IN THE UTAH COURT OF APPEALS

MICAH RIGGS on behalf of Decedent, VICKIE WARREN, Plaintiff, Appellant, and Cross-Appellee, vs. GEORGIA PACIFIC, LLP., HAMILTON MATERIALS, INC., and UNION CARBIDE CORPORATION, Defendants, Appellees, and Cross-Appellants.	Court of Appeals No. 2011-544-CA Third District Court No. 070911933 AS

AMICI CURIAE BRIEF OF UTAH CIVIL JUSTICE LEAGUE, UTAH DEFENSE LAWYERS ASSOCIATION, COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN CHEMISTRY COUNCIL, AMERICAN COATINGS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF DEFENDANTS, APPELLEES, AND CROSS-APPELLANTS

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STATEMENT OF FACTS

For purposes of the issue addressed by *amici curiae*, the relevant facts are as follows: Plaintiff Vickie Warren was allegedly exposed to the Defendants' asbestos-containing products before 1986. Her illness began to manifest in early 2007, and she was diagnosed with asbestos-related peritoneal mesothelioma, a form of cancer, in 2007. In 1986, after Plaintiff's alleged exposures ended but before her disease became manifest and was diagnosed, the Utah Legislature enacted the Liability Reform Act (LRA), U.C.A. § 78B-5-817 et seq., which among other reforms replaced joint and several liability with proportionate liability.

SUMMARY OF ARGUMENT

The sole issue addressed by *amici* is Plaintiff's challenge to the application of the LRA to cases like this one involving pre-enactment exposures and post-enactment manifestations and diagnoses of disease. Plaintiff alleges that the LRA applies only to cases in which a plaintiff was first exposed to asbestos or asbestos-containing products after the LRA's 1986 enactment.

"Asbestos-related diseases have a relatively long latency period, meaning that it usually takes decades from the time of exposure to asbestos or asbestos-containing products and the date of medical diagnosis of asbestos-related disease or asbestos-related death." U.S. Government Accountability Office, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts*, GAO-11-819, at 1 (Sept. 2011) [hereinafter GAP Rep.]; *see also* Stephen J. Carroll et al., *Asbestos Litigation* xix (RAND Corp.

2005) (noting the "long latency period before any symptoms are manifested—about 40 years, according to the Manville Personal Injury Settlement Trust").

Thus, Plaintiff's theory would essentially eviscerate the application of the LRA to asbestos cases in Utah, given that virtually all current asbestos cases involve pre-1986 exposures. The impact of restoring joint and several liability in Utah asbestos cases for years, if not decades, post-enactment would have a substantial negative impact on many Utah companies, including small businesses. Present and future asbestos defendants would be subjected to disproportionate liability since most former manufacturers of asbestos-containing products have been forced into bankruptcy. *See* Carroll et al., *supra*, at xxiii ("bankruptcy proceedings have expanded to include most of the original lead defendants in asbestos litigation and scores of other companies besides"); GAO Rep. at 2 ("To date, approximately 100 companies have declared bankruptcy at least partially due to asbestos-related liability."). The asbestos litigation environment in Utah would likely worsen as the state would become more attractive for plaintiffs as a result of the application of joint and several liability to such cases.

The trial court properly rejected Plaintiff's late argument—raised at the eleventh hour on the eve of trial (and over two decades after the LRA's enactment)—and correctly held that Plaintiff's motion to apply pre-LRA law was untimely, and in any event, the trigger for application of the LRA is not based on time of exposure but when a plaintiff has been diagnosed with a disease (i.e., when her cause of action arose). Since Plaintiff was diagnosed with an asbestos-related cancer in 2007, the LRA applies to her action.

Furthermore, altering the law in the manner sought by Plaintiff is not necessary to provide adequate compensation to asbestos claimants. Trusts have been established to pay claims for harms caused by exposures to asbestos products made or sold by companies forced into bankruptcy because of their asbestos liabilities. So far, over sixty trusts have been established to collectively form a *$38.6 billion* privately funded asbestos personal injury compensation system that operates parallel to, but wholly independent of, the civil tort system. *See* GAO Rep. at 3. Some commentators have even suggested that trust recoveries may fully compensate asbestos victims.

For these reasons, this Court should affirm the trial court's decision.

ARGUMENT

I. FOR A QUARTER CENTURY, UTAH COURTS AND LITIGANTS HAVE PROPERLY UNDERSTOOD UTAH'S 1986 LIABILITY REFORM ACT TO APPLY TO POST-ENACTMENT CAUSES OF ACTION

As a result of changes in case law and a recognition of the unfair nature of joint and several liability, the Utah Legislature passed the LRA in 1986. Under the LRA, defendants are only liable for their proportion of fault for a harm, and only if the plaintiff is not principally at fault for his or her own harm. *See* U.C.A. § 78B-5-818. A defendant found to be a minor player can no longer be saddled with the entire judgment under the LRA.

Soon after the LRA's enactment, the Utah Supreme Court held in *Stephens v. Henderson*, 741 P.2d 952, 953 (Utah 1987), that as with any substantive law that does not explicitly provide otherwise, the LRA applies "when plaintiff's cause of action arose" on or after the effective date of the legislation – April 28, 1986. Since its enactment,

plaintiffs and defendants in asbestos cases have operated with the understanding that the LRA's apportionment rules apply to anyone whose disease manifests after 1986. The Court should reject Plaintiff's untimely effort to call into question settled law.

First, it is a basic principle of law that a claim arises, and the substantive law governing the claim is set, when the plaintiff experiences a legally-cognizable injury. *See Stephens*, 741 P.2d at 954. In the toxic tort context, "even though there exists a possibility, even a probability of future harm, it is not enough to sustain a claim." *Seale v. Gowans*, 923 P.2d 1361, 1364 (Utah 1996). "[A] plaintiff must wait until some harm manifests itself" in the form of a diagnosed illness. *Id.*; *see also Hansen v. Mountain Supply Fuel Co.*, 858 P.2d 970 (Utah 1993) ("[The potential plaintiff is not harmed until the onset of the actual illness. At that time, he or she can bring an action for actual injury.").[1] Simply stated, an exposure is not an injury.[2]

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[1] *See also Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30 (Ariz. Ct. App. 1987) (holding that subclinical asbestos-related condition was insufficient to support a cause of action); *Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 542 (Me. 1986) (explaining that inhalation of asbestos dust does not constitute harm under state's defective products statute); *Simmons v. Pacor, Inc.*, 674 A.2d 232, 237 (Pa. 1996) (asymptomatic pleural thickening does not give rise to cause of action); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990) (finding no cause of action for claimants without functional impairment); *In re Massachusetts Asbestos Cases*, 639 F. Supp. 1, 3 (D. Mass. 1985) ("'[T]he first appearance of symptoms attributable to [asbestos] constitutes the injury.'" (quoting *Payton v. Abbott Abbott Labs*, 551 F. Supp. 245, 246 (D. Mass. 1982)).

[2] *See Buttram v. Owens-Corning Fiberglas Corp.*, 941 P.2d 71, 73 (Cal. 1997) (holding that California's "Proposition 51," which abolished joint and several liability for noneconomic damages, applies to causes of action for latent and progressive disease, such as asbestos-related mesothelioma, where the plaintiff was diagnosed with the disease or otherwise discovered it after Proposition 51's effective date); *In re Johns-Manville Asbestos Litig.*, 1987 WL 11334, *1 (N.D. Ill. May 22, 1987) ("Under Illinois law a cause of action for an asbestos-related injury arises when the injury manifests itself, rather than when the plaintiff is exposed to the asbestos that causes his injury.").

Second, Plaintiff's theory would upset the long-settled expectations and reliance interests of litigants in asbestos and other cases involving latent injuries. With respect to asbestos litigation in particular, as the trial court noted, the Case Management Order (CMO) governing all asbestos-related litigation filed in the Third Judicial District has recognized the application of the LRA for over a decade. The CMO, first adopted in 2001, cited the LRA and directed that "consistent with" its apportionment rule, "defendants will notify plaintiffs' counsel . . . of the identity of those non-party defendants it intends to place on the jury verdict form for purposes of the allocation of fault." *In re Asbestos Litig.*, No. 010900863 AS, Case Management Order No. 1, at 3-4 (Utah 3d Dist. May 7, 2001). As explained by the Utah Supreme Court in *Kilpatrick v. Bullough Abatement Inc.*, 2008 UT 82, ¶ 4, 199 P.3d 957 (Utah 2008), "[t]he CMO was the product of negotiation among all interested parties." "As one of the primary law firms for asbestos-related litigation in Utah, Brayton Purcell," the law firm representing Plaintiff in this action, "participated in developing the CMO." *Id.* The second amended CMO, entered in September 2003, expressly stated that the provisions apply to all Brayton Purcell asbestos cases in Utah. *See In re Asbestos Litig.*, No. 010900863 AS, Case Management Order No. 1, at 1 (Utah 3d Dist. Sept. 30, 2003). As this history shows, plaintiffs and defendants in asbestos litigation have long accepted and relied upon application of several liability under the LRA to claims of post-1986 asbestos exposures.

Finally, given the many opportunities Plaintiff had to challenge the applicability of the LRA in the three years preceding trial (and Plaintiff's counsel had twenty-five years to do so in Utah asbestos cases since the LRA's enactment), *amici* strongly support

Defendants' position that Plaintiff should be estopped from raising this issue in this appeal. As the Defendants observe, the availability of joint liability can dramatically alter discovery and trial strategy, as it is likely to lead a defendant to focus on defeating liability entirely rather than on demonstrating that others are more blameworthy. The trial court correctly held that Plaintiff waived her challenge to applicability of the LRA when she did not raise her objection earlier in the litigation. R9520.

II. PLAINTIFF'S THEORY WOULD HAVE ADVERSE IMPLICATIONS

Application of joint and several liability in asbestos litigation would have adverse practical implications for the state, its judiciary, and its employers.

A. Joint and Several Liability is Inappropriate and Leads to Unjust Results

Joint and several liability provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant may be held liable for a plaintiff's entire compensatory damages award. Thus, a jury's finding that a particular defendant may have been only 1% at fault is overridden, and that defendant may be forced to pay 100% of the award if other responsible defendants are insolvent or unable to pay their fair share.

The all-or-nothing doctrine of contributory negligence in place at the turn of the last century provided the foundation for joint liability. Under that doctrine, a plaintiff that was even partially at fault for his or her own injury was barred from any recovery. The plaintiff had to be totally blameless to recover damages. The justification for requiring a defendant to bear the burden of an insolvent co-defendant's negligence was

that it was believed to be fairer for the culpable defendant to bear the loss than to leave the blameless plaintiff without a full recovery.

Over time, virtually all states moved to remedy the harsh consequences of the all-or-nothing contributory negligence rule and began to apply comparative fault. *See* Victor E. Schwartz, *Comparative Negligence* § 1.05[e][3], at 29 (5th ed. 2010). Utah abandoned its contributory negligence tort scheme in favor of a comparative fault theory of tort liability when the state legislature enacted the Utah Comparative Negligence Act in 1973.

The advent of comparative fault has enabled many more plaintiffs to win. Under comparative fault, a plaintiff who is partially to blame for his or her own injury is not barred from recovery but will have his or her recovery reduced in proportion to that individual's share of fault for the harm. Thus, a plaintiff who is found to be 40% at fault will have his award reduced by 40%. Most states, including Utah, will permit a plaintiff to recover in this manner unless the jury decides that the plaintiff was principally at fault for his own harm. This approach encourages responsible behavior by not rewarding highly negligent plaintiffs, and reflects the widely held view that it is morally wrong to award damages to a plaintiff who is more at fault than all of the defendants.

With the advent of comparative fault the justification for requiring solvent defendants to bear an insolvent defendant's share of fault was lost. Courts no longer have the assurance that imposition of joint liability will pit a blameless plaintiff against a blameworthy defendant. Today's plaintiff can recover damages even when he or she is at fault. As the Tennessee Supreme Court explained in *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992):

> Our adoption of comparative fault is due largely to considerations of fairness: the contributory negligence doctrine unjustly allowed the entire loss to be borne by a negligent plaintiff, notwithstanding that the plaintiff's fault was minor in comparison to defendant's. Having thus adopted a rule more closely linking liability and fault, it would be inconsistent to simultaneously retain a rule, joint and several liability, which may fortuitously impose a degree of liability that is out of all proportion to fault.

Likewise, the Kentucky Supreme Court in *Dix & Associates Pipeline Contractors, Inc. v. Key*, 799 S.W.2d 24, 27 (Ky. 1999), said:

> Whereas it is fundamentally unfair for a plaintiff who is only 5 percent at fault to be absolutely barred from recovery from a defendant who is 95 percent at fault, it is equally and fundamentally unfair to require one joint tort-feasor to bear the entire loss when another tort-feasor has caused 95 percent of the loss.

See also Brown v. Keill, 580 P.2d 67, 874 (Kan. 1978) ("There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss.").

A number of authorities, including the authoritative Prosser treatise, noted this problem and criticized the continued application of joint liability in comparative fault jurisdictions. *See* W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* 475-76 (5th ed. 1984) ("[T]he failure to consider the negligence of all tortfeasors, whether parties or not, prejudices the joint defendants who are thus required to bear a greater proportion of the plaintiff's loss than is attributable to their fault."). The Restatement (Third) of Torts: Apportionment of Liability § 10 cmt. a (2000) also notes that "it is difficult to make a compelling argument" for joint and several liability. For those reasons, "the clear trend over the past several decades has been a move away from joint and several

liability." Restatement (Third) of Torts: Apportionment of Liability § 17 Reporters' Note at 149 (2000).

Recognizing the need for reform, virtually every state that has adopted comparative fault has also chosen to abolish or modify the application of joint and several liability through legislation or court decision. Utah did so by enacting the LRA in 1986. "These reforms show a clear movement toward equating liability with fault." Kathleen M. O'Connor & Gregory P. Sreenan, *Apportionment of Damages: Evolution of a Fault-Based System of Liability for Negligence*, 61 J. Air L. & Com. 365, 381 (1995-1996); *see also DeBenedetto v. CLD Consulting Engineers, Inc.*, 903 A.2d 969, 984 (N.H. 2006) ("Many jurisdictions have supplanted the joint and several liability doctrine with pure several liability or a hybrid rule that employs a percentage threshold. . . . Legislatures in a number of such jurisdictions have noted the inequity of 'deep pocket' suits as a factor underlying the amendment of their respective states' tort liability regimes.").[3]

The trial court's application of the LRA is consistent with the mainstream view that joint and several liability is no longer supportable given the fact that the doctrine's historical underpinnings have been removed in Utah as in most other states.

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[3] This trend in favor of proportionate liability is reflected as well in the United States Supreme Court's recent holding approving of apportionment of liability as between potential contributors to contamination at hazardous waste sites under the Superfund statute. *See Burlington N. & Sante Fe R.R. Co. v. United States*, 129 S. Ct. 1870, 1881 (2009) (citing to common law principle under Restatement (Second) of Torts § 433A(1)(b) for proposition that apportionment is proper when "there is a reasonable basis for determining the contribution of each cause to a single harm").

Furthermore, imposition of joint and several liability would run counter to spirit of the LRA. One primary driving force behind the LRA was "basic fairness." *Sullivan v. Scoular Grain Co.*, 853 P.2d 877, 880 (Utah 1993) (quoting Tape of Utah Senate Floor Debates, 46th Leg. 1986, Gen. Sess. (Feb. 12, 1986)). As noted by one Utah Senator during the debate on the bill, "'[I]t is the basic fairness concept we're driving at. The defendant ought to be on the hook only for its own percentage of damages, but ought not be the guarantor for everyone else's damages.'" *Id.*

B. Joint and Several Liability Would Negatively Impact the Many Peripheral Defendants That Have Been Pulled Into the Asbestos Litigation, Including Small Businesses

Asbestos litigation has now forced at least ninety-six companies into bankruptcy, *see* Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (Rand Inst. for Civil Justice 2010), with devastating impacts on defendants companies' employees, retirees, shareholders, and surrounding communities. *See* Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003).

As a result of the large number of 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, *abstract at* 2001 WLNR 1993314. One former plaintiffs' attorney 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).

The dockets reflect that the litigation has moved beyond the era in which manufacturers, producers, suppliers and distributors of friable asbestos-containing products or raw asbestos are the principal defendants. The expanded range of defendants has produced exponential growth in the dimensions of asbestos litigation. *See* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1, *abstract at* 2000 WLNR 2042486; Susan Warren, *Asbestos Quagmire: Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J., Jan. 27, 2003, at B1, *abstract at* 2003 WLNR 3099209; Congressional Budget Office, *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003) (explaining 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.").

The Towers Watson consulting firm has identified more than 10,000 companies, including subsidiaries, named as asbestos defendants. *See* Towers Watson, *A Synthesis of Asbestos Disclosures From Form 10-Ks - Insights*, Apr. 2010, at 1. At least one company in nearly every U.S. industry is involved in the litigation. *See* American Academy of Actuaries' Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends* 5 (Aug. 2007). Nontraditional defendants now account for more than half of asbestos expenditures. *See* Carroll et al., *supra*, at 94.

It is important for the Court to recognize that application of joint and several liability to asbestos claims will not only impact the defendants involved in the subject appeal, but also the many smaller businesses across Utah that would be subject to disproportionate liability. Changing the settled law for the past several decades would

make Utah a magnet for damaging litigation that draws in businesses with only a tertiary connection to the original conduct and makes them completely liable. The Court should reject such an attempt to resuscitate a rule that simply no longer has any application in Utah's tort regime.

III. IT IS UNNECESSARY TO ALTER UTAH LAW TO SECURE ADDITIONAL COMPENSATION FOR ASBESTOS CLAIMANTS

Altering the law in the manner sought by the Plaintiff is not necessary to secure adequate compensation for asbestos claimants. Asbestos claimants are able to obtain recoveries from trusts created to pay claims relating to the many companies that have declared bankruptcy. So far, over sixty trusts have been established to collectively form a *$38.6 billion* privately funded asbestos personal injury compensation system that operates parallel to, but wholly independent of, the civil tort system. *See* GAO Rep. at 3; *see also* Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (2010 Rand Corp.). "Trust outlays have grown rapidly since 2005." Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* xi (Rand Corp. 2011).

"For the first time ever, trust recoveries may fully compensate asbestos victims." Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 Mealey's Asbestos Bankr. Rep. 1 (Nov. 2006). For example, it is estimated that mesothelioma plaintiffs in Alameda County (Oakland) will receive an average $1.2 million from active and emerging asbestos bankruptcy trusts, *see* Charles E. Bates et al., *The Naming Game*, 24:15 Mealey's Litig. Rep.: Asbestos 1 (Sept. 2, 2009), and could

receive as much as $1.6 million. *See* Charles E. Bates et al., *The Claiming Game*, 25:1 Mealey's Litig. Rep.: Asbestos 27 (Feb. 3, 2010). Funds available from such trusts are available to Utah asbestos claimants, in addition to recoveries from tort system defendants in proportion to their fault for the alleged harm.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to affirm the trial court's decision.

Respectfully submitted,

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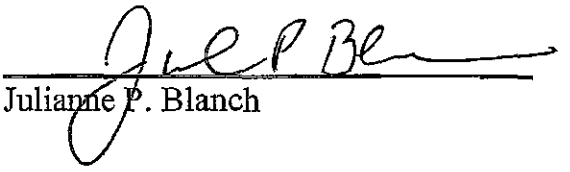
CERTIFICATION OF COMPLIANCE

Pursuant to U.R.A.P. 24(f), Counsel for the *amici* hereby certifies that the foregoing Brief contains a proportionally spaced 13-point typeface and contains 3,568 words, as determined by the automatic word count feature on Microsoft Word 2007, including headings and footnotes, and excluding the table of contents and table of authorities.



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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of March, 2012, a true and correct copy of the Brief of *Amici Curiae* was e-served and/or hand delivered to the following:

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