69 A.3d at 1036 (noting that the Wagner study "[did] not suggest that any of the 32 who had some exposure were exposed only from asbestos brought into the home on the clothing of an occupationally-exposed household member.").

The Wagner article also pertains to an entirely different industry (asbestos mining) with different exposures than insulation work and of a different and considerably more potent fiber type (crocidolite, not amosite). Plaintiffs have pointed to no article at the time that interpreted Wagner to require take home restrictions in all jobs involving asbestos – there are no such articles because no one would have conceived of such an overbroad interpretation of Wagner. And Wagner still post-dates all of Ms. Grigg's alleged exposure to Owens-Illinois products.

Like Selikoff's work, Newhouse's study opened new horizons. Before Newhouse, no one had clearly documented the existence of asbestos disease among the family members of asbestos factory workers. Neither Newhouse (1965) nor Selikoff (1965), however, identified such disease among the family members of *insulation* workers—that finding was yet to come.

Indeed, the Newhouse study did not settle the take-home exposure issue at all. Shortly before publication in the British journal, the Newhouse findings were presented, along with other papers, to the New York Conference on Biological Effects of Asbestos organized by Selikoff in October 1964.[22] Though concerned about the Newhouse findings, Selikoff observed at a July 1971 meeting organized by the International Association of Heat and Frost Insulators and Asbestos Workers that research was being done in New York on the problem, and that "so far, fortunately, the data looks reassuring." *Farrar*, 69 A.3d at 1037.[23] Additionally, a 1965 report from a working

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22 *Cf. Estate of Holmes v. Pneumo Abex, L.L.C.* (Ill. App. 2011) 955 N.E.2d 1173, 1178 ("plaintiff's expert...testified the first epidemiological study showing an association between disease and asbestos fibers brought home from the workplace was presented and published by [Muriel] Newhouse and Hilda Thompson in October 1964."), *appeal denied* (Ill. 2012) 968 N.E.2d 1066; *Dube v. Pittsburgh-Corning Corp.* (D. Me. June 9, 1988) 1988 WL 64733, *1 ("It was generally unknown until 1964 that asbestos could cause mesothelioma, a fatal disease, to people like Joan Dube who were not directly involved in asbestos production or working with asbestos, but were exposed only in a domestic context, i.e., through dust brought home on the person or clothes of one who was working with the substance."), *rev'd on other grounds* (1st Cir. 1989) 870 F.2d 790.

23 The proceedings of that meeting were printed in *The Asbestos Worker* (Vol. XVII No. 16, August 1971 at 9); *see also* Ellenbecker Trial Tr. at 80 (RT6077).

group convened by the Geographical Pathology Committee of the International Union Against Cancer, published in the British Journal of Industrial Medicine, provided a list of epidemiological study recommendations—including the explicit recommendation that "special attention be directed to surveys in. . . . the insulating industry," which had "not so far been widely investigated" and required "special attention."[24] The most this group could say about domestic exposures, however, was that "[a] study of the family unit or household *may be of interest* in view of the *occasional reports of significant neighborhood and household exposures*."[25]

It was not until OSHA's issuance of regulations in June 1972 that companies faced any requirements that could have arguably been aimed at reducing the risk of take-home asbestos exposures.[26] OSHA's standards included provisions requiring "special clothing" for any worker exposed above the ceiling limit of 10 f/cc; change rooms for any

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24 *Report and Recommendations of the Working Group on Asbestos and Cancer* (1965) Brit. J. Ind. Med. 22:165-171, 166 (emphasis added).

25 *Id.* at 167 (emphasis added). A 1971 case report published in the American Review of Respiratory Disease identified a 31-year old man whose mesothelioma was attributed to his father's work as a pipefitter. *See* Paul Champion, *Two Cases of Malignant Mesothelioma after Exposure to Asbestos* (1971) Am. Rev. of Resp. Disease 821-26. The son had never been occupationally exposed to asbestos; the father had severe asbestosis. The author notes the "danger to which relatives of asbestos workers are exposed," but cites only to Newhouse (1965) and not Wagner (1960). *Id.* at 824.

26 *See Farrar*, 69 A.3d at 1037 ("The clear and most widely broadcast breakthrough came in June of 1972, when OSHA adopted regulations dealing specifically with the problem of tracking asbestos dust on clothing into the home."); *Exxon Mobil Corp. v. Altimore* (Tex. Ct. App. 2008) 256 S.W.3d 415, 422 ("According to Dr. Lemen, 1972 was a crucial year in the history of asbestos research. By 1972, experts agreed that a certain degree of exposure to asbestos could cause asbestosis or cancer. . . . Therefore, during the relevant time period, 1942 to 1972, there was a consensus within the scientific community that there was a measurably safe level of exposure to asbestos.").

employee exposed above the time-weighted average of 5 f/cc (reduced to 2 f/cc in 1976); and lockers and laundering instructions for those laundering work clothing. 29 C.F.R. § 1910.93(d)(3)-(5). Because OSHA has no authority over home exposures, this provision would have been aimed at preventing further *worker exposures* from work clothes worn home, not home exposures. OSHA provided only "minimal written justification for the 1972 final asbestos standard," and "[n]ot a single study was specifically cited." *Farrar*, 69 A.3d at 1037-38 (quoting John Martonik *et al.*, *The History of OSHA's Asbestos Rulemakings and Some Distinctive Approaches that They Introduced for Regulating Occupational Exposure to Toxic Substances* (2001) Am. Indus. Hyg,. Ass'n J. 62:208). The OSHA take-home requirements did not apply to every asbestos exposure – they only came into play if the workplace exposures exceeded the OSHA regulatory standard of the time. Thus, a company would have been on notice by 1972 to prevent take home exposures *exceeding the OSHA standard*, but would not have been expected to require clothes changes, showers, etc. if the workplace exposures were lower than 5 f/cc (1972) or, later, 2 f/cc (1976). The requirements were based on the quantity of the worker's *dose*, a concept Plaintiffs choose to ignore in imputing knowledge of take home to all doses in the 1950s.

The first *epidemiological* study documenting increased asbestos disease due to take-home exposure, conducted by Anderson *et al.*, was not published until 1976—

eighteen years after Ms. Grigg's last alleged exposure.[27] That study, however, did not address mesothelioma, but rather lung abnormalities.[28] Significantly, the thirty-seven cases of household mesothelioma that Anderson cited in the medical literature were derived from studies published between 1965 and 1974—none predating Ms. Grigg's exposure.[29]

The first study documenting mesothelioma among family members of an insulation worker—i.e., the circumstances alleged here—was not published until 1978.[30] In this study, Vianna identified ten women whose mesotheliomas could be attributed to domestic exposure, mostly from hand laundering of clothes worn by husbands in the insulation industry and three "brake-lining workers").[31] He calculated that a household member with take-home exposure may be ten times as likely as an unexposed person to develop mesothelioma, but noted that uncertainty remained: "Although there is no convincing evidence that indirect exposure contributes to the occurrence of mesotheliomas, there have been numerous reports of this rare tumour in individuals

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27 Henry A. Anderson, *et al.*, *Household-contact Asbestos Neoplastic Risk* (1976) Ann. N.Y. Acad. Sci., 271:311–323. This development is critical, because epidemiological evidence is "one of the most valuable pieces of scientific evidence of causation." *Lopez v. Wyeth-Ayerst Labs.* (N.D. Cal. Dec. 13, 1996) 1996 WL 784566, *aff'd* (9th Cir. Feb. 25, 1998) 139 F.3d 905, 1998 WL 81296; *see also Casey v. Ohio Med. Prods.* (N.D. Cal. 1995) 877 F. Supp. 1380 (considering lack of epidemiological evidence an important factor in determining the reliability of an expert opinion).

28 *Id.* at 311.

29 *Id.* at 312.

30 *See* Nicholas J. Vianna & Adele K. Polan, *Non-occupational Exposure to Asbestos and Malignant Mesothelioma in Females* (1978) Lancet 1:1061–1063.

31 *Id.* at 1061.

exposed at home to dusty clothing[.] . . . We assessed the possibility that household exposure might be a major risk factor for females with malignant mesotheliomas."[32] This language reflects the lack of any epidemiology studies before 1978 and reliance solely on "unconvincing" case reports prior to that time—none of which predated 1967.[33] Thus, even in 1978, the medical literature still suggested uncertainty over take-home disease, including from insulation work.

Case reports and case-control studies on take-home exposures continued to be published throughout the 1980s and 1990s.[34] By 1995, enough information existed on take-home asbestos exposures that the National Institute for Occupational Safety and Health ("NIOSH") included asbestos in its report to Congress on the state of knowledge of all take-home exposures at that time.[35] Nowhere in its report does NIOSH give any indication that the knowledge compiled in this 1995 report existed or had even begun to exist in the 1950s. In fact, most of the epidemiological studies of take-home exposure appeared after 2000 as the body of data became more robust.[36] The 2012 Donovan literature review found that uncertainty still remained, and that "[m]ore work is necessary. . . to better characterize the input variables, in particular the relationship

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32 *Id.*

33 *Id.*

34 *See* Ellen P. Donovan, *et al.*, *Evaluation of Take Home (para-occupational) Exposure to Asbestos and Disease: A Review of the Literature* (2012) Critical Rev. in Toxic. 1-29, at 15-16.

35 *See Report to Congress on Workers' Home Contamination Study Conducted Under The Workers' Family Protection Act*, DHHS (NIOSH) (Sept. 1995) Pub. No. 95-123.

between airborne concentrations in the home relative to the workplace, such that screening calculations could be performed in order to assess the reasonableness of a 'cause-effect' relationship between laundering clothing and the likelihood of disease."[37]

Today, the risk of take-home disease is accepted provided the worker worked in an extremely high exposure situation and brought sufficient fibers home to cause exposures in the home that were consistent with the kind of heavy workplace exposures known to cause disease. Nothing in the history of developing asbestos knowledge, however, would have alerted an insulation manufacturer to such a risk in the 1950s—before *any* study identified insulation-caused disease, or take-home disease, and especially take-home disease from insulation work.[38] The trial court's failure to recognize this state of the art was clear error.

B. Generic Early Recommendations About Workplace Clothing Are Insufficient To Impute Knowledge of the Risk of Take-Home Asbestos Exposure

Faced with the undisputed timeline described above, Plaintiffs' experts engage in a shell game to create a false impression of medical knowledge that did not exist. Plaintiffs first point to generic warnings issued in the early part of the 20th century against wearing home clothing covered in harmful dusts and substances. *See* Ellenbecker Trial Tr. at 53-

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36 Donovan *et al.*, *supra*, at 17.

37 *Id.* at 25.

38 *See, e.g., Rodarmel v. Pneumo Abex, L.L.C.* (Ill. App. 4th Dist. 2011) 957 N.E.2d 107, 109; *Hudson v. Bethlehem Steel Corp.* (Pa. Com. Pl. Philadelphia County Dec. 12, 1995) 1995 WL 17778064, *4.

54 (RT6050-51). But none of the documents cited warn about the hazards of taking home asbestos fibers—nor would they have had reason to, since asbestos was deemed to be a controllable hazard during most of this time period that only produced diseases in high-exposure workplace settings. Ellenbecker Trial Tr. at 84 (RT6081), 89-90 (RT6086-87). Instead, Plaintiffs combine these recommendations with their assertion that all companies should have known asbestos was dangerous by the 1930s. *See e.g.*, Horn Trial Tr. at 44 (RT6640). But what Plaintiffs imply—incorrectly—is that companies should have known that any form of work with asbestos was hazardous starting in the 1930s. No medical literature supports this proposition. Knowledge of the types of exposures that could produce asbestos disease only developed over time, as studies and investigations focused on lower-exposure environments and uses of end products like asbestos insulation. Plaintiffs also contend that Owens-Illinois should have warned against the risks of take-home asbestos exposure *before take-home asbestos exposure was ever studied in the literature.* That is not how medical science or occupational health knowledge develops. General health requirements such as broad proscriptions against carrying home harmful substances only arise in relation to individual substances when it is understood that the substance in question could be harmful at levels carried home on clothing.

Plaintiffs' theory is not only factually inaccurate, it is bad science. The human body is capable of defending itself against a whole array of daily exposures to known harmful substances, up to a point. Disease results when those exposures reach a level

that overwhelms our defenses, called the "threshold" point. Aspirin, alcohol, sunlight, even known "poisons" like arsenic are only poisonous if the dose is high enough to make them so, and either harmless or beneficial at lower doses (e.g., the human body requires a certain amount of arsenic).

For this reason, since the time of Paracelsus, toxicology has rested on the bedrock principle that "the dose makes the poison."[39] As a result, for toxicologists "[d]ose is the single most important factor to consider in evaluating whether an alleged exposure caused a specific adverse effect."[40] This dose principle holds true for carcinogens like asbestos just as much as it does for any other harmful substance:

> Most chemicals that have been identified to have "cancer-causing" potential (carcinogens) do so only following long-term, repeated exposure for many years. Single exposures or even repeated exposures for relatively short periods of time (e.g., weeks or months) generally have little effect on the risk of cancer, unless the exposure was remarkably high and associated with other toxic effects.[41]

Thus, generalized knowledge in the 1950s that asbestos was "hazardous" actually was a much more specific knowledge that exposures above the accepted 5 mppcf level could potentially produce asbestos disease in workplace settings. And generalized

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39 Federal Judiciary Center, *Reference Manual on Scientific Evidence, Reference Guide on Toxicology* 403 (2d ed. 2000) (the "fundamental tenet" of toxicology). The "father of toxicology," physician and philosopher Paracelsus, first articulated this principle in the 16th century, stating: "All substances are poisonous—there is none which is not; the dose differentiates a poison from a remedy." David L. Eaton, *Scientific Judgment and Toxic Torts—A Primer In Toxicology For Judges And Lawyers* (2003) 12 J.L. & Pol'y 5, 11.

40 *Id.*

41 *Id.* at 9.

knowledge in the 1950s that harmful dusts could be taken home on clothing would have been meaningless without *specific knowledge of what substances were harmful at levels that would have been found on clothing taken home from a workplace*. This specific knowledge rests on scientific studies that were not conducted until well after Ms. Grigg's alleged exposure to Owens-Illinois products.

Plaintiffs thus have no basis to assert that Owens-Illinois should have warned Ms. Grigg's husband about take-home exposures in the 1950s. Warnings can only follow the state of medical knowledge, not precede it. *Amici* urge the Court to correct the scientific and legal error in the trial court's ruling to prevent subjecting companies to after-the-fact impositions of duty that would have made no medical sense at the time of the exposure.

II. PUNITIVE DAMAGES IN ASBESTOS CASES ARE INAPPROPRIATE FOR UNFORESEEABLE HARMS, AND JEOPARDIZE RECOVERIES FOR PLAINTIFFS

A. Punitive Damages Should Not Be Imposed Where, As Here, The Alleged Harm Was Not Foreseeable

As explained above, it is speculative to conclude that a company in the 1950s would have known to warn about take-home insulation exposures, and certainly not at the levels Ms. Grigg's husband encountered. Applying quasi-criminal *punitive damages* to such activity makes no sense. California's "oppression, fraud, or malice" standard for punitive damages cannot possibly encompass conduct that lacked any intent to injure.

Civ. Code, § 3294. And "intent" cannot exist where, as set forth above, Owens-Illinois could not even have known of the hazard. *See* OI Opening Br. at 41-43.[42]

B. Punitive Damages Impair the Entire Asbestos Docket

The reasons for this Court to overturn the punitive damages award below go beyond the four corners of this case or its impact on Owens-Illinois. Punitive damages awards—or even their threat—can gravely skew the allocation of available resources to the tens of thousands of current and future asbestos plaintiffs.

Now in its fourth decade, the asbestos litigation shows no signs of abating. A 2012 review of asbestos-related liabilities reported to the Securities and Exchange Commission by over 150 publicly traded companies showed that "[s]ince 2007, filings have been fairly stable."[43] "Typical projections based on epidemiologic studies assume that mesothelioma claims arising from occupational exposure to asbestos will continue for the next *35 to 50 years*."[44]

With a finite pool of resources available to satisfy asbestos claims, giving today's claimants windfall awards only serves to exhaust funds available to compensate future

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42 As Owens-Illinois correctly notes, the assessment of punitive damages against Owens-Illinois also serves neither of the twin policy goals of punishment and deterrence. OI Opening Br. at 45-47. Owens-Illinois has already paid more than three times its net worth in asbestos awards, and it has not engaged in the manufacture or sale of asbestos insulation—the conduct a punitive damages award would presumably be designed to deter—since it sold Kaylo in 1958. (RT7538-39; V1-CT172-80).

43 Mary Elizabeth C. Stern & Lucy P. Allen, NERA Economic Consulting, *Asbestos Payments per Resolved Claim Increased 75% in the Past Year—Is This as Dramatic as it Sounds?* at 7 (Aug. 2012); *see also* Jenni Biggs *et al.*, *A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated* at 1 (Towers Watson June 2013) (mesothelioma claim filings have "remained near peak levels since 2000.").

plaintiffs. Moreover, the threat of punitive damages prolongs individual cases and complicates settlement negotiations, slowing down an already clogged asbestos docket—also to the detriment of other current and future plaintiffs. To help preserve depleting resources for future plaintiffs and their families, and to ensure that California asbestos litigation does not provide super-rewards for some plaintiffs with the attending consequences to future litigants and the settlement process, California should curtail or cease its practice of permitting punitive damages claims in asbestos cases.

1. Punitive Damages Eat Into a Shrinking Pool of Funds Available to Compensate Asbestos Tort Claimants

The funds available to compensate asbestos plaintiffs are not limitless. The continued payment of asbestos claims has aggregate consequences for defendants by potentially sending them into bankruptcy, as well as plaintiffs by depleting the pot of money from which future claimants can be compensated. Punitive damages in asbestos cases accelerate this depletion. In a very real sense, every undeserved verdict awarded by a jury means less money to pay other current and future asbestos claimants.

Litigation over personal injuries allegedly caused by asbestos exposure "has continued for more than 40 years in the United States with hundreds of thousands of claims filed and billions of dollars in compensation paid."[45] As a result, "nearly all of the

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44 Biggs at 5 (emphasis added).

45 Lloyd Dixon *et al.*, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* xi (Rand Corp. 2010) ("RAND Report").

major manufacturers" of asbestos-containing products have declared bankruptcy, leaving plaintiffs to search for ever-more "peripheral" defendants.[46] Asbestos litigation has led over 100 companies with asbestos-related liabilities to file bankruptcy,[47] and the steady stream of asbestos-related bankruptcies shows no sign of abating. There has been overwhelming publicity about the consequences of having been in any way involved with asbestos-containing products.

These realities have provoked a chorus of concern over "the possibility that asbestos defendants' assets may become so depleted by early awards that the defendants will no longer be in existence and able to pay compensatory damages to later plaintiffs." *Fischer v. Johns-Manville Corp* (N.J. 1986) 512 A.2d 466, 478; *see also* John C. Jeffries, *A Comment on the Constitutionality of Punitive Damages* (1986) 72 Va. L. Rev. 139, 141-143 (noting that the "destructive synergism between traditional punitive damages doctrine and modern mass tort litigation" has become "reality" in asbestos litigation and other latent injury contexts, where manufacturers face both "massive" compensatory liability and the threat of "repetitive and unrestrained punitive awards").

The threat of punitive damages is not limited to judgments. "[T]he potential for punitive awards is a weighty factor in settlement negotiations and inevitably results in a larger settlement agreement than would ordinarily be obtained. To the extent that this

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46 *Id.* at 3.

47 *See* RAND Report at 25; Mark D. Plevin *et al., Where Are they Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases* (Feb. 2012) 11:7 Mealey's Asbestos Bankr. Rep. 1, Chart 1.

premium exceeds what would otherwise be a fair and reasonable settlement for compensatory damages, assets that could be available for satisfaction of future compensatory claims are dissipated." *Dunn v. Hovic* (3d Cir.) 1 F.3d 1371, 1398 (Weis, J., dissenting), *modified in part* (3d Cir. 1993) 13 F.3d 58; *see also* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation* (2002) 54 Baylor L. Rev. 331, 353 (punitive damages threaten compensation for future asbestos plaintiffs "even in cases that are settled out of court, because of the leveraging effect punitive damages have at the settlement table").

The persistence of the asbestos mass tort is likely to send even more companies into bankruptcy and further drain the compensation pool. "Actions taken by courts that could accelerate this process would be irresponsible absent a clear and compelling justification that does not exist with respect to the awarding of punitive damages in modern asbestos cases." Mark A. Behrens & Cary Silverman, *Punitive Damages in Asbestos Personal Injury Litigation: The Basis for Deferral Remains Sound* (2011) 8 Rutgers J. L. & Pub. Pol'y 50, 65. This case is an opportunity for California courts to save money for deserving asbestos claimants in the future by setting reasonable and durable restrictions on the award of punitive damages.

2. Punitive Damages Frustrate Settlements and Worsen the Backlog of Cases on California's Asbestos Dockets

If punitive damages are upheld in this case, it could have consequences not just for a future claimant's ability to be compensated, but also the length of time it could take to get such compensation. Punitive damages are the proverbial elephant in the room in

every tort case. If punitive damage awards are sustained in cases with no evidence of malice, oppression, or foreseeability, that threat will end up affecting a far greater percentage of hearings, settlement conferences, trials, and appeals. The net effect will be fewer settlements, delayed trial proceedings, more plaintiffs forum-shopping in this state, and further clogging of an already overcrowded California asbestos docket.

Imposition of punitive damages in asbestos cases also blocks the ability of courts to resolve these cases efficiently. Allowing punitive damages awards injects tremendous uncertainty into asbestos cases. Plaintiff and defense counsel may be oceans apart in terms of estimating both the likelihood and potential amount of any particular defendant's liability for punitive damages. The uncertainty of how much, if any, punitive element should factor into settlements will mean that plaintiff and defense counsel will likely start their negotiations much farther apart, and it will be harder for the parties to come together. Conversely, eliminating punitive damages fosters settlements because it removes a "wild card" element to these cases and allows plaintiffs and defendants to more easily value claims. As one federal district judge wrote, "Barring successive punitive damages awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution of the damage claims of many thousands of injured plaintiffs." William M. Schwarzer, *Punishment Ad Absurdum* (Oct. 1991) 11 Cal. Law. 116.

Additionally, punitive damages trials are longer and more complex than trials where punitive damages are off the table. Plaintiffs' counsel needs to put on the

additional evidence required to satisfy their heightened burden of proof for punitive damages. Defendants may request bifurcated trials that would require fact finders to resolve compensatory liability and damages issues prior to considering evidence relevant only to punitive damages. Some plaintiffs' counsel may even be more likely to take cases to trial to hold out for the possibility of hitting the punitive damages "jackpot."

Punitive damages verdicts also raise the specter of lengthy appeals that would expend judicial resources and delay resolution of plaintiffs' claims. Because California does not have a statutory punitive damages cap, an excessive and disproportionate punitive damages award is a real possibility. Defendants will pursue constitutional challenges to address this problem. As this Court is likely aware, punitive damages have been a fertile field for appellate litigation.

Plaintiffs may also tend to forum-shop in certain California jurisdictions due to their propensity for awarding punitive damages. *See* Patrick J. Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws* (2010) 70 La. L. Rev. 529, 536 (citing Los Angeles and San Francisco Counties as two of the post plaintiff-friendly jurisdictions, and noting that "[i]f a plaintiff has a large number of states from which to choose, the plaintiff and his counsel would be foolish—indeed, might be committing malpractice in the latter's case—not to base the choice upon obtaining plaintiff-friendly legal rules, including the availability of punitive damages"). To the extent such claims involve non-residents, they could slow resolution of California asbestos suits due to competition for trial settings.

3. There is a Better Way for California Courts To Deal With Punitive Damages Claims in Asbestos Cases

This Court should consider the way other jurisdictions with burdensome asbestos dockets have addressed the consequences of rampant punitive damages awards in asbestos cases. Such approaches range from permitting juries considering punitive damages to be told that prior punitive and/or compensatory awards leveled against the defendant have already "punished" the company sufficiently, *see, e.g., Fischer,* 512 A.2d at 480; *Wangen v. Ford Motor Co.* (Wis. 1980) 294 N.W. 2d 437, 459-460, to doing away with punitive damages in asbestos actions altogether. *See, e.g., In re Collins* (3d Cir. 2000) 233 F.3d 809, *cert. denied* (2001) 532 U.S. 1066.

The United States District Court for the Eastern District of Pennsylvania, which oversees Multidistrict Litigation No. 875 (the federal asbestos "MDL"), "has a practice when it does remand cases of severing and retaining jurisdiction over punitive damages claims." *In re Patenaude* (3d Cir. 2000) 210 F.3d 135, 140 n.3. The rationale behind this practice is consonant with many of the issues described above: "[M]ultiple judgments for punitive damages in the mass tort context against a finite number of defendants with limited assets threaten fair compensation to pending claimants and future claimants who await their recovery, and threaten the economic viability of the defendants." *Collins,* 233 at 812 (quoting *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* 32 (Mar. 1991)).

Nevertheless, in 2000, several plaintiffs sought to overturn that practice and force the MDL to "remand punitive damages claims for trial together with the remainder of

personal injury claims arising from asbestos exposure." *Id.* at 810. The Third Circuit rejected plaintiffs' request for a writ of mandamus directing the Judicial Panel on Multidistrict Litigation to commence the remand of punitive damage claims, explaining its reasons as follows:

> The resources available to persons injured by asbestos are steadily being depleted. The continuing filings of bankruptcy by asbestos defendants disclose that the process is accelerating. It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls; this prudent conservation more than vindicates the Panel's decision to withhold punitive damage claims on remand.

Id. at 812. The *Collins* Court further found it "discouraging that while the Panel and transferee court follow this enlightened practice, some state courts allow punitive damages in asbestos cases." *Id.* The court noted that this "continued hemorrhaging of available funds deprives current and future victims of rightful compensation." *Id.*

Acting on precisely such concerns, a number of courts overseeing asbestos dockets have followed the lead of the federal asbestos MDL and eliminated punitive damages entirely in asbestos cases. "[T]rial courts in Baltimore City; Northampton County (Bethlehem and Easton), Pennsylvania; [and] Philadelphia;" do not permit punitive damages in asbestos cases. David C. Landin *et al.*, *Lessons Learned from the Frontlines: A Trial Court's Checklist for Promoting Order and Sound Policy in Asbestos Litigation* (2008) 16 Brook. J.L. & Pol'y 589, 654. Philadelphia Court of Common Pleas Judge John Herron recently issued new protocol governing mass torts cases in the court's Complex Litigation Center ("CLC"); that protocol continues the CLC's longstanding practice of deferring punitive damage claims in asbestos cases. *See* Court of Com. Pl.

Phila. County, Pa., *General Court Regulation No. 2013-01*, Order at ¶ 3 (Feb. 7, 2013) ("All punitive damage claims in asbestos claims shall be deferred.").

Similarly, Florida enacted a law banning punitive damages "in any civil action alleging an asbestos or silica claim." Fla. Stat. § 774.207(1). Some states do not permit punitive damages;[48] many others cap punitive damages by statute.[49]

In large part because it has not acted to curtail punitive damages, the California judicial system has become a magnet for asbestos filings. *See* Borchers, *supra*, at 536. But with no end to the asbestos mass tort in sight, the time is ripe for California to join others that have put limits on such damages. *See* Mark A. Behrens & Barry Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases* (2001) 6 Tex. Rev. of L. & Pol. 137.

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48 Nebraska bars punitive damages on state constitutional grounds. Louisiana, Massachusetts, and Washington, and New Hampshire permit punitive damages only when authorized by statute. Michigan recognizes exemplary damages as compensatory, rather than truly punitive. Connecticut has limited what they call punitive recovery to the expenses of bringing the action. *See Exxon Shipping Co. v. Baker* (2008) 554 U.S. 471, 495.

49 *See* Ala. Code § 6-11-21; Alaska Stat. § 9.17.020; Colo. Rev. Stat. § 13-21-102; Conn. Gen. Stat. § 52-240b; Fla. Stat. § 768.73; Fla. Stat. § 774.207; Ga. Code § 51-12-5.1; Idaho Code § 6-1604; Ind. Code § 34-51-3-4,-5; Kan. Stat. § 60-3702; Me. Rev. Stat. tit.18-A § 2-804; Miss. Code. § 11-1-65; Mo. Rev. Stat. § 510.265.1; Mont. Code. § 27-1-220; Nev. Rev. Stat. § 42.005; N.H. Rev. Stat. § 507:16; N.J. Stat. § 2A:15-5.14; N.C. Gen. Stat. § 1D-25; N.D. Cent. Code § 32.03.2-11; Ohio Rev. Code. § 2315.21; Okla. Stat. tit. 23, § 9.1 ; S.C. Code. § 15-32-530; Tenn. Code. § 29-39-104; Tex. Civ. Prac. & Rem. Code. § 41.008; Va. Code. § 8.01-38.1; Wis. Stat. § 895.043. "The States that rely on a multiplier have adopted a variety of ratios, ranging from 5:1 to 1:1." *Baker*, 554 U.S. at 496.

CONCLUSION

For these reasons, the judgment should be reversed and, alternatively, a new trial or remittitur.

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CERTIFICATE OF WORD COUNT

I, Kevin Underhill, an attorney duly admitted to practice before all courts of the State of California and a member of Shook, Hardy & Bacon L.L.P., counsel of record for *amici curiae*, certify that the foregoing complies with the requirements of Rules 8.520 and 8.204 of the California Rules of Court in that it was prepared in proportionally spaced type in Times Roman 13-point font, double spaced, and contains less than 14,000 words as measured using the word count function of "Word 2000."

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