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New York City Courts

SHERRY KLEIN HEITLER
Administrative Judge for Civil Matters
First Judicial District

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FROM:	VALERIE QUALLS FOR: HON. SHERRY KLEIN HEITLER	
RE:	WEITZ & LUXENBERG CASES (Chidester, Milazzo, Moritz, Roman, Sadowski, Smith) v. CRANE, CLEAVER-BROOKS, DOMCO INDEX # 400000/88 (Motion Seq. #010)	
RE:	WEITZ & LUXENBERG CASES (Chidester, Milazzo, Moritz, Roman, Sadowski, Smith) v. CRANE, CLEAVER-BROOKS, DOMCO INDEX # 190293/11, et al (Motion Seq. #013)	

Faxed herewith is a copy of an Order rendered with regard to the above referenced matters. Please notify all other interested parties.

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Index No. 190293/2011
Index No. 190311/2011
Index No. 190294/2011
Index No. 190262/2011
Index No. 190215/2011
Index No. 190299/2011
Motion Seq. No. 013

DECISION AND ORDER

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SHERRY KLEIN HEITLER, J.:

The law firm of Weitz & Luxenberg, P.C., on behalf of the above-captioned plaintiffs ("Plaintiffs"), moves by order to show cause for an order lifting the deferral recited in Section XVII of the New York City Asbestos Litigation ("NYCAL") Case Management Order, as amended May 26, 2011 ("CMO"), which provides that "[c]ounts for punitive damages are deferred until such time as the Court deems otherwise, upon notice and hearing", in order to permit Plaintiffs to try their causes of action for punitive damages against the defendants remaining in these cases.[1] Plaintiffs' application is jointly opposed by the NYCAL defendants' liaison counsel and various members of the NYCAL defendants' bar ("Defendants"), and individually opposed by defendants Crane, Cleaver-Brooks, and Domco. The law firm of Eckert, Seamans, Cherin & Mellott, LLC also separately opposes on behalf of the NYCAL defendants it

[1] According to Plaintiffs the remaining defendants in these cases are Crane Co. ("Crane"), Cleaver Brooks Company, Inc. ("Cleaver Brooks), and Domco Products Texas, LP ("Domco").

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was granted by this court. The opposing parties and the *Amici* request that the court continue to defer counts for punitive damages indefinitely as CMO § XVII purportedly intends.

The Defendants further cross-move under the NYCAL global index number (040000/1988) to vacate and declare inapplicable the entire CMO. Cleaver Brooks and Domco join in the Defendants' cross-motion.

All sides have presented well-reasoned, thoughtful arguments which demonstrate a considerable amount of work and attention to their positions. While Plaintiffs' motion is brought on behalf of certain named individuals, their argument is broad-based and concerns the viability of the application of CMO § XVII to all NYCAL plaintiffs. Defendants recognize this fact and have tailored their arguments to encompass this larger picture.

I heard oral argument on the motions at which all sides were invited to express their positions on the record.

BACKGROUND

The modern industrial use of asbestos[4] began around 1880 and peaked in the 1960s and

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[2] Consolidated Rail Corporation, American Premier Underwriters, Inc., Norfolk Southern Railway Company, and CSX Transportation, Inc., (collectively, "Railroad Defendants").

[3] The *Amici* define themselves as "organizations that represent companies doing business in New York, their insurers, and civil justice reform groups." *Amici* Brief, p. 1.

[4] Asbestos is the generic name for a group of six naturally occurring fibrous silicate minerals.

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and longest-running mass tort litigation in the United States.[7] The history of asbestos litigation has been described as "a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s."[8]

Tens of thousands of complex, time-consuming asbestos personal injury actions have been filed in the New York County Supreme Court alone. In order to streamline discovery and manage the court's asbestos docket, in March of 1988 Justice Helen E. Freedman of this court oversaw the origination of the CMO which governs all NYCAL cases and which was "crafted with great care by representatives chosen by both the plaintiffs' and the defendants' asbestos personal injury bar and . . . bears the imprimatur of the court." *In re NYC Asbestos Litigation (Ames v Kentile Floors)*, Index No. 107574/08, at *2 (Sup. Ct. NY. Co. June 17, 2009, Heitler, J.), *aff'd* 66 AD3d 600 (1st Dept 2009). The original CMO was silent on the issue of punitive damages.

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5 National Toxicology Program, Department of Health and Human Services, *Report on Carcinogens, Twelfth Edition* (2011), Asbestos, pp. 53-54, available at http://ntp.niehs.nih.gov/ntp/roc/twelfth/profiles/ Asbestos.pdf#search=asbestos

6 *Ortiz v Fibreboard Corp.*, 527 US 815, 821 (1999).

7 Stephen J. Carroll, et al, *Asbestos Litigation*, RAND Inst. for Civil Justice, 2005, at 21, available at http://www.rand.org/pubs/monographs/MG162.html ("2005 Rand Report").

8 *Georgine v Amchem Prods.*, 83 F3d 610, 618 (3d Cir. 1996) (quoting Judicial Conference of the U.S. Ad Hoc Comm. on Asbestos Litig., Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 [1991]).

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punitive damages in her 2012 Southwestern University Law Review article (Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 527-28):

> Many courts, including mine, long ago decided that punitive damages had little or no place in the asbestos litigation. . . . Because New York allows imposition of punitive damages in tort cases, rather than merely dismissing the claims, I deferred all punitive claims indefinitely. . . . It seemed like the fair thing to do for a number of reasons. First, to charge companies with punitive damages for wrongs committed twenty or thirty years before, served no corrective purpose. In many cases, the wrong was committed by a predecessor company, not even the company now charged. Second, punitive damages, infrequently paid as they are, only deplete resources that are better used to compensate injured parties. Third, since some states did not permit punitive damages, and the federal [multidistrict litigation] court precluded them, disparate treatment among plaintiffs would result. Finally, no company should be punished repeatedly for the same wrong. However, deferral of all punitive damages claims by judicial fiat despite the fact that other jurisdictions allowed them, and, indeed, New York juries had previously awarded them, clearly raises ethical and possibly equal protection issues.[9]

On this motion Plaintiffs assert that the NYCAL landscape has so dramatically changed since 1996 that the policies and considerations underlying CMO § XVII's deferral of punitive damages no longer apply. Plaintiffs' central arguments in this regard are as follows:

- Prior to 1996 NYCAL asbestos plaintiffs were not denied the right to seek punitive damages at trial[10];
- Unlike NYCAL plaintiffs, asbestos plaintiffs in other states and in other counties within New York State are permitted to assert claims for punitive damages

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9 Although no appellate review was sought concerning Justice Freedman's 1996 determination, there have been some attempts *in limine* to overcome the CMO § XVII ban on punitive damages which were unsuccessful. See *Gadaleta v A.C.&S., Inc.*, Index No. 110739/02 (Sup. Ct. NY. Co. September 22, 2004, Lebedeff, J.); *Bernard v Brookfield Properties Corp.*, Index No. 107211/08 (Sup. Ct. NY. Co. Oct. 24, 2011, Shulman, J.)

10 *See Home Ins. Co. v American Home Products Corp.*, 75 NY2d 196, 204 (1990) ("The concept of punitive damages has been sanctioned under New York law in actions based on negligence . . . and strict products liability . . . .")

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