

SUPREME COURT OF NEW JERSEY

Docket No. 085939

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THOMASINA FOWLER individually	:
and as Administrator and	:
Administrator ad Prosequendum of	: Civil Action
the Estate of Willis Edenfield,	:
	: On Petition for Certification of
	: the Final Judgment of the
Plaintiff-Petitioner,	: Superior Court of New Jersey,
	: Appellate Division
v.	:
	: Docket No. A-4007-18-TI
UNION CARBIDE CORPORATION,	:
	: Sat Below:
Defendant/Respondent,	: Hon. Jose L. Fuentes, P.J.A.D.
	: Hon. Mary Gibbons Whipple, J.A.D.
	: Hon. Lisa Rose, J.A.D.
AKZO NOBEL CHEMICALS, INC., as	:
successor to Imperial Chemical	:
Industries PLC and National	:
Starch and Chemical Co.	:
(Discovery Only); CORN PRODUCTS	:
INTERNATIONAL INC., as successor	:
to National Starch and Chemicals	:
Co. (Discovery Only); HENKEL	:
CORPORATION, individually and as	:
successor-in-interest to the	:
Adhesive and Electronics	:
division of National Standard	:
Chemical Co. (Discovery Only);	:
NATIONAL STARCH, LLC,	:
individually and as successor to	:
National Starch and Chemical	:
Co.(Discovery Only),	:
	:
Defendants.	:

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**BRIEF OF AMICI CURIAE**  
**CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA**  
**AND THE NEW JERSEY CIVIL JUSTICE INSTITUTE**

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Philip S. Goldberg, Esq.  
N.J. Attorney No. 36772001  
Mark A. Behrens, Esq. (pro hac vice)  
Cary Silverman, Esq. (pro hac vice)  
SHOOK, HARDY & BACON L.L.P.  
1800 K Street, NW, Suite 1000  
Washington, DC 20006  
Tel: (202) 783-8400  
Fax: (202) 783-4211  
pgoldberg@shb.com  
mbehrens@shb.com  
csilverman@shb.com

Attorneys for Amici Curiae  
Chamber of Commerce of the United  
States of America and New Jersey  
Civil Justice Institute

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**PRELIMINARY STATEMENT**

The Chamber of Commerce of the United States of America and New Jersey Civil Justice Institute respectfully submit this brief as amici curiae in support of Defendant/Respondent Union Carbide Corporation. Amici urge the Court to affirm the Appellate Division's ruling, which found that whether a manufacturer adequately warned a customer and the customer's employees of product risks is evaluated based on what is reasonable under the circumstances. This formulation permits consideration of all safety information communicated by the manufacturer to the employer. Limiting the inquiry to the text of warnings printed on a product's packaging, as the trial court instructed the jury, is contrary to New Jersey law and inconsistent with the realities of industrial products and workplaces. A jury should be allowed to consider all of a manufacturer's efforts to educate employers about the risks and safe use of products, and facilitate the sharing of that information with employees. The alternative, considering only the few words printed on a label, will result in less effective warnings when packaging is limited, discarded, or unlikely to be read by employees. The trial court's ruling may also incentivize over-warning on product packaging rather than relying on more effective means of communication. Accordingly, for the reasons explained in more detail below, this Court should affirm.

## INTEREST OF AMICI CURIAE

Amici curiae, the Chamber of Commerce of the United States of America ("the Chamber") and New Jersey Civil Justice Institute ("NJCJI"), are concerned that the trial court's ruling, which the Appellate Division correctly reversed, subjects manufacturers of industrial products to unwarranted failure-to-warn liability.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

NJCJI is a nonprofit, nonpartisan group whose members include individuals, small businesses, business associations, and professional organizations that are dedicated to improving New Jersey's civil justice system. NJCJI's mission is to advocate for the rational and predictable application of New Jersey law, which is critical to ensuring the fair resolution of conflicts, attracting and retaining jobs, and fostering economic

growth. To that end, NJCJI comments on proposed legislation and amendments to court rules and appears as amicus curiae in important appellate proceedings.<sup>1</sup>

#### **PROCEDURAL HISTORY AND STATEMENT OF FACTS**

Amici summarize the procedural history and facts relevant to this brief, as set forth in the Appellate Division's ruling.

This is an action on behalf of Willis Edenfield, who worked as a batcher, weighing and measuring ingredients, including asbestos, for a plant's manufacturing process. Pa4.<sup>2</sup> Union Carbide supplied a small portion of the asbestos purchased for use at the plant between 1969 and 1984. Id.

When determining whether Union Carbide adequately warned employees of the dangers of asbestos, the trial court instructed the jury that it could consider only the text that appeared on the bags. Pa10. For this purpose, the jury was not allowed to consider evidence showing that Union Carbide undertook

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<sup>1</sup> See, e.g., Spade v. Select Comfort Corp., 232 N.J. 504 (2018); In re: Accutane Litig., 234 N.J. 340 (2018); Dugan v. TGI Fridays, Inc., 231 N.J. 24 (2017); McCarrell v. Hoffman-La Roche, Inc., 227 N.J. 569 (2017); Morgan v. Sanford Brown Inst., 225 N.J. 289 (2016); DeMarco v. Stoddard, 223 N.J. 363 (2015); Lippman v. Ethicon, Inc., 222 N.J. 362 (2015); Wadeer v. N.J. Mfrs. Ins. Co., 220 N.J. 591 (2015); Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173 (2012); Allen v. V&A Bros., Inc., 208 N.J. 114 (2011); Voss v. Tranquilino, 206 N.J. 92 (2011); Bosland v. Warnock Dodge, Inc., 197 N.J. 543 (2009).

<sup>2</sup> Amici curiae will use the following abbreviations in this brief: "Pa" refers to the Plaintiff's appendix.



additional approaches to accompany the sales of its products. The record indicates that those steps included:

1. Union Carbide sent Material Safety Data Sheets (MSDS) and pamphlets that recommended employees wear respirators and protective clothing, avoid inhalation of dust, remove spilled material through vacuum or water, and carefully launder clothing to avoid airborne exposure to asbestos. Pa7-8. These materials warned that exposure to asbestos fibers could increase the risks of developing mesothelioma, asbestosis, and lung cancer. Pa8.
2. Union Carbide provided its customers with best practices for handling asbestos and other information on possible health implications of asbestos exposure. Id.
3. Union Carbide distributed Occupational Safety and Health Administration (OSHA) regulations to its customers and provided OSHA-recommended posters designed to convey safety information to employees. Id.
4. Union Carbide representatives had conversations with the plaintiff's employer about the dangers of asbestos and workplace safety measures. Id.

5. Union Carbide offered to perform air monitoring testing for its customers. Pa8-9.

The trial court deemed all of this information to go beyond the label and, therefore, barred the jury from considering it. See id. at 16a. The jury specifically asked the court to clarify whether it could consider other materials that the Defendant provided to the plaintiff's employer to educate and warn about the dangers of asbestos. Pa17. In response, the court instructed the jury to consider only the bags. Id. The jury then returned a verdict of nearly \$2.4 million against Union Carbide. Pa14.

The Appellate Division reversed and remanded the case for a new trial, finding the trial court erroneously instructed the jury on Union Carbide's duty to warn. Pa26. The court ruled that New Jersey law allows a manufacturer to discharge its duty to warn end users of a product by providing adequate warnings and information to the employer, so long as the manufacturer's actions are "reasonable under the circumstances." Pa25.

#### **LEGAL ARGUMENT**

#### **I. DIRECTING A JURY TO EVALUATE WHETHER A MANUFACTURER FULFILLED ITS DUTY TO WARN EXCLUSIVELY BASED ON A LABEL, WITHOUT ALLOWING THE JURY TO CONSIDER OTHER RELEVANT EVIDENCE, IGNORES THE REALITIES OF INDUSTRIAL PRODUCTS AND WORKPLACES**

The trial court's narrow focus on the adequacy of a warning printed on a product's packaging may make sense in some cases involving ordinary consumer products, but it fails to

accommodate the significantly different context in which industrial products are sold to employers for use by their employees in the workplace. See Grier v. Cochran W. Corp., 308 N.J. Super. 308, 317 (App. Div. 1998) ("What a manufacturer may be reasonably required to do in order to transmit information to a consumer/user of a product may be quite different from what is required of a manufacturer of a product intended for use by many people over an extended period of time in an industrial environment."). In an industrial environment, it is important to evaluate whether a manufacturer fulfilled its duty to warn based on all information the manufacturer communicated to a worker's employer to educate its employees.

Industrial products, unlike consumer products, are not marketed to end users. Whether the product at issue is machinery, equipment, chemicals, or, as here, asbestos, the product is sold to a business and then used by the customer's employees in the manufacturing process. In this context, a conventional written warning on the packaging may not be the most effective means to communicate the risk of harm to employees. 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, 68 (1983). Whether a manufacturer has fulfilled its duty to warn must be viewed more holistically.

For example, some raw materials are shipped on flatbed trucks or in dump trucks, unloaded at a worksite, and placed directly into an employer's facility. See Victor E. Schwartz & Christopher E. Appel, Effective Communication of Warnings in the Workplace: Avoiding Injuries in Working with Industrial Materials, 73 Mo. L. Rev. 1, 7-8 (2008). In such instances, there is no packaging on which to provide a warning. Even where there is an opportunity to place warnings on industrial materials, the packaging, including the warning, may be removed before it reaches end users. See id. at 8.

In other situations, the product's packaging may not lend itself to more than a brief cautionary statement. It may be impossible for limited packaging to include each of the essential elements of an effective warning: identifying the danger in a manner that it is understandable to the employee, relating the consequences of non-compliance so that the gravity of the risk can be appreciated, and presenting measures to reduce or eliminate the risk in clear, simple terms. Id. at 12.

Even if space on a product's packaging allows such a warning, "[c]omprehensive, encyclopedic warnings often will not be read by busy employees." Id. Complex machinery or equipment may require detailed instructions that can be presented effectively only in an owner's manual or other literature, or explained through training. Unlike warnings associated with

consumer products, "on-product warnings generally cannot practicably communicate the lengthy and complex instructional warnings required by industrial products." Schwartz & Driver, 52 U. Cin. L. Rev. at 68.

Businesses that supply industrial materials also face "fundamental problems" in attempting to communicate warnings only through written channels. Id. at 69. First, a product manufacturer is not in the best position to craft a brief written warning for use on product packaging that identifies the most significant risks and how to reduce them, which will vary from customer to customer based on the specific use of the product. Second, manufacturers typically do not have direct access to those who will use the product and cannot control the training provided to users. Third, manufacturers may be unaware that many of a customer's employees speak a foreign language or cannot read. Employers use all of the risk and safety information that a product manufacturer shares when developing tailored training programs, implementing safety policies and practices, and providing protective gear.

In sum, in the industrial context, "[t]he conveyance of a warning is not an act or event, but a process" and "[w]arnings must not be viewed in isolation, but rather with regard to other warnings issued for the purpose of maximizing their cumulative effectiveness." Schwartz & Appel, 73 Mo. L. Rev. at 17.

Product liability law has long recognized these principles. As the Appellate Division recognized, when a business supplies a product to a customer for the use of others, courts consider whether the seller's communication of warnings was reasonable under the circumstances. See Pa22-23, 25 (discussing Grier, 308 N.J. Super. at 317-18, citing Restatement (Third) of Torts: Prod. Liab. § 2 cmt. i (1998)); see also Restatement (Second) of Torts § 388, cmt. n (1977) (recognizing that a product supplier's duty to warn end users of the risks of its product may be discharged in some circumstances by providing information or needed precautions to the product's purchaser). New Jersey law does not impose absolute liability by demanding that courts prohibit jurors from considering, and drawing obvious inferences from, relevant safety information that a manufacturer shared with a purchaser.

**II. SAFER WORKPLACES ARE PROMOTED BY PERMITTING JURIES TO CONSIDER ALL OF A MANUFACTURER'S EFFORTS TO COMMUNICATE RISK AND SAFETY INFORMATION**

The trial court's interpretation of New Jersey law, if endorsed by this Court, would push manufacturers of industrial equipment and materials "to provide warnings that are not effective in order to meet a court's adequacy analysis." Schwartz & Appel, 73 Mo. L. Rev. at 30. Focusing solely on a product's packaging in determining liability would encourage manufacturers to attach lengthy, generic warnings to products

that are not tailored to an employer's specific use of a product, are not likely to be read or heeded by employees, and may bury important information.

To be sure, warning labels are important. And label design characteristics that support messaging effectiveness – signal words, symbols, color, format, location, and text describing the nature of the hazard and consequences of noncompliance – are generally recognized. But research proving the effectiveness of even well-designed on-product warnings is scant and published articles have cast doubt on the usefulness of on-product safety warnings in preventing injuries. See Eli P. Cox III et al., Do Product Warnings Increase Safe Behavior? A Meta-Analysis, 16(2) J. of Pub. Pol'y & Marketing 195, 195, 201 (1997).

While well-designed warnings may result in safer behavior, evidence suggests that, operating alone, warning labels may not effectively prevent workplace injuries. See, e.g., John M. McGrath, The Role of Equipment Warning Labels in the Industrial Workplace, 17:1 Int'l J. of Occupational Safety & Ergonomics 49, 49-53 (2011). For example, one study found that, even after repeated exposures to a conspicuous warning label on a table saw over an extended period of time, less than one-quarter of respondents, noticed, read, and remembered some aspect of the label. See id. at 55-56. Only 5 of 36 respondents remembered any

specific content of the warning label (fingers getting caught in the saw blade). Id. As the author observed:

In so-called failure-to-warn claims, the message characteristics of a warning label are often the sole focus of litigation. When accidents happen, the assumption may be that a well-designed label would have been noticed, read, and remembered and would have affected workers' behavioral change and, thereby, prevented the accident from occurring. A contextual approach challenges this assumption by pointing to the importance of considering all of the variables that influence message transmission and reception.

Id. at 57. The author concluded that, realistically, workplace warning labels may remind workers about safety information they have already received via other means. Id. at 57-58; see also Mark R. Lehto & Gavriel Salvendy, Warnings: A Supplement Not a Substitute for Other Approaches to Safety, 38(11) *Ergonomics* 2155, 2161-62 (1995) (concluding that, in most situations, intervention strategies other than warning labels or signs, such as training, supervision and the provision of other forms of safety information, is more effective than warning labels alone).

Experts on occupational safety also observe that, contrary to the trial court's approach to evaluating liability, "[t]he notion of a warning being a sign or a portion of a label is much too narrow a view of how such safety information gets transmitted." Kenneth R. Laughery & Amy Hammond, Overview, in Warnings and Risk Communication 8 (Taylor & Francis 1999).



Rather, components of a warning "may include a variety of media and messages," including "printed on-product labels, printed flyers that accompany the product, statements in advertisements about the product, verbal statements from the salesperson to the purchaser, and material data sheets provided to the employer."

Id. at 8-9. Similarly, a text on warnings and hazard communications observes:

Warnings can be properly viewed as communications purposed to inform and influence the behavior of people. Warnings are not simply signs or labels. They can include a variety of media where various kinds of information get communicated to people. The use of various media or channels and an understanding of the characteristics of the receivers or target audiences to whom warnings are directed are important in the design of effective warnings. The concept of a warning system with multiple components or channels for communication to a variety of receivers is central.

Michael S. Wogalter et al., Warnings and Hazard Communications, in Gavriel Salvendy & Waldemar Karwowski (eds.) Handbook of Human Factors/Ergonomics 51 (New York, Wiley 2021).

Unsurprisingly, the OSHA Hazard Communication Standard not only includes requirements for warning labels on chemicals used in the workplace, but mandates the use of safety data sheets and worker training. See generally 29 C.F.R. § 1910.1200; see also Occupational Safety & Health Admin., OSHA Fact Sheet: Steps to an Effective Hazard Communication Program for Employers that Use Hazardous Chemicals (2014).

Given the limitations of on-product warning labels in the workplace, and their uncertain effectiveness, courts should consider all risk and safety information conveyed by a product manufacturer to an employer, which can be incorporated into worker training and workplace practices. Far more effective than the trial court's label-only approach to communicating warnings (and evaluating liability) is the approach that the record in this case indicates was employed by Union Carbide. The manufacturer did not rely solely on the label to convey the risks of its product and provide information on how it could be used most safely. Rather, Union Carbide provided its customers with detailed Material Safety Data Sheets, pamphlets, best practices, toxicology reports, health and safety regulations, and government-recommended posters. See Pa7-10. These materials warned that exposure to asbestos fibers could increase the risks of asbestos-related disease and recommended safety practices and protective gear to minimize the risk of harm. Pa8a. The manufacturer even spoke directly with the plaintiff's employer about the dangers of asbestos and workplace safety measures, and offered to perform air monitoring testing for its customers. See id.

With these measures, Union Carbide did not delegate its duty to warn employees. Rather, these are the types of "reasonable steps" that a responsible manufacturer takes to

inform an employer and its employees of dangers of which they may be unaware. See Coffman v. Keene Corp., 133 N.J. 581, 607 (1993) ("Reliance on supervisors and managers to become apprised of safety hazards and to retransmit these warnings orally to workers 'rather than the individual reading of a product warning, is a typical method by which information is disseminated in the modern workplace.'" ) (quoting Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1529 (D.C. Cir. 1984)).

For example, in Grier, the Appellate Division found that the manufacturer of a machine used to unload aircraft cargo discharged its duty to warn employees that they should raise a guardrail to prevent falls by including a warning in the operation and maintenance manual provided to purchasers, painting the guardrail "OSHA yellow," and offering free training to each airline that purchased the equipment. 308 N.J. Super. at 319.

Such multi-pronged efforts are far more effective in fostering a safe workplace than a constricted focus on the precise wording of a space-constrained warning on a product's bag or on machinery that is likely to be overlooked by workers. When manufacturers provide multiple sources of information, employers use that knowledge to develop policies and practices based on their specific use of the product, communicate tailored warnings directly to employees, and provide employees with

needed safety training and supervision. See Schwartz & Driver, 52 U. Cin. L. Rev. at 78. These types of efforts to convey product safety information should be encouraged, not penalized.

Principles of product liability law should advance worker safety. Imposing liability on manufacturers based on the wording of a warning on an industrial product's bag, while forcing a jury to ignore all other safety information that the manufacturer conveyed, is contrary to this goal.

#### CONCLUSION

For these reasons, amici curiae request that the Court affirm the ruling of the Appellate Division below, finding that the trial court erroneously instructed the jury on the duty to warn.

Respectfully submitted,

/s/ Philip S. Goldberg  
Philip S. Goldberg, Esq.  
N.J. Attorney No. 36772001  
Mark A. Behrens, Esq. (pro hac vice)  
Cary Silverman, Esq. (pro hac vice)  
SHOOK, HARDY & BACON L.L.P.  
1800 K Street, NW, Suite 1000  
Washington, DC 20006  
Tel: (202) 783-8400  
Fax: (202) 783-4211  
pgoldberg@shb.com  
mbehrens@shb.com  
csilverman@shb.com

Attorneys for Amici Curiae  
Chamber of Commerce of the United States  
of America and New Jersey Civil Justice  
Institute

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