No. 110662

IN THE SUPREME COURT OF ILLINOIS

CYNTHIA SIMPKINS, Individually and as Special Administrator for the Estate of Annette Simpkins, Deceased, *Plaintiff-Appellee,* v. CSX TRANSPORTATION, INC. *Defendant-Appellant.*	On Appeal from the Appellate Court of Illinois, Fifth District There Heard on Appeal Pursuant to Supreme Court Rule 304(a) from the Circuit Court of Madison County, Illinois No. 07-L-62 Hon. Daniel, J. Stack, *Judge Presiding.*

AMICI CURIAE BRIEF OF ILLINOIS CIVIL JUSTICE LEAGUE, ILLINOIS CHAMBER OF COMMERCE, ILLINOIS MANUFACTURERS' ASSOCIATION, COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN INSURANCE ASSOCIATION, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF DEFENDANT-APPELLANT

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POINTS AND AUTHORITIES

QUESTION PRESENTED

Whether premises owners, such as the defendant railroad, owe a legal duty of care to remote plaintiffs allegedly injured as a result of secondhand exposure to asbestos or other substances emitted in the workplace. The subject action involves the estate of a woman who was allegedly exposed to asbestos carried home on the person and clothing of her former husband, who worked for the defendant's predecessor railroad from 1958 to 1964.

INTEREST OF *AMICI CURIAE*

Amici are associations collectively representing Illinois premises owners and their insurers. Consequently, *amici* have a significant interest in the subject appeal. *Amici* have dedicated years studying the subject matter of this case and the adverse impacts on our business climate caused by efforts to impose increasingly broad duties on ever-more remote defendants. Consequently, *amici* are well-suited to provide a broad perspective to the Court.

Amici agree with the Circuit Court's dismissal of Plaintiff-Appellee's complaint in this action and with the Second District Appellate Court's conclusion in *Nelson v. Aurora Equipment Co.*, 391 Ill. App. 3d 1036, 330 Ill. Dec. 909, 909 N.E.2d 931 (Ill. App. 2d Dist.), *appeal denied*, 233 Ill. 2d 564, 919 N.E.2d 355 (Ill. 2009), that imposing a broad new duty rule on Illinois premises owners to protect against remote, off-site exposure to asbestos or other toxic substances emitted in the workplace would be contrary to Illinois law. If the Court were to affirm the Fifth District Appellate Court's ruling below, reversing the Circuit Court's dismissal decision and imposing a broad new duty rule, Illinois employers would be subject to potentially limitless and indefinite

liability, needlessly prolonging the asbestos litigation and adding to the already huge number of Illinois asbestos filings.

STATEMENT OF FACTS

Amici adopt Defendant-Appellant CSX's Statement of Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Now in its fourth decade, asbestos litigation has been sustained by the plaintiffs' bar's search for new defendants and new theories of liability. In particular, the connection between plaintiffs and asbestos-containing products has become increasingly remote, and the liability connection more attenuated. This appeal is an example.

Premises owner liability for off-site exposure to asbestos is of relatively recent vintage. In earlier years, asbestos litigation was focused mostly on the manufacturers of asbestos-containing products, often called "traditional defendants." Most of those companies have been forced into bankruptcy. As a result, plaintiffs' lawyers began to target "peripheral defendants," including premises owners for alleged harms to independent contractors exposed to asbestos on the owners' premises. Plaintiffs' lawyers are now targeting property owners for alleged harms to secondarily exposed "peripheral plaintiffs." Like this action, these "peripheral defendant-peripheral plaintiff" claims involve workers' family members who allege exposure to asbestos off-site, typically through contact with a directly exposed worker or that worker's soiled work clothes.

In recent years, a growing number of courts have addressed the issue of whether premises owners owe a duty to "take home" exposure claimants. These claims have been uniformly rejected by courts that employ an Illinois-like duty analysis, including the highest courts of Delaware, Georgia, Iowa, Michigan, and New York. Other courts that

have rejected take home asbestos exposure claims include state appellate courts in Texas and Maryland, a federal appellate court applying Kentucky law, and a federal district court applying Pennsylvania law. Kansas and Ohio have statutorily barred claims against premises owners for off-site asbestos exposures. Only jurisdictions that apply a duty analysis that is inapplicable in Illinois have found a duty to exist in some circumstances, including the New Jersey and Tennessee Supreme Courts, and a few lower courts, often in unpublished and even noncitable decisions.

Claims such as the instant appeal are generally failing across the board because courts and legislatures have appreciated that allowing a new cause of action against landowners by remote plaintiffs injured off-site would be inconsistent with traditional duty rules and worsen the asbestos litigation.

Plaintiff-Appellee tries to downplay the novelty of the remedy being sought here by pointing to (1) a few older cases touching on take home exposure claims against former asbestos product *manufacturers and sellers*,[1] (2) payment eligibility criteria for various trusts, specifically including the Manville Trust, set up in bankruptcy to pay asbestos-related claims against former asbestos product *manufacturers*;[2] and (3) the

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[1] For example, Plaintiff-Appellee refers to *In re Asbestos and Asbestos Insulation Material Products Liability Litigation*, 431 F. Supp. 906, 908-909 (J.P.M.D.L. 1977), where the "majority of the defendants [were] manufacturers or distributors of various asbestos products" along with some "insurance companies, doctors, suppliers of raw asbestos fibers, trade associations, trade unions, and the United States of America," and two failed proposed global settlements of claims against manufacturers of asbestos-containing products, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Products, Inc. v. Windsor* 521 U.S. 591 (1997).

[2] For a discussion of asbestos-related trusts, 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), *available at* http:// www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf; William P. Shelley et al.,

aborted federal "FAIR Act" legislation that would have comprehensively replaced the civil asbestos tort system with a federally managed, privately funded, administrative scheme.[3] These references essentially amount to a legal sleight of hand trick.

In the past, a few courts in other states, but not all, have permitted *product liability* claims involving bystander asbestos exposure.[4] As this Court knows, however, product liability law rests on an entirely different foundation than the law of premises owner liability and cannot support the duty rule sought here by Plaintiff-Appellee. 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

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The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 17 Norton J. Bankr. L. & Prac. 257 (2008); Francis E. McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, 62 N.Y.U. Ann. Surv. Am. L. 163 (2006).

[3] For a discussion of the FAIR Act, see Patrick M. Hanlon, *An Elegy for the FAIR Act*, 12 Conn. Ins. L.J. 527 (2006).

[4] *See Fuller-Austin Insulation Co., Inc. v. Bilder*, 960 S.W.2d 914, 918 (Tex. App.—Beaumont 1998); *AC&S, Inc. v. Abate*, 710 A.2d 944, 961 (Md. Ct. Spec. App.), *cert. denied sub nom. Crane v. Abate*, 713 A.2d 979 (Md. 1998), *cert. denied*, 525 U.S. 1171 (1999); *Anchor Packing Co. v. Grimshaw*, 692 A.2d 5, 34 (Md. Ct. Spec. App. 1997), *rev'd on other grounds sub nom. Porter Hayden Co. v. Bullinger*, 713 A.2d 962 (Md. 1998); *Lunsford v. Saberhagen Holdings, Inc.*, 208 P.3d 1092 (Wash. 2009. *But see Rohrbaugh v. Owens-Corning Fiberglas Corp.*, 965 F.2d 844, 847 (10th Cir. 1992) (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).

toward any member of the consuming public who may be injured by it. . . ." Restatement (Second) of Torts § 402A cmt. *c* (1965).

Here, Plaintiff-Appellee allegedly was exposed to asbestos dust carried home from work by a family member. She did not buy asbestos from the Defendant-Appellant railroad. No sales transaction was involved. Unlike asbestos product manufacturers, the Defendant-Appellant had no meaningful way to incorporate the costs of any risk posed by those products into the pricing of its wholly unrelated activities. Therefore, the Defendant-Appellant cannot be said to have "undertaken and assumed" a duty to the plaintiff. *Id.*

It is also telling that the issue of premises owner liability for take home exposures is just now before this Court, because Illinois is certainly no stranger to asbestos litigation. Illinois has experienced asbestos litigation for decades and consistently has been among the top states in the nation for asbestos filings, often serving as a magnet for claimants from around the country.

This Court should reject Plaintiff-Appellee's invitation to create a broad new duty rule in Illinois. A new duty requirement for premises owners would allow plaintiffs' lawyers to name scores of employers and other premises owners directly in asbestos and other toxic tort suits. The impact would be to augment these litigations and subject premises owners to limitless and indefinite liability.

For these reasons, *amici curiae* urge the Court to reverse the decision of the Appellate Court below and affirm the Circuit Court's decision to dismiss Plaintiff-Appellee's complaint.

ARGUMENT

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

A. The Asbestos Litigation Environment

Asbestos litigation is the "longest-running mass tort" in U.S. history. Helen Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 511 (2008). "For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005). As far back as 1997, the United States Supreme Court described the litigation as a "crisis." *Amchem Prods., Inc. v. Windsor* 521 U.S. 591, 597 (1997).[5] Through 2002, approximately 730,000 asbestos claims had been filed. *See* Stephen J. Carroll et al., *Asbestos Litigation xxiv* (RAND Inst. for Civil Justice 2005), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf.[6]

By 2006, asbestos-related liabilities had forced over eighty-five companies into bankruptcy. *See* Martha Neil, *Backing Away from the Abyss*, A.B.A. J., Sept. 2006, at 26, 29, *available at* http://www.abajournal.com/magazine/article/backing_away_from_the_abyss/. As of today, asbestos litigation has 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), *available at* http://www.rand.org/pubs/technical_reports/

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[5] *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).

2010/RAND_TR872.pdf, 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). Bankrupt companies and communities are not the only ones affected:

> 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 thousands and possibly tens of thousands 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 S. Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. Tex. L. Rev. 981, 998 (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 available* at 2001 WLNR 1993314; *see also* Steven B. Hantler et al., *Is the Crisis in the*

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[6] RAND has estimated that $70 billion was spent in the litigation through 2002, with future costs greatly exceeding that figure. *See* Carroll et al., *supra,* at 92, 106.

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 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 far beyond the era in which manufacturers, producers, suppliers and distributors of friable asbestos-containing products or raw asbestos were the defendants. The range of defendants has expanded beyond those responsible for asbestos-containing products, producing exponential growth in the dimensions of asbestos litigation and compounding the burden on the courts. *See* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1, *abstract available 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 available at* 2003 WLNR 3099209; Congressional Budget Office, *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003) (asbestos suits have expanded "from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities."), *available at* http://www.cbo.gov/doc.cfm?index=4641.

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, *available at* http://www.towerswatson.com/assets/pdf/1492/Asbestos_Disclosures_Insights_4-15-10.pdf.

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), *available at* www.actuary.org/pdf/casualty/asbestos_aug07.pdf. Nontraditional defendants like Defendant-Appellant now account for more than half of asbestos expenditures. *See* Carroll et al., *supra*, at 94.

B. Illinois is a Magnet for Asbestos Claims; Illinois Employers Have Been Hit Hard by the Litigation

Illinois has a long history with asbestos litigation. Beginning in the 1990s, the number of asbestos filings in Madison County skyrocketed. *See* Editorial, *Lawsuit Heaven*, St. Louis Post-Dispatch, Jan. 13, 2003, at B6, *available at* 2003 WLNR 1815375; Adele Nicholas, *Judicial Shakeup Signals Reform In Madison County*, Corp. Legal Times, Jan. 2005, at 50 (stating that over 5,000 asbestos lawsuits were filed in Madison County between 1994-2004). Between 1996 and 2002, the number of filings increased 1144%, from 65 cases in 1996, 176 in 1998, 411 in 2000, to 884 in 2001. *See* Victor E. Schwartz et al., *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 Wash. U. J.L. & Pol'y 235, 243-44 (2004). In 2003, 953 asbestos lawsuits were filed in the county. *See* Mark A. Behrens, *What's New in Asbestos Litigation*, 28 Rev. Litig. 501, 541-42 (2009). It was estimated that Madison County, with a population around only a quarter-million people, was home to an astonishing twenty-five percent of the nation's mesothelioma claims. *See* Brian Brueggemann, *Chicagoan to Test Asbestos Case*, Belleville News-Democrat, Nov. 16, 2004, at 1A, *available at* 2004 WLNR 18871876.

Such an explosion of cases, grossly disproportionate to the county's population, resulted in significant criticism of Madison County and Illinois generally with respect to the way asbestos claims were being handled. The high number of filings, many by out of state plaintiffs, led former U.S. Attorney General Griffin Bell to declare that Madison County "ha[d] allowed itself to become a Mecca for asbestos lawsuits." Griffin B. Bell, *Asbestos and The Sleeping Constitution*, 31 Pepp. L. Rev. 1, 7 (2004).

Madison County has continued to experience substantial asbestos litigation. *See Litigating in the Field of Dreams: Asbestos Cases in Madison County, Ill.*, U.S. Chamber Institute for Legal Reform, at 5 (Oct. 2010), *available at* http://www.instituteforlegal reform.com/images/stories/documents/pdf/research/asbestoscasesinmadisoncounty illinois.pdf (between 2006-2008, the number of asbestos claims in Madison County climbed ninety-seven percent while the county's population rose less than one percent). After a brief decrease in filings, Madison County's asbestos claims jumped back to 814 filings in 2009 from 639 in 2008 (roughly a twenty-seven percent increase). The pace continued in 2010. *See* Amelia Flood, *Asbestos Filings Up in St. Clair, Madison Filings Top 650*, The Record (Madison and St. Clair), Dec. 8, 2010, *available at* http://www. madisonrecord.com/news/231862-asbestos-filings-up-in-st.-clair-madison-filings-top-650#. Annual asbestos filings in Madison County are approaching their all-time high, with a growing percentage of such claims brought by plaintiffs with no connection to the county. The Illinois Civil Justice League reviewed about 400 asbestos cases filed in Madison County "from 2009 and found that just 11 percent of the plaintiffs had a connection to Illinois let alone Madison County." Editorial, *Don't Slide Back Into Hellhole*, Belleville News-Democrat, July 26, 2010, *available at* 2010 WLNR 14870143.

Claims are also finding their way to alternative Illinois courtrooms. For instance, asbestos filings in Cook Country increased forty percent in 2004. *See Trial Lawyers, Inc.: Illinois – A Report on the Lawsuit Industry in Illinois 2006*, Manhattan Institute Center for Legal Policy 12 (2006), *available at* http://www.triallawyersinc. com/IL/ il01.html. St. Clair County's asbestos docket "saw a jump in filings last year. That rise has continued." Amelia Flood, *E-filing and Growing Asbestos Docket are Top Challenges for New St. Clair County Circuit Clerk*, The Record (Madison and St. Clair), Feb. 10, 2011, *available at* http://www.stclairrecord.com/news/233309-e-filing-and-growing-asbestos-docket-are-top-challenges-for-new-st.-clair-county-circuit-clerk#; Amelia Flood, *Asbestos Cases Accumulating in St. Clair County's Little Used Docket,* The Record (Madison and St. Clair), Mar. 18, 2010, *available at* http://www.madison record.com/news/225464-asbestos-cases-accumulating-in-st.-clair-countys-little-used-docket#.

These developments show that Illinois remains at the forefront of asbestos litigation nationally, continuing to serve as a "magnet" for such lawsuits. In fact, a January 2011 Standing Case Management Order for All Asbestos Personal Injury Cases in Madison County found "that there is a significant volume of asbestos currently on file...." *In re All Asbestos Litig. Filed in Madison County*, Standing Case Management Order for All Asbestos Personal Injury Cases, at I(B)(1)(A) (Cir. Ct. 3d Jud. Dist. Madison County, Ill. Jan. 26, 2011). The new duty rule sought here by Plaintiff-Appellee would usher in a new wave of litigation, prolonging and worsening the already severe challenges the litigation poses for Illinois employers.

Illinois businesses already have borne a direct and substantial economic impact from asbestos litigation. Several major Illinois employers, including Chicago-based USG Corp. and UNR Industries, have been forced into bankruptcy due to the flood of asbestos cases. *See* Melita Marie Garza, *USG Files for Bankruptcy; Asbestos Claims Lead Firm to Seek Protection*, Chi. Trib., June 26, 2001, at 1, *available at* 2001 WLNR 10606473; Charles Storch, *UNR Trust Gives Plan for Claims*, Chi. Trib., Apr. 27, 1991, at 3, *available at* 1991 WLNR 3789305. At the time of USG's bankruptcy, the company was facing approximately 190,000 claims, *see Local Focus*, Chi. Daily Herald, Feb. 25, 2003, at 1, *available at* 2003 WLNR 16920994, and was forced to shutter multiple plants. *See* Stephen Rynkiewicz & James P. Miller, *USG Posts $9 Million Loss*, Chi. Trib., Jan. 30, 2002, at 1, *available at* 2002 WLNR 12618392.

Even for those major Illinois employers able to eventually exit bankruptcy, the cost of the litigation has been considerable. *See, e.g., USG bankruptcy Exit Plan Approved $3.95 Billion Would Resolve Claims for Asbestos Liability*, Chi. Trib., June 16, 2006, at 3, *available at* 2006 WLNR 10412543; *Owens Corning to Pay Asbestos Claims; $5.2 Billion Settlement to End Bankruptcy Stay*, Chi. Trib., May 11, 2006, at 3, *available at* 2006 WLNR 8076088.

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

The general duty analysis in Illinois law was thoroughly articulated in the present context by the Second District in *Nelson v. Aurora Equipment Co.*, 391 Ill. App. 3d 1036, 330 Ill. Dec. 909, 909 N.E.2d 931 (Ill. App. 2d Dist.), *appeal denied*, 233 Ill. 2d 564, 919

N.E.2d 355 (Ill. 2009), and is likely to be addressed by Defendant-Appellant, so for the sake of judicial economy those arguments will not be fully discussed here. A brief discussion, however, is important to provide context for Sections III and IV of this brief and demonstrate how Illinois law is more consistent with the law applied by courts in states that have rejected the duty rule sought here than the law applied by the minority of courts that have accepted Plaintiff-Appellee's proposed duty theory.

In Illinois, the law is settled that "[t]he touchstone of the duty analysis is to ask whether the plaintiff and defendant stood in such a relationship to one another that the law imposes on the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Krywin v. Chicago Transit Auth.*, 238 Ill. 2d 215, --, 345 Ill. Dec. 1, 8, 938 N.E.2d 440, 447 (Ill. 2010); *Vancura v. Katris*, 238 Ill. 2d 352, 345 Ill. Dec. 485, 939 N.E.2d 328, 347 (Ill. 2010). As the court explained in *Nelson*, "The reasonable foreseeability of injury is one important concern," but this Court "has recognized that foreseeability alone 'provides an inadequate foundation upon which to base the existence of a legal duty.'" *Nelson*, 391 Ill. App. 3d at 1039, 909 N.E.2d at 934 (quoting *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140, 143 Ill. Dec. 288, 291, 554 N.E.2d 223, 226 (Ill. 1990)).[7] Other factors include the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden upon the defendant.

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[7] *See also Zimmerman v. Netemeyer*, 122 Ill. App. 3d 1042, 1047, 78 Ill. Dec. 383, 387, 462 N.E.2d 502, 506 (5th Dist. 1984) (stating, "it appears from close examination and analysis of the determination of duty in Illinois cases that 'foreseeability of harm' in actuality plays little part in the resolution of the duty issue."). Furthermore, as the California Supreme Court explained in *Thing v. La Chusa*, 771 P.2d 814, 830 (Cal. 1989), "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury."

Ward, 136 Ill.2d at 140-41, 143 Ill. Dec. at 291-92, 554 N.E.2d at 226-27. The existence of a legal duty also includes "considerations of public policy." *Marshall v. Burger King Corp.*, 22 Ill. 2d 422, 436, 305 Ill. Dec. 897, 906, 856 N.E.2d 1048, 1057 (Ill. 2006). The nature of the relationship between the parties is the threshold question that must be answered. *See, e.g., Tedrick v. Community Res. Ctr.*, 235 Ill. 2d 155, 336 Ill. Dec. 210, 920 N.E.2d 220 (Ill. 2009) (mental health care providers could not be held liable under a theory of transferred negligence); *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 117 Ill. 2d 507, 111 Ill. Dec. 944, 513 N.E.2d 387 (Ill. 1987) (hospital owed no duty to nonpatient, nonuser of prescription drug), *cert. denied*, 485 U.S. 905 (1988).

Here, there was no relationship between the parties and, thus, no foundation upon which to support the imposition of liability against Defendant-Appellant. The "touchstone" of the duty analysis is entirely absent.

III. MOST COURTS HAVE REJECTED THE DUTY RULE SOUGHT HERE

"Most of the courts which have been asked to recognize a duty to warn household members of employees of the risks associated with exposure to asbestos conclude that no such duty exists." *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 697 (Iowa 2009). "In jurisdictions, like [Illinois], where the duty analysis focuses on the relationship between the plaintiff and the defendant, and not simply the foreseeability of injury, the courts *uniformly* hold that an employer/premises owner owes *no* duty to a member of a household injured by take home exposure to asbestos." *In re Asbestos Litig.*, 2007 WL 4571196, *8 (Del. Super. Ct. Dec. 21, 2007) (emphasis added), *aff'd sub nom. Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009).

For example, the Michigan Supreme Court in *Miller v. Ford Motor Co. (In re Certified Question from the 14th Dist. Court of Appeals)*, 740 N.W.2d 206, 219 (Mich. 2007), held that a property owner (Ford Motor) did not owe a duty to protect plaintiff from asbestos fibers carried home on the clothing of a family member who worked at a Ford plant. The court explained, "Before a duty can be imposed there must be a relationship between the parties and the harm must have been foreseeable." *Id.* at 213. As here, the *Miller* plaintiff "had never been on or near defendant's property and had no further relationship with defendant" outside of being a household member of someone who worked on its premises. *Id.* at 216. Therefore, the court found, "the 'relationship between the parties' prong of the duty test, which is the most important prong in this state, strongly suggests that no duty should be imposed." *Id.* Additionally, the court concluded, "no duty should be imposed because protecting every person with whom a business's employees . . . come into contact, or even with whom their clothes come into contact, would impose an extraordinary and unworkable burden." *Id.* at 217.

New York's highest court, with one justice abstaining, unanimously reached the same conclusion and overturned an appellate court in *Holdampf v. A.C. & S., Inc. (In re N.Y. City Asbestos Litig.)*, 840 N.E.2d 115 (N.Y. 2005). *Holdampf* involved an action by the spouse of a former Port Authority employee whose wife developed mesothelioma from washing her husband's asbestos-soiled work clothes. The court rejected plaintiff's foreseeability approach, explaining that "foreseeability bears on the scope of a duty, not whether a duty exists in the first place." *Id.* Under New York law, a duty may arise only "when there is a relationship either between the defendant and a third-person tortfeasor."

Id. at 119 (quoting *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001)).

The *Holdampf* court found that there was "no relationship" between the Port Authority and the plaintiff that would give rise to a duty owed, "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. 840 N.E.2d at 120. The court further stated that the duty rule sought by plaintiffs 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 this "line is not so easy to draw." *Id.* at 122. 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.

Subsequent to the New York high court's decision in *Holdampf*, a New York trial court in *Rindfleisch v. Alliedsignal, Inc. (In re Eighth Judicial Dist. Asbestos Litig.)*, 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. As 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." *Id.* at 820. The court added, "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." *Id.* (quoting *DeAngelis v. Lutheran Med. Center*, 449 N.E.2d 406, 407-08 (N.Y. 1983)). The court concluded 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.

In *CSX Transportation, Inc. v. Williams,* 608 S.E.2d 208 (Ga. 2005), the Georgia Supreme Court unanimously held, "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 court noted that in Georgia, as in New York, foreseeability of harm had been rejected as a basis for extending a duty of care. *Id.* at 209. The court also said that its decision was guided by important public policy considerations: "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." *Id. (*quoting *Widera v. Ettco Wire and Cable Corp.*, 611 N.Y.S.2d 569,571 (N.Y. App. Div. 1994), *leave denied*, 650 N.E.2d 414 (N.Y. 1995)).

Most recently, the Delaware Supreme Court in *Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009), affirmed summary judgment in favor of defendant on a nonfeasance

theory of negligence because of the lack of a relationship between plaintiff and her husband's employer.

Other courts that have rejected take home asbestos exposure claims against premises owners include the Second District Illinois Appellate Court, *see Nelson v. Aurora Equip. Co.*, 391 Ill. App. 3d 1036, 330 Ill. Dec. 909, 909 N.E.2d 931 (Ill. App. 2d Dist.), *appeal denied*, 233 Ill. 2d 564, 919 N.E.2d 355 (Ill. 2009), and state appellate courts in Texas and Maryland, *see Alcoa, Inc. v. Behringer*, 235 S.W.3d 456 (Tex. App.—Dallas 2007); *Adams v. Owens-Illinois, Inc.*, 705 A.2d 58 (Md. Ct. Spec. App. 1998); a federal appellate court applying Kentucky law, *see Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439 (6th Cir. 2009); and a federal district court applying Pennsylvania law, *see Jesensky v. A-Best Prods. Co.*, 2003 WL 25518083 (W.D. Pa. Dec. 16, 2003) (issuing a magistrate opinion recommending grant of summary judgment to Duquesne Light Co.), *adopted by*, 2004 WL 5267498 (W.D. Pa. Feb. 17, 2004), *aff'd on other grounds*, 287 Fed. Appx. 968 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1614 (2009). Kansas and Ohio have statutorily barred claims against premises owners for off-site asbestos exposures. *See* Kan. Stat. Ann. § 60-4905(a); Ohio Rev. Code Ann. § 2307.941(a)(1); *see also Boley v. Goodyear Tire & Rubber Co.*, 929 N.E.2d 448 (Ohio 2010).

Several of these courts focused on the state of knowledge of the hazards of nonoccupational exposure to asbestos and concluded that no duty could be owed with respect to household exposures occurring before 1972 because the risks were not foreseeable before that time.

For example, the Michigan Supreme Court in *Miller* rejected a duty by Ford Motor to a plaintiff exposed to asbestos fibers at home in the 1950s and 1960s. As stated, the primary basis for the court's decision was that plaintiff had never been on Ford's property and had no relationship with Ford. The court also examined the foreseeability of the harm and concluded that no duty should be imposed on that basis. "From 1954 to 1965, the period during which [plaintiff's stepfather] worked at defendant's plant, *we did not know what we do today* about the hazards of asbestos." 740 N.W.2d at 218 (emphasis added). The court concluded, "the risk of 'take home' asbestos exposure was, in all likelihood, *not foreseeable* by defendant while [plaintiff's stepfather] was working at defendant's premises from 1954 to 1965." *Id.* (emphasis added).

In what is perhaps the most analogous case to this one, a Texas appellate court in *Alcoa, Inc. v. Behringer*, 235 S.W.3d 456 (Tex. App.—Dallas 2007), reversed a nearly $15.6 million judgment awarded to the ex-wife of a smelting plant employee who regularly washed her husband's soiled work clothes from 1953 to 1959 and later developed mesothelioma. The court said that while there was evidence in the record that Alcoa was aware that *occupational* exposure to asbestos posed health risks, "*the danger of nonoccupational exposure to asbestos dust on workers' clothes was neither known nor reasonably foreseeable to Alcoa in 1950s.*" *Id.* at 462 (emphasis added). The record reflected that it was not until 1972 that OSHA regulations recognized a causal connection, and not until 1978 that the first epidemiological study was published on the

link between females with mesothelioma and nonoccupational asbestos exposure. *See id.* at 461.[8]

Likewise, a Kentucky federal court found, "Although the general danger of prolonged occupational asbestos exposure to asbestos manufacturing workers was known by at least the mid-1930's, the extension of that harm was not widely known until at least 1972, when OSHA regulations recognized a causal connection." *Martin v. General Elec. Co.*, 2007 WL 2682064, *5 (E.D. Ky. Sep. 5, 2007) (unpublished), *aff'd sub nom. Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439 (6th Cir. 2009). The Sixth Circuit echoed the district court's findings, stating: "There has been no showing of any general knowledge of bystander exposure in the industry. Indeed, other courts have found there was no knowledge of bystander exposure in the asbestos industry in the 1950's," 561 F.3d at 445, and that "secondary exposure was not foreseeable in the 1950's and early 1960's." *Id.* at 446.

These courts have focused on 1972 because that was "a crucial year in the history of asbestos research." *Exxon Mobil Corp. v. Altimore*, 256 S.W.3d 415, 422 (Tex. App.—Hous. 2008) (summarizing testimony of Dr. Richard Lemen, a frequent expert for asbestos plaintiffs). "By 1972, experts agreed that a certain degree of exposure to

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[8] The court noted that the first published case study of nonoccupational asbestos exposure was in 1965. Epidemiology studies are the "gold standard" for establishing causation. A case report is nothing more than an occurrence in which a person with a particular exposure also develops a particular disease. If epidemiology has established the link, a case report can potentially reflect a real causative source. In most instances, however, case reports are at best suggestive of a possible link and frequently represent unrelated incidents.

asbestos could cause asbestosis or cancer," *id.*[9], leading the federal Occupational Safety and Health Administration ("OSHA") to issue permanent standards regulating occupational exposure to asbestos in June of 1972. "The 1972 OSHA regulations established standards for exposure to asbestos dust and mandated methods of compliance with the exposure requirements, including monitoring work sites, compelling medical examinations, and, for the first time, labeling products with warnings." *Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276, 280 (4th Cir. 1993). According to OSHA, "[t]hese limits were intended primarily to protect employees against asbestosis, and it was hoped that they would provide some incidental degree of protection against asbestos induced forms of cancer."[10] "Also in 1972, while it had insufficient information to issue a single standard protective of all asbestos-related disease, the National Institute for Occupational Safety and Health ("NIOSH") proposed an asbestos exposure standard. . . ." *Altimore*, 256 S.W.3d at 422.

Before 1972, asbestos had been widely used as perhaps the world's best insulation material. "Indeed, in its heyday asbestos was described by some as a 'miraculous' mineral and a 'boon to mankind.'" *Matter of Celotex Corp.*, 196 B.R. 973, 980 (Bankr. M.D. Fla. 1996). After 1972, OSHA's asbestos regulations "became increasing stringent

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9 *See also Owens-Corning Fiberglas Corp. v. Mayor and City Council of Baltimore City*, 670 A.2d 986, 990 (Md. Ct. Spec. App.) ("As of 1972, it was generally recognized 'that exposure to asbestos of high enough intensity and long enough duration [was] causally related to asbestosis and cancers.'") (quoting *ACandS, Inc. v. Godwin,* 667 A.2d 116, 131 (Md. 1995), *cert. denied*, 677 A.2d 565 (Md. 1996)).

10 *See* Occupational Safety & Health Admin., *Regulatory History of Asbestos*, *available at* http://www.osha.gov/pls/oshaweb/owadisp. show_document?p_table= PREAMBLES&p_id=775.

over time, with most uses of asbestos banned today." *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 310 (E. & S.D.N.Y. 2002).

Here, the decedent's alleged exposure to asbestos from the Defendant-Appellant's predecessor would have ended in 1964.

IV. COURTS THAT HAVE FOUND A DUTY HAVE APPLIED PRINCIPLES THAT ARE NOT APPLICABLE IN ILLINOIS

"In nearly every instance where courts *have* recognized a duty of care in a take home exposure case, the decision turned on the court's conclusion that the foreseeability of risk was the primary (if not only) consideration in the duty analysis." *In re Asbestos Litig.*, 2007 WL 4571196, at *11 (emphasis in original), *aff'd sub nom. Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009).[11] This is not the approach taken in Illinois.

For instance, the New Jersey Supreme Court in *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006), described the "foreseeability of harm" as "a crucial element in determining whether imposition of a duty on an alleged tortfeasor is appropriate." *Id.* at 1148. The case involved a union welder/steamfitter employed by more than fifty contractors between 1947 and 1984 at numerous sites including a refinery owned by Exxon Mobil. During the course of his employment, plaintiff was exposed to asbestos, and his late wife developed mesothelioma as a result of handling his work clothes. The court held that the wife's injury was foreseeable and found that Exxon Mobil owed her a duty of care. Here, Plaintiff-Appellee decedent's alleged exposures took place much

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[11] *But see Alcoa, Inc. v. Behringer*, 235 S.W.3d 456 (Tex. App.—Dallas 2007); *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439 (6th Cir. 2009) – all rejecting claims against premises owners.

earlier. In contrast to the exposures in *Olivo*, which reached into the early 1980's, Plaintiff's exposure here ended many years before the 1972 OSHA regulations that recognized a causal connection and several more years before the 1978 publication of the first epidemiological study linking females with mesothelioma and nonoccupational asbestos exposure.

Likewise, the Tennessee Supreme Court in *Satterfield v. Breeding Insulation, Inc.*, 266 S.W.3d 347 (Tenn. 2008), said, "It is foreseeable that the adverse effects of repeated, regular, and extended exposure to asbestos on an employee's work clothes could injure [other] persons.... Accordingly, the duty we recognize today extends to those who regularly and repeatedly come into close contact with an employee's contaminated work clothes over an extended period of time, regardless of whether they live in the employee's home or are a family member." *Id.* at 374. Unlike, here, however, the exposures at issue in *Satterfield* took place from 1973 to 1975 and 1978 to 1984, after the 1972 OSHA "regulations prohibiting employees who had been exposed to asbestos from taking their work clothes home to be laundered." *Id.* at 353.

Two Louisiana cases, *Chaisson v. Avondale Industries, Inc.*, 947 So. 2d 171 (La. App. 2006), and *Zimko v. American Cyanamid*, 905 So. 2d 465 (La. App. 2005), *writ denied*, 925 So. 2d 538 (La. 2006), also found a duty to exist, but Louisiana relies "heavily upon foreseeability when finding a duty." *Chaisson*, 947 So. 2d at 182.

Zimko 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. The Michigan Supreme Court noted this history when it declared, "we do not find *Zimko* to be persuasive." *Miller*, 740 N.W.2d at 215. The Sixth Circuit in *Martin* also noted that neither *Zimko* nor *Olivo* "persuasively explains how the defendant could have knowledge of the risk of secondary exposure involved." 561 F.3d at 446.

Furthermore, the validity of *Zimko* has been called into question in Louisiana:

> *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 v. A.P. Green Industries, Inc., 933 So. 2d 843, 871-72 (La. App. 2006) (Tobias, J., concurring) (emphasis added).

Third, like *Olivo*, the *Zimko* decision is factually distinguishable from this action because the alleged bystander exposure there occurred "from 1977 until 1990." *Zimko*, 905 So. 2d at 471.

Likewise, *Chaisson* is factually distinguishable from this action because the alleged bystander exposure there occurred "from 1976 to 1978," *Chaisson*, 947 So. 2d at 181, 183, "after OSHA revealed the risks of household exposure to asbestos." *Id.* at 183. Indeed, the *Chaisson* court noted that the "facts of this case are analogous to *Olivo* and *Zimko*." *Id.* The court concluded, "[a] reasonable company in similar circumstances as [defendant], *a company aware of the 1972 OSHA standards regarding the hazards of household expose to asbestos*, had a duty to protect third party household members from exposure to asbestos from a jobsite it knew contained asbestos." *Id.* The court also made crystal clear that its holding was limited to the facts and circumstances of that particular case. The court did not find a categorical duty rule. *Id.* at 184, *see also id.* at 200 (*per curiam* opinion on rehearing, stating "the Court's opinion does not create a categorical duty rule as the majority stated in our opinion."). Here Defendant-Appellant obviously

could not have been aware of those standards during the relevant time period because they did not exist and were not promulgated until many years after the exposure ended.

In *Condon v. Union Oil Co. of California,* 2004 WL 1932847, *5 (Cal. App. Aug. 31, 2004) (unpublished), the court did not engage in a thorough duty analysis, but relied exclusively on the foreseeability factor to summarily conclude "it was foreseeable" that workers' family members were at risk of exposure if the workers were exposed. As explained, Illinois law requires more. Furthermore, California Rule of Court 977(a) prohibits courts and parties from citing or relying on unpublished opinions, so *Condon* has no authoritative value, even in California.

Finally, an unpublished Washington appellate decision, *Rochon v. Saberhagen Holdings, Inc.* 140 Wash. App. 1008, 2007 WL 2325214 (Wash. App. Aug 13, 2007) (unpublished), applied a different analytical approach than the one used in Illinois. *See In re Asbestos Litig.*, 2007 WL 4571196, *11 n.83. ("It is . . . clear that, like Tennessee, New Jersey, and Louisiana, Washington emphasizes the foreseeability of injury when determining whether a duty exists."). The other Washington State case cited by Plaintiff-Appelle, *Lunsford v. Saberhagen Holdings, Inc.*, 208 P.3d 1092 (Wash. 2009), involved strict product liability claims against a manufacturer whose predecessor supplied asbestos-containing materials. As described in the Introduction, product liability law rests on an entirely different foundation than the novel remedy sought here and provides no support for Plaintiff-Appellee's theory.

V. THE NEW DUTY RULE SOUGHT BY PLAINTIFF IS UNSOUND AND WOULD HAVE PERVERSE RESULTS: ASBESTOS LITIGATION WOULD WORSEN AND OTHER CLAIMS WOULD RISE

A broad new duty requirement for landowners would allow plaintiffs' lawyers to name countless premises owners directly in asbestos and other suits. 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. *See* Mark A. Behrens & Frank Cruz-Alvarez, *A Potential New Frontier in Asbestos Litigation: Premises Owner Liability for "Take Home" Exposure Claims*, 21:11 Mealey's Litig. Rep.: Asbestos 32 (July 5, 2006). As one commentator has explained,

> If the law becomes clear that premises-owners or employers owe a duty to the family members of their employees, the stage will be set for a major expansion in premises liability. The workers' compensation bar does not apply to the spouses or children of employees, and so allowing those family members to maintain an action against the employer would greatly increase the number of potential claimants.

Patrick M. Hanlon, *Developments in Premises Liability Law 2005*, *in* Asbestos Litigation in the 21st Century (ALI-ABA Course of Study, 2005), *available at* SL041 ALI-ABA 665, *694 (Westlaw).

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 while

wearing work clothes, as well as local laundry workers or others who handled the worker's clothes. *See Miller,* 740 N.W.2d at 219.[12]. A Louisiana federal court has already concluded that Louisiana case law recognizing a duty to members of an exposed worker's household would extend to the niece of exposed workers living in other households. *See Catania v. Anco Insulations, Inc.,* 2009 WL 2999159 (M.D. La. Sept. 18, 2009). The Court must consider all potential filings that might occur. The history of asbestos litigation makes clear that, with respect to those types of claims, "if you build it, they will come."

Moreover, potential defendants may not be limited to corporate property owners like the defendant railroad. 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.

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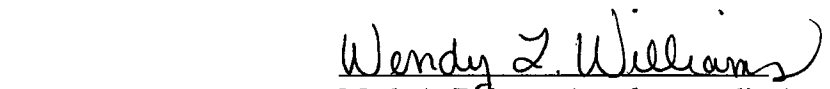
[12] *See also Van Fosse,* 777 N.W.2d at 699 (plaintiff's proposed expansion of duty "would be incompatible with public policy" and "would arguably also justify a rule extending the duty to a large universe of other potential plaintiffs who never visited the employers' premises but came into contact with a contractor's employee's asbestos-tainted clothing in a taxicab, a grocery store, a dry-cleaning establishment, a convenience store, or a Laundromat."); *In re Asbestos Litig.*, 2007 WL 4571196, at *12 ("[T]here is no principled basis in the law upon which to distinguish the claim of a spouse or other household member . . . from the claim of a house keeper or laundry mat operator who is exposed while laundering the clothing, or a co-worker/car pool passenger who is exposed during rides home from work, or the bus driver or passenger who is exposed during the daily commute home, or the neighbor who is exposed while visiting with the employee before he changes out of his work clothing at the end of the day."); *Holdampf*, 840 N.E.2d at 122 (fearing that to expand duty would raise the "specter of limitless liability," perhaps resulting in liability to family babysitter or employees of a neighborhood laundry); *Adams,* 705 A.2d at 66 ("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.").

Finally, it is important to note that rejecting the novel remedy sought here will not result in Plaintiff-Appellee being left without a recovery. First, Plaintiff-Appellee's claim here supplements a similar negligence count against numerous manufacturers. Complaint at 3, ¶ 3 (C6). Second, while Plaintiff-Appellee seeks to impose liability on a solvent peripheral defendant as a substitute for proper entities that are now bankrupt, trusts have been established to pay claims involving those companies' products. In fact, one study concluded: "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). Illinois claimants presumably could recover similar sums.

CONCLUSION

For these reasons, *amici curiae* urge this Court to reverse the decision of the Appellate Court below and affirm the Circuit Court's decision to dismiss Plaintiff-Appellee's complaint.

Respectfully submitted,



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Dated: February 15, 2011

No. 110662

IN THE SUPREME COURT OF ILLINOIS

CYNTHIA SIMPKINS, Individually and as Special Administrator for the Estate of Annette Simpkins, Deceased, *Plaintiff-Appellee,* v. CSX TRANSPORTATION, INC. *Defendant-Appellant.*	On Appeal from the Appellate Court of Illinois, Fifth District There Heard on Appeal Pursuant to Supreme Court Rule 304(a) from the Circuit Court of Madison County, Illinois No. 07-L-62 Hon. Daniel, J. Stack, *Judge Presiding.*

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 30 pages.

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CERTIFICATE OF SERVICE

I certify that on February 15, 2011, I served three copies of the foregoing Brief upon counsel by depositing a copy in a first-class postage-prepaid envelope into a depository under the exclusive care and custody of the U.S. Postal Service addressed to:

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CERTIFICATE OF MAILING

The undersigned, one of the attorneys for *Amici Curiae,* hereby certifies that on February 15, 2011, she caused twenty copies of the foregoing Brief to be sent by overnight mail to the following:

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