No. 13-31048

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROSE MAE NAQUIN DUPRE, widow of Freddie Joseph Dupre; **RONALD JOSEPH DUPRE; MARVIN ANDREW DUPRE; BRIAN ANTHONY DUPRE**, major child of Freddie Joseph Dupre, *Plaintiffs-Appellants,* v. **CBS CORPORATION; FOSTER WHEELER, L.L.C.; GENERAL ELECTRIC COMPANY,** *Defendants-Appellees*.	Appeal from the United States District Court for the Eastern District of Louisiana

AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC. AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES CBS CORPORATION, FOSTER WHEELER, L.L.C., AND GENERAL ELECTRIC COMPANY

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CERTIFICATE OF INTERESTED PERSONS PURSUANT TO FIFTH CIRCUIT RULES 26.1.1 AND 28.2.1 AND DISCLOSURE STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 26.1

Pursuant to Fifth Circuit Rules 26.1.1 and 28.2.1, and Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel of record states that the *amici curiae* represented on this brief have no parent corporations or stock. The undersigned also certifies that the entities or persons listed below, as described in Fifth Circuit Rule 28.2.1, have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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QUESTION PRESENTED

Whether Defendants-Appellees may be held liable for claims arising from exposure to asbestos insulation that was manufactured, supplied, and distributed by other companies, where Defendants-Appellees delivered uninsulated equipment to the Navy, and the Navy thereafter had that equipment insulated with asbestos.

IDENTITY AND INTEREST OF *AMICI CURIAE* AND SOURCE OF AUTHORITY TO FILE

Amici are organizations that represent companies that have been named as defendants in asbestos lawsuits and their insurers. Accordingly, *amici* have a substantial interest in ensuring that tort law rules applied in the asbestos litigation are fair, follow traditional tort law rules, and reflect sound public policy.

Here, Plaintiffs are asking this Court to impose liability on makers of *uninsulated* turbines and boilers in "bare metal" form for harms from exposure to asbestos-containing external thermal insulation manufactured and sold by *third parties* and attached post-sale. The MDL court confirmed, "there is no evidence that Decedent was exposed to respirable dust from asbestos-containing insulation that was manufactured or supplied by Westinghouse—or that Decedent was in proximity when Westinghouse representatives were performing any work." *Dupre v. Eagle, Inc*., 2012 WL 5395194, *1 (E.D. Pa. Oct. 2, 2012).

The MDL court properly granted summary judgment for the Defendants. *Amici* seek to use their broad perspective to educate the Court about the legal and policy implications of Plaintiffs' radical theory and why it should be rejected.

Amici file this brief with an accompanying Motion for Leave to File.

STATEMENT OF THE CASE

Amici adopt Defendants-Appellees' Statement of the Case as relevant to *amici*'s argument.

INTRODUCTION AND SUMMARY OF ARGUMENT

Now into its fourth decade,[1] the asbestos litigation is the "longest-running mass tort."[2] Originally and for many years, asbestos litigation typically pitted a "dusty trades" worker "against the asbestos miners, manufacturers, suppliers, and processors who supplied the asbestos or asbestos products that were used or were present at the claimant's work site or other exposure location." James S. Kakalik *et al*., *Costs of Asbestos Litigation* 3 (Rand Corp. 1983). By the late 1990s, the asbestos litigation had reached such proportions that the United States Supreme Court noted the "elephantine mass" of cases, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999), and referred to the litigation as a "crisis." *Amchem Prods. Inc. v.*

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1 *See Borel v. Fibreboard Paper Prods. Corp*., 493 F.2d 1076 (5th Cir. 1973) (asbestos manufacturers found strictly liable for injuries to industrial insulation workers exposed to their products), *cert. denied*, 419 U.S. 869 (1974).

2 Helen Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 511 (2008).

Windsor, 521 U.S. 591, 597 (1997). Mass filings pressured many primary historical defendants into bankruptcy, including virtually all manufacturers of asbestos-containing thermal insulation.

As a result of these bankruptcies, "the net...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.[3] One plaintiffs' attorney candidly described the asbestos litigation as an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, Mealey's Litig. Rep.: Asbestos, Mar. 1, 2002, at 33, 37 (quoting Mr. Scruggs).[4] Most recently, this trend was described in a significant ruling that is achieving nationwide notoriety. *See In re Garlock Sealing Tech., LLC,* 2014 WL 104021 (W.D.N.C. Jan. 10, 2014).

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[3] *See also* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 556 (2007) (the "surge of bankruptcies in 2000-2002" triggered "a search for new recruits to fill the gap in the ranks of defendants through joint and several liability."); Stephen J. Carroll *et al*., *Asbestos Litigation* xxiii (RAND Corp. 2005) (stating that when "increasing asbestos claims rates encouraged scores of defendants to file Chapter 11 petitions" the plaintiffs' bar began "to press peripheral non-bankrupt defendants to shoulder a larger share of the value of asbestos claims and to widen their search for other corporations that might be held liable for the costs of asbestos exposure and disease.").

[4] *See also* Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander,"* 23 Widener L.J. 59 (2013) (discussing quote from Dickie Scruggs and ways plaintiffs' lawyers have tried to expand the asbestos litigation to impose liability on defendants for harms caused by others' products, including with respect to the theory raised by Plaintiffs in this appeal).

In an attempt to further stretch the liability of solvent manufacturers, some plaintiffs' counsel are promoting the theory that makers of *uninsulated* products in "bare metal form" – such as turbines, boilers, pumps, and valves – should have warned about potential harms from exposure to asbestos-containing external thermal insulation manufactured and sold by *third parties* and attached post-sale, such as by the U.S. Navy.[5] "It is easy to see what is suddenly driving this novel theory: most major manufacturers of asbestos-containing products have filed bankruptcy and the Navy enjoys sovereign immunity." Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 501, 542 (2009). "As a substitute, plaintiffs seek to impose liability on solvent manufacturers for harms caused by products they never made or sold." Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made Over the Past Decade and Hurdles You Can Vault in the Next*, 36 Am. J. of Trial Advoc. 1, 24-25 (2012).

Plaintiffs' theory is so extreme that almost no plaintiff raised it until recently. Indeed, the lack of older case law on point, after several decades of litigation and many hundreds of thousands of filings, by itself, speaks volumes about the theory's exotic nature and recent vintage.

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[5] *See* Peter Geier, *Asbestos Litigation Moves On With World War II Shipyard Cases 'Dying Off', Plaintiff Attorneys Dig Deeper to Find New Strategies*, 130:5 Recorder (San Francisco) 12 (Jan. 9, 2006), *at* 2006 WLNR 25577320.

Ordinarily, manufacturers are named in asbestos cases with respect to asbestos that was contained in their *own* products—*not* to hold them liable for products *made by others*. This is an important point to keep clear. Whether couched in terms of strict liability or negligence, or in terms of manufacturing defect, design defect or failure to warn, it is black-letter product liability law that manufacturers are not liable for harms caused by others' products except in very limited situations not present here. *See* James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 Sw. U. L. Rev. 595, 602 (2008).

Plaintiffs' lawyers claim that liability should extend to makers of uninsulated products used on ships, such as the turbines and boilers at issue here, based upon the *foreseeability* that those products would be used in conjunction with asbestos-containing external thermal insulation made by others. But, as every first-year law student knows, foreseeability can be a *Palsgraf*-like slippery slope. Courts must draw a line limiting tort liability in order to avoid the unending slippery slope that a foreseeability standard would inevitably create.[6] That line is logically drawn at the point where a plaintiff is harmed by a product that was neither made nor sold by the defendant.

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[6] As the California Supreme Court explained in *Thing v. La Chusa*, 48 Cal. 3d 644, 656, 659 (Cal. 1989), "foreseeability, like light, travels indefinitely in a vacuum," raising the potential for "the limitless exposure to liability."

Furthermore, Plaintiffs' theory represents unsound public policy. If adopted, Plaintiffs' third-party duty to warn theory would worsen the nearly four decades long asbestos litigation and invite a flood of new cases. Hundreds of companies made products that arguably were used in the vicinity of some asbestos insulation, which in earlier years was ubiquitous in industry and buildings. Many of these companies may have never manufactured a product containing asbestos (*e.g.,* manufacturers of steel pipe and pipe hangers; makers of nuts, bolts, washers, wire, and other fasteners of pipe systems; makers of any equipment attached to and using the pipe system; and paint manufacturers), but they could nonetheless be held liable under Plaintiffs' theory.

Civil defendants in other types of cases would also be adversely affected, as the broad new duty rule sought here presumably would not be limited to asbestos litigation but could require manufacturers to warn about all conceivable dangers relating to hazards in others' products that might be used in conjunction with or near their own. For example, makers of bread or jam would be required to warn of peanut allergies, as a peanut butter and jelly sandwich is a foreseeable use of their products. Door or drywall makers could be held liable for failure to warn about the dangers of lead paint made by others and applied to their products post-sale. As this Court can appreciate, the only limit on such an expansive legal requirement would be the imagination of creative plaintiffs' lawyers.

In addition, consumer safety could be undermined by the potential for over-warning and through conflicting information that may be provided by manufacturers of different components and by makers of finished products.

For these reasons, the Court should affirm the orders granting summary judgment to Defendants-Appellees.

ARGUMENT

I. IT IS FUNDAMENTAL TORT LAW THAT MANUFACTURERS OUTSIDE THE CHAIN OF DISTRIBUTION CANNOT BE HELD LIABLE FOR HARMS CAUSED BY POST-SALE, THIRD-PARTY ADDITION OF ASBESTOS TO THEIR PRODUCTS

Product liability law generally provides that any entity *which participates in the chain of distribution* of a product *is liable* for harms caused by *a defect* in *that product*, whether negligently or nonnegligently caused. *See* Restatement (Second) of Torts § 402A (1965); Restatement Third, Torts: Products Liability § 1 (1997); La. Rev. Stat. § 9:2800.54. Here, the Defendant makers of uninsulated "bare metal" turbines and boilers used on naval ships were *not* in the chain of distribution of the asbestos-containing external thermal insulation affixed to their products post-sale. Therefore, Defendants are not liable for Plaintiff's alleged asbestos-related injury. *See* James Henderson, Jr. & Aaron Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn,* 65 N.Y.U. L. Rev. 265, 284 (1990) ("The [defendant's own] product must, in some sense of the word, 'create' the risk.").

As a comment to § 402A explains:

> On whatever theory, *the justification for strict liability has been* said to be *that the seller, by marketing 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*; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that *public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them*, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

Restatement (Second) of Torts § 402A cmt. *c* (emphasis added). None of the interests support imposing liability on Defendants who did not market or sell the asbestos-containing insulation that caused the Plaintiff's harm.

For these reasons, asbestos third-party duty to warn claims like the one at issue here have been almost uniformly rejected by courts. The diverse and growing body of courts that have rejected these novel claims include the Supreme Courts of California[7] and Washington;[8] appellate courts in Maryland,[9]

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[7] *See O'Neil v. Crane Co*., 266 P.3d 987, 1005 (Cal. 2012); *see also Lee v. Clark Reliance Corp*., 2013 WL 3677250, *6 (Cal. Ct. App. July 15, 2013); *McNaughton v. General Elec. Co.*, 2012 WL 5395008, *1 n.1 (E.D. Pa. Aug. 9, 2012) (applying California law); *Floyd v. Air & Liquid Sys. Corp*., 2012 WL 975756, *1 n.1 (E.D. Pa. Feb. 10, 2012) (applying California law); *Floyd v. Air & Liquid Sys. Corp*., 2012 WL 975684, *1 n.1 (E.D. Pa. Feb. 9, 2012); *Floyd v. Air & Liquid Sys. Corp*., 2012 WL 975359, *1 (E.D. Pa. Feb. 8, 2012); *Brewer v. Crane Co*., 2012 WL 3126523, *1 (Cal. Ct. App. Aug. 2, 2012); *Nolen v. Foster Wheeler Energy Corp*., 2012 WL 3126765, *1 (Cal. Ct. App. Aug. 2, 2012). For pre-*O'Neil* decisions rejecting asbestos third-party duty to warn claims in California, *see Woodard v. Crane Co*., 2011 WL 3759923, *1 (Cal. Ct. App. Aug. 25, 2011); *Walton v. William Powell Co*., 108 Cal. Rptr. 3d 412, 420 (Cal. Ct. App. 2010); *Hall v. Warren Pumps, L.L.C*., 2010 WL 528489, *1 (Cal. Ct. App. Feb. 16, 2010);

Massachusetts,[10] New York,[11] and Pennsylvania;[12] trial courts in Connecticut,[13] Delaware (applying the law of Delaware and many other states),[14] Maine,[15]

Merrill v. Leslie Controls, Inc., 101 Cal. Rptr. 3d 614, 626 (Cal. Ct. App. 2009); *Taylor v. Elliott Turbomachinery Co*., 90 Cal. Rptr. 3d 414, 418 (Cal. Ct. App. 2009); *Petros v. 3M Co*., 2009 WL 6390885, *1 (Cal. Super. Ct. Sept. 30, 2009).

[8] *See Simonetta v. Viad Corp*., 197 P.3d 127, 134 (Wash. 2008); *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 501 (Wash. 2008); *see also Yankee v. APV N. Am., Inc*., 262 P.3d 515, 522 (Wash. Ct. App. 2011); *Wangen v. A.W. Chesterton Co*., 163 Wash. App. 1004, 2011 WL 3443962, *5-6 (Wash. Ct. App. Aug. 8, 2011); *Anderson v. Asbestos Corp*., 151 Wash. App. 1005, 2009 WL 2032332, *2 (Wash. Ct. App. July 13, 2009).

[9] *See Ford Motor Co. v. Wood*, 703 A.2d 1315, 1332 (Md. Ct. Spec. App. 1998), *abrogated on other grounds*, *John Crane, Inc. v. Scribner*, 800 A.2d 727, 743 (Md. 2002).

[10] *See Whiting v. CBS Corp*., 982 N.E.2d 1224, 2013 WL 530860, *1 (Mass. App. Ct. 2013); *see also Dombrowski v. Alfa Laval*, *Inc.*, 2010 WL 4168848, *3 (Mass. Super. Ct. July 1, 2010).

[11] *See In re Eighth Judicial Dist. Asbestos Litig. (Drabczyk v. Fisher Controls Int'l, L.L.C.)*, 938 N.Y.S.2d 715, 715-17 (N.Y. App. Div. 2012). New York City asbestos cases have proceeded, however, under a third-party duty to warn theory relying on *Berkowitz v. A.C. & S., Inc*., 733 N.Y.S.2d 410, 411-12 (N.Y. App. Div. 2001), a single paragraph opinion, devoid of legal analysis, which misstates New York law as decided in *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222, 225-26 (N.Y. 1992). A New York City federal judge has explicitly distinguished *Berkowitz*, stating that the decision "hardly stands for the broad proposition that a manufacturer has a duty to warn whenever it is foreseeable that its product will be used in conjunction with a defective one. Rather, the specifications there apparently *prescribed* the use of asbestos." *Surre v. Foster Wheeler L.L.C*., 831 F. Supp. 2d 797, 802-03 (S.D.N.Y. 2011).

[12] *See Schaffner v. Aesys Techs., L.L.C*., 2010 WL 605275, *6 (Pa. Super. Ct. Jan. 21, 2010); *see also Montoney v. Cleaver-Brooks, Inc*., 2012 WL 359523, *1, *3 (Pa. Com. Pl. Jan. 5, 2012); *Kolar v. Buffalo Pumps, Inc*., 15 Pa. D. & C. 5th 38, 49 (Pa. Com. Pl. Aug. 2, 2010); *Ottinger v. Am. Standard, Inc*., 2007 WL 7306556, *11 (Pa. Com. Pl. Sept. 11, 2007); *cf. Eckenrod v. GAF Corp*., 544 A.2d 50, 52 (Pa. Super. Ct. 1988) ("[A] plaintiff must present evidence to show that he inhaled asbestos fibers shed by the specific manufacturer's product.").

[13] *See Abate v. AAF-McQuay, Inc*., 2013 WL 812066, *5 (Conn. Super. Ct. Jan. 29, 2013), *reconsideration denied*, 2013 WL 5663462, *3 (Conn. Super. Ct. Sept. 24, 2013).

[14] *See Farrall v. Ford Motor Co*., 2013 WL 4493568, *1 n.5 (Del. Super. Ct. Aug. 19, 2013); *In re Asbestos Litig. (Thomas Milstead),* 2012 WL 1996799, *4 (Del. Super. Ct. May 31, 2012) (applying Maryland law); *In re Asbestos Litig. (Anita Cosner)*, 2012 WL 1694442, *1 (Del. Super. Ct. May 14, 2012) (applying Massachusetts law); *In re Asbestos Litig. (Reed Grgich)*, 2012 WL 1408982, *4 (Del. Super. Ct. Apr. 2, 2012) (applying Utah law), *reargument denied*, 2012 WL 1593123 (Del. Super. Ct. Apr. 11, 2012), *appeal refused sub nom.* Crane Co. v. Grgich, 44 A.3d 921, *1 (Del. Super. Ct. 2012); *In re Asbestos Litig. (Frederick & Patricia*

Minnesota,[16] and New Jersey;[17] federal district courts in Alabama,[18] Delaware,[19] Florida,[20] Illinois,[21] and New York;[22] and state and federal courts applying maritime law, including the manager of the federal asbestos MDL and the Sixth Circuit Court of Appeals.[23]

Parente), 2012 WL 1415709, *2 (Del. Super. Ct. Mar. 2, 2012) (applying Connecticut Law); *In re* A*sbestos Litig. (Ralph Curtis & Janice Wolfe)*, 2012 WL 1415706, *5 (Del. Super. Ct. Feb. 28, 2012) (applying Oregon law); *In re Asbestos Litig. (Robert Truitt)*, 2011 WL 5340597, *3 (Del. Super. Ct. Oct. 5, 2011); *In re Asbestos Litig. (Irene Taska)*, 2011 WL 379327, *1-2 (Del. Super. Ct. Jan. 19, 2011) (applying Connecticut law); *In re Asbestos Litig. (Arland Olson)*, 2011 WL 322674, *2 (Del. Super. Ct. Jan. 18, 2011) (applying Idaho law); *Bernhardt v. Ford Motor Co*., 2010 WL 3005580, *2-3 (Del. Super. Ct. July 30, 2010); *Wilkerson v. American Honda Motor Co*., 2008 WL 162522, *2-3 (Del. Super. Ct. Jan. 17, 2008). *But see In re Asbestos Litig. (Dorothy Phillips) (Limited to Hoffman/New Yorker Inc.)*, 2013 WL 4715263, *2 (Del. Super. Ct. Aug. 30, 2013) (applying Virginia law); *In re Asbestos Litig. (Darlene K. Merritt & James Kilby Story)*, 2012 WL 1409225, *3 (Del. Super. Ct. Apr. 5, 2012) (applying Virginia law); *In re Asbestos Litig. (Kenneth Carlton)*, 2012 WL 2007291, *3-4 (Del. Super. Ct. June 1, 2012) (applying Arkansas law).

[15] *See Rumery v. Garlock Sealing Techs., Inc*., 2009 WL 1747857, *9 (Me. Super. Ct. Apr. 24, 2009).

[16] *See Nelson v. 3M Co*., 2011 WL 3983257, *5-6 (Minn. Dist. Ct. Aug. 16, 2011).

[17] *See Mystrena v. A.W. Chesterton Co.*, No. MID-L-4208-10, at 23 (N.J. Super. Ct. Law Div. May 8, 2012); *Fayer v. A.W. Chesterton Co.*, No. MID-L-5016-10, at 23 (N.J. Super. Ct. Law Div. May 8, 2012).

[18] *See Morgan v. Bill Vann Co*., 2013 WL 4657502, *5 (S.D. Ala. Aug. 30, 2013).

[19] *See Dalton v. 3M Co*., 2013 WL 4886658, *10 (D. Del. Sept. 12, 2013) (applying Mississippi law), *report and recommendation adopted*, 2013 WL 5486813 (D. Del. Oct. 1, 2013).

[20] *See Faddish v. Buffalo Pumps*, 881 F. Supp. 2d 1361, 1374 (S.D. Fla. 2012).

[21] *See Niemann v. McDonnell Douglas Corp.*, 721 F. Supp. 1019, 1028 (S.D. Ill. 1989).

[22] *See Surre v. Foster Wheeler L.L.C*., 831 F. Supp. 2d 797, 804 (S.D.N.Y. 2011).

[23] *See Stark v. Armstrong World Indus., Inc*., 21 F. App'x 371, 381 (6th Cir. 2001); *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 499 (6th Cir. 2005); *Various Plaintiffs v. Various Defendants*, 856 F. Supp. 2d 703, 712 (E.D. Pa. 2012); *Conner v. Alfa Laval, Inc*., 842 F. Supp. 2d 791, 801 (E.D. Pa. 2012); *Floyd v. Air & Liquid Sys. Corp.*, 2012 WL 975756, *1 n.1 (E.D. Pa. Feb. 10, 2012); *Floyd v. Air & Liquid Sys. Corp*., 2012 WL 975615, *1 n.1 (E.D. Pa. Feb. 8, 2012); *Cabasug v. Crane Co*., 2013 WL 6212151, *13 (D. Haw. Nov. 26, 2013); *In*

The Supreme Court of California's decision in *O'Neil v. Crane Co.*[24] is perhaps the most significant of these decisions. The case involved a mesothelioma plaintiff allegedly exposed to asbestos in the late 1960s in the course of his job supervising individuals who repaired equipment in the engine and boiler rooms of a World War II-era naval ship. The plaintiff sued two companies that sold valves and pumps to the Navy. It was undisputed that the defendants never manufactured or sold any of the asbestos-containing materials to which the plaintiff was exposed. Instead, the plaintiff's asbestos exposures came from external insulation and replacement internal gaskets and packing made by third parties.

The Supreme Court of California applied general principles of tort law, concluding that, while "manufacturers, distributors, and retailers have a duty to ensure the safety of their products…we have never held that these responsibilities extend to preventing injuries caused by *other* products that might foreseeably be used in conjunction with a defendant's product." *Id.* at 991 (emphasis in original). The court reasoned that requiring manufacturers to warn about the dangerous propensities of products they did not design, make, or sell would be contrary to the

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re Asbestos Prods. Liab. Litig (No. VI) (Sweeney v. Saberhagen Holdings, Inc.), 2011 WL 346822, *6-7 (E.D. Pa. Jan. 13, 2011), *report and recommendation adopted*, 2011 WL 359696 (E.D. Pa. Feb. 3, 2011); *Abbay v. Armstrong Int'l, Inc.,* 2012 WL 975837, *1 (E.D. Pa. Feb. 29, 2012); *In re Asbestos Litig. (Harold & Shirley Howton),* 2012 WL 1409011, *6 (Del. Super. Ct. Apr. 2, 2012), *appeal refused*, 44 A.3d 921 (Del. 2012); *In re Asbestos Litig. (Wesley K. Davis)*, 2011 WL 2462569, *6 (Del. Super. Ct. June 7, 2011).

[24] *O'Neil v. Crane Co*., 266 P.3d 987, 1007 (Cal. 2012).

purposes of strict products liability.[25] The court added, "[i]t is also unfair to require manufacturers of nondefective products to shoulder a burden of liability when they derived no economic benefit from the sale of the products that injured the plaintiff." *Id.* at 1006. The court rejected the notion that a manufacturer has a duty to warn about the dangers of products that it knew or should have known would be used alongside its own. *Id*. The court concluded that "expansion of the duty of care as urged here would impose an obligation to compensate on those whose products caused the plaintiffs no harm. To do so would exceed the boundaries established over decades of product liability law." *Id.* at 1007.

As stated, a number of decisions rejecting Plaintiffs' theory have been decided under maritime law. In *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488 (6th Cir. 2005), the leading admiralty case, the Sixth Circuit Court of Appeals confirmed that a manufacturer is not liable for asbestos-containing components and replacement parts it did not manufacture or distribute. Lindstrom was a merchant seaman who worked in the engine rooms of various ships and developed mesothelioma as an alleged result of maintenance work on pumps and valves. Lindstrom claimed that he was exposed to asbestos while replacing gaskets on pumps manufactured by Coffin Turbo Pump, Inc. But, as Lindstrom testified,

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[25] *See id.* at 995-96 ("[T]he reach of strict liability is not limitless. We have never held that strict liability extends to harm from entirely distinct products that the consumer can be expected to use with, or in, the defendant's nondefective product.").

the replacement gaskets themselves were not manufactured by Coffin Turbo. The Sixth Circuit affirmed summary judgment, holding: "Coffin Turbo cannot be held responsible for the asbestos contained in another product." *Id*. at 496. Furthermore, Lindstrom alleged exposure to asbestos packing that was attached to water pumps manufactured by Ingersoll Rand Company. The asbestos packing, however, was not manufactured by Ingersoll Rand. The court, again, held that Ingersoll Rand could not be held responsible for asbestos-containing material attached to Ingersoll Rand's products post-manufacture. *Id*. at 497.

Numerous other maritime decisions are in agreement:

- *Stark v. Armstrong World Indus., Inc.*, 21 Fed. Appx. 371, 381 (6th Cir. 2001) ("In essence, [plaintiff] seeks to have Foster Wheeler and CE [two boiler manufacturers] held responsible because their equipment is integrated into the rest of the machinery of the vessel, much of which uses and may release asbestos. This form of guilt by association has no support in the law of products liability.").
- *In re Asbestos Prods. Liab. Litig (No. VI)* (*Sweeney v. Saberhagen Holdings, Inc*.), 2011 WL 346822, *7 (E.D. Pa. Jan. 13, 2011) ("We find that maritime law applies to this action and that Plaintiff's evidence is insufficient to survive summary judgment under that standard in that he cannot establish any threshold exposure to asbestos-containing parts manufactured or distributed by Crane. Rather, the evidence establishes that any asbestos-containing parts of Crane valves to which Plaintiff may have been exposed would have been replacement parts manufactured and distributed by companies other than Crane."), *report and recommendation adopted*, 2011 WL 359696 (E.D. Pa. Feb. 3, 2011).
- *In re Asbestos Litig. (Wesley K. Davis)*, 2011 WL 2462569, *5 (Del. Super. Ct. New Castle County June 7, 2011) ("Consistent with *Lindstrom*…the Court declines to hold that Crane became liable for exposures to other manufacturers' asbestos products by supplying asbestos gaskets or packing with its new valves without providing any specifications,

instructions, or recommendations regarding replacement parts or insulation.").

- *Conner v. Alfa Laval, Inc.,* 842 F. Supp. 2d 791, 801 (E.D. Pa. 2012) (Robreno, J.) ("Therefore, this Court adopts *Lindstrom* and now holds that, under maritime law, a manufacturer is not liable for harm caused by, and owes no duty to warn of the hazards inherent in, asbestos products that the manufacturer did not manufacture or distribute. This principle is consistent with the development of products-liability law based on strict liability and negligence, relevant state case law, the leading federal decisions, and important policy considerations regarding the issue.").
- *Floyd v. Air & Liquid Sys. Corp*., 2012 WL 975615 (E.D. Pa. Feb. 8, 2012) ("This Court has recently adopted the so-called 'bare metal defense' under maritime law, holding that a manufacturer has no liability for harms caused by – and no duty to warn about hazards associated with – a product it did not manufacture or distribute."), and 2012 WL 975756 (E.D. Pa. Feb. 10, 2012).
- *Abbay v. Armstrong Int'l, Inc.,* 2012 WL 975837, *1 (E.D. Pa. Feb. 29, 2012) (Robreno, J.) ("Plaintiff has alleged exposure to asbestos-containing insulation used in conjunction with Elliott turbines. This Court has held that [under maritime law] a manufacturer cannot be liable for injuries from products that it did not manufacture or supply.").
- *In re Asbestos Litig. (Harold and Shirley Howton)*, 2012 WL 1409011, *6 (Del. Super. Ct. New Castle County Apr. 2, 2012) ("The court finds under Maritime law Defendant does not owe a duty [to] Plaintiff for asbestos-containing parts used with or added to its products after sale."), *appeal refused sub nom. Crane Co. v. Howton*, 44 A.3d 921 (Del. Super. Ct. New Castle County 2012).
- *Various Plaintiffs v. Various Defendants*, 856 F. Supp. 2d 703, 709 (E.D. Pa. 2012) ("This Court recently found that the so-called 'bare metal defense' is recognized under maritime law, holding that a manufacturer has no liability for harms caused by – and no duty to warn about hazards associated with - a product it did not manufacture or distribute.").
- *Cabasug v. Crane Co.,* 2013 WL 6212151, *13 (D. Haw. Nov. 26, 2013) ("under maritime law, a manufacturer is not liable for harm caused by, and owes no duty to warn of the hazards inherent in, asbestos-containing replacement parts that the manufacturer did not manufacture or distribute.").

II. COURTS OUTSIDE OF THE ASBESTOS CONTEXT HAVE REFUSED TO EXTEND LIABILITY TO MANUFACTURERS OF PRODUCTS THAT ARE USED IN CONJUNCTION WITH PRODUCTS BY THIRD PARTIES THAT CAUSE HARM

For years, courts in non-asbestos cases have refused to impose liability on manufacturers of products that are used in conjunction with harm-causing products made by others. For example, in *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222 (N.Y. 1992), New York's highest court "decline[d] to hold that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product which is compatible with the defective product of another manufacturer." *Id*. at 225-226. The plaintiff's decedent was killed while inflating a truck tire, manufactured by Goodyear, when a multi-piece tire rim made by a different company separated explosively. Plaintiff's decedent claimed that Goodyear had a duty to warn against its tire being used in conjunction with allegedly defective multi-piece tire rims made by others because Goodyear was *aware* that the defective rim could be used with its product. The *Rastelli* court rejected plaintiff's foreseeability-based theory and found that there could be no liability because "Goodyear had no control over the production of the subject multi-piece rim, had no role in placing that rim in the stream of commerce, and derived no benefit from its sale. Goodyear's tire did not create the alleged defect in the rim that caused the rim to explode." *Id*. at 226.

Additional cases from the Eleventh Circuit,[26] Supreme Courts of Texas[27] and Hawaii,[28] a California Court of Appeal,[29] and a Michigan appellate court[30] held that liability does not extend to car or tire manufacturers for defects found in other manufacturers' products.

In *Brown v. Drake-Willock International, Ltd.,* 530 N.W.2d 510 (Mich. App. 1995), *appeal denied*, 562 N.W.2d 198 (Mich. 1997), the court held that dialysis machine manufacturers owed no duty to warn hospital employees of the risk of exposure to formaldehyde supplied by another company even though the dialysis machine manufacturers had recommended the use of formaldehyde to clean the machines. The court held: "The law does not impose upon manufacturers a duty to warn of the hazards of using products manufactured by someone else." *Id*. at 515.

Additional cases have held that a manufacturer or distributor of a paint sprayer were not liable for a user's burn injuries where a solvent sold by a third

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[26] *See Reynolds v. Bridgestone/Firestone, Inc*., 989 F.2d 465, 472 (11th Cir. 1993) (tire company cannot be held liable for unreasonably dangerous tire rim).

[27] *See Firestone Steel Prods. Co. v. Barajas,* 927 S.W.2d 608, 616 (Tex. 1996) ("A manufacturer does not have a duty to warn or instruct about another manufacturer's products, though those products might be used in connection with the manufacturer's own products.").

[28] *See Acoba v. General Tire, Inc.*, 986 P.2d 288, 305 (Haw. 1999) (tire manufacturer and inner tube manufacturer did not have a duty to warn for defective rim assembly).

[29] *See Zambrana v. Standard Oil Co. of Cal.,* 26 Cal. App. 3d 209, 217 (1972) (tire maker not liable for combination of parts attached to its tire which were said to be defective); *Wiler v. Firestone Tire & Rubber Co*., 95 Cal. App. 3d 621 (1979) (tire manufacturer could not be held liable for the defective valve stem made and attached to its tires by another company).

[30] *See Spencer v. Ford Motor Co.*, 367 N.W.2d 393 (Mich. App. 1985) (truck manufacturer could not be held liable merely because its truck could accommodate a dangerous rim).

party and used to clean the sprayer ignited, *see Dreyer v. Exel Indus., S.A*., 326 Fed. Appx. 353, 358 (6th Cir. 2009); a metal forming equipment manufacturer was not liable for a defective wood planking used in conjunction with its product, *see Toth v. Economy Forms Corp.,* 571 A.2d 420, 423 (Pa. Super. Ct.)*, appeal denied*, 593 A.2d 422 (Pa. 1990); a crane manufacturer had no duty to warn about rigging it did not manufacture, integrate into its crane, or place in the stream of commerce, *see Walton v. Harnischfeger,* 796 S.W.2d 225, 226 (Tex. App. 1990); a hydraulic valve manufacturer was not liable for a defective log splitter used in conjunction with its product, *see Childress v. Gresen Mfg. Co*., 888 F.2d 45, 46, 49 (6th Cir. 1989); an airplane manufacturer was not liable to passengers for circulatory problems caused by seats installed post-sale, *see In re Deep Vein Thrombosis,* 356 F. Supp. 2d 1055, 1068 (N.D. Cal. 2005); a manufacturer of a truck cab and chassis was not liable when a dump bed and hoist made by a third party were added post-sale without a back-up alarm and resulted in an injury, *see Shaw v. General Motors Corp*., 727 P.2d 387, 390 (Colo. App. 1986) ("The burden of guarding against the injury suffered here should appropriately be placed upon the entity that designed the final product, arranged for the acquisition of all the component parts, and directed their assembly."); a water heater manufacturer had no duty to warn of dangers of misplacing a temperature control device it did not manufacture, *see Cleary v. Reliance Fuel Oil Assocs.*, 17 A.D.3d 503, 506 (N.Y. App. Div.), *appeal*

denied, 836 N.E.2d 1149 (N.Y. 2005); a manufacturer of a garbage packer mounted on a truck chassis made by another company was not liable for a defect in the chassis, *see Sanders v. Ingram Equip., Inc*., 531 So. 2d 879, 880 (Ala. 1988); and a manufacturer of electrically powered lift motors used in conjunction with scaffolding equipment had no duty to warn of risks created by scaffolding made by others, *see Mitchell v. Sky Climber, Inc*., 487 N.E.2d 1374, 1376 (Mass. 1986).

Similarly, courts in non-asbestos cases have refused to impose liability on manufacturers for harms caused by replacement parts sold by third parties. For example, in *Baughman v. General Motors Corp.*, 780 F.2d 1131 (4th Cir. 1986), the Fourth Circuit refused to hold an automobile manufacturer liable for a mechanic's injuries when a tire mounted on a replacement wheel exploded. Plaintiff contended that even though the vehicle's manufacturer did not place the replacement wheel into the stream of commerce, the vehicle was nevertheless defective because the manufacturer failed to adequately warn of the dangers with similar wheels sold by others. The Fourth Circuit rejected this argument, stating:

> Where, as here, the defendant manufacturer did not incorporate the defective component part into its finished product and *did not place the defective component into the stream of commerce, the rationale for imposing liability is no longer present. The manufacturer has not had the opportunity to test, evaluate, and inspect the component; it has derived no benefit from its sale*; and it has not represented to the public that the component part is its own.

Id. at 1132-33 (emphasis added); *see also Cousineau v. Ford Motor Co.,* 363 N.W.2d 721, 727-28 (Mich. Ct. App. 1985) (truck manufacturer not liable for injuries caused by defective replacement wheel made by another company); *Hansen v. Honda Motor Co*., 480 N.Y.S.2d 244, 245-46 (N.Y. App. Div. 1984) (motorcycle manufacturer not liable for defective replacement wheel manufactured by another company).

Other decisions are in agreement. *See Fricke v. Owens-Corning Fiberglas Corp.*, 618 So. 2d 473, 475 (La. App. 1993) (previous owner of mustard vat tank showed that it was not manufacturer of vinegar in vat at time of accident and thus did not owe any duty to worker to warn users of dangers regarding vinegar/acetic acid); *Fleck v. KDI Sylvan Pools*, 981 F.2d 107, 118 (3d Cir. 1992) (it would be "unreasonable" to impose liability on a manufacturer of a "safe pool" for injuries sustained as a result of a lack of depth warnings on a replacement pool liner made by another manufacturer), *cert. denied sub nom. Doughboy Recreational, Inc., Div. of Hoffinger Indus., Inc. v. Fleck,* 507 U.S. 1005 (1993); *Exxon Shipping Co. v. Pacific Res., Inc.,* 789 F. Supp. 1521, 1526 (D. Haw. 1991) (chain manufacturer not liable for defectively designed replacement chain made by another even though the replacement part was "identical, in terms of make and manufacture, to the original equipment").

III. IMPOSITION OF LIABILITY ON A DEFENDANT FOR AN ASBESTOS PRODUCT MADE OR SOLD BY A THIRD PARTY WOULD REPRESENT UNSOUND PUBLIC POLICY

"[C]ourts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree." *In re New York City Asbestos Litig.* (*Holdampf v. A.C.&S., Inc.*), 840 N.E.2d 115, 119 (N.Y. 2005) (quoting *Hamilton v. Beretta U.S.A. Corp*., 750 N.E.2d 1055 (N.Y. 2001)). That policy would be significantly undermined by the theories Plaintiffs are promoting here. *See* Thomas W. Tardy, III & Laura A. Frase, *Liability of Equipment Manufacturers for Products of Another: Is Relief in Sight?*, HarrisMartin's Columns–Raising the Bar in Asbestos Litigation, May 2007, at 6.

In the real world of product design and usage, virtually every product is connected in some manner with many others in ways that could conceivably be anticipated if courts were willing to extend foresight far enough. Such a duty rule would lead to "legal and business chaos – every product supplier would be required to warn of the foreseeable dangers of numerous other manufacturers' products. . . ." John W. Petereit, *The Duty Problem With Liability Claims Against One Manufacturer for Failing to Warn About Another Manufacturer's Product*, Toxic Torts & Env'tl L. 7 (Defense Research Inst. Toxic Torts & Env'tl L. Comm. Winter 2005).

"For example, a syringe manufacturer would be required to warn of the danger of any and all drugs it may be used to inject, and the manufacturer of bread [or jam] would be required to warn of peanut allergies, as a peanut butter and jelly sandwich is a foreseeable use of bread." Tardy & Frase, *supra*, at 6. Packaging companies might be held liable for hazards regarding contents made by others.

We will not belabor this exercise because similar scenarios could be developed for virtually any product. If a manufacturer's duty were defined by foreseeable uses of *other* products, the chain of warnings and liability would be so endless, unpredictable, and speculative as to be worthless. No rational manufacturer could operate under such a system. Manufacturers also cannot be expected to have R&D facilities to identify potential dangers with respect to all products that may be used in conjunction with or in the vicinity of their own products.

Consumer safety also could be undermined by the potential for over-warning and through conflicting information on different components and finished products. *See* David C. Landin *et al., Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Public Policy in Asbestos Litigation*, 16 Brook. J.L. & Pol'y 589, 630 (2008) (urging courts to reject the duty Plaintiffs seek here); *see also* Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory,*

52 U. Cin. L. Rev. 38, 43 (1983) ("The extension of workplace warnings liability unguided by practical considerations has the unreasonable potential to impose absolute liability. . . .").

"Further, '[i]f business [entities] believe that tort outcomes have little to do with their own behavior, then there is no reason for them to shape their behavior so as to minimize tort exposure.'" Paul Riehle *et al*., *Product Liability for Third Party Replacement or Connected Parts: Changing Tides From the West*, 44 U.S.F. L. Rev 33, 61-62 (2009) (quoting Stephen J. Carroll *et al.*, *Asbestos Litigation* 129 (RAND Corp. 2005)).

IV. IMPOSITION OF LIABILITY ON "BARE METAL" PRODUCT MAKERS FOR INSULATION PRODUCTS MADE BY OTHERS WOULD WORSEN ASBESTOS LITIGATION AND IS UNNECESSARY BECAUSE TRUSTS EXIST TO PAY FOR HARMS CAUSED BY EXPOSURE TO ASBESTOS INSULATION BY BANKRUPT COMPANIES

"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). So far, the litigation has forced approximately 100 employers into bankruptcy, and has had devastating impacts on defendant 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).

Plaintiffs' theory would worsen the asbestos litigation and lead to a flood of claims against solvent makers of uninsulated "bare metal" products for harms caused by exposures to asbestos-containing thermal insulation products made by others. This is especially problematic because the influx of asbestos claims shows no signs of abating. A 2012 review of asbestos-related liabilities reported to the Securities and Exchange Commission by over 150 publicly traded companies showed that "[s]ince 2007, filings have been fairly stable." Mary Elizabeth C. Stern & Lucy P. Allen, NERA Economic Consulting, *Asbestos Payments per Resolved Claim Increased 75% in the Past Year—Is This as Dramatic as it Sounds?*, 7 (Aug. 2012); *see also* Jenni Biggs *et al*., *A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated* 1 (Towers Watson June 2013) (mesothelioma claim filings have "remained near peak levels since 2000."). "Typical projections based on epidemiology studies assume that mesothelioma claims arising from occupational exposure to asbestos will continue for the next 35 to 50 years." Biggs *et al*., *supra*, at 5. Industry analysts predicted last year that another 28,000 mesothelioma claims will be filed. *Id*. at 1.

Furthermore, it is important to remember that trusts have been established to pay claims involving exposures to asbestos products made by bankrupt entities. *See* Lloyd Dixon *et al*., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* (Rand Corp.

2010). Over sixty trusts have been established to collectively form a *$36.8 billion* privately-funded asbestos personal injury compensation system that operates parallel to, but wholly independent of, the civil tort system. U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 3 (Sept. 2011).[31]

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); *see generally* William P. Shelley *et al.*, *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts,* 17 Norton J. Bankr. L. & Prac. 257 (2008). For example, it is estimated that mesothelioma plaintiffs in Oakland, California (Alameda County) 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).

[31] *See also* Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* 2 (Rand Corp. 2011); Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance*, 11:1 Mealey's Asbestos Bankr. Rep. 1 (June 2012).

CONCLUSION

If the Court finds it has jurisdiction over this appeal, the Court should affirm the orders granting summary judgment to Defendants-Appellees.

Respectfully submitted,

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Dated: February 4, 2014

CERTIFICATE OF COMPLIANCE WITH FIFTH CIRCUIT RULES 29.3 AND 32 AND FEDERAL RULES OF APPELLATE PROCEDURE 29 AND 32

1. This brief complies with the typeface requirements of Fifth Circuit Rule 32.1 and Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in proportionally spaced typeface using Microsoft Word 2007, in Times New Roman style, 14 point font.

2. Pursuant to Fed. R. App. P. 32(C), the brief also complies with the type-volume limits in Fifth Circuit Rules 29.3 and 32.2 and Fed. R. App. P. 29(d) and Fed. R. App. 32(a)(7)(b) because it contains 6,967 (less than 7,000) words.

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CERTIFICATE OF SERVICE

I certify that the foregoing Brief was filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

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Dated: February 4, 2014