Second Civil Number **B189160**

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 7

EILEEN HONER,

Plaintiff and Appellant,

v.

FORD MOTOR COMPANY, *et al.*,

Respondents.

Los Angeles Superior Court Case Number BC 323 721
The Honorable David L. Minning, Judge Presiding

AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC., ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF RESPONDENTS

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The Honorable David L. Minning, Judge Presiding

The Coalition for Litigation Justice, Inc., Association of California Insurance Companies, Chamber of Commerce of the United States of America, National Association of Manufacturers, American Tort Reform Association, National Association of Mutual Insurance Companies, and American Chemistry Council — collectively "*amici*" — ask this Court to affirm the trial court's orders granting summary judgment to the Respondents.

STATEMENT OF INTEREST

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

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

The Association of California Insurance Companies ("ACIC") is an affiliate of the Property Casualty Insurers Association of America and represents more than 300 property/casualty insurance companies doing business in California. ACIC member companies write 40.9 percent of the property/casualty insurance in California, including 56.1 percent of personal automobile insurance, 42.8 percent of commercial automobile insurance, 39 percent of homeowners insurance, 32.5 percent of business insurance and 46 percent of private workers compensation insurance.

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

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every

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

industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

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

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

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

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

STATEMENT OF FACTS

Amici adopt Respondents' Statement of Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The United States Supreme Court has described the asbestos litigation in this country as a "crisis," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997). Claims have poured in at an extraordinary rate. An estimated eighty-five employers have been forced into bankruptcy. Due to these bankruptcies, payments to the sick are threatened. More than 8,500 defendants have been named.

It is against this background that the subject must be considered. Here, this Court must decide whether a premises owner may be held liable for injuries to the spouse of an independent contractor as a result of off-site, secondhand exposure to asbestos. The appeal involves injuries allegedly sustained by plaintiff as a result of exposure to asbestos on the skin and work clothes of her father and brother, who both worked as insulators at various sites, including Respondents' manufacturing plants.

Premises owner liability for off-site exposure to asbestos is a new issue in asbestos litigation. Asbestos litigation has evolved over the years as plaintiffs' lawyers have raised new theories of liability in the attempt to reach new types of defendants. In earlier years, the litigation was focused mostly on the manufacturers of asbestos-containing

products, often called "traditional defendants." Most of those companies have been forced to seek bankruptcy court protection. As a result, plaintiffs' lawyers began to target "peripheral defendants," including premises owners for alleged harms to independent contractors exposed to asbestos. Plaintiffs' lawyers are now targeting property owners for alleged harms to secondarily exposed "peripheral plaintiffs." Like this action, these claims involve workers' family members who have been exposed to asbestos off-site, typically through contact with a directly exposed worker or that worker's soiled work clothes.

Since the beginning of 2005, several courts have decided whether premises owners owe a duty to "take home" exposure claimants. Premises owner liability for secondhand asbestos exposures has been rejected by the highest courts in Georgia and New York, New York and Tennessee trial courts, and a Texas appellate court.

As we will explain, a broad new duty requirement for landowners here could allow plaintiffs' lawyers to begin to name countless scores of employers and other landowners directly in asbestos and other toxic tort suits. The impact would be to augment these litigations, and would have significant negative consequences for employers and homeowners in California. The decision also could have substantial negative impacts beyond California when future state courts are asked to permit secondhand exposure recoveries against premises owners in their own jurisdictions.

For these reasons, *amici* ask this Court to affirm the trial court's orders granting summary judgment to the Respondents.

ARGUMENT

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

A. The Current Asbestos Litigation Environment

Courts and commentators have recognized since the early 1990s the extraordinary problems created by the "elephantine mass" of asbestos cases. *Norfolk & W. Ry. Co., v. Ayers*, 538 U.S. 135, 166 (2003) (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)); *see also* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

1. Filings by Claimants Who Are Not Sick

The vast majority of recent asbestos claimants—up to ninety percent—are "people who have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by an asbestos-related disease and likely never will be." *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary,* 106th Cong., at 5 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School). The RAND Institute for Civil Justice recently concluded that "a large and growing proportion of the claims entering the system in recent years were submitted by individuals who had not at the time of filing suffered an injury that had as

yet affected their ability to perform the activities of daily living." Stephen J. Carroll *et al., Asbestos Litigation* 76 (RAND Inst. for Civil Justice 2005), *available at* http://www.rand.org/ publications/MG/MG162 [hereinafter RAND Rep.].

Mass screenings conducted by plaintiffs' lawyers and their agents have "driven the flow of new asbestos claims by healthy plaintiffs." Hon. Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 Pepp. L. Rev. 1, 5 (2003). "There often is no medical purpose for these screenings and claimants receive no medical follow-up." *Id.* *U.S. News & World Report* has described the claimant recruiting process:

> To unearth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving law firms 40 percent of any recovery. One solicitation reads: 'Find out if YOU have MILLION DOLLAR LUNGS!'

Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36, *available at* 2001 WLNR 7718069. These screenings are frequently conducted in areas with high concentrations of workers who may have worked in jobs where they were exposed to asbestos. *See Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005) ("Labor unions, attorneys, and other persons with suspect motives [have] caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms."). It is estimated that over one million workers have undergone attorney-sponsored screenings. *See* Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?*, 31 Pepp. L. Rev.

33, 69 (2003).; *see also* Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 Hofstra L. Rev. 833 (2005).

Many X-ray interpreters (called "B Readers") hired by plaintiffs' lawyers are "so biased that their readings [are] simply unreliable." *Owens Corning*, 322 B.R. at 723; *see also* American Bar Association Commission on Asbestos Litigation, *Report to the House of Delegates* (2003), *available at* http://www.abanet.org/leadership/full_report.pdf (litigation screening companies find X-ray evidence that is "consistent with" asbestos exposure at a "startlingly high" rate, often exceeding fifty percent and sometimes reaching ninety percent);[2] Joseph N. Gitlin *et al.*, *Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 Acad. Radiology 843 (2004) (B Readers hired by plaintiffs claimed asbestos-related lung abnormalities in 95.9% of the X-rays sampled, but independent B Readers found abnormalities in only 4.5% of the same X-rays); John M. Wylie II, *The $40 Billion Scam*, Reader's Digest, Jan. 2007, at 74.[3] As one physician explained, "the chest x-rays are not read blindly, but

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[2] As a result of its findings, the Commission proposed the enactment of federal legislation to codify the evidence that physicians recognize is needed to show impairment. The ABA's House of Delegates adopted the Commission's proposal in February 2003. *See Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong., Appen. A (Mar. 5, 2003) (statement of Hon. Dennis Archer, President-Elect, Am. Bar Ass'n), *available at* 2003 WL 785387.

[3] One of the earliest detailed reviews of B Reads in litigation arose out of information distributed to tire workers, which said that 94% of the workers screened at one location and 64% at another were found to have asbestosis. *See Raymark Indus., Inc. v. Stemple*, 1990 WL 72588 (D. Kan. May 30, 1990). In 1986, the National Institute for Occupational Safety and Health looked into the matter and found that only 0.2% of the workers they evaluated had physical changes consistent with asbestosis. *See* J. Jankovic & R.B. Reger, *Health Hazard Evaluation Report*, NIOSH Rep. No. HETA 87–017–1949 (Dep't Health &

(Footnote continued on next page)

always with the knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker's behalf." David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 Pepp. L. Rev. 11, 13 (2003) (quoting Lawrence Martin, M.D.).

2. Bankruptcies and the Economic Impact of the Litigation

"For some time now, mounting asbestos liabilities have pushed otherwise viable companies into bankruptcy," *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 201 (3d Cir. 2005), including an estimated eighty-five employers. *See* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29; *see also* Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 392 (1993) (stating that each time a defendant declares bankruptcy, "mounting and cumulative" financial pressure is placed on the "remaining defendants, whose resources are limited."). RAND found: "Following 1976, the year of the first bankruptcy attributed to asbestos litigation, 19 bankruptcies were filed in the 1980s and 17 in the 1990s. Between 2000 and mid-2004, there were 36 bankruptcy filings, more than in either of the prior two decades." RAND Rep., *supra*, at xxvii.

Human Servs., NIOSH 1989). In 1998, an audit by the Manville Settlement Trust determined that 59% of X-ray readings relied upon by plaintiffs' counsel to show asbestos-related abnormalities were inaccurate. *See In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 309 (E.D.N.Y. & S.D.N.Y. 2002). Another review conducted by medical experts appointed by an Ohio federal judge found that 65% of the claimants reviewed had no asbestos-related conditions and 20% presented only pleural plaques. *See* Hon. Carl Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 37-39 (1991).

Nobel Prize-winning economist Joseph Stiglitz of Columbia University and two colleagues studied the direct impact of asbestos bankruptcies on workers and found that bankruptcies resulting from asbestos litigation put up to 60,000 people out of work between 1997 and 2000. *See* Joseph E. Stiglitz *et al.*, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms,* 12 J. Bankr. L. & Prac. 51 (2003). Those workers and their families lost up to $200 million in wages, *see id.* at 76, and employee retirement assets declined roughly twenty-five percent. *See id.* at 83.

Another study, which was prepared by National Economic Research Associates, found that workers, communities, and taxpayers will bear as much as $2 billion in additional costs due to indirect and induced impacts of company closings related to asbestos. *See* Jesse David, *The Secondary Impacts of Asbestos Liabilities* (Nat'l Econ. Research Assocs., Jan. 23, 2003). For every ten jobs lost directly, the community may lose eight additional jobs. *See id.* at 8. The shutting of plants and job cuts decrease per capita income, leading to a decline in real estate values, and lower federal, state, and local tax receipts. *See id.* at 11-13.

RAND has estimated that $70 billion was spent in asbestos litigation through 2002; future costs could reach $195 billion. *See* RAND Rep., *supra*, at 92, 106. To put these vast sums in perspective, former United States Attorney General Griffin Bell has pointed out that asbestos litigation costs will exceed the cost of "all Superfund sites combined, Hurricane Andrew, or the September 11th terrorist attacks." Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the*

Asbestos Litigation Crisis, 6:6 Briefly 4 (Nat'l Legal Center for the Pub. Interest June 2002), *available at* http://www.nlcpi.org.

3. Peripheral Defendants Are Being Dragged into the Litigation

As a result of these bankruptcies, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14. The Congressional Budget Office observed that asbestos suits have expanded "from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities." Congress of the United States, Congressional Budget Office, *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003); *see also* Steven B. Hantler *et al.*, *Is the Crisis in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1151-52 (2005) (discussing spread of asbestos litigation to "peripheral defendants"). One well-known plaintiffs' attorney has described the litigation as an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).

More than 8,500 defendants have now become "ensnarled in the litigation." *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 747-48 (E.D.N.Y. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992); Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*, Columns – Raising The Bar In Asbestos Litig., Aug. 2004, at 5. Many

of these defendants are familiar household names. *See* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1. Other defendants include small businesses facing potentially devastating liability. *See* Susan Warren, *Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J., Jan. 27, 2003, at B1. Nontraditional defendants now account for more than half of asbestos expenditures. *See* RAND Rep., *supra*, at 94. The Respondents here are an example of both trends at work. As we will explain, the new duty rule sought by plaintiff could exacerbate the spread of the litigation to even more peripheral defendants.

II. THIS COURT SHOULD HOLD THAT LANDOWNERS OWE NO DUTY TO REMOTE PLAINTIFFS INJURED OFF-SITE THROUGH SECONDHAND EXPOSURE TO HAZARDS ON THE PROPERTY

It is well established that before a defendant may be liable for negligence it must be shown that the defendant owes a duty to the plaintiff. The existence and scope of a duty of care, if any, is a question of law to be determined by the court. Duty questions involve "policy-laden" judgments in which a line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit. "A person may have a moral duty to prevent injury to another, but no legal duty." *Pulka v. Edelman*, 358 N.E.2d 1019, 1022 (1976), *reargument denied*, 362 N.E.2d 640 (N.Y. 1977).

Here, the Court must determine whether it is fair and reasonable to require landowners to protect against off-site injuries resulting from secondhand exposures to asbestos and other substances emitted in the workplace. To make this determination, the Court must balance a variety of factors, including: (1) the foreseeability of harm to the injured party; (2) the degree of certainty he or she suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant and the consequences to the community of imposing a duty of care with resulting liability for breach; (7) and the availability, cost, and prevalence of insurance for the risk involved. *Rowland v. Christian* (1968) 69 Cal.2d 108, 113.

A. Courts That Have Recently Considered the Issue Presented Here Rejected Premises Owner Liability for Secondhand Asbestos Exposures

Since 2005, two state courts of last resort – the Georgia Supreme Court and the New York Court of Appeals – Tennessee and New York trial courts, and a Texas appellate court have decided the issue of premises owner liability for secondhand exposures to asbestos emitted in the workplace. These courts rejected the duty the plaintiff invites this Court to adopt here. *See also Adams v. Owens-Illinois, Inc.*, 705 A.2d 58, 66 (Md. Ct. Spec. App. 1998) ("If liability for exposure to asbestos could be premised on [decedent's] handling of her husband's clothing, presumably Bethlehem [the premises owner] would owe a duty to others who came into close contact with [decedent's husband], including other family members, automobile passengers, and co-

workers. Bethlehem owed no duty to strangers based upon providing a safe workplace for employees."). This Court should follow the sound reasoning of these courts.

1. Georgia: *CSX Transportation, Inc. v. Williams*

In January 2005, the Georgia Supreme Court in *CSX Transportation, Inc. v. Williams,* 608 S.E.2d 208 (Ga. 2005), became the first state court of last resort to consider the liability of an employer for off-site, exposure-related injuries to nonemployees. The court unanimously held that "Georgia negligence law does not impose any duty on an employer to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace." *Id.* at 210. The appeal involved a wrongful death action on behalf of a woman and negligence claims by three children who were exposed to asbestos emitted from the clothing of family members employed at the defendant's facilities.

The court held that the duty of employers to provide their employees with a reasonably safe work environment does not encompass individuals who were neither employees nor exposed to any danger in the workplace; there would have to be a basis for extending the employer's duty beyond the workplace. The court noted that "mere foreseeability" of harm had been rejected as a basis for creating third-party liability in previous cases. *Id.* at 209. The court also cited New York law for the proposition that duty rules must be based on policy considerations, including the need to limit the consequences of wrongs to a controllable degree because of the negative policy implications that would result from holding employers liable for exposure-related harms

to non-employees. The court also distinguished decisions holding landowners liable for the release of toxins into the environment, explaining that the defendant did not "spread[] asbestos dust among the general population, thereby creating a dangerous situation in the world beyond the workplace." *Id.* at 210. The court concluded, "we decline to extend on the basis of foreseeability the employer's duty beyond the workplace to encompass all who might come into contact with an employee or an employee's clothing outside the workplace." *Id.*

2. ***New York: In re New York City Asbestos Litigation (Holdampf v. A.C. & S., Inc.) and In re Eighth Judicial District Asbestos Litigation (Rindfleisch v. AlliedSignal, Inc.)***

In October 2005, New York's highest court, with one justice abstaining, unanimously reached the same conclusion and reversed an appellate court in *In re New York City Asbestos Litigation* (*Holdampf v. A.C. & S., Inc.*), 840 N.E.2d 115 (N.Y. 2005). The action was brought by a former Port Authority employee and his wife after the wife developed mesothelioma from washing her husband's asbestos-soiled work clothes.

At the outset, the court said that a defendant cannot be held liable for injuries to a plaintiff unless a "specific duty" exists, because "otherwise a defendant would be subjected to 'limitless liability to an indeterminate class of persons conceivably injured' by its negligent acts." *Id.* at 119 (quoting *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1060 (N.Y. 2001)). That duty, the court said, is not defined solely by the foreseeability of harm. Rather, courts must balance a variety of factors, including the

reasonable expectation of parties and society generally, the likelihood of unlimited or insurer-like liability, and public policy.

The court held that the Port Authority did not owe a duty as her husband's employer. The court noted that at common-law, now codified in New York, an employer's duty to provide a safe workplace is limited to employees. The court said that in *Widera v. Ettco Wire and Cable Corp.*, 204 A.D.2d 306, 611 N.Y.S.2d 569 (N.Y. App. Div. 1994), *leave denied*, 650 N.E.2d 414 (N.Y. 1995), the appellate court "properly refused" to recognize a cause of action for negligence against an employer for injuries suffered by its employee's family member as a result of exposure to toxins brought home from the workplace on the employee's work clothes. The *Widera* court had concluded: "The recognition of a common-law cause of action under the circumstances of this case would . . . expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs." 204 A.D.2d at 307-08, 611 N.Y.S.2d at 571; *see also Ruffing v. Union Carbide Corp.*, 1 A.D.3d 339, 766 N.Y.S.2d 439 (2d Dept. 2003) (worker whose wife and daughter in utero were exposed to toxic substances carried home by worker, resulting in daughter's birth defects, failed to state cause of action against employer).

The New York Court of Appeals in *Holdampf* explained that the case did not involve the Port Authority's failure to control the conduct of a third-party tortfeasor, because there was no third-party tortfeasor in the case. *Compare Pulka v. Edelman*, 358 N.E.2d 1019 (1976) (defendant garage owner and third party tortfeasor customer),

reargument denied, 362 N.E.2d 640 (N.Y. 1977); *D'Amico v. Christie*, 518 N.E.2d 896 (N.Y. 1987) (defendant employer and third party tortfeasor ex-employee). Nor did the appeal involve a relationship between the plaintiff and defendant that would require the defendant to protect the plaintiff from the conduct of others. Specifically, the court said, there was no relationship between the Port Authority and Elizabeth Holdampf – much less that of master and servant (employer and employee), parent and child or common carrier and passenger, examples where liability has been imposed in other cases.

The court also held that the Port Authority did not owe a duty to the plaintiff as a landowner. The court noted that New York recognizes that a landowner's duty of reasonable care can run to the surrounding community, such as when mining practices carried out on the landowner's property cause the negligent release of toxins into the ambient air. But the off-site exposure in *Holdampf* was "far different from" those situations. *Id.* at 121. Mrs. Holdampf's exposure came from handling her husband's work clothes; none of the Port Authority's activities released "asbestos into the community generally." *Id.*

The court concluded that the duty rule sought by plaintiffs would not only upset traditional tort law rules, but also would be unworkable in practice and unsound as a matter of policy. The court expressed skepticism that a new duty rule could be crafted to avoid potentially open-ended liability for premises owners. The appellate court had tried to avoid this problem by limiting its holding to members of the employee's household, but the Court of Appeals said that the "line is not so easy to draw." *Id.* The new duty

rule could potentially cover anyone who might come into contact with a dusty employee or that person's dirty clothes, such as a baby-sitter or an employee of a local laundry. The court also considered the likely consequences of adopting the expanded duty urged by plaintiffs: despite plaintiffs' contention that the incidence of asbestos-related disease caused by the kind of secondhand exposure at issue is rather low, the court wrote, "experience counsels that the number of new plaintiffs' claims would not necessarily reflect that reality." *Id.*

Subsequent to the New York high court's decision in *Holdampf*, a New York trial court in *In re Eighth Judicial District Asbestos Litigation (Rindfleisch v. AlliedSignal, Inc.),* 12 Misc. 3d 936, 815 N.Y.S.2d 815 (N.Y Sup. Ct. 2006), refused to distinguish *Holdampf* and found no duty for harms caused by secondary asbestos exposures that occurred after the adoption of Occupational Safety and Health Administration ("OSHA") regulations in 1986 that required employers to provide workers with protective work clothing, changing rooms, or shower and laundry facilities, and to inform workers that soiled work clothing could contain asbestos. Plaintiff argued that it was foreseeable that if OSHA regulations were not followed, asbestos-laden materials could be carried into the household, causing harm to third parties. The court, however, said that the creation of a duty did not depend on the mere foreseeability of the harm. The court explained, "The courts of New York have repeatedly refused to extend liability to proposed tortfeasors where plaintiffs have suffered grave consequences in the absence of a duty owed." 12 Misc. 3d at 942, 815 N.Y.S. 2d at 820. The court went on to state, "[a] line must be

drawn between the competing policy considerations of providing a remedy to everyone who is injured and of expending exposure to tort liability almost without limit." *Id.* (quoting *DeAngelis v. Lutheran Med. Center*, 58 N.Y.2d 1053, 1055, 462 N.Y.S.2d 626, 627-28, 449 N.E.2d 406, 407-08 (1983). The court concluded that it must be "cautious of creating an indeterminate class of potential plaintiffs" and, therefore, declined to find a duty of care owed to the plaintiff.

3. Tennessee: *Satterfield v. Breeding Insulation Co.*

Earlier this year, a Tennessee trial court reached the same conclusion in *Satterfield v. Breeding Insulation Co.*, No. L-14000 (Tenn. Cir. Ct., Blount County Mar. 21, 2006), arising from the death of a child from secondhand asbestos exposure. The court held that Tennessee law "does not stand for the broad extension of the duty of an employer to third parties as argued by the Plaintiffs in this case." Accordingly, the court granted the defendant's motion for summary judgment, "leaving it to consideration by the Tennessee legislature as to whether it is wise to establish the duty sought by Plaintiffs in the case at bar."

4. Texas: *Exxon Mobil Corp. v. Altimore*

Most recently, a Texas appellate court in *Exxon Mobil Corp. v. Altimore*, 2006 WL 3511723 (Tex. App.-Hous. (14th Dist.) Dec. 7, 2006), unanimously overturned an almost $2 million trial verdict and held that a premises owner owed no duty to an employee's wife injured by pre-1972 exposure to asbestos brought home on her husband's work clothing. The court said that the defendant could not be charged with

knowledge of the take home risk of exposure until after OSHA adopted an asbestos exposure standard in 1972 and prohibited employers from allowing workers to take their work clothes home if the worker has been exposed to asbestos. Earlier studies supporting a connection between direct exposure and harm could not support a duty with respect to household exposures prior to 1972, because "there were still mixed messages from the medical and scientific community on the risks associated with asbestos exposure" for secondarily exposed persons. *Id.* at *8. The court said: "[Plaintiff] argues that knowledge of a risk of harm to someone, creates a duty of care to everyone. We disagree this is the law of Texas." *Id.*

The court then found that after the 1972 OSHA regulations were adopted, "the risk to [plaintiff] of contracting a serious illness had become foreseeable, triggering, for the first time a duty to protect [plaintiff] and those persons similarly situated." *Id.* By that time, however, the subject employee was no longer being exposed to asbestos, so no duty was owed.

B. Arguments for Liability Rest on a Weak Foundation

This Court should follow the Georgia and New York decisions in this appeal. Plaintiff's arguments supporting the creation of a new duty rule are unsound as a matter of law and policy.

1. No Relationship Existed Between the Parties

In determining whether it is fair and reasonable to require landowners to protect against off-site exposures to asbestos, the Court must first consider the relationship of the

parties. Here, as in the cases cited above, there is *no* relationship between the parties that could support a finding of a duty.

This case does not involve the Respondents' failure to control the conduct of a third-party tortfeasor. No third-party tortfeasor is involved. This case also does not involve a relationship between the Plaintiff and Respondents that would require the Respondents to protect Plaintiff from the conduct of others, such as master and servant (employer and employee), parent and child, or common carrier and passenger.

2. Product Liability Rules Are Based on a Different Foundation than Premises Liability and Do Not Support the Duty Sought Here

Plaintiff's brief cites *Anchor Packing Co. v. Grimshaw*, 692 A.2d 5 (Md. Ct. Spec. App. 1997), *rev'd on other grounds sub nom. Porter Hayden Co. v. Bullinger*, 713 A.2d 962 (Md. 1998), which involved product liability claims against asbestos product manufacturers and suppliers for secondhand exposures to asbestos by workers' spouses and family members. Plaintiff apparently cites this case to suggest that, because product liability law may permit liability to be imposed for injuries to bystanders, the same duty must exist with respect to premises owners.[4] This reasoning is wrong.

This case is not a product liability case; rather, it is a premises liability case. Product liability law is based on entirely different rationales than the law of premises

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[4] *Compare Rohrbaugh v. Owens-Corning Fiberglas Corp.*, 965 F.2d 844 (10th Cir. 1992) (holding that asbestos manufacturer was not liable under Oklahoma law for the death of an insulator's wife, who was exposed to asbestos dust carried home on the insulator's work clothes).

liability at issue here. The application of strict product liability to commercial sellers and distributors "reflects the origins of liability without fault in the law of warranty, which has traditionally focused on sales transactions." *Restatement Third, Torts: Products Liability* § 20 cmt. *a* (1997). A justification for strict products liability has been that "the seller, by undertaking to market his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it. . . ." *Restatement (Second) of Torts* § 402A cmt. *c* (1965).

Here, plaintiff allegedly was exposed to asbestos dust carried home from work by her husband and brother. Plaintiff did not buy asbestos from the Respondents. No sales transaction was involved. Unlike asbestos product manufacturers, Respondents had no meaningful way to incorporate the costs of any risk posed by those products into the pricing of their wholly unrelated products. Therefore, Respondents cannot be said to have "undertaken and assumed" a duty to the plaintiff. *Id.*

This Court should follow the decisions that are directly on point rather than try to fit a square peg into a round hole and import holdings from product liability cases. *Anchor Packing* rested on an entirely different foundation than the law of premises owner liability and does not support the novel duty rule presented here.

3. Cases Involving Law of Nuisance and Strict Liability for Abnormally Dangerous Activity Do Not Support the Duty Sought Here

Plaintiff also refers to cases imposing a duty on landowners for damages occurring off-site under the law of nuisance and strict liability for abnormally dangerous activity. Reliance on those cases is misplaced.

The situation presented here does not involve release of asbestos into the community generally. This important difference mirrors the distinction made by the Georgia Supreme Court when it stated that the case before it did not "involve [the landowner] itself spreading asbestos dust among the general population, thereby creating a dangerous situation in the world beyond the workplace." *Williams*, 608 S.E.2d at 210. As described, the New York Court of Appeals came to the same conclusion in *Holdampf*.

4. Defendant Lacked the Ability to Prevent the Harm

In determining whether it is "fair and reasonable" to require landowners to protect against off-site exposures to asbestos, the Court also must consider the opportunity and ability of the Respondents to exercise due care to prevent the harm at issue. The plaintiff's husband and brother were in the best position to prevent the harm. As the New York Court of Appeals said in *Holdampf*, where the defendant did provide workers with a changing room, the defendant was entirely dependent upon the exposed worker's willingness to comply with and carry out risk-reduction measures. The court appreciated that imposition of a duty of care is unfair where a premises owner cannot control the

conduct of directly exposed workers so as to prevent harm to third parties secondarily exposed off-site.

For the reasons explained in *Holdampf*, Respondents had little or no ability to enforce risk-reduction measures. The exposed workers here were not even employed by the Respondents; they were independent contractors. Respondents could not directly discipline or discharge the workers if they failed to carry out risk-reduction measures. Thus, imposition of a duty rule would result in insurer-like liability for Respondents and other premises owners. That result would be unfair.

Plaintiff also apparently presumes that the directly exposed workers here were ignorant of the risks of asbestos exposure. Here, the workers were career insulators. It is almost inconceivable that the workers' employers or union - as well as the exposed workers - were unaware of the risks of asbestos exposure.

5. Other Authority Provides Weak Support for a New Duty Rule

a. Louisiana: *Zimko v. American Cyanamid*

Plaintiff cites a Louisiana case, *Zimko v. American Cyanamid*, 905 So. 2d 465 (La. Ct. App. 2005), *writ denied*, 925 So. 2d 538 (La. 2006), which involved a plaintiff who claimed he developed mesothelioma from household exposure to asbestos fibers that clung to his father and his father's work clothes. The *Zimko* plaintiff also attributed his disease to exposures at his own place of employment. The Louisiana appellate court, without engaging in an independent analysis, concluded that the father's employer owed

a duty of care to the son. In recognizing this duty, the court said it found the New York appellate court's decision in *Holdampf* to be "instructive." *Id.* at 483.

Zimko provides only flimsy support for plaintiff's theory here. First, the New York appellate court decision that the *Zimko* court found to be "instructive" was overturned by the New York Court of Appeals after *Zimko* was decided. Furthermore, the validity of *Zimko* was recently called into question in Louisiana in *Thomas v. A.P. Green Indus., Inc.*, 933 So. 2d 843 (La. Ct. App. 2006). The case did not involve secondhand asbestos exposure, but was a typical premises owner liability case brought by an exposed worker. A justice who wrote a concurring opinion warned against any reliance *on Zimko*:

> *One must clearly understand the factual and legal basis upon which Zimko was premised and its history.*
>
> *Zimko* was a 3 to 2 decision of this court. [The father's employer] was found liable to the plaintiff and [plaintiff's' employer] was found not liable to the plaintiff. Neither [company] sought supervisory review from the Louisiana Supreme Court, but the plaintiff did on the issue of the liability of [his employer]. . . . Thus, the Supreme Court was not reviewing the correctness of the majority opinion respecting [the liability of the father's employer]. . . . *Any person citing Zimko in the future should be wary of the majority's opinion in Zimko in view of the Louisiana Supreme Court never being requested to review the correctness of the liability of American Cyanamid.*
>
> The Court of Appeals of New York (that state's highest court) briefly alluded to the problem in *Zimko* in the case of *In re New York City Asbestos Litigation*. . . and chose not to follow *Zimko*.

Thomas, 933 So. 2d at 871-72 (Tobias, J., concurring) (emphasis added).

b. New Jersey: *Olivo v. Owens-Illinois, Inc.*

Curiously, Plaintiff does not cite a New Jersey Supreme Court decision which departed from the Georgia and New York high court decisions and found a duty to exist in *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006). *Olivo* involved an independent contractor who worked as a union welder at a refinery owned by Exxon Mobil. During the course of his employment, the plaintiff was exposed to asbestos, and his late wife developed mesothelioma as a result of handling his work clothes. The court held that "to the extent that Exxon Mobil owed a duty to workers on its premises for the foreseeable risk of exposure to [asbestos], similarly, Exxon Mobil owed a duty to spouses handling the workers' unprotected work clothing based on the foreseeable risk of exposure from asbestos brought home on contaminated clothing." *Id.* at 1149.

Importantly, the New Jersey Supreme Court emphasized that, unlike other states, New Jersey law views forseeability as "determinant" in establishing the defendant's duty of care. *Id.* at 1148. The court remanded the case for further consideration, concluding that there were "genuine issues of material fact about the extent of the duty that Exxon Mobil owed to [the plaintiff], and whether Exxon Mobil satisfied that duty." *Id.* at 1151.

California law, however, is more closely aligned with Georgia and New York law – and departs for New Jersey – by requiring an analysis of various factors in addition to mere foreseeability in deciding the existence of a duty. *See, e.g., Thing v. La Chusa* (1989) 48 Cal. 3d 644, 656, 659, 257 Cal. Rptr. 865, 872, 874, 771 P.2d 814, 821, 823 (rejecting a simple "reasonable foreseeability" test for assessing duty because

"foreseeability, like light, travels indefinitely in a vacuum" and because of "the importance of avoiding the limitless exposure to liability that the pure foreseeability test of 'duty' would create.") (internal citations omitted).

Like Georgia and New York, and unlike New Jersey, California courts have held that "foreseeability is not coterminous with duty." *Sakiyama v. AMF Bowling Centers, Inc.* (2003) 110 Cal. App. 4th 398, 407, 1 Cal. Rptr. 3d 762, 768; *Erlich v. Menezes* (1999) 21 Cal. 4th 543, 552, 87 Cal. Rptr. 2d 886, 981 P.2d 978); *see also Coldwell Banker Residential Brokerage Co. v. Super. Ct.* (2004) 117 Cal. App. 4th 158, 167, 11 Cal. Rptr. 3d 564, 571 ("the mere existence of foreseeability of harm . . . is, for public policy reasons, not sufficient to impose liability."); *Vasquez v. Residential Inv., Inc.* (2004) 118 Cal. App. 4th 269, 282, 12 Cal. Rptr. 3d 846, 855 (duty in negligence action does not focus on foreseeability alone, but must consider the burden on the defendant to prevent the harm).

In fact, California courts "may find that no duty exists, despite foreseeability of harm, because of other [*Rowland*] factors." *Sakiyama* 110 Cal. App. 4th at 407, 1 Cal. Rptr. 3d at 768; *see also Burgess v. Superior Court* (1992) 2 Cal. 4th 1064, 1072, 9 Cal. Rptr. 2d 615, 831 P.2d 1197 (duty "depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability."). Because the consequences of a negligent act must be limited to avoid an intolerable burden on society, the determination of duty "recognizes that policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk." *Elden v. Sheldon*

(1988) 46 Cal. 3d 267, 274, 250 Cal. Rptr. 254, 758 P.2d 582; *see also Adelman v. Associated Intern. Ins. Co.* (2001) 90 Cal. App. 4th 352, 108 Cal. Rptr. 2d 788; *Lubner v. City of Los Angeles* (1996) 45 Cal. App. 4th 525, 53 Cal. Rptr. 2d 24, *review denied* (Aug 28, 1996). As the Supreme Court of California wrote in *Thing*, "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which the foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury." *Thing*, 48 Cal. 3d at 668; 257 Cal.Rptr. at 881; 771 P.2d at 830. The *Rowland* factors do not support a finding of a duty in this action.

C. The Broad New Duty Rule Sought by Plaintiffs Is Unsound and Would Have Perverse Results: Asbestos Litigation Would Worsen and Other Claims Would Rise

Finally, the Court's duty analysis must consider the public interest. As a practical matter, judicial adoption of a new cause of action against landowners by remote plaintiffs injured off-site would exacerbate the current asbestos litigation and augment other toxic tort claims. A broad new duty requirement for landowners would allow plaintiffs' lawyers to begin to name countless premises owners directly in asbestos and other suits.

Future potential plaintiffs might include anyone who came into contact with an exposed worker or his or her clothes. Such plaintiffs could include co-workers, children living in the house, extended family members, renters, house guests, baby-sitters, carpool members, bus drivers, and workers at commercial enterprises visited by the worker when he was dirty, as well as local laundry workers or others that handled the worker's clothes.

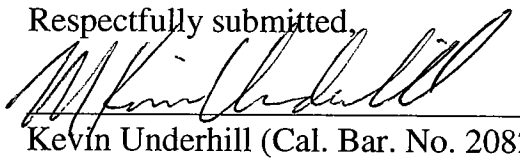
Moreover, potential defendants may not be limited to corporate property owners like Respondents. Landlords and private homeowners also might be liable for secondhand exposures that originate from their premises. In an attempt to reach for homeowners' insurance policies, private individuals could be swept into the "dragnet search" for potentially responsible parties in asbestos cases.

Thus, any attempt to limit a rule of liability to reasonably foreseeable plaintiffs is likely to be no limit at all. Creation of a new duty rule for premises owners based on secondary exposures to asbestos could generate a "next wave" in asbestos litigation, resulting in significant negative consequences for California courts and premises owners.

CONCLUSION

For these reasons, *amici* ask this Court to affirm the trial court's orders granting summary judgment to the Respondents.

Respectfully submitted,



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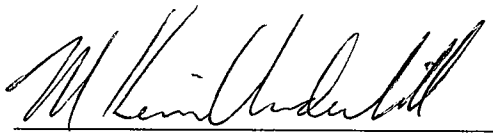
CERTIFICATE OF WORD COUNT

Pursuant to Rule 14(c)(1) of the California Rules of Court, the undersigned hereby certifies that this Brief contains 7,026 words, exclusive of captions, tables, and this certification.



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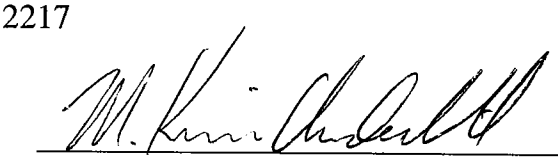

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