COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

MIDDLESEX, SS:		**NO. 2012-P-0329**
ELLEN N. WHITING, individually and as Executrix of the Estate of Willis R. Whiting, Jr., ***Plaintiff-Appellant,***	:	**On Appeal from a Judgment of the Middlesex County Superior Court**
V.	:	
CBS CORPORATION AND CRANE CO., ***Defendants-Appellees.***	:	

AMICI CURIAE BRIEF OF MASSACHUSETTS CHAMBER OF COMMERCE, INC., COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AMERICAN INSURANCE ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, AND NFIB SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANTS-APPELLEES

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QUESTION PRESENTED

Amici[1] support the Superior Court's grant of summary judgment in favor of Defendants-Appellees, and file this brief to address one issue under review:

> Whether an equipment manufacturer may be held liable for harms allegedly caused by (1) asbestos-containing replacement parts (gaskets or packing) manufactured or sold by third parties or (2) asbestos-containing external thermal insulation manufactured and sold by third parties and attached post-sale by the Navy.

The Superior Court held that Defendants-Appellees, makers of valves and turbines installed aboard a naval combat ship (the *USS Guadalcanal*), owed no duty to warn Plaintiff of the hazards in asbestos-containing products made or sold by third parties and used in conjunction with Defendants-Appellees' products. We agree with that decision.

INTEREST OF *AMICI CURIAE*

Amici are organizations that represent companies doing business in Massachusetts and their insurers. *Amici* have a substantial interest in ensuring that Massachusetts' tort system is fair, follows

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[1] None of the parties or their counsel, or anyone other than the *amici*, their members, or their counsel, authored this brief in whole or in part or made a monetary contribution intended to fund the brief's preparation or submission.

traditional tort law rules, and reflects sound public policy. Because the Superior Court's decision is consistent with these principles, follows Massachusetts law, and reflects the clear majority rule nationwide, the grant of summary judgment in favor of Defendants-Appellees should be affirmed.

STATEMENT OF THE CASE AND FACTS

Amici adopt Defendants-Appellees' Statement of the Case and Facts relating to the question presented.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

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). Since the litigation emerged nearly four decades ago, lawyers who bring asbestos cases have perpetuated the litigation by seeking out new defendants or raising new theories of liability. *See* Mark Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 501 (2009); 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.

An emerging theory being promoted here and by some plaintiffs' counsel is that makers of products used in naval propulsion systems, such as pumps, valves, and turbines, should be held liable for harms allegedly caused by asbestos-containing replacement parts (*e.g.*, gaskets or packing) manufactured or sold by third parties or by asbestos-containing external thermal insulation manufactured or sold by third parties and attached post-sale by the Navy.

Ordinarily, manufacturers are named in asbestos cases with respect to asbestos that was contained in their *own* products, not to hold them liable for *others'* products. This is an important point. The focus here is on products made by third parties, not on the products made or sold by Defendants-Appellees.

Plaintiff's theory is so extreme that almost no plaintiff raised it until recently. The lack of older case law on point, after nearly forty years of litigation and many hundreds of thousands of filings,[2]

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[2] Through 2002, approximately 730,000 asbestos claims had been filed. *See* Stephen J. Carroll *et al.*, *Asbestos Litigation* xxiv (RAND Corp. 2005). Countless more claims have been filed in the last decade.

by itself, speaks volumes about the exotic nature of Plaintiff's theory.

The driving force behind the theory, two appellate decisions from Washington State, is now gone, rejected by the Washington Supreme Court in *Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008), and *Braaten v. Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008). Plaintiffs' lawyers then tried to raise the theory in California, where it was rejected by numerous appellate courts,[3] and then *unanimously* rejected by the California Supreme Court in *O'Neil v. Crane Co.*, 266 P.3d 987 (Cal. 2012). Since *Simonetta*,

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[3] *See Taylor v. Elliott Turbomachinery Co., Inc.*, 171 Cal. App. 4th 564 (Cal. App. 1st Dist. 2009); *Hall v. Warren Pumps, LLC*, 2010 WL 528489 (Cal. App. 2d Dist. Div. 2 Feb. 16, 2010), *review granted* (Cal. May 12, 2010), *review dismissed, cause remanded* (Feb 29, 2012); *Merrill v. Leslie Controls, Inc.*, 179 Cal. App. 4th 262 (Cal. App. 2d Dist. Div. 3 2009), *review granted and opinion superseded*, 224 P.3d 919 (Cal. 2010), *review dismissed, cause remanded* (Feb 29, 2012); *Walton v. The William Powell Co.*, 183 Cal. App. 4th 1470 (Cal. App. 2d Dist. Div. 4), *review granted and opinion superseded*, 232 P.3d 1201 (Cal. 2010), *review dismissed, cause remanded* (Feb. 29, 2012); *Woodard v. Crane Co.*, 2011 WL 3759923 (Cal. App. 2d Dist. Div. 4 Aug. 25, 2011), *review granted* (Cal. Nov. 16, 2011), *review dismissed, cause remanded* (Feb. 29, 2012); *see also Petros v. 3M Co.*, 2009 WL 6390885 (Cal. Super. Ct. Alameda County Sept. 30, 2009).

Braaten, and *O'Neil*, many other courts have rejected the theory Plaintiff is shopping here. *See infra.*

Whether couched in terms of negligence or warranty law (or strict liability in other states), it is black-letter law that manufacturers are not liable for harms caused by other manufacturers' products except in limited situations not present here: (1) if a component part maker substantially participated in the integration of its product into the design of a finished product or (2) where two otherwise safe products combine to create a new, synergistic hazard.

Plaintiff essentially seeks to impose "rescuer liability" on Defendants-Appellees for failure to warn about asbestos-related hazards in products made or sold by others. *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 (2008) (Professor Henderson is the Frank B. Ingersoll Professor of Law at Cornell Law School and was Co-Reporter for the Restatement Third, Torts: Products Liability).

What is suddenly driving Plaintiff's theory? The answer is found in a statement by former plaintiffs' attorney Richard Scruggs. He 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*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs). As this Court is aware, most of the primary historical asbestos defendants (*i.e.*, those companies that manufactured asbestos products) have been forced into bankruptcy, and the Navy enjoys sovereign immunity. As a substitute, Plaintiff seeks to impose liability on Defendants-Appellees for harms caused by products they never made, sold, installed, or profited from.

Plaintiff's justification for this radical expansion of liability is "foreseeability." As every first-year law student knows, however, foreseeability can be a *Palsgraf*-like slippery slope that has no end. Courts must draw a reasonable line, and that line has been in place for the entire history of asbestos litigation and going back in time through the common law.

This Court should reject Plaintiff's invitation to create a broad new duty rule that is contrary to both Massachusetts law and the clear majority rule nationwide.

Furthermore, Plaintiff's theory represents unsound public policy. The decision would worsen the asbestos litigation and invite a flood of new cases into Massachusetts, particularly since Plaintiff's theory has been soundly rejected elsewhere.

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 Plaintiff's 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. Valve and pump manufacturers, as well as door or drywall manufacturers, 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 (the "Boy Who Cried Wolf" problem) and through conflicting information that may be provided by manufacturers of different components and by makers of finished products.

For these reasons, the Superior Court's decision to grant summary judgment in favor of Defendants-Appellees should be affirmed.

ARGUMENT

I. DEFENDANTS-APPELLEES CANNOT BE HELD LIABLE IN NEGLIGENCE BECAUSE THEY OWED NO DUTY TO PLAINTIFF-APPELLANT

In negligence, it is well established that before a defendant may be liable to a plaintiff there must first be a legal duty owed by the defendant to the plaintiff and a breach of that duty proximately

resulting in the injury. Whether a defendant has a duty of care to the plaintiff in the circumstances is a question of law for the Court, and is determined "by reference to existing social values and customs and appropriate social policy." *Cremins v. Clancy,* 415 Mass. 289, 292 (1993).[4] Contrary to Plaintiff's suggestion, foreseeability alone is insufficient to create a tort law duty.[5] Here, social values, customs, and appropriate social policy all support a finding that no duty was owed by Defendants-Appellees.

First, Massachusetts, like other states, limits the duty to warn in negligence cases to those in the chain of distribution of the hazardous product. For example, in *Mitchell v. Sky Climber, Inc.*, 396 Mass. 629 (1986), a negligence action against a seller of a

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[4] *See also Yakubowicz v. Paramount Pictures Corp.,* 404 Mass. 624, 629 (1989) ("In determining whether the law ought to provide that a duty of care is owed by one person to another, we look to existing social values and customs, and to appropriate social policy."); *Schofield v. Merrill,* 386 Mass. 244, 247 (1982) (a duty "finds its source in existing social values and customs.").

[5] As the California Supreme Court explained, "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which the foresight alone provides a socially and judicially acceptable limit on recovery of damages for injury." *Thing v. La Chusa,* 771 P.2d 814, 830 (Cal. 1989).

lift motor used in movable scaffolding equipment, the Supreme Judicial Court held, "A manufacturer of a product has a duty to warn foreseeable users of dangers in the use of *that product* of which he knows or should have known." *Id.* at 631 (emphasis added). The Court added, "We have never held a manufacturer liable . . . for failure to warn of risks created solely in the use or misuse of the product of *another manufacturer.*" *Id.* (emphasis added).

Similarly, in *Garcia v. Kusan, Inc.*, 39 Mass. App. Ct. 322 (1995), citing *Mitchell*, this Court held, "In the absence of special circumstances, [plaintiff] may not recover for instructions and representations concerning the use of other manufacturers' equipment and may only recover if he can establish that some item traced to a specific defendant caused his injury." *Id.* at 329. In *Carrier v. Riddell, Inc.*, 721 F.2d 867 (1st Cir. 1983), the First Circuit said, "we have researched Massachusetts law and can find no case imposing liability upon a manufacturer (for failure to warn) in favor of one who uses the product of a *different* manufacturer." *Id.* at 869 (emphasis in original). The court added, "there are various Massachusetts 'warning cases,' the language of which

suggests a duty of care runs to those who buy or use the product itself, not a different maker's product." *Id.*[6]

Plaintiff suggests *Mitchell*'s holding was limited to instances involving *unforeseeable* harms. *See Mitchell*, 396 Mass. at 631 (stating that a manufacturer has "no duty . . . to set forth . . . a warning of a possible risk created solely by an act of another that would not be associated with a foreseeable use or misuse of the manufacturer's own product.") At most, *Mitchell* "left unanswered the question whether a manufacturer owes a duty to warn if the potential danger, though created solely by a third party, *is* associated with a foreseeable use of the

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[6] *See also Mathers v. Midland-Ross Corp.*, 403 Mass. 688, 691 (1989) ("A plaintiff who sues a particular manufacturer for product liability generally must be able to prove that the item which it is claimed caused the injury can be traced to that specific manufacturer."); *Cipollone v. Yale Indus. Prods., Inc.*, 202 F.3d 376, 379 (1st Cir. 2000) (under Massachusetts law, "the manufacturer of a component part is liable only if the defect existed in the manufacturer's component itself."); *Feitas v. Emhart Corp., U.S.M.*, 715 F. Supp. 1149, 1153 (D. Mass. 1989) ("Because plaintiff failed to produce any evidence that defendant designed, manufactured or sold any of the components of the rubber mill which contributed to plaintiff's injury, defendant's motion for summary judgment is allowed.").

manufacturer's product." *Morin v. AutoZone Northeast, Inc.*, 79 Mass. App. Ct. 39, 51 (2011), *review denied*, 460 Mass. 1104 (2011).

Plaintiff's interpretation of *Mitchell* is too narrow. It ignores other Massachusetts authority and runs counter to the majority rule nationwide. *See, e.g., Simonetta,* 197 P.3d at 133 (explaining that the Restatement (Second) of Torts § 388 and cases from around the country limit the duty to warn to those in the chain of distribution of the hazardous product); *Stark v. Armstrong World Indus., Inc.*, 21 Fed. Appx. 371, 2001 WL 1216977, at *8 (6th Cir. 2001) ("This form of guilt by association has no support in the law of products liability.").

In fact, in cases just like this one, courts have cited *Mitchell* for the proposition that no liability can be imposed on a manufacturer for harms caused by a third party's asbestos-containing product.[7]

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[7] *See Dombrowski v. Alfa Laval, Inc.*, 2010 WL 4168848 (Mass. Super. Middlesex County July 1, 2010) ("Massachusetts courts 'have never held a manufacturer liable . . . for failure to warn of risks created solely in the use or misuse of the product of another manufacturer'") (quoting *Mitchell*); *In re Asbestos Litig. (Anita Cosner)*, 2012 WL 1694442, at *1 (Del. Super. Ct. New Castle County May 14, 2012) ("Massachusetts courts 'have never held a manufacturer
(Footnote continued on next page)

Furthermore, there are sound social policy reasons not to extend liability to remote defendants such as Defendants-Appellees for products made or sold by third parties. As this Court recently explained:

> Considerations against the imposition of a duty to warn about replacement parts include (1) the original manufacturer's lack of preventive control over the design and marketing of the later component; (2) its lack of any economic benefit from the sale of the replacement component; (3) the perishability of warnings in manuals during the span between the original sale and the later or remote owner's acquisition of the product; and (4) the greater suitability in these circumstances of a duty to warn by the component manufacturer by reason of its control, benefit, and clear accountability.

Morin, 79 Mass. App. Ct. at 51 n.10.

Other courts have identified several additional social policy factors that support a finding of no duty in the circumstances presented here. These include the fact that "the connection between

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liable . . . for failure to warn of risks created solely in the use or misuse of the product of another manufacturer'" because a finding of such a duty "would exceed all reasonable limits.") (citations omitted); *Braaten v. Saberhagen Holdings,* 198 P.3d 493, 499 (Wash. 2008) (citing *Mitchell*); *Ottinger v. American Standard, Inc.*, 2007 WL 7306556 (Pa. Com. Pl. Philadelphia County Sept. 11, 2007) (citing *Mitchell*, among other cases, for the "legal principle that a party does not have a duty to warn generally about the risks of products manufactured by another. . . .").

[Defendants-Appellees'] conduct and [Plaintiff's] injury is remote." *Taylor v. Elliott Turbomachinery Co., Inc.*, 171 Cal. App. 4th 564, 594 (Cal. App. 1st Dist. 2009).

Second, "[l]ittle moral blame can be attached to the conduct for which [Plaintiff] seeks to impose liability" (i.e., the failure to warn of dangerous propensities in other manufacturers' products). *Id.* at 595. As commentators have explained:

> Manufacturers of equipment derive no financial benefit from the sale of replacement or affixed parts manufactured by others, nor do they have the financial leverage to influence the design of those parts. As the replacement and affixed parts manufacturers have their own motives for the design and manufacture of their products, the equipment manufacturers are not a necessary factor in bringing the replacement or affixed products to market. Thus, in requiring companies that played no more than a relatively small or attenuated "role in exposing workers to asbestos to bear substantial costs of compensating for asbestos injuries not only raises fundamental questions of fairness but undercuts the deterrence objectives of the tort system."

Paul J. 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 (2009), quoting Stephen J. Carroll *et al.*, *Asbestos Litigation*

129 (RAND Corp. 2005), *at* http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf.

Third, imposing liability in situations such as this appeal would not serve the policy of preventing future harm. Asbestos litigation today arises from exposures that took place long ago. Imposing a duty to warn on Defendants-Appellees would do nothing to prevent the type of injury alleged by Plaintiff. "Such exposures have already taken place, and in light of the heavily regulated nature of asbestos today,[8] it is most unlikely that holding [Defendants-Appellees] liable for failing to warn of the danger posed by other manufacturers' products will do anything to

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[8] In 1972, the federal Occupational Safety and Health Administration ("OSHA") first issued permanent standards regulating occupational exposure to asbestos. *See* 29 C.F.R. § 1910.1001. "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). After 1972, OSHA's asbestos regulations "became increasingly stringent over time." *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 310 (E. & S.D.N.Y. 2002); *see also* Occupational Safety & Health Admin., *Regulatory History of Asbestos*, *at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=PREAMBLES&p_id=784.

prevent future asbestos-related injuries." *Taylor*, 171 Cal. App. 4th at 595.

Fourth, as described in more detail later, imposing a duty in these circumstances would impose significant burdens on manufacturers generally. Manufacturers could incur liability not only for their own products, but also for every hazardous product with which their product might foreseeably be used. The broad new duty rule sought by Plaintiff presumably would not be limited to asbestos cases, causing potentially limitless liability for any number of potential defendants in countless situations.

Fifth, because it may often be difficult for a manufacturer to know what kind of other products will be used or combined with its own product, defendants might well face the dilemma of trying to insure against unknowable risks and hazards.

Finally, "there can be little doubt" that [Defendants-Appellees'] conduct in selling critical components to the Navy "was of high social utility." *Taylor*, 171 Cal. App. 4th at 596; *see also Hall*, 2010 WL 528489, at *8 (noting "high social utility" of equipment "used to power Navy vessels and run factories").

II. DEFENDANTS-APPELLEES CANNOT BE HELD LIABLE UNDER WARRANTY LAW FOR HARMS CAUSED BY OTHERS

Liability under the implied warranty of merchantability in Massachusetts is "congruent in nearly all respects with the principles expressed in Restatement (Second) of Torts § 402A (1965)." *Haglund v. Philip Morris Inc.*, 446 Mass. 741, 746 (2006); *Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1, 22 (1998) (same); *see also Cigna Ins. Co. v. Oy Saunatec, Ltd.*, 241 F.3d 1, 15 (1st Cir. 2001) ("Actions under Massachusetts law for breach of the implied warranty of merchantability are the functional equivalent of strict liability in other jurisdictions."). "[T]he Legislature has imposed duties on merchants as a matter of social policy, and has expressed its intent that this warranty should establish liability as comprehensive as that to be found in other jurisdictions that have adopted the tort of strict product liability." *Commonwealth v. Johnson Insulation,* 425 Mass. 620, 653 (1997), quoting *Back v. Wickes Corp.,* 375 Mass. 633, 639-40 (1978). The Restatement (Second) of Torts § 402A "takes the position that the seller of 'any product in a defective condition unreasonably dangerous to the user

or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer[.]'" *Johnson*, 425 Mass. at 654, quoting Restatement (Second) of Torts § 402A (1965); *see also* Restatement Third, Torts: Products Liability § 1 (1997).

The need for a tie between a plaintiff's injury and a defective product put into the stream of commerce by the defendant is stated throughout Massachusetts case law. *See Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 354 (1983) ("Recognizing that *the seller is in the best position to ensure product safety*, the law of strict liability imposes on the seller a duty to prevent the release of "any product in a defective condition unreasonably dangerous to the user or consumer," *into the stream of commerce*.") (emphasis added), quoting Restatement (Second) of Torts § 402A(1) (1965); *Mattoon v. City of Pittsfield*, 56 Mass. App. Ct. 124, 140 (2002) (explaining that § 402A "defines the strict liability of a seller for physical harm to a user or consumer of the *seller's product*.") (emphasis added), *review denied*, 438 Mass. 1108 (2003); *Wolfe v. Ford Motor Co.*, 6 Mass. App. Ct. 346, 349 (1978) ("The duty of

the manufacturer to warn of the dangers in the use of *his product* is well established. . . .") (emphasis added).[9]

Here, however, Defendants-Appellees were not in the chain of distribution of the asbestos-containing products that allegedly caused Plaintiff's harm; therefore, they should not be held liable for harms caused by those products. Liability should not be imposed on an entity that does not manufacture or market the allegedly defective product that caused a plaintiff's injury. *See Soule v. General Motors Corp.*, 882 P.2d 298, 8 Cal. 4th 548, 568 n.5 (Cal. 1994) ("we have consistently held that manufacturers are not insurers of their products; they are liable in tort only when 'defects' in their products cause injury.").

This finding is supported by the policies underlying imposition of strict liability:

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[9] *See also Lou ex rel. Chen v. Otis Elevator Co.*, 2004 WL 504697, at *4 (Mass. Super. Feb. 13, 2004) (noting with respect to a defective product the interest of Massachusetts "in holding accountable a United States company doing business in Massachusetts if it is found to be responsible for *putting that product into the stream of commerce.*") (emphasis added).

> 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 these interests support imposing warranty liability on Defendants-Appellees, who did not market or sell the asbestos-containing insulation or replacement parts which allegedly caused Plaintiff's harm.

Plaintiff argues that warranty liability should be imposed because his exposures were "foreseeable" to Defendants-Appellees. Setting aside whether this is true, it does not change the fact that manufacturers and sellers are responsible only for reasonably foreseeable harms caused by their own products; they are not liable for harms resulting from others'

products except in limited situations not present here.

The basis for a bright-line rule that ties liability to the *injury-producing product* is that manufacturers cannot be expected to determine the relative dangers of various products they do not produce or sell and certainly do not have a chance to inspect or evaluate. This legal distinction acknowledges that overextending the level of responsibility could potentially lead to commercial as well as legal nightmares in product distribution.

"The [defendant's own] product must, in some sense of the word, 'create' the risk.'" 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). As Professor Henderson recently explained, if a manufacturer is required to warn about someone else's products, the manufacturer "is being required to perform a watchdog function in order to rescue product users from risks it had no active part in creating and over which it cannot exert meaningful control." Henderson, 37 Sw. U. L. Rev. at 601.

III. COURTS IN OUT-OF-STATE CASES HAVE REJECTED PLAINTIFF'S THEORY

The Superior Court's grant of summary judgment in favor of Defendants-Appellees is strongly supported by persuasive out-of-state authorities, including recent decisions by the Washington and California Supreme Courts and numerous other courts. With very few exceptions, such as two unreported, older, and obsolete decisions cited by Plaintiff, courts have almost uniformly held that manufacturers of products such as valves and turbines owe no duty to warn regarding the hazards of asbestos-containing products made by third parties and used in conjunction with their products.

1. Washington Supreme Court: *Simonetta/Braaten*

The Washington Supreme Court was the first court of last resort to consider the issue here, voting 6-3 to overturn an appellate court and hold that manufacturers have no duty to warn about asbestos-related hazards in new or replacement parts made by others.

In *Simonetta v. Viad Corp.*, 197 P.3d 127, 138 (Wash. 2008), the court began its opinion with a discussion of plaintiff's negligence claim and the

black-letter rule for the duty to disclose as set forth in the Restatement (Second) of Torts § 388 (1965). Section 388 provides:

> One who supplies directly or through a third person a chattel for another to use is subject to liability . . . if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that [users] . . . will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

The court said that "a careful review of case law interpreting failure to warn cases" found "little to no support under [Washington law] for extending the duty to warn to another manufacturer's product." *Id.* at 132, 133. In addition, "[c]ase law from other jurisdictions similarly limits the duty to warn in negligence cases to those in the chain of distribution of the hazardous product." *Id.* at 133.

Next, the court addressed plaintiff's strict liability claim. The court explained that strict liability is based on the rationale that imposition of liability is justified on "the defendant who, by manufacturing, selling, or marketing a product, is in the best position to know of the dangerous aspects of

the product and to translate that knowledge into a cost of production against which liability insurance can be obtained." *Id.* at 134. The court concluded that the "unreasonably dangerous product" which caused the plaintiff's harm was "the asbestos insulation," not the defendant's evaporator. *Id.* Thus, because the defendant "was not in the chain of distribution of the dangerous product" liability could not be imposed. *See id.*

Similarly, in *Braaten v. Saberhagen Holdings,* 198 P.3d 493 (Wash. 2008), the Washington Supreme Court rejected negligence and strict liability failure to warn claims against pump and valve manufacturers for harm caused by plaintiff's exposure to asbestos-containing external insulation and asbestos-containing replacement packing and replacement gaskets made by third parties. As stated, the national authority relied upon and cited by the *Braaten* court included this Court's decision in *Mitchell v. Sky Climber, Inc.*, 487 N.E.2d 1374 (Mass. 1986). *See Braaten*, 198 P.3d at 499.

In *Braaten*, the court rejected plaintiff's theories relating to externally applied third-party asbestos insulation. With respect to plaintiff's

strict liability claim, the court said, "We held in *Simonetta* that a manufacturer is not liable for failure to warn of the danger of exposure to asbestos in insulation applied to its products if it did not manufacture the insulation and was not in the chain of distribution of the insulation." *Id.* at 498 (citing *Simonetta*, 197 P.3d at 136). The court noted that its decision in *Simonetta* was "in accord with the majority rule nationwide: a 'manufacturer's duty to warn is restricted to warnings based on the characteristics of the manufacturer's own products.'" *Id.* at 498.

For similar reasons, the *Braaten* court also dismissed plaintiff's negligence claim. The court explained that, because "'the duty to warn is limited to those in the chain of distribution of the hazardous product,' the defendants here had no duty to warn of the danger of exposure to asbestos in the insulation applied to their products." *Id.* at 501, quoting *Simonetta*, 197 P.3d at 133.

The court also considered whether defendants were required to warn of the danger of exposure to asbestos in replacement packing or replacement gaskets. Once again, the court found the law straightforward and easy to apply. As the court had explained in

Simonettta, a manufacturer does not have an obligation to warn of the dangers of another manufacturer's product. Accordingly, the court held, "The defendant-manufacturers are not in the chain of distribution of asbestos-containing packing and gaskets that replaced the original packing and gaskets and thus fall within the general rule." *Braaten*, 198 P.3d at 500. "Moreover, whether the manufacturers knew replacement parts would or might contain asbestos makes no difference because such knowledge does not matter, as we held in *Simonetta*." *Id.* (citing *Simonetta*, 197 P.3d at 136).

Finally, the court rejected plaintiff's negligence claim relating to the replacement packing and gaskets. "As in the case of the asbestos-containing insulation, the general rule is that there is no duty to warn of the dangers of another manufacturer's product, the breach of which is actionable in negligence." *Id.* at 504. Because the defendant pump and valve companies were not in the chain of distribution of the replacement gaskets and packing they "had no duty to warn of the danger of

exposure to asbestos in packing and gaskets, the breach of which would be actionable negligence." *Id.*[10]

2. California Supreme Court: *O'Neil*

This year, the California Supreme Court in *O'Neil v. Crane Co.*, 266 P.3d 987 (Cal. 2012), *unanimously* reached the same conclusion as the Washington Supreme Court in *Simonetta* and *Braaten*. *O'Neil* involved a mesothelioma plaintiff allegedly exposed to asbestos as a result of supervising individuals who repaired equipment in the engine and boiler rooms of a World War II-era naval ship. He sued two companies that sold valves and pumps to the Navy for use in the ship's steam propulsion system at least twenty years earlier. It was undisputed that the defendants never manufactured or sold any of the asbestos-containing materials to which plaintiff was exposed. Instead, plaintiff's alleged asbestos exposures came from external insulation and replacement gaskets and packing made by third parties.

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[10] *See also Anderson v. Asbestos Corp., Ltd.*, 151 Wash. App. 1005, 2009 WL 2032332 (Wash. App. Div. 1 July 13, 2009) (following *Braaten* and *Simonetta* to dismiss claim against Caterpillar for asbestos insulation used with engines it manufactured).

Applying general principles of product liability law, the California Supreme Court said 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 is contrary to the purposes of strict liability.

Since the seminal case, *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963), strict liability has been understood to "insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market" or who are in chain of commerce for that product. *O'Neil*, 266 P.3d at 995. "It is 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," the court found. *Id.* at 1006. In reaching its decision, 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. The court reaffirmed that "foreseeability alone is not sufficient to create an independent tort duty"; there is no liability where the defendant's own product did not cause the plaintiff's harm. *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.[11]

3. Sixth Circuit Court of Appeals: *Lindstrom*

Earlier, in another influential decision, the Sixth Circuit held in *Lindstrom v. A-C Prods. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005), that under maritime law a pump manufacturer was not liable for injuries caused by asbestos-containing products made

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[11] *See also Floyd v. Air & Liquid Sys. Corp.*, 2012 WL 975359 (E.D. Pa. Feb. 8, 2012) ("The Supreme Court of California recently held that, under California law, a product manufacturer generally is not liable in strict liability or negligence for harm caused by a third party's products.") (applying Cal. law).

by third parties. In *Lindstrom*, a merchant seaman who worked in the engine rooms of various naval ships and developed mesothelioma as an alleged result of maintenance work on pumps and valves sued a number of manufacturers. The central issue in *Lindstrom* was causation as it related to component parts, rather than the existence of a duty. Nevertheless, the court affirmed summary judgment for Coffin Turbo Pump, Inc., which did not manufacture or supply the external insulation used on the pumps where plaintiff worked or the replacement gaskets that may have caused his illness. The court held, "Coffin Turbo cannot be held responsible for the asbestos contained in another product." *Id.* at 496. The court also affirmed summary judgment for other pump manufacturers with respect to exposures plaintiff may have had to asbestos in replacement gaskets and packing made by other companies. *See id.* at 495.[12]

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[12] *See also Stark v. Armstrong World Indus., Inc.*, 21 Fed. Appx. 371, 2001 WL 1216977, at *8 (6th Cir. 2001) (rejecting claim that turbine and boiler manufacturers should be held liable because their equipment "is integrated into the machinery of the vessel, much of which uses and may release asbestos.").

Lindstrom was recently adopted in other maritime law cases by the current manager of the federal asbestos multidistrict litigation, Judge Eduardo Robreno of the United States District Court for the Eastern District of Pennsylvania. *See Conner v. Alfa Laval, Inc.*, - F. Supp. 2d -, 2012 WL 288364, at *7 (E.D. Pa. Feb. 1, 2012) ("[T]his 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.").[13]

Lindstrom was also followed this year by Delaware courts. *See In re Asbestos Litig. (Harold and Shirley Howton)*, 2012 WL 1409011, at *6 (Del. Super. Ct. New

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[13] *See also Floyd v. Air & Liquid Sys. Corp.*, 2012 WL 975615 (E.D. Pa. Feb. 8, 2012); *Various Plaintiffs v. Various Defendants*, 2012 WL 1106730 (E.D. Pa. Apr. 3, 2012).

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."); *In re Asbestos Litig. (Wesley K. Davis)*, 2011 WL 2462569, at *5 (Del. Super. Ct. New Castle County June 7, 2011) ("Consistent with *Lindstrom* and *Braaten*, 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.").

4. Maryland Appellate Court: *Wood*

In another often-cited earlier case, *Ford Motor Co. v. Wood*, 703 A.2d 1315, 1331 (Md. Ct. Spec. App.), *cert. denied*, 709 A.2d 139 (Md. 1998), *abrogated on other grounds, John Crane, Inc. v. Scribner* 800 A.2d 727 (Md. 2002), plaintiffs alleged asbestos exposure from replacement parts in older Ford vehicles. Unable to identify the maker of the replacement parts, plaintiffs sued Ford claiming that "regardless of who manufactured the replacement parts, there was sufficient evidence from which a jury could infer that

Ford had a duty to warn of the dangers involved in replacing the brakes and clutches on its vehicles." *Id.* at 1130. The Maryland appellate court held that "a vehicle manufacturer [is liable only for defective components] incorporated…into its finished product." *Id.* at 1331 (citing *Baughman v. General Motors Corp.*, 780 F.2d 1131 (4th Cir. 1986)). The court was "unwilling to hold that a vehicle manufacturer has a duty to warn of dangers of a product that it did not manufacture, market, or sell, or otherwise place into the stream of commerce." *Id.* at 1332.

In *Baughman,* the decision cited in *Wood,* the court 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:

> 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 Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 472 (11th Cir. 1993); *Spencer v. Ford Motor Co.*, 367 N.W.2d 393, 396 (Mich. App. 1985); *Acoba v. General Tire, Inc.*, 986 P.2d 288, 305 (Haw. 1999).

5. Other Recent Decisions Add More Support

Additional support for rejecting Plaintiff's novel theory is found in recent decisions by Pennsylvania appellate and trial courts,[14] New York appellate and federal courts,[15] Delaware trial courts

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[14] *See Schaffner v. Aesys Tech., LLC,* 2010 WL 605275 (Pa. Super. Jan. 21, 2010); *Ottinger v. American Standard, Inc.*, 2007 WL 7306556 (Pa. Com. Pl. Philadelphia County Sept. 11, 2007); *Kolar v. Buffalo Pumps, Inc.*, 2010 WL 5312168, 15 Pa. D. & C. 5th 38 (Pa. Com. Pl. Philadelphia County Aug. 2, 2010); *Montoney v. Cleaver-Brooks, Inc.*, 2012 WL 359523 (Pa. Com. Pl. Philadelphia County Jan. 5, 2012); *compare Chicano v. General Elec. Co.*, 2004 WL 2250990 (E.D. Pa. Oct. 5, 2004).

[15] *See Surre v. Foster Wheeler LLC*, - F. Supp. 2d -, 2011 WL 6382545 (S.D.N.Y. Dec. 20, 2011); *In re Eighth Judicial Dist. Asbestos Litig. (Drabczyk v. Fisher Controls Int'l)*, 92 A.D.3d 1259, 938 N.Y.S.2d 715 (N.Y. App. Div. 4th Dept. 2012); *but see Berkowitz v. A.C.&S., Inc.*, 288 A.D.2d 148, 733 N.Y.S.2d 410 (1st Dept. 2001).

applying the law of various states (including Massachusetts),[16] trial court decisions in Maine,[17] Minnesota,[18] and New Jersey,[19] and an Illinois federal court opinion,[20] among others.

IV. OTHER AUTHORITY SUPPORTS DEFENDANTS-APPELLEES

Numerous other decisions from around the country that involve other products also support a finding that Plaintiff's claims fail as a matter of law. For

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[16] *See In re Asbestos Litig. (Anita Cosner)*, 2012 WL 1694442 (Del. Super. Ct. New Castle County May 14, 2012) (applying Mass. law); *Wilkerson v. American Honda Motor Co., Inc.*, 2008 WL 162522 (Del. Super. Ct. New Castle County Jan. 17, 2008) (Del. law); *In re Asbestos Litig. (Irene Taska)*, 2011 WL 379327 (Del. Super. Ct. New Castle County Jan. 19, 2011) (applying Conn. law); *In re Asbestos Litig. (Arland Olson)*, 2011 WL 322674 (Del. Super. Ct. New Castle County Jan. 18, 2011) (applying Idaho law); *In re Asbestos Litig. (Ralph Curtis and Janice Wolfe)*, 2012 WL 1415706 (Del. Super. Ct. New Castle County Feb. 28, 2012) (applying Or. law); *In re Asbestos Litig. (Reed Grgich)*, 2012 WL 1408982 (Del. Super. Ct. New Castle County Apr. 2, 2012) (applying Utah law).

[17] *See Rumery v. Garlock Sealing Tech., Inc.*, 2009 WL 1747857 (Me. Super. Ct. Cumberland County Apr. 24, 2009).

[18] *See Nelson v. 3M Co.*, 2011 WL 3983257 (Minn. 2d Dist. Ct. Ramsey County Aug. 16, 2011).

[19] *See Mystrena v. A.W. Chesterton Co.*, No. MID-L-4208-10 (N.J. Super. Ct. Middlesex County May 8, 2012); *Fayer v. A.W. Chesterton Co.*, No. MID-L-5016-10 (N.J. Super. Ct. Middlesex County May 8, 2012).

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

example, in *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222 (N.Y. 1992), plaintiff's decedent was killed while inflating a Goodyear tire when a multipiece tire rim made by a different company separated explosively. Plaintiff's decedent claimed, among other things, that Goodyear had a duty to warn against its tire being used with allegedly defective multipiece tire rims made by others. 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 for use with a defective product of another manufacturer." *Id.* at 225-226.

Similarly, in *Brown v. Drake-Willock Int'l, 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.

Numerous other decisions are in agreement. *See, e.g., 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."); *In re Deep Vein Thrombosis,* 356 F. Supp. 2d 1055, 1068 (N.D. Cal. 2005)("no case law . . . supports the idea that a manufacturer, after selling a completed product to a purchaser, remains under a duty to warn the purchaser of potentially defective additional pieces of equipment that the purchaser may or may not use to complement the product bought from the manufacturer."); *Fleck v. KDI Sylvan Pools,* 981 F.2d 107, 118 (3d Cir. 1992) (stating 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,* 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").[21]

V. IMPOSITION OF A DUTY REQUIREMENT 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.*, 727 N.Y.S.2d 7 (N.Y. 2001). That policy would be significantly undermined by the theory promoted by Plaintiff. Defendants whose products happen to be used in conjunction with defective products made or

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[21] *See also Sperry v. Bauermeister, Inc.*, 804 F. Supp. 1134, 1140 (E.D. Mo. 1992) (seller not liable for incorporation of its parts into system designed by another), *aff'd*, 4 F.3d 596 (8th Cir. 1993); *Fricke v. Owens-Corning Fiberglas Corp.*, 618 So. 2d 473, 475 (La. App. 1993) (manufacturer not liable for inadequate warning on product it neither made nor sold); *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1309 (3d Cir. 1995) (recycling machine component part manufacturer was not liable for a failure to warn of the danger of another component which it neither manufactured nor assembled); *Walton v. Harnischfeger*, 796 S.W.2d 225, 226 (Tex. App.-San Antonio 1990) (crane manufacturer had no duty to warn about rigging it did not manufacture, integrate into its crane, or place in the steam of commerce).

supplied by others could incur liability not only for their own products, but also for every other product with which their product might foreseeably be used.

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 (DRI 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." 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. 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, so unpredictable, and so 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 (the "Boy Who Cried Wolf" problem) and through conflicting information on different components and finished products." David C. Landin *et al., Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Public Policy in Asbestos Litigation*, 16 Brook. J.L. &

Pol'y 589, 630 (2008) (urging courts to reject the duty Plaintiff seeks here).[22]

VI. IMPOSITION OF A DUTY REQUIREMENT WOULD EXACERBATE ASBESTOS LITIGATION

The United States Supreme Court in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997), described the asbestos litigation as a "crisis." The litigation has forced almost 100 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 Corp. 2010), *at* http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf, devastating defendant companies, their employees, retirees, shareholders, and surrounding communities. *See* Joseph E. Stiglitz *et al.*, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003).

As a result, "the net has spread from the asbestos makers to companies far removed from the

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[22] *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….").

scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract at* 2001 WLNR 1993314. 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. The broad new duty rule sought by Plaintiff here would worsen the asbestos litigation and fuel claims against remote defendants.

Finally, it is important to note that while Plaintiff no doubt seeks to impose liability on solvent manufacturers as a substitute for primary historical defendants that have been forced into bankruptcy, trusts have been created to pay claims involving those companies' products. Funds available from these trusts are available to Massachusetts asbestos claimants, in addition to recoveries obtained from tort system defendants. It is unnecessary to twist tort law in the manner sought by Plaintiff to provide asbestos claimants with adequate recoveries.

In fact, scores of 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. *See* U.S. Government Accountability Office, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts*, GAO-11-819, at 3 (Sept. 2011), *at* http://www.gao.gov/products/GAO-11-819. "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).[23]

CONCLUSION

For these reasons, *amici* urge this Court to affirm the Superior Court's decision granting summary judgment to Defendants-Appellees.

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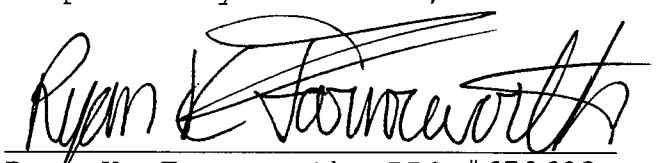
[23] For example, it is estimated that mesothelioma plaintiffs in Alameda County (Oakland) will receive an average $1.2 million from active and emerging asbestos bankruptcy trusts, *see* Charles E. Bates *et al.*, *The Naming Game*, 24:15 Mealey's Litig. Rep.: Asbestos 1 (Sept. 2, 2009), and could receive 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). Massachusetts claimants with similar injuries would receive similar treatment.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE
PURSUANT TO MASS. R. A. P. 16(k)

I hereby certify that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs, including but not limited to Rules 16(a)(6) (pertinent findings or memorandum of decision), 16(f) (reproduction of statutes, rules, and regulations), 16(h) (lengths of briefs), 18 (appendix to the briefs), and 20 (form of briefs, appendices, and other papers).

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Dated: June 7, 2012

CERTIFICATE OF SERVICE

I certify that I served two copies of the foregoing Brief upon counsel by mailing them in a first-class postage-prepaid envelope put into a depository under the exclusive care and custody of the U.S. Postal Service on June 7, 2012, addressed to the following:

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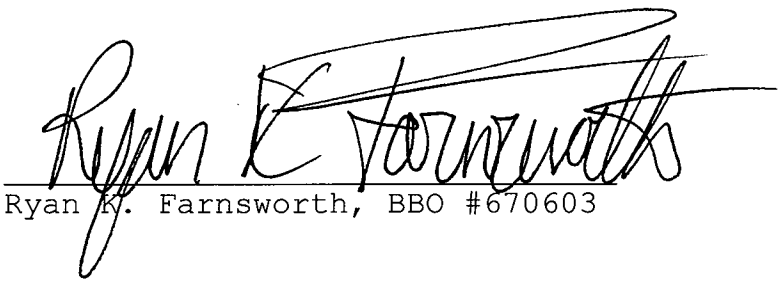

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