IN THE SUPREME COURT OF PENNSYLVANIA

No. 7 WAP 2008

JUDITH R. BUGOSH, Administratix of the Estate of EDWARD J. BUGOSH, Deceased, and JUDITH R. BUGOSH, in her own right,

v.

I.U. NORTH AMERICA INC., as successor by merger to The Garp Company, formerly known as The Gage Company, formerly known as Pittsburgh Gage and Supply Company, E.W. BOWMAN, INC., EMHART GLASS INC., formerly known as Emhart Manufacturing Company, formerly known as Hartford Empire, F.B. WRIGHT COMPANY, SURFACE COMBUSTION, INC., TAYLORED INDUSTRIES, INC.

BRIEF OF THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY, COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NFIB SMALL BUSINESS LEGAL CENTER, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, AMERICAN TORT REFORM ASSOCIATION, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND AMERICAN CHEMISTRY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

Regarding the Order of the Superior Court of July 18, 2007 affirming the Order of the Trial Court and Notice of Appeal from Order or other Determination dated April 28, 2006 of the Court of Common Pleas of Allegheny County, Pennsylvania
G.D. No. 04-18310 (on appeal at 997 of 2006)

Victor E. Schwartz
Mark A. Behrens
SHOOK, HARDY & BACON L.L.P.
600 14th Street, NW, Suite 800
Washington, DC 20005-2004
(202) 783-8400 (Telephone)
(202) 783-4211 (Facsimile)

Of Counsel

Michael L. Martinez (Pa. Bar No. 30123)
Patricia M. Connally
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2595
(202) 624-2500 (Telephone)
(202) 628-5116 (Facsimile)

Attorneys for *Amici Curiae*

(Additional Of Counsel Listed on Next Page)

Of Counsel

Jan Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5000

George W. Keeley
KEELEY, KUENN & REID
150 North Wacker Drive, Suite 1100
Chicago, IL 60606
(312) 782-1829
Counsel to the National Association of Wholesaler-Distributors

Gregg Dykstra
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
(317) 875-5250

Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW, Suite 400
Washington, DC 20036
(202) 682-1163

Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018
(847) 553-3826

Lynda S. Mounts
Kenneth A. Stoller
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 828-7158

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

QUESTION PRESENTED

Whether this Court should adopt the Restatement Third, Torts: Products Liability § 2 (1998) in place of the Restatement (Second) of Torts § 402A (1965).

Suggested Answer: Yes

STATEMENT OF INTEREST

Amici are organizations that represent Pennsylvania companies that are frequently named as defendants in product liability litigation, and their insurers. *Amici* are well suited to provide a broad perspective to this Court and explain why this Court should adopt § 2(c) of the Restatement Third, Torts: Products Liability as the standard to apply in failure-to-warn claims. *Amici* believe that the decision of the Superior Court as to Appellant I.U. North America, Inc. ("I.U.N.A.") should be reversed and a new trial granted.

The Pennsylvania Chamber of Business and Industry ("Pennsylvania Chamber") is Pennsylvania's largest broad-based advocacy group with 24,000 members and customers representing all segments of Pennsylvania's business community. Thousands of Pennsylvania Chamber members throughout the Commonwealth employ greater than fifty percent of Pennsylvania's private workforce.

The Coalition for Litigation Justice, Inc. ("Coalition") is a nonprofit association formed by insurers to address and improve the asbestos litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil

justice system.[1] The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos litigation environment.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. The U.S. 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 U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all

---

[1] The Coalition for Litigation Justice includes Century Indemnity Company, Chubb & Son, a division of Federal Insurance Company, CNA service mark companies, Fireman's Fund Insurance Company, Liberty Mutual Insurance Group, and the Great American Insurance Company.

fifty states. NFIB represents over 300,000 members who own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

The National Association of Wholesaler-Distributors ("NAW") is the Washington, D.C.-based trade association that represents the wholesale distribution industry. NAW encompasses more than 80 national line-of-trade national associations, representing virtually all products that move to market via wholesaler-distributors; over 20 U.S.-based regional, state, and local wholesale distribution associations; approximately 40,000 wholesale distribution companies, most of which belong to one or more NAW-affliated associations.

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 state and federal courts that have addressed important liability issues.

The American Insurance Association ("AIA"), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the insurance industry; and it keeps members informed of regulatory and legislative developments. Among its other activities, AIA files *amicus* briefs in cases before state and federal courts on issues of importance to the insurance industry.

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 member companies account for $184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% 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 United States property and casualty insurance industry. In light of its involvement in Pennsylvania, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

Founded in 1895, National Association of Mutual Insurance Companies ("NAMIC") is a full-service, national trade association with more than 1,400 member companies that underwrite more than forty percent of the property/casualty insurance premiums in the United States. NAMIC members account for forty-seven percent of the homeowners market, thirty-nine percent of the automobile market, thirty-nine percent of the workers' compensation market, and thirty-four percent of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's

economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Amici adopt Appellant I.U.N.A.'s Statement of Jurisdiction.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Amici adopt Appellant I.U.N.A.'s Statement of the Standard of Review.

STATEMENT OF FACTS

Amici adopt Appellant I.U.N.A.'s Statement of Facts.

SUMMARY OF THE ARGUMENT

Product liability claims have evolved and expanded in ways never expected or anticipated by the authors of the Restatement (Second) of Torts § 402A (1965) when they wrote that landmark change in product liability law. The authors of § 402A (called Reporters) were focused on one type of product liability claim - manufacturing defects. In subsequent years, courts struggled to apply § 402A to design defect and failure-to-warn claims. The result has been a confusing and contradictory body of products liability law both nationally and in Pennsylvania. The Restatement Third, Torts: Products Liability § 2 (1998) ("Third Restatement") was drafted to put an end to this doctrinal disorder; the Third Restatement provides a clear and fair standard for product liability claims. It should be adopted by this Court.

A public policy judgment by the Reporters of the Third Restatement was to include a foreseeability requirement in the duty-to-warn provision found in § 2(c). This requirement applies to both manufacturers and distributors, such as Appellant I.U.N.A. The basis for the

foreseeability requirement is not only basic fairness and rejection of liability by hindsight, but also to have a tort system that will encourage innovation and effective warnings.

Under the facts of this case, during the time in question, I.U.N.A.'s predecessor distributed construction materials. We understand that I.U.N.A. did not use or manufacture asbestos products itself and only about 1% of the products it distributed contained asbestos. I.U.N.A. could, and should, be subject to liability for failure to warn if it, based on its knowledge, should have known about a risk. On the other hand, a distributor of a product should not have a duty greater than that of a manufacturer and should not be required to warn of unforeseeable risks. The Third Restatement would permit I.U.N.A. to introduce evidence that it did not know, and had no reasonable way of ascertaining, that the *de minimis* supply of asbestos products passing through its distribution inventory posed a risk to a buyer of those products. I.U.N.A. should be permitted to do so.

ARGUMENT

I. THE THIRD RESTATEMENT ADOPTS A FAIR AND UNIFORM STANDARD TO ADDRESS PRODUCTS LIABILITY CLAIMS

In 1965, when § 402A of the Restatement (Second) of Torts was approved, issues of manufacturing defects were well known to courts, but little case law existed on concepts of strict liability. The Restatement (Second) was written to try to make sense of these developing concepts. The authors of the Restatement (Second), Dean John Wade and Dean William Prosser, were concerned with mismanufactured products. *See* Victor E. Schwartz, *The Restatement, Third, Torts: Products Liability: A Model of Fairness And Balance*, 10-Fall Kan. J.L. & Pub. Pol'y 41, 41 (2000) (Dean Wade made clear in his writings that "the focus of the

Reporters was on manufacturing defects.").[2] The Reporters' Notes to § 402A unequivocally show that the authors of § 402A were concerned about a product that had something wrong with it - a bicycle that had a missing spoke, a cosmetic that contained glass, a drink that had something in it that should not have been there (i.e., the famous mouse in a cola bottle). The thinking then, as today, is that an ordinary person need not prove that he or she "exercised all possible care" when harmed by a mismanufactured product.

Defining defect for manufacturing cases was not complex. As Brooklyn Law School Professor Aaron Twerski, co-reporter for the Third Restatement explains, "Manufacturing defects are rare events, and the implications for imposing strict liability were not serious." Aaron D. Twerski, *Chasing the Illusory Pot of Gold at the End of the Rainbow: Negligence and Strict Liability in Design Defect Litigation*, 90 Marq. L. Rev. 7, 17 (2006). "The shift to strict liability went smoothly" for such cases. *Id.*

Since the adoption of the Restatement (Second), however, courts have struggled with applying a strict liability doctrine developed for one type of tort claim – the manufacturing defect – to very different claims involving defective design and failure to warn. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn,* 65 N.Y.U. L. Rev. 265, 270 (May 1990) ("doctrinal confusions . . . result from some courts' misguided attempts to distinguish (and apply) a strict liability cause of action for failure to warn"); *see also* Restatement Third § 1 Cmt. *a* ("it soon became evident

---

2 *See also* Aaron D. Twerski, *Chasing the Illusory Pot of Gold at the End of the Rainbow: Negligence and Strict Liability in Design Defect Litigation*, 90 Marq. L. Rev. 7, 17 (2006) ("The focus in the early years of section 402A was on manufacturing defect cases."); James A. Henderson, Jr., *A Discussion and a Defense of the Restatement (Third) of Torts: Products Liability*, 8-Fall Kan. J.L. & Pub. Pol'y 18, 41 (1998) "20 ("the drafters back then almost certainly were thinking of manufacturing defect liability. They just hadn't focused on design liability.").

that § 402A, created to deal with liability for manufacturing defects, could not appropriately be applied to cases of design defects or defects based on inadequate instructions or warnings.").

Courts that persist in applying the strict liability doctrine to failure-to-warn claims "have been forced either to articulate outrageous positions that both deeply offend traditional notions of moral responsibility and prevent tort law from achieving its objectives, or to create verbal distinctions that have little practical consequence other than to confuse litigants and commentators." *Id.* at 272-73. The New Jersey case of *Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539 (N.J. 1982), is a good example. The New Jersey Supreme Court initially ruled that defendants could be held liable for failing to warn of a risk that was scientifically unknowable at the time. The court later restricted this holding to asbestos cases and then the legislature overturned the decision completely. *See Feldman v. Lederle Labs.*, 479 A.2d 374, 388 (N.J. 1984); N.J. Stat. Ann. § 2A:58C-4.

Pennsylvania itself has struggled with these issues and this Court has recognized the need to clarify the law of product liability. In *Phillips v. Cricket Lighters,* 576 Pa. 644, 655-56, 841 A.2d 1000, 1006-07 (2003), while holding that negligence concepts had no place in strict liability law, the majority opinion recognized that lower courts have "muddied the waters at times with the careless use of negligence terms in the strict liability arena." In 2006, this Court acknowledged Pennsylvania products liability law contains "substantial deficiencies" and "should be closely limited pending overhaul by the Court." *Pennsylvania Dept. of Gen. Servs. v. United States Mineral Prods.,* 587 Pa. 236, 254, 898 A.2d 590, 601 (2006).

Section 2 of the Third Restatement resolves the conflict and tension created by § 402A's "one size fits all" approach and sets forth distinct principles of manufacturing defect,

design defect and failure to warn. The rules are stated functionally rather than in terms of traditional labels, such as negligence and strict liability:

> §2. Categories of Product Defect
>
> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
>
> (a) Contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
>
> (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
>
> (c) is defective because of the inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe."

Restatement Third, Torts: Products Liability § 2 (1998).

In a concurring opinion in the *Phillips* case, members of this Court have suggested that the solution to the confusing and contradictory law of product liability that has developed in Pennsylvania would be to adopt this section of the Restatement Third:

> In my view, adoption of the Restatement's closely reasoned and balanced approach, which synthesizes the body of products liability law into a readily accessible formulation based on the accumulated wisdom from thirty years of experience, represents the clearest path to reconciling the difficulties persisting in Pennsylvania law, while enhancing fairness and efficacy in the liability scheme.

Phillips, 576 Pa. at 656-57. It is time for a majority of this Court to hold the same.[3]

---

[3] The *amicus curiae* brief of the Products Liability Advisory Council, Inc. contains a comprehensive analysis of the case law surrounding Section 2 of Restatement, Third.

II. THE "FORESEEABLE RISK" REQUIREMENT IN THE THIRD RESTATEMENT SECTION 2(c) IS FAIR, BALANCED AND OVERWHELMINGLY SUPPORTED BY SCHOLARS AND COURTS

While maintaining "true" strict liability for manufacturing defects in § 2(a), § 2(c) of the Third Restatement clarifies that a manufacturer or distributor of a product may only be liable for failing to warn of foreseeable risks. The duty-to-warn provision has not been the subject of controversy among the courts nor was it much debated during the drafting of the Third Restatement. The Reporters of the Third Restatement and members of the ALI were united and very clear in their pronunciation that the duty to warn by a supplier of a product should be the same as that of a manufacturer.[4]

This consensus is based not just on the fairness of foreseeable risk principles, but also to encourage and not deter innovation. The Reporters of the Third Restatement believed that if a manufacturer has a duty to warn about the unknowable, it may produce warnings about almost every possible risk. The adverse public policy result would be that people would ignore warnings. *See* Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. Cin. L. Rev. 38 (1983). The Reporters of the Third Restatement appreciated these very practical considerations and believed that by confining duty to warn to foreseeable risks, better and more effective warnings will result.

---

[4] Some members of the plaintiffs' bar have written disparagingly of Section 2 of the Restatement. These criticisms, however, narrowly focus on the requirement for a plaintiff to prove a reasonable alternative design in design defect cases and not on the duty-to-warn provisions. *See* Victor E. Schwartz, *The Restatement, Third, Torts: Products Liability: A Model of Fairness and Balance*, 10-Fall Kan. J.L. & Pub. Pol'y 41, 43 (2000). Notably, this Court has considered favorably the alternate, safe design element in the Third Restatement's § 2(b). *See Duchess v. Langston Corp.*, 564 Pa. 529, 559 n.24, 769 A.2d 1131, 1149 n.24 (2001) (citing the Third Restatement in

(Footnote continued on next page)

It is also important to note that § 402A of the Restatement (Second) itself never intended to apply strict liability to failure-to-warn claims. Indeed, comment *j* to § 402A makes clear that the failure to warn requires a fault-based inquiry whereby a manufacturer or distributor cannot be held liable for failing to warn about a risk that was not known and was not knowable at the time the product was sold. *See* Restatement (Second) of Torts § 402A cmt. *j* (product bearing a warning "which is safe for use if it is followed, is not in defective condition, nor it is unreasonably dangerous").[5]

Even as pure strict liability was developing and being applied to manufacturing and design defect claims, the general concept that a duty to warn flows from what a manufacturer or seller knew or should have known continued to run through case law and statutes and remained uncontroversial in many states.[6] This touchstone for failure-to-warn claims is now a well accepted principle of a majority of courts. *See generally* James A. Henderson, Jr. & Aaron D. Twerski, *Products Liability*, 10-Fall Kan. J.L. & Pub. Pol'y 21 (2000) ("foreseeable risk is an integral factor in a product liability action" and a majority of courts have followed this position of the Third Restatement); *see also* Victor E. Schwartz, *The Death of "Super Strict Liability": Common Sense Returns To Tort Law*, 27 Gonzaga L. Rev. 179 (1991/92).

---

recognizing that "alternate, safer design" evidence is an "essential element" of design defect case).

5 Comment *j* of § 402A has received some criticism over the years and was narrowed under the Third Restatement to allow for the possibility of liability even if an adequate warning is provided. *See* Third Restatement § 2 cmt. l. But, the premise that a fault-based inquiry be undertaken before assigning liability is retained by § 2. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Products Liability*, 10-Fall Kan. J.L. & Pub. Pol'y 21 (2000).

6 As pointed out by *amicus* Product Liability Advisory Council, Inc., Pennsylvania courts have used negligence concepts in strict liability cases, including duty-to-warn cases. *See* PLAC Brief at 26-27.

According to the Reporter's Notes to comment *m* of the Third Restatement, the overwhelming number of state courts look to what a manufacturer knew or should have known about a risk and to not impute hindsight knowledge to the manufacturer. Restatement, Third § 2(c), cmt. *m*, at 106.[7]

Tellingly, Massachusetts, one of the few states where the Supreme Judicial Court in dictum in a footnote suggested that it might impose "super strict" liability (i.e., liability regardless of the absence of fault), *see Simmons v. Monarch Mach. Tool Co.*, 596 N.E.2d 318, 320 n. 3 (Mass. 1992), later declined to do so. In *Vassallo v. Baxter Healthcare Corp.*, 428 Mass 1, 21, 696 N.E.2d 909, 922 (1998), the Massachusetts Supreme Judicial Court considered § 2 of the Third Restatement for guidance in acknowledging that the "goal of the law . . . to induce conduct that is capable of being performed" is not advanced "by imposing liability for failure to warn of risks that were not capable of being known" and, as a practical matter, rejected the dictum from the footnote in the *Simmons* case. The *Vassallo* court concluded that it would "revise" its law "[i]n recognition of the clear judicial trend regarding the duty to warn in products liability cases and the principles stated in Restatement (Third) of Torts." *Id.* at 22-23.

In sum, the overall conclusion of the Reporters of Third Restatement was that almost every court has declined to impose "liability by hindsight" in failure-to-warn cases. In the few cases where language exists that might have allowed such injustice, it was basically dictum

---

[7] A lower Pennsylvania court decision is cited by the Reporters as having language that could be read to impute knowledge to a manufacturer, but it does not appear that the defendant in that case was actually held responsible for a risk that it neither knew nor should have known about. *See Dambacher v. Mallis*, 336 Pa. Super. 22, 485 A.2d 408 (1984), *appeal dismissed*, 508 Pa. 643, 500 A.2d 428 (1985).

because a defendant was not actually held liable in a situation where it neither knew nor should have known about a risk.

III. DISTRIBUTORS SHOULD NOT BE HELD LIABLE UNDER A STANDARD GREATER THAN THAT APPLIED TO MANUFACTURERS

Under the Third Restatement, non-manufacturer sellers or distributors of products are held to the same standard as manufacturers. For example, a distributor would be liable for a mismanufactured product, even though it neither knew nor could have known of the defect. The liability of both distributors and manufacturers is encompassed in the general black letter law of § 1 of the Third Restatement: "One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect." Thus, a distributor is not held to a lesser standard than a manufacturer for a manufacturing defect claim.

Similarly, the Third Restatement does not hold a distributor to a stricter standard than a manufacturer. As set forth previously in this brief, under § 2(c) of the Third Restatement, a manufacturer is only subject to liability for failure to warn for foreseeable risks. Under both the Restatement (Second) and the Third Restatement, as well as the overwhelming majority of cases that have considered the issue, "hindsight liability" is not imposed on manufacturers. As distributors are held to the same standard as manufacturers for claims of failure to warn, neither manufacturers nor distributors are, or should be, subject to liability for hindsight failures to warn.

The Third Restatement position on imposing strict liability for manufacturing defects is easily understood. Such defects are basically failures of quality control, can usually be avoided by reasonable care, and are predictable in terms of future risk. But these factors are not in play

with respect to liability about failure to warn for unknown risks. Such a failure is not based on failure of quality control, but on the scientific knowledge that was available at the time of manufacture. Product sellers, including distributors, who are merely pass-throughs of a product should not be subject to liability in a manner that is greater than a manufacturer would have under either the Restatement (Second) or the Third Restatement.

IV. SECTION 2(c) OF THE THIRD RESTATEMENT SHOULD BE APPLIED HERE

Over ten years ago, the United States Supreme Court observed that we were in the midst of an "asbestos-litigation crisis," *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997), as a result of the "elephantine mass" of filed claims, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). This Court has noted "the heavy toll that asbestos litigation is visiting upon certain Commonwealth corporations." *Ieropoli v. AC&S Corp.*, 842 A.2d 919, 932 (Pa. 2004). A similarly heavy toll is, of course, borne by the courts themselves. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005) ("For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits.").

By 2002, the RAND Institute estimated that as many as 730,000 plaintiffs have filed suit. Stephen J. Carroll *et al., Asbestos Litigation* xxiv (Rand Inst. for Civil Justice 2005). In August 2006, approximately 322,000 asbestos bodily injury cases were pending in state and federal courts. *See* American Academy of Actuaries' Mass Torts Subcommittee, *Overview of Asbestos Claims and Trends,* 5 (Aug. 2007). All told, "as many as 10 million claims may have been filed, and the ultimate net cost may hit $265 billion, more than double the cost of the total Superfund cleanup program." Center for Legal Policy at the Manhattan Institute, *Trial Lawyers, Inc., A Report on the Asbestos Litigation Industry*, 7 (2008).

The continued pattern of asbestos claims nationally is evident in two dimensions. First, it is evident *vertically*; plaintiffs continue to file huge numbers of cases, even some plaintiffs who have, as yet, suffered no impairment from their exposure to asbestos.[8] In fact, the courts of this Commonwealth were among the first to confront and address this vertical expansion of claims, ruling that asymptomatic asbestos plaintiffs cannot recover under Pennsylvania law. *See Giffear v. Johns-Manville Corp.*, 632 A.2d 880 (Pa. Super. Ct. 1993), *aff'd sub. nom., Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996).

Second, the pattern of asbestos claims is also increasingly evident *horizontally*, with claimants filing claims against an ever-widening universe of peripheral defendants. The "traditional" asbestos defendant was involved in asbestos production or production of asbestos insulation, with the plaintiff alleging significant exposure to the defendant's products. The range of defendants in asbestos cases has now greatly expanded as plaintiffs who have pursued claims against traditional defendants are now pursuing additional sources of recoveries.[9] Remarkably, there are now more than 8,400 asbestos defendants,[10] up from only 300 in 1982.[11]

---

8 *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247 (2000); *see generally* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331, 336-42 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1, 4-9 (2001).

9 *See* Steven B. Hantler *et al.*, *Is the "Crisis" in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1151-52 (2005) (discussing spread of asbestos litigation to "peripheral defendants"); Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *available at* 2001 WLNR 1993314 ("the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing"). One plaintiff's attorney asbestos litigation as an "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).

10 *See* Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*, Columns – Asbestos, Aug. 2004, at 5.

Because every peripheral defendant who can be named in the case presumably provides a potential additional source of some recovery, the greater the number of defendants, the better for the plaintiff. There is certainly no disincentive for the plaintiff to join defendants. This is not so, of course, for the courts and the defendants themselves because the sheer number of defendants often makes it difficult for a defendant to extricate itself from the case.

We have moved far beyond the era in which manufacturers and producers of friable asbestos products – whether raw asbestos or asbestos insulation – are the only defendants. Named defendants now frequently include companies who did not make asbestos products or use asbestos products. These peripheral defendants now account for over half of asbestos expenditures. Rand Institute Report, *supra,* at 94. The case presently before the court reflects this form of horizontal expansion to "non-asbestos" peripheral defendants.

In large measure, this increase in *filings* against peripheral defendants is a product of the court's difficulties in efficiently separating the wheat from the chaff, *i.e.* the failure to separate potentially meritorious claims involving a defendant who is substantially involved with and knowledgeable about a product which causes the plaintiff's harm. As with vertical expansion, this Court is familiar with attempts at horizontal expansion. *See Gregg v. V.J. Auto Parts, Inc.*, 943 A.2d 216, 226 (Pa. 2007) (defendant may be entitled to summary judgment when plaintiff can show only *de minimis* exposure to defendant's asbestos containing product and evidence existed of substantial exposure from other sources).

Plaintiff-Appellee Bugosh's claim against I.U.N.A. is just the sort of claim that should not be permitted to proceed. The Plaintiff-Appellee claims that he was exposed to asbestos-

---

[11] *See* James S. Kakalik *et al.*, *Variation in Asbestos Litigation Compensation and*
(Footnote continued on next page)