IN THE CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION TWO

NATHAN K. WILLIAMS, as successor-in-interest, inc.

Plaintiff and Respondent,

v.

J-M MANUFACTURING COMPANY, INC.

Defendant and Appellant.

On Appeal from the Superior Court for the State of California, County of Alameda, Case No. RG19032329, Hon. Frank Roesch

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AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

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INTRODUCTION

For over sixty years, the California Supreme Court has held that a plaintiff asserting a strict-liability claim against a product manufacturer for design defect must show that his injury resulted from a foreseeable use of the product. Far from establishing unlimited or absolute liability, the Court has repeatedly affirmed that the doctrine of proximate cause—which incorporates policy based considerations—limits liability for product manufacturers. As the Court has warned, without these common-sense limits, manufacturers would become de facto insurers of the safety of everyone who uses or is exposed to their products at any time, a result that would be both inefficient and unjust.

Here, the trial court should have applied this well-established precedent and granted judgment to Appellant on the ground that the injury to Respondent's brother was unforeseeable and thus barred as a matter of law. It failed to do so, however, and Respondent now urges this court to do away with doctrines of foreseeability and proximate cause altogether for strict-liability claims. According to Respondent, a plaintiff should *always* recover if he can prove that the product's design was defective and caused his injury. Thus, under Respondent's theory, a chemical manufacturer could be held strictly liable for injuries resulting to a child who ingested the chemical from the wood of a treehouse that his father built using discarded lumber taken from boats

that happened to be treated with that chemical decades ago—regardless of how unforeseeable that use of the treated wood may have been. If the chemical is found to be "defective," the manufacturer would be strictly liable for every injury arguably caused by it across the years. Respondent's rule thus provides no logical stopping point to cut off liability. Adopting that rule would devastate manufacturers who do business in California. And where the injuries are unforeseeable, such a rule would have no countervailing deterrent effect.

Although the foreseeability question often involves difficult line-drawing problems and close judgment calls, this is an easy case. The California Supreme Court has already addressed the foreseeability of so-called "take home" asbestos exposure. In *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, the Supreme Court held that while injuries to members of an asbestos-worker's household might be foreseeable, injuries to anyone else incidentally exposed to asbestos fibers due to contact with an asbestos worker are not. Because Respondent's brother was not a member of Respondent's household, his injuries, allegedly caused by Appellant's asbestos-cement pipes, were not foreseeable as a matter of law. Accordingly, Appellant cannot be held liable for those injuries.

Although Respondent's proposed rule would be crippling for all manufacturers, the Court should be especially wary of applying that rule in

the context of asbestos litigation because that area is already rife with abuse. As numerous courts around the country have recognized, the gross misconduct of plaintiffs' firms pursuing asbestos claims has resulted in unjust damages awards and tarnished the legal profession. This Court should thus hesitate before endorsing Respondent's theory of absolute liability for asbestos manufacturers.

ARGUMENT

I. Product Manufacturers Should Not Be Held Strictly Liable to Third Parties Where the Injuries Resulting from Incidental Exposure to the Defendants' Products Were Unforeseeable

According to Respondent, a plaintiff suing under a strict-liability theory must prove only two things: (1) that the defendant's product was defective, and (2) that the defect caused the plaintiff's injuries. (Resp. Br. 38; see also *id.* at 39.) Under that theory, a product manufacturer that designs, manufactures, and sells a defective product—*i.e.*, an unreasonably dangerous product or a product with a deficient warning—could be held strictly liable for *every* injury caused by that product down the centuries, regardless of how unforeseeable the type of injury or the use that led to the injury. (See Resp. Br. at 50 [asserting that "product defendants" "are already potentially liable to everyone because their products move freely through the public market"].)

That has never been California law. Nor should it be. On the contrary,

the time-honored doctrine of proximate cause, which includes the concept of reasonable foreseeability, has consistently been applied in the strict-liability context to limit the liability of product manufacturers.

In the context of "take-home" asbestos contamination, the Supreme Court has defined the outer limits of foreseeable injury. Specifically, the Court has held that while it may be foreseeable that members of an asbestos worker's household could be injured by asbestos fibers brought home on the worker's clothes, it is not foreseeable that non-household members would be injured from incidental exposure to asbestos fibers on a worker's clothes. Because Respondent's brother was not a member of Respondent's household, it was not reasonably foreseeable that he would be injured by asbestos fibers from Respondent's clothes. Accordingly, the trial court erred in denying judgment to Appellant.

A. Foreseeability Has Always Been a Component of Strict Liability

The doctrine of strict liability is designed "to insure that the costs of injuries resulting from defective products are borne by the manufacturer that put such products on the market rather than by the injured persons who are powerless to protect themselves." (*Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 733 [quoting *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 63].) To that end, the doctrine relieves plaintiffs of the burden of

"prov[ing] that the manufacturer or distributor was negligent in the production, design, or dissemination of the article in question." (*Id.* at pp. 736–37.) However, while the doctrine of strict liability has expanded liability beyond the "negligence and warranty remedies," it "has never been, and is not now, *absolute* liability." (*Id.* p. 733, emphasis added.)

As the Supreme Court has "repeatedly expressed, under strict liability the manufacturer does not thereby become the insurer of the safety of the product's user." (*Ibid.*) Accordingly, a "manufacturer is not deemed responsible when injury results from an *unforeseeable use* of its product." (*Ibid.*, emphasis added; see also *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 126.) Courts have thus recognized that "[i]n actions premised on strict products liability, just as in actions premised on negligence, an element of foreseeability is involved; liability may not be imposed unless the injury results from a use of the product which is reasonably foreseeable." (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1190; see also *Milwaukee Electric Tool Corp. v. Superior Court* (1993) 15 Cal.App.4th 547, 557–58 [comparing negligence and strict liability claims and noting that "the concept of foreseeability is involved in both types of actions"].)

Accordingly, liability will not attach when a product is "used" in an unforeseeable manner. (See *Romito v. Red Plastic Co.* (1995) 38 Cal.App.4th

59, 70 [no liability for manufacturer of a skylight when the plaintiff accidentally fell through the skylight while working on the roof]; *Barrett*, 222 Cal.App.3d at 1190 ["there can be no recovery under the theory of strict products liability without some evidence of foreseeability"]; *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 362 ["Generally, foreseeability is relevant in a strict liability analysis to determine whether injury is likely to result from a potential use or misuse of a product"].) Put simply, a manufacturer does not have a duty to protect users against risks caused by unforeseeable uses of its products. (See *Milwaukee Electric Tool*, 15 Cal.App.4th at 564–65.)

The very cases Respondent cites confirm that foreseeability—and the doctrine of proximate cause more generally—is a necessary element in all strict liability cases. In *Elmore v. American Motors Corp.* (1969) 70 Cal.2d 578—which Respondent cites for the proposition that courts have "taken an expansive view on the persons who may seek recovery under a theory of strict products liability" (Resp. Br. at 38)—the plaintiff was driving a defective car, which careened into the oncoming lane after a piece broke loose and caused her to lose control. (*Id.* at 581–82.) In addressing the manufacturer's liability to those injured in the resulting crash, the Court held that the doctrine of strict liability could render a manufacturer liable to "bystanders" that neither consumed nor used the defective product "where injury to bystanders from the

defect is *reasonably foreseeable*." (*Id.* at 586, emphasis added.) Far from dispensing with the requirement to show proximate cause, the Court concluded that the evidence "furnishe[d] an inference that [plaintiffs'] injuries were proximately caused by a defect in the [vehicle] which existed at the time of sale." (*Id.* at 584; see also *id.* at 586 ["An automobile with a defectively connected drive shaft constitutes a substantial hazard on the highway not only to the driver and passenger of the car but also to pedestrians and other drivers"].) The Court would not have bothered to address proximate cause if such consideration was irrelevant in strict-liability cases.

Respondent also cites *Hegyes v. Unjian Enterprises, Inc.* (1991) 234 Cal.App.3d 1103, 1121 (see Resp. Br. at 41), where a plaintiff suffered birth defects due to injuries her mother had sustained in a car crash caused by the negligence of defendant's employee. The court concluded that the defendant had no duty of care toward the plaintiff, and it distinguished a products-liability case in which a court had held the manufacturer of a birth-control medication strictly liable for defects to the unborn child on the ground that "the defect in the [birth-control] product [in that case] *was* the effect it could have on later conceived children; therefore, the injury to the fetus *was foreseeable*." (*Id.* at 1121, first emphasis in original, second emphasis added [citing *Jorgensen v. Meade Johnson Laboratories, Inc.* (10th Cir. 1973) 483 F.2d 237].)

Hegyes thus does not support the proposition that the "foreseeability inquiry in strict products liability is . . . aimed at determining whether a product is defective." (Resp. Br. at 41–42.) On the contrary, *Hegyes* confirms that the foreseeability question in strict-liability cases is whether *the injury* was foreseeable.

The court made the same point in *Clair v. Monsanto Co.* (Mo.Ct.App. 2013) 412 S.W.3d 295 (cited at Resp. Br. at 51.) Applying California law, the court explained that a plaintiff asserting a strict-liability claim must show that she "was injured while using or coming into contact with the product in an intended or *reasonably foreseeable manner* and that the plaintiff's ability to avoid injury was frustrated by the absence of a safety device, or by the nature of the product's design." (*Id.* at 310, emphasis added.)

Thus, while Respondent is correct that strict liability is primarily "concern[ed] with the defendant's product, not the defendant's conduct." (Resp. Br. at 41), courts have consistently applied the proximate-cause requirement and required plaintiffs to show that their injuries resulted from foreseeable uses of the product. Put differently, courts have treated foreseeability as a separate requirement that must be proved *in addition* to proving "[t]hat the defendant manufactured, sold, or supplied the injury-causing product." (*O'Neil*, 53 Cal.4th at 362.) Contrary to Respondent's assertion, this court need

not conclude that the "release of asbestos fiber no longer constitutes a defect" when the alleged injury is unforeseeable. (Resp. Br. at 43.) Rather, the court can accept that asbestos-cement pipe is defective but nevertheless hold that the injury to Respondent's brother was unforeseeable.

B. The Supreme Court Has Held that "Take Home" Asbestos Exposure is Foreseeable *Only* in the Context of Household Members

In light of these fundamental principles, the question here is whether the injury to Respondent's brother resulted from a reasonably foreseeable use of Appellant's products. In "pursuing this inquiry," courts should keep in mind that foreseeability "includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct." (*Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57.) "[W]hat is required to be foreseeable is the general character of the event or harm"—"not its precise nature or manner of occurrence." (*Id.* at 58.)

Respondent's brief studiously avoids arguing that all injuries to third parties exposed to an asbestos worker's clothes are foreseeable. Instead, Respondent simply asserts that Appellant "certainly knew its asbestos-cement pipe would cause" injuries. (Resp. Br. at 50.) But the foreseeability inquiry is meaningless when framed at such a high level of generality. It is undoubtedly foreseeable that an asbestos worker tasked with removing or repairing

asbestos products could be injured by asbestos fibers released in this course of his work. By contrast, a manufacturer could not reasonably foresee that an individual who purchases an asbestos-workers' shirt from a thrift store would be injured by asbestos fibers that remained on the shirt because it was not washed before being donated. Between these two extremes lies a gray area in which the precise boundary between foreseeable and unforeseeable injury is not immediately apparent. Fortunately, the Supreme Court has already addressed this situation and provided clear, binding guidance as to where the line should be drawn.

In *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, the Supreme Court resolved a negligence action brought by a household member of an asbestos worker who alleged injuries allegedly caused by "take home" asbestos exposure. The Court held that employers and property owners owe a duty "only to members of a worker's household, i.e., persons who live with the worker and are thus foreseeably in close and sustained contact with the worker over a significant period of time." (*Id.* at 1154–55.) The Court specifically ruled out the existence of a duty to "other persons who may have reason to believe they were exposed to significant quantities of asbestos by repeatedly spending time in an enclosed space with an asbestos worker—for example, a regular carpool companion." (*Id.* at 1155; see also *ibid.* ["Persons whose contact with the

worker is more incidental, sporadic, or transitory do not, as a class, share the same characteristics as household members and are therefore not within the scope of the duty we identify here"].) "By drawing the line at members of a household," the Court "limit[ed] potential plaintiffs to an identifiable category of persons who, as a class, are most likely to have suffered a legitimate, compensable harm." (*Ibid.*) Put simply, while the "cause of asbestos-related diseases is the inhalation of asbestos fibers," "the general foreseeability of harm turns on the regularity and intimacy of physical proximity." (*Ibid.*) Applying these foreseeability principles, the court held "that defendants owed the members of their employees' households a duty of ordinary care to prevent take-home exposure and that this duty extends no further." (*Id.* at 1156.)

There is no principled reason why the foreseeability analysis should be any different for product manufacturers, and Respondent provides none. If anything, the foreseeability analysis should cut in favor of product manufacturers, which are one step removed from the primary exposure and thus less able to prevent the injury. In all events, because the Supreme Court has squarely held that injuries to non-household members resulting from "incidental exposure" to asbestos fibers are not reasonably foreseeable, Appellant cannot be held strictly liable for the injuries sustained by Respondent's brother. (*Id.* at 1154.)

II. The Court Should Rigorously Enforce Traditional Concepts of Proximate Cause and Foreseeability for Asbestos Claims Because of the Long History of Abusive Asbestos Litigation

Eliminating foreseeability and proximate cause for strict-liability claims would have devastating consequences for *all* manufacturers in California. But the doctrine of absolute liability that Respondent urges the Court to adopt would be particularly onerous for manufacturers of asbestos products given the long history of litigation abuse in asbestos cases. The Court should thus be doubly hesitant to throw open the courthouse gates to every plaintiff allegedly exposed to asbestos fibers regardless of how "incidental" or attenuated the exposure. (*Kesner*, 1 Cal.5th at 1154.)

In 1973, the Fifth Circuit became the first court to establish strict liability against asbestos manufacturers for injuries caused by exposure to asbestos. (See *Borel v. Fibreboard Paper Products Corporation* (5th Cir. 1973) 493 F.2d 1076.) Enticed by the "low burden of proof" and the number of "deep-pocketed defendants," plaintiffs' firms immediately began "canvassing aggressively" for clients.[2] While some individuals undoubtedly suffered from diseases caused by asbestos exposure, one estimate found that up to 90% of plaintiffs that filed suit had not experienced *any* symptoms of asbestos-related

[2] Texans for Lawsuit Reform Foundation, *The Story of Asbestos Litigation in Texas & Its National Consequences* (2017) 4 [hereinafter *Asbestos Litigation*].

disease or suffered any illnesses affecting their daily functions.[3] In fact, many of the plaintiffs' lung conditions were "not medically distinguishable" from the rest of the "adult male population of the United States of similar age" who did not have any asbestos exposure.[4]

To overcome this hurdle, Plaintiffs' attorneys routinely hired experts or "litigation doctors" who were "so biased that their readings were simply unreliable."[5] These so-called "B Readers"—individuals hired to read X-rays produced at litigation screenings—were "not hired to actually read X-rays."[6] Instead, they were effectively "selling" positive readings to "lawyer-buyers"

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[3] Tex. S.B. 15, 79th Leg., R.S., ch. 97, § 1(f), 2005 Tex. Gen. Laws 169; see also Brickman, *An Analysis of the Financial Impact of S. 852: The Fairness in Asbestos Injury Resolution Act of 2005* (2005) 27 Cardozo L. Rev. 991, 993 [finding that the "existence of actual injury and proof of substantial product exposure" was "irrelevant" in many cases]; Henderson, Jr. & Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring* (2002) 53 S.C. L. Rev. 815, 823 ["By all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who…are completely asymptomatic"].)

[4] Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?* (2003) 31 Pepperdine L. Rev. 33, 43 [hereinafter *On the Theory*].

[5] Brickman, *Fraud and Abuse in Mesothelioma Litigation* (2014) 88 Tul. L. Rev. 1071, 1091 [hereinafter *Fraud and Abuse*]; *Owens Corning v. Credit Suisse First Boston* (D. Del. 2005) 322 B.R. 719, 723; see also ABA Comm'n on Asbestos Litig., *ABA Report to the House of Delegates* (2003) <https://www.cdc.gov/niosh/docket/archive/pdfs/niosh-015/020103-exhibit12.pdf>; Behrens, *Asbestos Litigation Screening Challenges: An Update* (2009) 26 T.M. Cooley L. Rev. 721.

[6] *Fraud and Abuse*, *supra* note 5, at p. 1092.

regardless of any evidence of asbestos exposure.[7] Studies found that "B Readers provided positive readings for 50–90% of the screening generated X-rays they read—percentages far exceeding the results of most clinical studies of the prevalence of asbestosis in occupationally exposed workers."[8]

In addition to purchasing fake medical diagnoses, plaintiffs' firms would often coach their clients to lie about which asbestos-containing products they had used and how those products supposedly affected their health. The curtain hanging over this unethical practice was briefly pulled back when a plaintiffs' firm that had handled thousands of asbestos personal injury cases accidently handed defense counsel a document that contained pages of specific answers for clients to use when responding to questions. It also provided a list of products that contained asbestos, what those products looked like, and what clients should avoid saying.[9] The document would thus "enable someone who [had] never worked with an asbestos product to give convincing testimony that

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[7] *Ibid.*

[8] *Ibid.*

[9] *Asbestos Litigation*, *supra* note 2, at p. 5. The memo provided "specific instructions to clients as to the answers to give during the course of depositions about which products they were exposed to and which products they were to deny exposure to (even if they had been exposed to that product)." Brickman, *Civil RICO: an Effective Deterrent to Fraudulent Asbestos Litigation?* (2019) 40 Cardozo L. Rev. 2301, 2345. Clients were also "warned never to say that they had seen warning labels on product packages." *Id.*

he did, and was harmed by it."[10] These unethical tactics resulted in "unimpaired workers" with no injuries being "awarded billions of dollars in judgments and settlements."[11]

This abuse of the judicial system drove many companies into bankruptcy.[12] Following a company's bankruptcy, plaintiffs' firms would often counsel their clients to downplay their exposure to the bankrupt company's asbestos-containing products. For example, most asbestos claims in the immediate aftermath of *Borel* focused on Johns-Manville Corporation, which was the "leading manufacturer of asbestos-containing materials."[13] After John-Mansville declared bankruptcy in 1982, plaintiffs' attorneys targeting "other deep pockets" coached their clients to avoid naming John-Mansville as responsible for their alleged injuries.[14] Companies responsible for only a minimal amount of asbestos exposure have found themselves named in nearly

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[10] *Asbestos Litigation*, *supra* note 2, at p. 5.

[11] *On the Theory, supra* note 4, at p. 59.

[12] *Id*, at p. 55; see also Tex. S.B. 15, 79th Leg., R.S., ch. 97, § 1(g), 2005 Tex. Gen. Laws 169; Chamber of Com. Inst. Legal Reform, *Dubious Distribution: Asbestos Bankruptcy Trust Assets and Compensation* (2018) 16.

[13] *On the Theory*, *supra* note 4, at p. 54.

[14] *Id.* at p. 42.

every asbestos case.[15] One judge compared a defendant's alleged responsibility for the plaintiff's asbestos exposure as "akin to saying one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume." *Moeller v. Garlock Sealing Technologies, LLC* (6th Cir. 2011) 660 F.3d 950, 955.

In response to the "avalanche of litigation" set off by *Borel* and subsequent corporate bankruptcies, Congress created a nationwide system to address asbestos-related injuries as part of the Bankruptcy Reform Act of 1994. (See 11 U.S.C. § 524(g).) Under this system, a company that files for bankruptcy can create a trust that will assume all existing and future asbestos liabilities. Unfortunately, there is "virtually no public accountability or oversight" in the management of trust claims.[16]

In the period from 2006 through 2011, bankruptcy trusts paid out claims "in excess of $14 billion" to individuals who claimed to suffer injuries from their exposure to asbestos.[17] In recent years, courts have uncovered a "growing number of plaintiffs' attorneys' schemes to circumvent the disclosure

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[15] Behrens et al., Ill. Civil Justice League, *Illinois Asbestos Trust Transparency: The Need to Integrate Asbestos Trust Disclosures with the Illinois Tort System* (2017) 36 Mealey's Litig. Rep.: Asbestos 3.

[16] *Fraud and Abuse, supra* note 5, at p. 1077.

[17] Ableman, *A Case Study From a Judicial Perspective: How Fairness and Integrity in Asbestos Tort Litigation Can Be Undermined by Lack of Access to Bankruptcy Trust Claims* (2014) 88 Tul. L. Rev. 1185, 1196–97 [hereinafter *A Case Study*].

requirements in order to obtain significant recoveries from both tort and trust systems."[18] For example, in 2014, a bankruptcy court in North Carolina presented "'a stunning expose' of the breadth of the practice of withholding exposure evidence concerning the products of bankrupt entities."[19] (See *In re Garlock Sealing Technologies, LLC* (Bankr. W.D.N.C. 2014) 504 B.R. 71, 74.) The court revealed that many plaintiffs who represented to the court that Garlock's products caused their injuries often turned around and sought money from trusts of other bankrupt entities on the theory that *those companies'* products had caused their injuries.

In one particularly egregious example, a plaintiff obtained a $9 million verdict against Garlock after testifying that he had not been exposed to asbestos from any other company's products, and that his injuries were caused solely by exposure to asbestos in Garlock's products. But shortly after obtaining the verdict, the plaintiff, represented by the same counsel, filed fourteen trust claims for exposure to other companies' products. (*Ibid.*) One of the trust claims involved a company whose products the plaintiff's lawyers had expressly told the court his client had never been exposed to. "In total, these lawyers failed to disclose exposure to 22 other asbestos products." (*Ibid.*) The

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[18] *Id*, at p. 1196.

[19] Ableman, *The Garlock Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases* (2014) 37 Am. J. Trial Advoc. 479, 483.

Garlock court found that, "on average, plaintiffs disclosed only about 2 exposures to bankrupt[] companies' products, but after settling with Garlock made claims against about 19 such companies." (*Ibid.*) Based on its review of thousands of case files produced during discovery, the *Garlock* court found that "[i]t was a regular practice by many plaintiffs' firms to delay filing Trust claims for their clients so that remaining tort system defendants would not have that information." (*Id.* at p. 84.) The court concluded that this "manipulation of exposure evidence by plaintiffs and their lawyers" had "infected" all of Garlock's asbestos cases. (*Ibid.*)

As other courts have recognized, the *Garlock* case "demonstrates that asbestos plaintiffs' law firms acted fraudulently or at least unethically in pursuing asbestos claims in the tort system and the asbestos trust system." (*Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp.* (W.D. Pa. Aug. 12, 2015) 2015 WL 4773425, at *5.) The takeaway from the *Garlock* case is clear: "the practice of deliberately failing to disclose evidence of other exposures is far closer to the norm tha[n] the exception."[20]

Since *Garlock*, plaintiffs' firms have continued to fail to disclose trust claims when litigating asbestos cases, thereby "double-dipping" into trusts and

[20] *Fraud and Abuse, supra* note 5, at p. 1125.

tort judgments.[21] In one case, a Delaware Superior Court judge reported that plaintiffs' counsel had repeatedly "assured the court that no disclosure was required because no [bankruptcy trust] claims had been filed."[22] But on the day before trial "defense counsel learned that a total of twenty bankruptcy claims had been submitted to various trusts and that significant sums of money had already been received" by the plaintiffs.[23] The judge later described the details of this case to Congress in a hearing on asbestos regulatory reform.[24] She highlighted the "inherent unfairness" associated with the scheme of asbestos-litigation and bankruptcy trusts. Emphasizing the need for total transparency

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[21] See Behrens, U.S. Chamber Inst. for Legal Reform, *Disconnects and Double-Dipping: The Case for Asbestos Bankruptcy Trust Transparency in Virginia* (2016) 14–24 [listing examples of plaintiffs' failure to disclose trust claims]; see also Ableman et al., *A Look Behind the Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co.* (2015) 30 Mealey's Litig. Rep.: Asbestos 9 [listing cases "that illustrate the continued suppression of evidence" that plaintiffs' firms perpetuate in asbestos litigation]; Kelso & Scarcella, U.S. Chamber Inst. for Legal Reform, *The Waiting Game: Delay and Non-Disclosure of Asbestos Trust Claims* (2015) 9; Informational Brief of Bestwall LLC, *In re Bestwall LLC*, 2017 WL 4988527 (Bankr. W.D.N.C. Nov. 2, 2017); Statement of Interest on Behalf of the United States of America Regarding Estimation of Asbestos Claims, *In re Bestwall LLC* (Bankr. W.D.N.C. Dec. 28, 2020, No. 17-31795) at 1–2, 10.

[22] *A Case Study*, *supra* note 17, at pp. 1189–90.

[23] *Id.*

[24] Asbestos Claims Transparency, Hr'g Before Subcomm. on Regul. Reform, Com. and Antitrust L. of the Comm. on the Judiciary, House of Reps., 113th Cong. (Mar. 13, 2013) [statement of Hon. Peggy L. Ableman], 2013 WLNR 7440143.

when it came to asbestos litigation and bankruptcy trust claims, she stated that "the very foundation and integrity of the judicial process is compromised by the withholding of information that is critical to the ultimate goal of all litigation."[25]

Addressing another instance of egregious misconduct, an Ohio court took the drastic step of barring a plaintiffs' firm from practicing before the court after discovering that the firm had accepted payments from trusts for companies whose products the plaintiff had never been exposed to. (*Kananian v. Lorillard Tobacco Co.* (Ohio Com.Pl. 2007) 2007 WL 4913164.) The court found that the firm's attorneys "institutionally" failed to discharge the duties of an attorney honestly, faithfully, and competently, and had "not conducted themselves with dignity." (*Id.* at p.18.) As the judge later stated, "In my 45 years of practicing law, I never expected to see lawyers lie like this."[26] One newspaper reported how the *Kananian* case "opened a Pandora's box of deceit."[27]

In one Maryland case, the plaintiff denied making trust claims related to his mesothelioma. Then, ten days before trial, the plaintiff served amended

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[25] *Id.*

[26] McCarty, *Judge Becomes National Legal Star, Bars Firm from Court Over Deceit*, Cleveland Plain Dealer (Jan. 25, 2007) B1.

[27] *Id.*

discovery responses revealing that he had made twenty-two trust claims, thirteen of which were filed before his earlier denial.[28]

Plaintiffs' firms often coordinate with each other to mislead courts by "divid[ing] responsibility for submitting trust claims and conducting civil litigation."[29] For example, Plaintiffs' counsel "postpone filing trust claims that would undermine a particular theory of liability at trial until after disposition of the suit."[30] In litigation, these firms purposely fail to inform opposing counsel about claims that have been previously submitted by the plaintiff, sometimes waiting until the "literal[] eve of trial" to reveal undisclosed trust claims.[31] This suggests "a calculated strategy by the plaintiff's bar to withhold information about a plaintiff's true exposure history during litigation to unfairly shift the blame to less-culpable, solvent tort system defendants."[32] This strategy was "obviously devised to accomplish the receipt of maximum

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[28] Shelley et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update–Judicial and Legislative Developments and Other Changes in the Landscape Since 2008* (2014) 23 Widener L.J. 675, 689 [hereinafter *Need for Further Transparency*].

[29] *Id.* at pp. 681–82 ["First, different plaintiffs' law firms contract with each other to divide responsibility for submitting trust claims and conducting civil litigation. Trial counsel is not informed by trust counsel about claims that have been submitted on the plaintiff's behalf, and trial counsel pleads ignorance when the plaintiff's failure to disclose his trust submissions is unmasked."].

[30] *Ibid*.

[31] *A Case Study*, *supra* note 17, at p. 1194.

[32] *Need for Further Transparency, supra* note 28, at p. 682.

recovery for plaintiffs and their counsel" by over exaggerating a defendant's liability "while at the same time insulating out-of-state counsel from any disciplinary action by the courts for ethical violations."[33]

In 2020, the Department of Justice issued a report explaining its finding that a "significant number of asbestos claimants in the tort system and in Chapter 11 proceedings have provided conflicting and/or inaccurate information regarding the asbestos products to which they were exposed."[34] As the DOJ explained, the practice of so-called "double dipping"—filing a personal injury suit against a solvent company and filing additional bankruptcy trust claims for exposure to different companies' products—has "bedeviled the asbestos ecosystem."[35] The DOJ also found that plaintiffs' firms have continued their practice of recruiting clients regardless of whether they are exhibiting any actual asbestos-related injuries, concluding that "persons who

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[33] *A Case Study*, *supra* note 17, at pp. 1197–98.

[34] Statement of Interest, U.S. Dep't of Justice, DOJ-20-1395, Justice Department Files Statement of Interest Urging Transparency in the Compensation of Asbestos Claims (2020) 1 <https://www.justice.gov/opa/pr/justice-department-files-statement-interest-urging-transparency-compensation-asbestos-claims>.

[35] *Id.* at p. 8.

did not have malignant conditions accounted for 86 percent of all claims made to the trusts and 27 percent of trust payments."[36]

To be clear, *amicus* is not suggesting there has been any malfeasance in this case. The point is that given the well-documented history of wrongdoing in the seedy world of asbestos litigation, this court should think twice before accepting Respondent's invitation to eliminate notions of foreseeability and proximate cause, which may be the only defense product manufacturers have against liability to an unlimited class of dubious plaintiffs. This track record should also give the Court pause before abandoning *Kesner*'s clear foreseeability analysis in the context of "take home" asbestos exposure.

CONCLUSION

For the foregoing reasons, the Chamber urges the Court to reverse with directions to enter judgment for Defendant-Appellant.

Dated: April 17, 2023

Respectfully submitted,

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[36] *Id.* at p. 5.

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of the United States of America

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204, I certify that the total word count of this amicus curiae brief, excluding covers, table of contents, table of authorities, and certificate of compliance, is 5,204 words.

DATED: April 17, 2023

EIMER STAHLL LLP

By: */s/ Robert E. Dunn*
ROBERT E. DUNN
Attorney for Amicus Curiae the Chamber of Commerce of the United States of America

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Santa Clara, State of California. My business address is 99 S. Almaden Blvd. Suite 600, San Jose, CA 95113.

On April 17, 2023, I served true copies of the following documents described as:

APPLICATION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELANT

AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

By Electronic Service: I electronically filed the documents with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered users will be served by the TrueFiling system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 17, 2023, at San Jose, California.

/s/ Robert E. Dunn
Robert E. Dunn