New York County Clerk's Index No. 112742/04

NEW YORK SUPREME COURT

APPELLATE DIVISION - FIRST DEPARTMENT

IN RE:

NEW YORK CITY ASBESTOS LITIGATION,

This Document Relates To:

IGNAZIO COLLURA,

Plaintiff-Respondent,

-against-

PATTERSON-KELLEY COMPANY,

Defendant-Appellant.

AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT

Victor E. Schwartz
Mark A. Behrens
Andrew W. Crouse* (Admitted N.Y.)
SHOOK, HARDY & BACON L.L.P.
600 14th Street, N.W., Suite 800
Washington, D.C. 20005-2004
Tel: (202) 783-8400
Fax: (202) 783-4211

Attorneys for *Amici Curiae*
* Counsel of Record

(Of Counsel Listed on Next Page)

Of Counsel

Paul W. Kalish
Mark D. Plevin
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 624-2500

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Tel: (202) 463-5337
Counsel for the Chamber of Commerce of the United States of America

Ann W. Spragens
Robert J. Hurns
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018
Tel: (847) 553-3826

Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
Tel: (202) 682-1163

INDEX

TABLE OF CASES AND AUTHORITIES

CASES **Page**

OTHER AUTHORITIES

New York County Clerk's Index No. 112742/04

NEW YORK SUPREME COURT

APPELLATE DIVISION - FIRST DEPARTMENT

IN RE:
NEW YORK CITY ASBESTOS LITIGATION,

This Document Relates To:

IGNAZIO COLLURA,

Plaintiff-Respondent,

-against-

PATTERSON-KELLEY COMPANY,

Defendant-Appellant.

STATEMENT OF INTEREST

The Coalition for Litigation Justice, Inc. ("Coalition") was formed by insurers as a nonprofit association to address and improve the asbestos litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving asbestos claimants by seeking to reduce or eliminate the abuses and inequities that exist under the civil justice system.[1] The Coalition files *amicus curiae* briefs in important

[1] The Coalition includes the following: ACE-USA companies, Chubb & Son, a division of Federal Insurance Company; CNA service mark companies, Fireman's Fund Insurance Company, The Hartford Financial Services Group, Inc., General Reinsurance Corp., Liberty Mutual Insurance Group, Everest Re, and the Great American Insurance Company.

cases before state appellate courts and the United States Supreme Court that may have a significant impact on the asbestos litigation environment.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

The Property Casualty Insurers Association of America ("PCI") is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. Its members account for $173 billion in direct written premiums. They account for 50.2% of all personal automobile premiums written in the United States, and 37.8% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including

stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the U.S. property and casualty insurance industry. In 2003, PCI members accounted for 35.7% of the homeowners' insurance premiums in New York, 56.3% of the personal automobile insurance policies issued in New York, and wrote $11,768,235,000 of direct written premiums in New York. Fifty-three PCI members are domiciled in New York. In light of its involvement in New York, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

STATEMENT OF FACTS

Amici adopt the Statement of Facts of Defendant-Appellant Patterson-Kelley Company ("P-K").

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The United States Supreme Court has said that this country is experiencing an "asbestos-litigation crisis," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997), as a result of the "elephantine mass" of claims that have been filed. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). Claims continue to pour in at an extraordinary rate. At least seventy-three employers have been forced into bankruptcy. Due to these bankruptcies, payments to the sick are threatened. More than 8,500 defendants have been named in the litigation.[2]

How did this happen? One reason is that well-meaning trial judges sometimes created special rules for asbestos cases or reduced the burdens on plaintiffs seeking to prove their cases. Maybe this seemed like the "fair" thing to do in a particular action or the judges hoped that by streamlining the litigation the cases would be resolved more quickly. In the aggregate, however, these decisions have had the unintended effect of inviting weak or meritless claims against ever more remote

---

[2] *See* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

defendants.[3] The instant action should be considered against this background.

In this personal injury action, plaintiff alleges that he was exposed to asbestos or asbestos-containing products manufactured, sold, or distributed by more than eighty named defendants. Three days of extensive discovery deposition testimony (609 pages) were taken by the defendants. An additional day of videotape deposition testimony (125 pages) was taken by plaintiff's own counsel for possible use at trial. Plaintiff was certainly aware that product identification would be an important part of his case, yet even on questioning by his own lawyer he did not identify any P-K product as a source of any of his alleged asbestos exposures.

P-K thereafter sought summary judgment on the ground that plaintiff failed to identify any P-K product as a cause of his alleged injuries. In response, plaintiff filed an affidavit in which he claimed that he did work on several water heaters made by P-K that contained asbestos gaskets.

Under New York law, including numerous decisions by this Court, a party may not defeat a motion for summary judgment by

---

[3] *See* Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline The Litigation Have Fueled More Claims*, 71 Miss. L.J. 531 (2001).

offering a self-serving affidavit that contradicts prior sworn deposition testimony. In this action, however, the trial court denied P-K's motion on the condition that the plaintiff would be produced for yet another deposition to detail his alleged exposure to P-K's products.

This Court should reverse the decision of the trial court denying P-K's summary judgment motion and grant summary judgment in P-K's favor as to all of plaintiff's claims. To rule otherwise and give the plaintiff another (here, a *third*) "bite at the apple" after the close of discovery would: (1) undermine fundamental rules designed to promote the orderly administration of justice; (2) make the discovery process in asbestos cases even more protracted and expensive for all parties; (3) encourage fabricated testimony; (4) make trials more cumbersome and unwieldy because defendants will find it virtually impossible to extricate themselves from the litigation on pre-trial motion; and (5) lead some remote defendants to be pressured into nuisance value settlements based on the business judgment that it is "cheaper to pay than to fight," even where liability has not been established. Time has shown that, in the aggregate, such practices only serve to worsen the asbestos litigation "crisis."

ARGUMENT

I. AN OVERVIEW OF THE LITIGATION ENVIRONMENT IN WHICH THE SUBJECT APPEAL MUST BE CONSIDERED

When asbestos product liability lawsuits emerged almost thirty years ago, nobody could have predicted that courts today would be facing an ever growing "asbestos-litigation crisis." *Amchem*, 521 U.S. at 597. Instead of easing, "the crisis is worsening at a much more rapid pace than even the most pessimistic projections." Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis*, 6:6 Briefly 2 (Nat'l Legal Center for the Pub. Interest June 2002) [hereinafter Bell, *Courts' Duty*]; *see also* Stephen J. Carroll *et al.*, *Asbestos Litigation* xxiv (RAND Inst. for Civil Justice 2005) ("The number of claims filed annually has increased sharply in the past few years.") [hereinafter RAND Rep.]. At least 300,000 asbestos claims are now pending. *See* S. Rep. 108-118 (2003).

A. Mass Filings by the Non-Sick Threaten Payments to the Truly Sick

Today, the vast majority of new asbestos claimants - up to ninety percent - are "people who have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by an asbestos-related disease and likely never will

be." *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary,* 106th Cong., at 5 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School); *see also* Roger Parloff, *Asbestos,* Fortune, Sept. 6, 2004, at 186 ("According to estimates accepted by the most experienced federal judges in this area, two-thirds to 90% of the nonmalignants are 'unimpaireds' - that is, they have slight or no physical symptoms."); RAND Rep., *supra,* at 76 ("[A] large and growing proportion of the claims entering the system in recent years were submitted by individuals who had not at the time of filing suffered an injury that had as yet affected their ability to perform the activities of daily living."); Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs,* N.Y. Times, Apr. 10, 2002, at A15.

Mass screenings conducted by plaintiffs' lawyers and their agents have "driven the flow of new asbestos claims by healthy plaintiffs." Hon. Griffin B. Bell, *Asbestos & The Sleeping Constitution,* 31 Pepp. L. Rev. 1, 5 (2003); *see also Owens Corning v. Credit Suisse First Boston,* 322 B.R. 719, 723 (D. Del. 2005) ("Labor unions, attorneys, and other persons with suspect motives caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims

by persons who had never experienced adverse symptoms."); Lester Brickman, *On The Theory Class's Theories of Asbestos Litigation: The Disconnnect Between Scholarship and Reality?*, 31 Pepp. L. Rev. 33 (2003); Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 Hofstra L. Rev. 833 (2005).

These screenings are frequently conducted in areas with high concentrations of workers who may have worked in jobs where they were exposed to asbestos. *See Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co.*, 718 F. Supp. 1053, 1057 (D. Mass. 1989). Plaintiffs are recruited through exaggerated ads, such as: "Find out if YOU have MILLION DOLLAR LUNGS!" Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36. Many of the x-ray interpreters (B-readers) are "so biased that their readings [are] simply unreliable." *Owens Corning*, 322 B.R. at 723. As one physician has explained, "the chest x-rays are not read blindly, but always with the knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker's behalf." David E. Bernstein, *Keeping Junk Science Out of*

Asbestos Litigation, 31 Pepp. L. Rev. 11, 13 (2003) (quoting Lawrence Martin, M.D.).[4]

B. Bankruptcies Are Placing a Heavy Toll on Workers and Their Employers

Asbestos has forced at least seventy-three employers into bankruptcy. *See* RAND Rep., *supra*, at xxvii. The "process is accelerating," *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied sub nom. Collins v. Mac-Millan Bloedel, Inc.*, 532 U.S. 1066 (2001), due to the "piling on" nature of asbestos liabilities. *See* Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis.

---

[4] In 2004, researchers at Johns Hopkins University re-evaluated 551 x-rays and 492 matching interpretive reports used as a basis for an asbestos claim. The x-ray readers who had been retained by plaintiffs' lawyers found that 95.9% of the films revealed abnormalities. When six independent radiologists reinterpreted the x-rays, they found abnormalities in only 4.5% of the cases. Joseph N. Gitlin *et al.*, *Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 Acad. Radiology 843 (2004). Similarly, one of the most explosive revelations that has emerged from the federal silica MDL proceeding in the Southern District of Texas is Judge Janis Graham Jack found that nearly every one of the 10,000 silicosis claims was "manufactured for money." In her 249-page decision, she documented the "fraudulent means by which lawyers, doctors, and screening companies had manufactured the claims." Editorial, *The Silicosis Sheriff*, Wall St. J., July 14, 2005, at A10; *see also* Jerry Mitchell, *Silicosis Screening Process Irks Judge*, Clarion-Ledger, Mar. 6, 2005, at A1, *available at* 2005 WLNR 3546204 (explaining that U.S. District Judge Janis Graham Jack used the word "fraudulent" to describe the process that led to the diagnosis of most of the MDL plaintiffs).

383, 392 (1993) (each time a defendant declares bankruptcy, "mounting and cumulative" financial pressure is placed on the "remaining defendants, whose resources are limited."); Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, 16:6 Mealey's Litig. Rep.: Asbestos 20 (Apr. 20, 2001).[5]

For instance, RAND found: "Following 1976, the year of the first bankruptcy attributed to asbestos litigation, 19 bankruptcies were filed in the 1980s and 17 in the 1990s. Between 2000 and mid-2004, there were 36 bankruptcy filings, more than in either of the prior two decades." RAND Rep., *supra*, at xxvii.

A study by Nobel Prize-winning economist Joseph Stiglitz of Columbia University and two colleagues on the direct impact of asbestos bankruptcies on workers found that bankruptcies resulting from asbestos litigation put up to 60,000 people out of work between 1997 and 2000. *See* Joseph E. Stiglitz *et al.*, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003). Those workers and their families lost $175 million to $200 million in wages, *see id.* at

---

[5] *See also In re Combustion Eng'g, Inc.*, 391 F.3d 190, 201 (3d Cir. 2005) ("For some time now, mounting asbestos liabilities have pushed otherwise viable companies into bankruptcy.").

76, and employee retirement assets declined roughly twenty-five percent. *See id.* at 83.

RAND has estimated that $70 billion was spent in asbestos litigation through the end of 2002. *See* RAND Rep., *supra*, at 92. "[T]he future costs of asbestos litigation could total $130 billion to $195 billion." *Id.* at 106. To put these vast sums in perspective, former United States Attorney General Griffin Bell has pointed out that asbestos litigation costs will exceed the cost of "all Superfund sites combined, Hurricane Andrew, or the September 11th terrorist attacks." Bell, *Courts' Duty, supra*, at 4.

C. Peripheral Defendants Are Being Dragged into the Litigation

As a result of these bankruptcies, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14; *see also* The Congress of the United States, Congressional Budget Office, *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003) (stating that asbestos suits have expanded "from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities."). One well-known plaintiffs' attorney has remarked that the litigation has turned

into the "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation' — A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002). The defendant in this appeal, P-K, is an example.

More than 8,500 defendants, *see* Deborah R. Hensler, *California Asbestos Litigation - The Big Picture*, Columns - Raising the Bar in Asbestos Litig., Aug. 2004, at 5, have become "ensnarled in the litigation." *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 747-48 (E.D.N.Y. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992). Many of these defendants are familiar names. *See* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1. Other defendants are small businesses facing potentially devastating liability. *See* Susan Warren, *Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J., Jan. 27, 2003, at B1. Nontraditional defendants now account for more than half of asbestos expenditures. *See* RAND Rep., *supra*, at 94.

It is against this background that the current appeal should be considered.

II. Under Settled New York and Federal Court Precedent, as Well as Sound Public Policy, Plaintiff Should Not Be Permitted to Defeat P-K's Summary Judgment Motion by Offering a Self-Serving Affidavit that Contradicts His Prior Sworn Deposition Testimony

Plaintiff in this action alleges that he was exposed to asbestos or asbestos-containing products manufactured, sold, or distributed by more than eighty defendants. During discovery in this case, defendants' counsel deposed plaintiff for three days, documenting his alleged asbestos exposures in over 600 pages of testimony. Plaintiff's own counsel also took additional videotape deposition testimony (125 written pages) for possible use at trial in the event the plaintiff is unavailable to testify in person. Based on these examinations, plaintiff was no doubt aware that product identification and exposure testimony would be an important part of his case. Yet, even on questioning by his own lawyer he did not identify any P-K product as a source of any of his alleged asbestos exposures.

After discovery closed, P-K sought summary judgment based on lack of product identification. In response, plaintiff filed an affidavit in which he claimed that he worked on several water heaters made by P-K that contained asbestos gaskets. Plaintiff's self-serving affidavit should not be permitted to defeat P-K's summary judgment motion.

As explained below, a long line of settled New York and federal court decisions holds that a plaintiff cannot defeat a motion for summary judgment by offering a self-serving affidavit that contradicts his own prior sworn deposition testimony.

A. New York Precedent Clearly Holds that a Plaintiff May Not Defeat Summary Judgment By Offering a Self-Serving Affidavit that Contradicts Prior Sworn Deposition Testimony

New York courts, including this Court, have consistently ruled that a party may not defeat a motion for summary judgment by offering a self-serving affidavit that contradicts prior sworn deposition testimony. For example, in *Phillips v. Bronx Lebanon Hosp.*, 268 A.D.2d 318, 701 N.Y.S.2d 403 (1st Dept. 2000), this Court held that "self-serving affidavits" that contradict prior sworn deposition testimony "can only be considered to have been tailored to avoid the consequences of [the party's] earlier testimony." 268 A.D.2d at 320, 701 N.Y.S.2d at 405. Therefore, the affidavits "are insufficient to create a triable issue of fact to defeat defendant's motion for summary judgment." *Id.*

Likewise, in *Harty v. Lenci*, 294 A.D.2d 296, 298, 743 N.Y.S.2d 97, 98 (1st Dept. 2002), this Court held: "A party's affidavit that contradicts her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment." Again, earlier

this year, this Court in *Thompson v. Abbasi*, 15 A.D.3d 95, 101, 788 N.Y.S.2d 48, 53 (1st Dept. 2005), stated: "Plaintiff's self-serving affidavit, prepared in opposition to defendant's summary judgment motion, was clearly tailored to avoid the consequences of his earlier testimony, and is therefore insufficient to raise an issue of fact."[6]

Other New York appellate courts are solidly in accord. *See Brock Enters. Ltd. v. Dunham's Bay Boat Co.*, 292 A.D.2d 681, 683, 738 N.Y.S.2d 760, 762 (3d Dept. 2002); *Martin v. Savage*, 299 A.D.2d 903, 904, 750 N.Y.S.2d 684, 685 (4th Dept. 2002); *Richter v. Collier*, 5 A.D.3d 1003, 1004, 773 N.Y.S.2d 645, 646 (4th Dept. 2004); *Benamati v. McSkimming*, 8 A.D.3d 815, 817, 777 N.Y.S.2d 822, 824 (3d Dept. 2004); *Katz v. Seminole Realty Corp.*, 10 A.D.3d 386, 386-87, 780 N.Y.S.2d 778, 786 (2d Dept. 2004).[7]

---

[6] *See also Lupinsky v. Windham Const. Corp.*, 293 A.D.2d 317, 318, 739 N.Y.S.2d 717, 719 (1st Dept. 2002); *Kistoo v. City of New York*, 195 A.D.2d 403, 404, 600 N.Y.S.2d 693, 694 (1st Dept. 1993); *Schleifer v. Schlass*, 303 A.D.2d 204, 205, 756 N.Y.S.2d 538, 539 (1st Dept. 2003).

[7] Other state courts have reached similar holdings. *See, e.g., Yahnke v. Carson*, 613 N.W.2d 102, 109 (Wis. 2000) (discussing federal cases and adopting "sham affidavit rule"); *Marshall v. AC&S, Inc.*, 782 P.2d 1107, 11109-10 (Wash. Ct. App. 1989) (contradictory affidavit submitted by asbestos plaintiff did not raise a genuine issue of material fact).

B. Federal Court Decisions Also Hold that a Plaintiff May Not Defeat Summary Judgment By Offering A Self-Serving Affidavit that Contradicts Prior Sworn Deposition Testimony

Like the New York courts, the federal courts also have been "highly critical of efforts to patch up a party's deposition with his own subsequent affidavit." *Harris v. AC&S, Inc.*, 915 F. Supp. 1420, 1432 (S.D. Ind. 1995), *aff'd sub nom. Harris v. Owens-Corning Fiberglas Corp.*, 102 F.3d 1429 (7th Cir. 1997) (affirming summary judgment for asbestos defendant); *see also Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656 (11th Cir. 1984). As the Seventh Circuit Court of Appeals has observed: "Almost all affidavits submitted in litigation are drafted by the lawyers rather than the affiants. . . ." *Russell v. Acme-Evans Co.*, 51 F.3d 64, 67 (7th Cir. 1995).

The federal court doctrine, known as the "sham affidavit rule," was first addressed explicitly in a Second Circuit case called *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572 (2d Cir. 1969). The court stated:

> ***If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.***

Id. at 578. The *Perma* court rule is that, if an interested party has personal knowledge of the relevant facts, and if that

party cannot explain a material contradiction between deposition testimony and a subsequent affidavit by the acquisition of newly acquired evidence, then a trial court may disregard the affidavit as a "sham" (*i.e.*, as one failing to raise any issue that the trial court can call genuine). *See also Barwick v. Celotex Corp.*, 736 F.2d 946 (4th Cir. 1984) (affirming summary judgment for an asbestos defendant where the plaintiff attempted to overcome inadequate product identification during the discovery period by a subsequent affidavit); *Trans-Orient Marin Corp. v. Star Trading & Marine, Inc.*, 925 F.2d 566, 572 (2d Cir. 1991); *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975); *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1366 (8th Cir. 1983).

C. The New York and Federal Court Precedent Is Supported by Sound Public Policy

Here, rather than follow established precedent, the trial court apparently sought to draw a balance between: (1) denying the plaintiff the opportunity to recover against P-K, either because his memory may have been faulty during his prior depositions or his counsel failed to ask the "right" questions, and (2) requiring P-K to continue to defend a case where none of its products were identified during discovery as potentially causing plaintiff's alleged asbestos exposures. The court chose to deny P-K's summary judgment motion based on the general and

conclusory statements in plaintiff's self-serving, post-discovery affidavit, but permitted P-K to take additional discovery to explore the merits of the plaintiff's untimely claims.

No doubt, the trial court meant well in developing this approach. Nevertheless, this approach should be rejected. Allowing a plaintiff to file a late affidavit to "patch up" prior sworn testimony would substantially undermine the utility of having discovery deadlines and summary judgment procedures.

Plaintiffs, like the one here, are well aware of the importance of demonstrating product identification and exposure in asbestos personal injury cases. A plaintiff has ample time during discovery to identify all of the products to which he or she may have been exposed. Here, plaintiff was even deposed by his own counsel. A plaintiff should not be permitted to come forward after the discovery cut-off and basically say, "I just remembered. I forgot to mention X or Y product."

This Court can certainly appreciate the chaos that could result, and the expense that could be imposed on litigants, if this approach were embraced. For example, what if in this eighty-defendant case the plaintiff testified under oath as to exposures from products made by forty defendants? Would he then be permitted to file up to thirty-nine other affidavits

essentially saying, "I forgot about those too," and make himself available for numerous additional depositions after he was thoroughly deposed during discovery, including by his own counsel?

This approach would render discovery deadlines and summary judgment procedures virtually meaningless. It also would make the discovery process in asbestos cases even more protracted and expensive for all parties, and would encourage fabricated testimony.

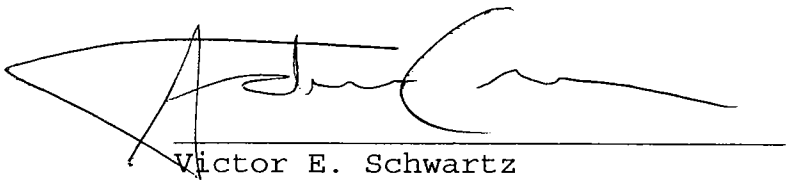
In addition, asbestos trials would become more cumbersome and unwieldy because defendants would find it virtually impossible to extricate themselves from the litigation on pre-trial motion. Finally this approach may lead some remote defendants to be pressured into nuisance value settlements based on the business judgment that it is "cheaper to pay than to fight," even where liability has not been established.

Time has shown that in the aggregate, bending procedural rules to permit recoveries by plaintiffs will not resolve the asbestos litigation "crisis." Such rules, no matter how well intended, will only serve to worsen the litigation.

CONCLUSION

For these reasons, *amici curiae* request that this Court reverse the decision of the trial court denying Defendant-Appellant P-K's summary judgment motion and request that summary judgment should be entered in P-K's favor as to all of Plaintiff-Respondent's claims.

Respectfully submitted,



Victor E. Schwartz
Mark A. Behrens
Andrew W. Crouse* (Admitted in N.Y.)
SHOOK, HARDY & BACON L.L.P.
Hamilton Square
600 14th Street, N.W., Suite 800
Washington, D.C. 20005-2004
Tel: (202) 783-8400
Fax: (202) 783-4211

Attorneys for *Amici Curiae*
* Counsel of Record

Paul W. Kalish
Mark D. Plevin
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 624-2500

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Tel: (202) 463-5337
Counsel for the Chamber of Commerce of the United States of America

Ann W. Spragens
Robert J. Hurns
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018
Tel: (847) 553-3826

Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Of Counsel

Dated: August 30, 2005

SECTION 1600.10 CERTIFICATION

I hereby certify pursuant to 22 N.Y.C.R.R. § 600.10 that the foregoing brief was prepared on a computer using Microsoft Word software.

Type. A proportionally spaced typeface was used, as follows:

Name of Typeface: Courier New

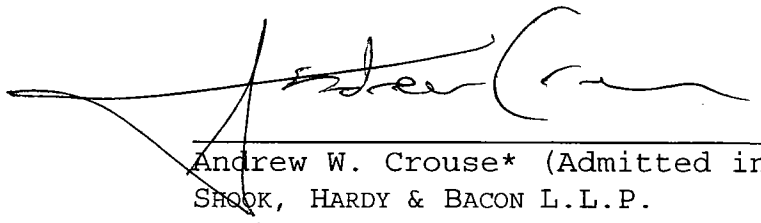
Point Size: 12

Line Spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes, but exclusive of the table of contents, table of authorities, statement of interest, and this statement is 3,243.

Dated: Washington, D.C.

August 30, 2005



Andrew W. Crouse* (Admitted in N.Y.)
SHOOK, HARDY & BACON L.L.P.
Hamilton Square
600 14th Street, N.W., Suite 800
Washington, D.C. 20005-2004
Tel: (202) 783-8400

Attorneys for *Amici Curiae*
* Counsel of Record