IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

CAROLYN COFFMAN ET AL.,	)	
	)	
Plaintiff/Appellee,	)	Tennessee Supreme Court
	)	No. E2017-01985-SC-R11-CV
v.	)	
	)	Appeal by Permission from the
ARMSTRONG	)	Court of Appeals
INTERNATIONAL, INC., ET AL.,	)	Circuit Court for Knox County
	)	No. 2-485-14
Defendants/Appellants.	)	

AMICI CURIAE BRIEF OF TENNESSEE CHAMBER OF COMMERCE AND INDUSTRY, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN TORT REFORM ASSOCIATION, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, AND COALITION FOR LITIGATION JUSTICE, INC. IN SUPPORT OF DEFENDANTS/APPELLANTS

Mark A. Behrens (*pro hac vice*)
SHOOK, HARDY & BACON L.L.P.
1800 K Street, NW, Suite 1000
Washington, DC 20006
(202) 783-8400
mbehrens@shb.com

John M. Kizer (BPR No. 29846)*
GENTRY, TIPTON & MCLEMORE, P.C.
900 South Gay Street, Suite 2300
Knoxville, TN 37902
(865) 525-5300
jmk@tennlaw.com

Attorneys for *Amici Curiae*
* Counsel of Record

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that the Equipment Defendants had a duty to warn of the dangers associated with the post-sale integration of asbestos-containing materials manufactured and sold by others.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Regulations

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici are organizations whose members include Tennessee manufacturers of products that incorporated or were used in conjunction with asbestos-containing products manufactured and sold by third parties. *Amici* also include insurers of such equipment. *Amici* are concerned that if the Court holds equipment manufacturers liable for the post-sale integration of other manufacturers' asbestos-containing products, the decision will threaten the viability of remaining solvent defendants ensnared in asbestos litigation, including small businesses. Asbestos personal injury litigation – approaching its fifth decade – has bankrupted over 120 companies, shows no sign of abating, and may last several more decades. Further, a duty finding could open the door to non-asbestos lawsuits against companies whose products are used with potentially hazardous products sold by third parties.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Originally and for many years, the primary defendants in asbestos cases were companies that mined asbestos or manufactured friable, amphibole asbestos-containing thermal insulation. *See* James S. Kakalik, et al., *Costs of Asbestos Litigation* 3 (RAND Corp. 1983).

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

Hundreds of thousands of claims were filed against the major asbestos producers, such as Johns-Manville Corporation.[2]

By the late 1990s, asbestos litigation nationwide had reached such proportions that the United States Supreme Court noted the "elephantine mass" of cases, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999), and referred to the litigation as a "crisis." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997). Mass filings pressured "most of the lead defendants and scores of other companies" into bankruptcy, including virtually all manufacturers of asbestos-containing thermal insulation. Steven J. Carroll, et al., *Asbestos Litigation* 67 (RAND Corp. 2005).

Following a 2000-2002 wave of bankruptcies during which virtually all insulation defendants exited the tort system, plaintiffs' attorneys shifted their focus "towards peripheral and new defendants…." Marc C. Scarcella, et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010*, 27 Mealey's Litig. Rep.: Asbestos 1, 1 (Nov. 7, 2012); Carroll, et al., *supra*, at xxiii (plaintiffs began to "press peripheral non-bankrupt

---

[2] *See* James Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 237 (2006) ("As leading plaintiffs' counsel Ron Motley and Joe Rice observed some time ago, the first seventeen asbestos defendants to go into bankruptcy represented 'one-half to three-quarters of the original liability share.'"). According to RAND, "[a]pproximately 730,000 people had filed an asbestos claim through 2002." Steven J. Carroll, et al., *Asbestos Litigation* xxiv (RAND Corp. 2005). Tens of thousands of additional claims have been filed since 2002.

defendants to shoulder a larger share of the value of asbestos claims and to widen their search for other corporations that might be held liable for the costs of asbestos exposure and disease."). The litigation became an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, 17 Mealey's Litig. Rep.: Asbestos 19 (Mar. 1, 2002) (quoting Mr. Scruggs).

The spread of the litigation to remote defendants is evident in the sheer number of companies that have been swept into the litigation to "fill the gap in the ranks of defendants" created by the insulation defendants' exit from the tort system. Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 556 (2007). "In 2019, more than 10,000 individual entities were named as defendants in asbestos litigation." KCIC, *Asbestos Litigation: 2019 Year in Review* 11 (2020). Companies formerly viewed as peripheral defendants are "now bearing the majority of the costs of awards relating to decades of asbestos use." American Academy of Actuaries' Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends* 3 (Aug. 2007); *see also* Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander*," 23 Widener L.J. 59 (2013).

In an attempt to further extend the liability of still-solvent companies, some plaintiffs' counsel (as in this case) are promoting the theory that makers of uninsulated products in "bare metal" form should have warned about potential harms from exposure to asbestos-

containing external thermal insulation manufactured and sold by third-parties and attached post-sale. Plaintiffs' lawyers are also claiming that manufacturers of products such as pumps and valves that originally came with asbestos-containing gaskets or packing should have warned about potential harms from exposure to replacement internal gaskets or packing or replacement external flange gaskets manufactured and sold by third parties.

Plaintiffs' lawyers are promoting this theory because the former asbestos producers that made up the "asbestos industry" are now immune. *See* Paul Riehle, et al., *Product Liability for Third Party Replacement or Connected Parts: Changing Tides From the West*, 44 U.S.F. L. Rev 33, 38 (2009) ("Not content with the remedies available through bankruptcy trusts and state and federal worker compensation programs, claimants' lawyers have extended the reach of products liability law to 'ever-more peripheral defendants'" whose products may have been used by others with asbestos-containing products) (citation omitted); Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made Over the Past Decade and Hurdles You Can Vault in the Next*, 36 Am. J. of Trial Advoc. 1, 24-25 (2012) ("As a substitute [for bankrupt former defendants], plaintiffs seek to impose liability on solvent manufacturers for harms caused by products they never made or sold.").

Tennessee statutory law, traditional tort principles, and sound policy all reject the duty Plaintiff seeks here.

ARGUMENT

I. THE TENNESSEE PRODUCT LIABILITY ACT AND TRADITIONAL TORT PRINCIPLES DO NOT SUPPORT LIABILITY FOR HARMS CAUSED BY THIRD-PARTIES

Product liability actions in Tennessee are governed by the Tennessee Products Liability Act (TPLA), Tenn. Code Ann. § 29-28-101 *et seq.* Under the TPLA and traditional tort law principles, manufacturers are liable for harms caused by their *own* products, but *not* for harms caused by products *made by others*.

Multiple references to manufacturers and sellers in the TPLA "fairly imply that a claim falling under the definition of a 'product liability action' may be asserted only against the manufacturer or the seller of the product that harmed the plaintiff." *Strayhorn v. Wyeth Pharms., Inc.*, 737 F.3d 378, 403 (6th Cir. 2013); *see also Richardson v. GlaxoSmithKline,* 412 F. Supp. 2d 863, 868 (W.D. Tenn. 2006) ("In order to recover [under the TPLA], a plaintiff must show that the product manufactured and sold by the defendant ... caused the injuries he alleges to have sustained."). There is no duty to warn of the dangers of another manufacturer's products "even where a manufacturer has sufficient expertise to foresee the dangers of another company's products." *Barnes v. The Kerr Corp.*, 418 F.3d 583, 590 (6th Cir. 2005).

As explained by a Tennessee federal court in *Kellar v. Inductotherm Corp.*, 498 F. Supp. 172 (E.D. Tenn. 1978), *aff'd*, 633 F.2d 216 (6th Cir. 1980): "If a manufacturer could be held liable for injury merely because it foresaw a danger created by another party, there would literally be no end of potential liability. To sustain such a theory

would be to cast manufacturers into the role of insurers of products manufactured by others." *Id* at 175.

And while this action is governed by the TPLA and is not a common law case,[3] it is worth noting that the TPLA reflects traditional tort law. *See* 63A Am. Jur. 2d Products Liability § 1027 ("The manufacturer's duty to warn is restricted to warnings based on the characteristics of the manufacturer's own products.... The manufacturer is not required to warn of dangers posed by use of another manufacturer's product in the same vicinity as its product was used."); *see also* James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 Sw. U. L. Rev. 595, 602 (2008) (Professor Henderson was Co-Reporter for the Restatement Third, Torts: Products Liability).

A manufacturer's ability to foresee that its product may be used in conjunction with a third-party's product does not turn the manufacturer into an insurer for harms caused by the other's product. *See, e.g., Kellar*, 498 F. Supp. at 175. Otherwise, a manufacturer would "be required to perform a watchdog function in order to rescue product users from risks it had no active part in creating and over which it cannot exert meaningful control." Henderson, *supra*, at 601.

[3] The Court of Appeals erroneously based its analysis on *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008), a premises liability case. *Satterfield* does not apply in actions such as this one that are governed by statute. *See id.* at 365.

As the California Supreme Court explained, "we have never held that a manufacturer's duty to warn extends to hazards arising exclusively from *other* manufacturers' products." *O'Neil v. Crane Co.*, 266 P.3d 987, 997 (Cal. 2012). The court concluded, "expansion of the duty of care as urged would impose an obligation to compensate on those whose products caused the plaintiffs no harm. To do so would exceed the boundaries established over decades of product liability law." *Id.* at 1007.

The Washington Supreme Court has said there is "little to no support . . . for extending the duty to warn to another manufacturer's product." *Simonetta v. Viad Corp.,* 197 P.3d 127, 132-33 (Wash. 2008). The court held that a manufacturer is not liable for failure to warn of the danger of exposure to asbestos in insulation applied to its products if it did not manufacture the insulation. In *Braaten v. Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008), the court rejected failure to warn claims against pump and valve manufacturers for harm caused by asbestos-containing replacement packing and replacement gaskets made by third-parties.[4]

---

[4] *See also Grant v. Foster Wheeler, LLC*, 140 A.3d 1242, 1248 (Me. 2016) (summary judgment affirmed where plaintiff did not demonstrate exposure to asbestos-containing products originating with defendants); *Whiting v. CBS Corp.*, 982 N.E.2d 1224 (Table) (Mass. Ct. App. 2013) (affirming summary judgment to manufacturers of turbines, pumps, valves, and pipes covered with insulation made by a third party); *Toole v. Georgia-Pacific, LLC,* No. A10A2179, 2011 WL 7938847, at *7 (Ga. Ct. App. 2011) ("[A]n asbestos victim must present evidence that he was

(Footnote continued on next page)

The "prevailing majority rule" is that a manufacturer "cannot be liable for a third party's asbestos materials used with its products, where the . . . manufacturer was not in the chain of distribution of such asbestos-containing materials." *Morgan v. Bill Vann Co., Inc.,* 969 F. Supp. 2d 1358, 1366 (S.D. Ala. 2013); *Dalton v. 3M Co.*, No. 10-113-SLR-SRF, 2013 WL 4886658, at *10 (D. Del. Sept. 12, 2013) ("The majority of courts . . . refuse to impose liability upon manufacturers for the dangers associated with asbestos-containing products manufactured and distributed by other entities."), *adopted*, 2013 WL 5486813 (D. Del. Oct. 1, 2013).[5]

---

exposed to a defendant's products."); *Davis v. John Crane, Inc.,* 836 S.E.2d 577, 584 (Ga. Ct. App. 2019); *Robinson v. Flowserve*, No. 14–CV–161–ABJ, 2015 WL 11622965, at *11 (D. Wyo. Oct. 9, 2015) ("the Wyoming Supreme Court would adopt the bare metal defense and hold that manufacturers are not strictly liable for aftermarket replacement parts that the manufacturer did not manufacture or supply"); *Collins v. ABB, Inc.,* No. 4:13-cv-01183, 2015 WL 12532475, at *5 (S.D. Tex. May 27, 2015) ("Texas courts have repeatedly refused to impose a duty upon manufacturers, to warn about dangers arising entirely from other manufacturers' products, even if it is foreseeable that the products will be used together."); *Winhauer v. Air & Liquid Sys. Corp.*, No. CV 15-00177-RGA-SRF, 2016 WL 4238637, at *5 (D. Del. Aug. 9, 2016) (unreported) ("a manufacturer is not subject to a duty to warn or protect against hazards arising from a product it did not manufacture, supply, or sell."), *adopted*, 2016 WL 4522173 (D. Del. Aug. 29, 2016) (Mississippi law); *Niemann v McDonnell Douglas Corp.,* 721 F. Supp. 1019, 1030 (S.D. Ill. 1989) (Illinois law).

[5] *See also* Mark A. Behrens & Margaret Horn, *Liability for Asbestos-Containing Connected or Replacement Parts Made by Third Parties:*
(Footnote continued on next page)

Courts that have broadened the traditional duty to warn in some situations justify their radical expansion of liability based on *foreseeability*. The approach is geared to make *someone* pay, even if that person was not the source of the exposure that caused the harm. *See Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 380 (Iowa 2014) ("Deep-pocket jurisprudence is law without principle.").

Foreseeability considerations guide manufacturers as to when they must take safety measures with respect to their *own* products, not to hold them responsible for others' products. As the California Supreme Court explained, "manufacturers, distributors, and retailers have a duty to ensure the safety of their products . . . we have never held that these responsibilities extend to preventing injuries caused by *other* products that might foreseeably be used in conjunction with a defendant's product." *O'Neil*, 266 P.3d at 991 (emphasis in original). The Washington Supreme Court said in *Braaten,* "whether the manufacturers knew replacement parts would or might contain asbestos makes no difference because such knowledge does not matter, as we held in *Simonetta*." 198 P.3d at 500 (citing *Simonetta*, 197 P.3d at 136).

Thus, courts in many non-asbestos cases have refused to impose liability on manufacturers of products used in conjunction with harm-causing products made by others. For example, in *Brown v. Drake-*

Courts Are Properly Rejecting this Form of Guilt by Association, 37 Am. J. Trial Advoc. 489 (2014).

Willock International, Ltd., 530 N.W.2d 510 (Mich. App. 1995), a Michigan appellate court held that dialysis machine manufacturers owed no duty to warn hospital employees of the risk of exposure to formaldehyde supplied by another company even though the dialysis machine manufacturers had recommended the use of formaldehyde to clean their machines. The court held: "The law does not impose upon manufacturers a duty to warn of the hazards of using products manufactured by someone else." *Id.* at 515.

Courts have reached similar conclusions in other types of cases. For example, a pickup truck manufacturer had no duty to warn consumers against improper installation of aftermarket equipment, *Westchem Agric. Chems. v. Ford Motor Co.*, 990 F.2d 426, 432 (8th Cir. 1993); an airplane manufacturer was not liable for passengers' circulatory problems caused by seats made by a third-party and installed post-sale, *In re Deep Vein Thrombosis*, 356 F. Supp. 2d 1055, 1068 (N.D. Cal. 2005); a maker of electrically powered lift motors used in conjunction with scaffolding equipment had no duty to warn of risks created by scaffolding made by others, *Mitchell v. Sky Climber, Inc.*, 487 N.E.2d 1374, 1376 (Mass. 1986); a truck cab and chassis manufacturer was not liable for harm by a dump bed and hoist made by a third-party, *Shaw v. Gen. Motors Corp.*, 727 P.2d 387, 390 (Colo. App. 1986); a crane manufacturer had no duty to warn about rigging it did not place in the stream of commerce, *Walton v. Harnischfeger*, 796 S.W.2d 225, 226 (Tex. App. 1990); a hydraulic valve manufacturer was not liable for a defective log splitter used in conjunction with its

product, *Childress v. Gresen Mfg. Co.*, 888 F.2d 45, 46, 49 (6th Cir. 1989); a paint sprayer manufacturer was not liable when a cleaning solvent from a third-party burned a user, *Dreyer v. Exel Indus., S.A.*, 326 F. App'x 353, 358 (6th Cir. 2009); a metal forming equipment manufacturer was not liable for defective wood planking used in conjunction with its product, *Toth v. Econ. Forms Corp.*, 571 A.2d 420, 423 (Pa. Super. Ct. 1990); and a manufacturer of a garbage packer mounted on a truck chassis was not liable for a defect in a chassis made by a third-party, *Sanders v. Ingram Equip., Inc.*, 531 So. 2d 879, 880 (Ala. 1988).

Courts in non-asbestos cases also have refused to impose liability on manufacturers for harms caused by replacement parts sold by third-parties. For example, in *Baughman v. General Motors Corp.*, 780 F.2d 1131 (4th Cir. 1986), the Fourth Circuit, applying South Carolina law, refused to hold a truck manufacturer liable for a tire mechanic's injuries when a tire mounted on a replacement wheel rim assembly exploded.[6] The plaintiff contended that even though the vehicle's manufacturer did not place the replacement wheel into the stream of commerce, the vehicle was nevertheless defective because the manufacturer failed to adequately warn of dangers with similar wheels sold by others. The

[6] *See Harris v. Ajax Boiler, Inc.*, No. 1:12-cv-00311-MR-DLH, 2014 WL 3101941, at *5 (W.D.N.C. July 7, 2014) (finding *Baughman* to be "persuasive" on the lack of a duty to warn about asbestos-containing products from third-parties).

court said, "[t]he duty to warn must properly fall upon the manufacturer of the replacement component part." *Id.* at 1333.[7]

In *Fleck v. KDI Sylvan Pools*, 981 F.2d 107, 118 (3d Cir. 1992), the Third Circuit, applying Pennsylvania law, held that it would be "unreasonable" to impose liability on a swimming pool manufacturer for injuries sustained by a diver as a result of a lack of depth markers and warnings on a replacement pool liner made by another manufacturer.

In *Exxon Shipping Co. v. Pacific Res., Inc.* 789 F. Supp. 1521 (D. Haw. 1991), a Hawaii federal court held that a chain manufacturer was not liable for a defectively designed replacement chain made by another even though the replacement part was "identical, in terms of make and manufacture, to the original equipment." *Id.* at 1526.

The weak foundation for the duty at issue here is further exposed by the fact that some courts adopting the duty in asbestos cases appear

---

[7] *See also Firestone Steel Prods. Co. v. Barajas,* 927 S.W.2d 608 (Tex. 1996); *Acoba v. General Tire, Inc.*, 986 P.2d 288 (Haw. 1999); *Zambrana v. Standard Oil Co. of Cal.,* 26 Cal. App. 3d 209 (1972); *Wiler v. Firestone Tire & Rubber Co.*, 95 Cal. App. 3d 621 (1979); *Lytell v. Goodyear Tire & Rubber Co.,* 439 So. 2d 542 (La. Ct. App. 1983); *Spencer v. Ford Motor Co.*, 367 N.W.2d 393 (Mich. Ct. App. 1985); *Cousineau v. Ford Motor Co.*, 363 N.W.2d 721 (Mich. Ct. App. 1985); *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465 (11th Cir. 1993); *Rastelli v. Goodyear Tire & Rubber Co.,* 591 N.E.2d 222 (N.Y. 1992); *Ford Motor Co. v. Wood,* 703 A.2d 1315 (Md. Ct. Spec. App. 1998), *abrogated on other grounds, John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002).

not to embrace it in non-asbestos cases.[8] The rulings reflect courts improperly applying special results-oriented rules to asbestos cases rather than appropriately treating these cases like other product liability actions. *See Air & Liquid Sys. Corp. v. DeVries,* 139 S. Ct. 986, 995 (U.S. 2019) (adopting duty to warn of others' products in some instances in maritime tort context because of "[m]aritime law's longstanding solicitude for sailors.").[9] As one commentator explained:

> Asbestos litigation, over the decades, has taken products liability substantive law, case handling procedures, trial practice and evidence well beyond then-existing frontiers…. Many bankruptcies later, however, the new waves of asbestos litigation now reach out farther to more remote defendants, and often stretch proofs of exposure and causation in seeking to cast the broader liability net. The recent decisions [rejecting a duty to warn of others' products] reflect that bedrock evidentiary and products liability principles and the policies that underlie them ought not be compromised even though the claim is labeled as one involving "asbestos."

---

[8] *Compare Matter of New York City Asbestos Litig. (Dummitt v. Crane Co.) & Matter of Eighth Jud. Dist. Asbestos Litig. (Suttner v. Crane Co.)*, 59 N.E.3d 458 (N.Y. 2016), *with Rastelli v. Goodyear Tire & Rubber Co.,* 591 N.E.2d 222 (N.Y. 1992); *May v. Air & Liquid Sys. Corp.*, 129 A.3d 984 (Md. 2015), *with Ford Motor Co. v. Wood,* 703 A.2d 1315 (Md. Ct. Spec. App. 1998), *abrogated on other grounds, John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002).

[9] *But see Davis,* 836 S.E.2d at 249 (rejecting *DeVries* as applying "only in the maritime tort context due to particular concerns for the welfare of sailors.").

Michael Hoenig, Commentary, *No Liability for Another's Asbestos Products*, N.Y.L.J., Feb. 17, 2012.[10]

II. A DUTY TO WARN OF RISKS IN OTHERS' PRODUCTS IS UNSOUND POLICY

A. A Duty Would Threaten the Financial Viability of Remaining Defendants and Fuel the Search for "Solvent Bystanders"

Hundreds of companies made products that were used in conjunction with asbestos insulation, which in earlier years was ubiquitous in industry and buildings. Many of these companies may have never manufactured an asbestos-containing product, but they could face liability under Plaintiff's theory. Examples include manufacturers of steel pipe and pipe hangers; makers of nuts, bolts, washers, wire, and other fasteners of pipe systems; makers of any equipment attached to and using the pipe system; and paint manufacturers. Manufacturers and sellers of tools used with asbestos-containing materials, such as power saws, sanders, drills, hammers, or chisels also could face liability.

The financial viability of defendants would be threatened because they would be required to shoulder the cost of harms caused by others' asbestos products in addition to those caused by their own products.

---

[10] *See* S. Todd Brown, *Specious Claims and Global Settlements*, 42 U. Mem. L. Rev. 559, 566 (2012) (because of relaxed evidentiary requirements applied by some courts earlier in the asbestos litigation, "many claims that would not be compensable in typical personal injury cases – e.g., those lacking sufficient evidence to establish specific causation – could now go before a jury and be compensable.").

Some companies could be forced into bankruptcy, like scores of asbestos defendants that faced extreme liability.[11] Over 120 companies have declared bankruptcy due at least in part to asbestos-related liabilities, including at least three companies in the first quarter of 2020.[12]

More defendants could anticipate being pulled into the litigation as plaintiffs' attorneys expand their dragnet search for "solvent bystanders." *See In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (W.D.N.C. Bankr. 2014) (describing how a gasket and packing manufacturer became a target of asbestos cases following the bankruptcy wave until the company was forced into bankruptcy).

It is also important to note that asbestos personal injury litigation costs industry and insurers billions of dollars annually, shows no sign of slowing, and will last several decades. *See* Best's Market Segment Report, *No Slowdown in Asbestos and Environmental Claims* 1 (Nov. 28, 2018) ("Asbestos losses have not slowed down…."); Jenni Biggs, et al., *A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated* (Towers Watson June 2013) ("Typical projections based on epidemiology

---

[11] *See* S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299, 306 (2013) ("Defendants who were once viewed as tertiary have increasingly become lead defendants in the tort system, and many of these defendants have also entered bankruptcy in recent years.").

[12] Bankruptcies have terrible consequences for claimants, affected companies, workers, retirees, and communities. *See* Joseph E. Stiglitz, et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51, 70-88 (2003).

studies assume that mesothelioma claims arising from occupational exposure to asbestos will continue for the next 35 to 50 years.").

B. NON-ASBESTOS TORT CASES WOULD INCREASE

The duty Plaintiff seeks here would also lead to more non-asbestos tort filings since presumably the duty would extend to any product foreseeably used in conjunction with any hazardous product made or sold by a third-party. It could also lead to absurd results.

"For example, a syringe manufacturer would be required to warn of the danger of any and all drugs it may be used to inject." Thomas W. Tardy, III & Laura A. Frase, *Liability of Equipment Manufacturers for Products of Another: Is Relief in Sight?*, HarrisMartin's COLUMNS-Asbestos 6 (May 2007). "Can't you just see a smoker with lung cancer suing manufacturers of matches and lighters for failing to warn that smoking cigarettes is dangerous to their health?" John W. Petereit, *The Duty Problem With Liability Claims Against One Manufacturer for Failing to Warn About Another Manufacturer's Product*, HarrisMartin's COLUMNS-Asbestos 2, 4 (Aug. 2005).

Packaging companies might be held liable for hazards regarding contents made by others. Manufacturers of paint brushes may have to caution against the hazards of breathing mineral spirits that are commonly used to clean paint brushes. *See* Joseph W. Hovermill, et al., *Targeting of Manufacturers*, 47 No. 10 DRI For Def. 52, 54 (Oct. 2005). As a welcome counterpart to these outcomes, a California court has held that a broom manufacturer is not required to warn of the hazards of sweeping dust containing silica. *See* Tardy & Frase, *supra*, at 6.

We will not belabor this exercise because similar scenarios could be developed for virtually any product. Perhaps the only limit on the duty sought here would be the creativity of plaintiffs' lawyers.

C. THE DUTY WOULD BE COSTLY AND UNPREDICTABLE

"Just the threat of litigation and liability would force many manufacturers of safe products to spend time and money educating themselves and writing warnings about the dangers of other people's more dangerous products." *DeVries*, 139 S. Ct. at 999 (Gorsuch, J., dissenting). But manufacturers cannot be expected to maintain research facilities to identify potential dangers with respect to all products that may be used in conjunction with their own products. *See Taylor v. Elliott Turbomachinery Co., Inc.*, 90 Cal. Rptr. 3d 414, 422-23 (Ct. App. 2009) ("a bright-line legal distinction tied to the *injury-producing product* in the stream of commerce . . . acknowledges that over-extending the level of responsibility could potentially lead to commercial as well as legal nightmares in product distribution") (emphasis in original). Companies "might well face the dilemma of trying to insure against 'unknowable risks and hazards.'" *Id.* at 439 (citation omitted).

Further, the unpredictability that would be created by the imposition of liability would make it more difficult for businesses to grow and create jobs. Commentators have observed with respect to asbestos litigation:

> The uncertainty of how remaining claims may be resolved, how many more may ultimately be filed, what companies may be targeted, and at what cost, casts a pall over the

> finances of . . . American businesses. The cost of this unbridled litigation diverts capital from productive purposes, cutting investment and jobs. Uncertainty about how future claims may impact their finances has made it more difficult for affected companies to raise capital and attract new investment, driving stock prices down and borrowing costs up.

George Scott Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. Tex. L. Rev. 981, 998 (2003).

D. OVER-WARNING COULD UNDERMINE CONSUMER SAFETY

"Consumer safety also could be undermined by the potential for over-warning (the "Boy Who Cried Wolf" problem) and through conflicting information on different components and finished products." David C. Landin, et al., *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Public Policy in Asbestos Litigation*, 16 Brook. J.L. & Pol'y 589, 630 (2008) (urging courts to reject the duty plaintiff seeks here); *see also* 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, 43 (1983) ("The extension of workplace warnings liability unguided by practical considerations has the unreasonable potential to impose absolute liability…."). As the California Supreme Court said in *O'Neil,* "To warn of all potential dangers would warn of nothing." 266 P.3d at 1006 (citation omitted); *see also Straley v. United States*, 887 F. Supp. 728, 747 (D. N.J. 1995) ("billboard" warnings deprive users of effective warnings).

E. A DUTY WOULD NOT PREVENT FUTURE HARM

Imposing liability on a defendant for post-sale use of insulation or replacement parts made by third-parties would not serve the policy of preventing future harm. As a California Court of Appeal explained:

> [I]mposing a duty to warn…now will do nothing to prevent the type of injury before us – latent asbestos-related disease resulting from exposure four decades ago. Such exposures have already taken place, and in light of the heavily regulated nature of asbestos today, it is most unlikely that holding respondents liable for failing to warn of the danger posed by other manufacturers' products will do anything to prevent future asbestos-related injuries.

Taylor, 90 Cal. Rptr. 3d at 439. The duty Plaintiff seeks also raises a fairness issue since it could have been anticipated at the time defendants' products were sold and cannot be discharged now.

CONCLUSION

For these reasons, the Court should hold that the Equipment Defendants owed no duty to warn about the post-sale integration of asbestos-containing materials manufactured and sold by others.

Dated: April 13, 2020

Respectfully submitted,

/s/ Mark A. Behrens

Mark A. Behrens (*pro hac vice*)
SHOOK, HARDY & BACON, L.L.P.
1800 K Street, NW, Suite 1000
Washington, DC 20006
(202) 783-8400
mbehrens@shb.com

/s/ John M. Kizer

John M. Kizer (BPR No. 29846)*
GENTRY, TIPTON & MCLEMORE, P.C.
900 South Gay Street, Suite 2300
Knoxville, TN 37902
(865) 525-5300
jmk@tennlaw.com

Attorneys for *Amici Curiae*
* Counsel of Record

CERTIFICATE OF COMPLIANCE

I certify that the foregoing complies with the requirements set forth in Section 3, Rule 3.02 of Tennessee Supreme Court Rule 46. Excluding the Certificate of Compliance and Certificate of Service, the foregoing contains 3,882 words.

/s/ John M. Kizer
John M. Kizer (BPR No. 29846)

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served through the Court's e-filing system and/or through regular U.S. mail upon the following:

Co-Counsel for Appellee
H. Douglas Nichol
NICHOL & ASSOCIATES
6759 Baum Drive
Knoxville, TN 37919
(865) 588-7465
dnichol@nicholassociates.com

Co-Counsel for Appellee
Charles E. Valles
VALLES LAW FIRM, PLLC
6101 Long Prairie Rd., Suite 744-314
Flower Mound, TX 75028
(800) 586-4046
cvalles@valleslawfirm.com

Co-Counsel for Appellee
Ben K. Dubose
DUBOSE LAW FIRM, PLLC
4310 N. Central Expwy.
Dallas, TX 75206
(214) 389-8199
bdubose@duboselawfirm.com

Counsel for Crane Co.
James C. Bradshaw III
WYATT, TARRANT & COMBS, LLP
333 Commerce Street, Suite 1400
Nashville, TN 37201
(615) 244-0020
jbradshaw@wyattfirm.com

Co-Counsel for Appellee
Donald Capparella
DODSON, PARKER, BEHM & CAPPARELLA, P.C.
1310 6th Avenue North
Nashville, TN 37208
(615) 254-2291
capparella@dodsonparker.com

Counsel for The William Powell Co.
Joshua A. Wolfe
MCANGUS, GOUDELOCK & COURIE
520 West Summit Hill Drive, #905
Knoxville, TN 37902
(865) 243-2743
Joshua.Wolfe@mgclaw.com

Counsel for
The William Powell Co.
Scott D. Stephenson
Alan S. Zelkowitz
LITCHFIELD CAVO LLP
303 West Madison, Suite 300
Chicago, IL 60606
(312) 781-6663
stephenson@litchfieldcavo.com
zelkowitz@litchfieldcavo.com

Counsel for Fisher Controls Int'l
Hugh B. Bright, Jr.
C. Gavin Shepherd
M. Denise Moretz
William F. Clayton
Robert L. Vance
WOOLF, MCCLANE, BRIGHT,
ALLEN & CARPENTER, PLLC
900 South Gay Street, Suite 900
Knoxville, TN 37902
(865) 215-1000
hbright@wmbac.com

Counsel for Ingersoll-Rand
James E. Wagner
Debra L. Fulton
FRANTZ, MCCONNELL &
SEYMOUR
550 Main Avenue, Suite 500
P.O. Box 39
Knoxville, TN 37901
(865) 546-9321
jwagner@fmsllp.com
dfulton@fmsllp.com

Counsel for Goulds Pumps Inc.
Brady Edwards
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4000
Houston, TX 77002
(713) 890-5110
brady.edwards@morganlewis.com

Counsel for
A.W. Chesterton Co.
Michael K. Atkins
BAKER, O'KANE,
ATKINS & THOMPSON
P.O. Box 1708
Knoxville, TN 37901-1708
(865) 637-5600
matkins@boatlf.com

Counsel for Neles-Jamesbury, Inc. and
Metso Automation USA, Inc.
Jessalyn H. Zeigler
John W. Dawson, IV
BASS, BERRY & SIMS PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201
(615) 742-6200
jzeigler@bassberry.com

Counsel for Clark Reliance Co., Jerguson Gage and Valve Div. Flowserve Corp. f/k/a/ Duriron Co., and DeZurik, Inc.
Michael J. King
John W. Elder
Thomas A. Bickers
Lindsey M. Collins
PAINE, TARWATER & BICKERS
900 South Gay Street, #2200
Knoxville, TN 37902
(865) 525-0880
mjk@painebickers.com

Counsel for Metropolitan Life Insurance Company
W. Tyler Chastain
BERNSTEIN, STAIR & MCADAMS, LLP
116 Agnes Road
Knoxville, TN 37919
(865) 546-8030
wtylerc@bsmlaw.com

Counsel for Armstrong International, Inc.
James A. Beakes, III
B. Hart Knight
BUTLER SNOW LLP
150 Third Ave. South, #1600
Nashville, TN 37201
(865) 525-0880
jim.beakes@butlersnow.com

This 13th day of April, 2020.

/s/ John M. Kizer
John M. Kizer (BPR No. 029846)