IN THE COURT OF APPEALS OF MARYLAND

No. 544, September Term, 2014

RUTH BELCHE MAY,

Petitioners/Appellants,

v.

AIR & LIQUID SYSTEMS, INC., *ET AL.*,

Respondents/Appellees.

On Appeal from the Court of Special Appeals of Maryland
No. 02670, September Term, 2012

AMICI CURIAE BRIEF OF MARYLAND CHAMBER OF COMMERCE, MANUFACTURERS' ALLIANCE OF MARYLAND, COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND NFIB SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENTS/APPELLEES

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QUESTION PRESENTED

Whether a manufacturer has a duty to warn with respect to asbestos-containing products manufactured, supplied, or placed in the stream of commerce by third-parties.

INTEREST OF *AMICI CURIAE*

Amici[1] are organizations that represent companies doing business in Maryland, their insurers, and civil justice organizations. Accordingly, *amici* have a substantial interest in ensuring that Maryland's tort system is fair, follows traditional tort law rules, and reflects sound public policy. The Court of Special Appeals' decision not to impose liability on Respondents/Appellees for failure to warn about hazards caused by *other manufacturers'* asbestos-containing products is consistent with these principles, as well as Maryland precedent and the clear majority rule nationwide. The Court of Special Appeals' decision should be affirmed. *Amici*'s members would be adversely affected if the decision below is reversed.

STATEMENT OF THE CASE

Amici adopt Respondents/Appellees' Statement of the Case.

STATEMENT OF FACTS

Amici adopt Respondents/Appellees' Statement of Facts as relevant to *amici*'s argument here.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Now in its fourth decade, the asbestos litigation still costs employers and insurers billions of dollars a year and is expected to last several more decades. Approximately 100 companies have been forced into bankruptcy due at least in part to asbestos-related liabilities, yet the litigation marches on, sustained by changes in claiming practices by plaintiffs' lawyers and new theories of liability. Over time, the connection between

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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.

plaintiffs and asbestos-containing products has become increasingly remote, and the liability connection more attenuated. As Delaware Superior Court Judge Peggy Ableman (ret.) recently observed, the asbestos plaintiffs' bar has "succeeded in keeping the litigation alive and thriving no matter how tenuous the nexus is between the injured plaintiffs and the ever-growing number of alleged wrongdoers." Peggy Ableman, *The Time Has Come for Courts to Respond to The Manipulation of Exposure Evidence in Asbestos Cases: A Call for The Adoption of Uniform Case Management Orders Across the Country*, 30:5 Mealey's Litig. Rep.: Asbestos 1, 8 (Apr. 8, 2015). This appeal is an example.

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, valves, and evaporators used on ships to desalinize sea water – 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 Navy. Plaintiffs' lawyers are also claiming (as in this case) that manufacturers of products such as pumps and valves that originally came with asbestos-containing gaskets or packing should have warned about potential harms from exposure to replacement internal gaskets or packing or replacement external flange gaskets manufactured and sold by third-parties.

Plaintiffs' lawyers are promoting this novel theory because most major manufacturers of asbestos-containing thermal insulation products have filed bankruptcy and the Navy enjoys sovereign immunity.[2] "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,*

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[2] *See* 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, 38 (2009) ("Unable to collect against insolvent manufacturers, asbestos personal injury attorneys began searching for alternative and ancillary sources of recovery.").

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).[3]

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*. Product liability law generally attaches to entities *which participate in the chain of distribution* of a product that causes harm because of a *defect* in *that product*. *See* Restatement (Second) of Torts § 402A (1965); Restatement Third, Torts: Products Liability § 1 (1998).[4]

Furthermore, Plaintiffs' theory represents unsound public policy. If adopted, Plaintiffs' third-party duty to warn theory would worsen the four decades long asbestos

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[3] *See also* Riehle *et al.*, 44 U.S.F. L. Rev at 38 ("Not content with the remedies available through bankruptcy trusts and state and federal worker compensation programs, claimants' lawyers have extended the reach of products liability law to 'ever-more peripheral defendants' who used asbestos-containing materials on their premises or contemplated the use of asbestos-containing parts in connection with their products.") (quoting Alan Calnan & Byron G. Stier, *Perspectives on Asbestos Litigation: Overview and Preview*, 37 Sw. U. L. Rev. 459, 463 (2008)).

[4] 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); *see also* Restatement (Second) of Torts § 402A cmt. *f* (1965) (noting that § 402A applies to "any person engaged in the business of selling" product causing harm); Restatement (Third) of Torts: Prods. Liab. § 1 (1998) ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.").

litigation and invite a flood of new cases. *See Taylor v. Elliott Turbomachinery Co., Inc.*, 90 Cal. Rptr. 3d 414, 439 (Ct. App. 2009) ("Defendants whose products happen to be used in conjunction with defective products made or 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.").

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. *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).[5] As the California Supreme Court said in a case virtually identical to this one, "To warn of all potential dangers would warn of nothing." *O'Neil v. Crane Co.*, 266 P.3d 987, 1006 (Cal. 2012) (citation omitted).

For these reasons, courts nationwide have almost uniformly held that a manufacturer has no duty to warn to warn about hazards in a third-party's asbestos-containing product.[6] The case law is documented in the literature. *See* Mark A. Behrens

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[5] *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.'" Riehle *et al.*, 44 U.S.F. L. Rev at 61-62 (quoting Stephen J. Carroll *et al.*, *Asbestos Litigation* 129 (RAND Corp. 2005)).

[6] *See, e.g., O'Neil v. Crane Co.*, 266 P.3d 987 (Cal. 2012); *Simonetta v. Viad Corp.,* 197 P.3d 127 (Wash. 2008); *Braaten v. Saberhagen Holdings,* 198 P.3d 493 (Wash. 2008); *Toole v. Georgia-Pacific, LLC,* 2011 WL 7938847 (Ga. Ct. App. 2011); *Whiting v. CBS Corp.*, 2013 WL 530860, 982 N.E.2d 1224 (Table) (Mass. Ct. App. 2013); *Schaffner v. Aesys Tech., LLC,* 2010 WL 605275 (Pa. Super. Jan. 21, 2010); *Lindstrom v. A-C Prods. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005); *Conner v. Alfa Laval, Inc.,* 842 F. Supp. 2d 791 (E.D. Pa. 2012); *Faddish v. Buffalo Pumps*, 881 F. Supp. 2d 1361 (S.D. Fla. 2012); *Niemann v McDonnell Douglas Corp.,* 721 F. Supp. 1019 (S.D. Ill. 1989); *see also Hughes v. A.W. Chesterton Co.*, 89 A.3d 179 (N.J. Super. A.D.), *cert. denied*, 220 N.J. 41 (2014) (causation lacking where harm caused by third-party product).

& Margaret Horn, *Liability for Asbestos-Containing Connected or Replacement Parts Made by Third Parties: Courts Are Properly Rejecting This Form of Guilt by Association,* 37 Am. J. Trial Advoc. 489 (2014); Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander,"* 23 Widener L.J. 59 (2013); 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).[7]

This brief provides an overview of the current asbestos litigation environment and discusses the ramifications of the multi-billion dollar asbestos bankruptcy trust claim compensation system that operates parallel to, but independent of, the civil tort system. Outside of traditional tort payments, this parallel compensation system provides substantial compensation to plaintiffs for harms caused by companies that were "the largest tort system asbestos defendants in terms of number of lawsuits total compensation paid to plaintiffs, and judgments rendered"[8] until those companies reorganized in bankruptcy and emerged immune from further tort liability. There is no need to upend

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[7] *See also Dalton v. 3M Co.*, 2013 WL 4886658, at *10 (D. Del. Sept. 12, 2013) ("The majority of courts embrace the principles of the bare metal defense and refuse to impose liability upon manufacturers for the dangers associated with asbestos-containing products manufactured and distributed by other entities."), *report and recommendation adopted*, 2013 WL 5486813 (D. Del. Oct. 1, 2013); *In re Asbestos Litig. (Arland Olson),* 2011 WL 322674, at *2 (Del. Super. Ct. New Castle Cnty. Jan. 18, 2011) (following "the persuasive weight of decisions from other jurisdictions declining to impose a duty" where the defendant failed to warn or protect against hazards arising from a product it did not manufacture, distribute, or sell, "even if the defendant's product incorporated component parts that posed similar risks and would require replacement."); *Morgan v. Bill Vann Co., Inc.,* 969 F. Supp. 2d 1358, 1366-67 (S.D. Ala. 2013) ("the prevailing majority rule in other jurisdictions is to recognize the 'bare metal defense' (under which a pump manufacturer...cannot be liable for a third party's asbestos materials used with its products, where the pump manufacturer was not in the chain of distribution of such asbestos-containing materials)" and that "the trend in other jurisdictions favors adoption of that defense for sound and even compelling policy reasons....").

[8] *O'Neil v. Crane Co.* (Cal. July 28, 2010) 2010 WL 2984322, at *1 (Application and *Amicus Curiae* Brief of Bates White LLC Supporting Respondents).

Maryland tort law to provide compensation to persons injured through products made or sold by third-parties.

For these reasons, this Court should affirm the decision below.

ARGUMENT

I. THE ASBESTOS LITIGATION ENVIRONMENT

So far, "roughly 100 companies have entered bankruptcy to address their asbestos liabilities," including virtually all manufacturers of asbestos-containing thermal insulation. S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299, 301 (2013). Many of these bankruptcies occurred during a Bankruptcy Wave in the early 2000s, but the problem continues to this day. *See id.* at 306 ("Defendants who were once viewed as tertiary have increasingly become lead defendants in the tort system, and many of these defendants have also entered bankruptcy in recent years."); *see also Furthering Asbestos Claim Transparency (Fact) Act of 2013*, H.R. Rep. No. 113-254, at 5 (Oct. 30, 2013) ("more than half" of the asbestos-related bankruptcies have occurred since "the beginning of the year 2000.").[9]

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; 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 higher settlement demands on other established defendants, including those attempting to ward off bankruptcy, as well as a search for new recruits to fill the gap in the ranks of defendants through joint and several liability.").[10] One plaintiffs' attorney described the asbestos litigation as an "endless

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[9] These bankruptcies have had devastating impacts on the companies' employees, retirees, shareholders, and communities. *See* Joseph E. Stiglitz *et al.*, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003).

[10] *See also* Carroll *et al.*, *supra*, at xxiii ("When increasing asbestos claims rates encouraged scores of defendants to file Chapter 11 petitions...the resulting stays in litigation...drove plaintiff attorneys to press peripheral non-bankrupt defendants to

search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation' - A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).

The expanded range of defendants has produced exponential growth in the dimensions of the litigation. The Towers Watson consulting firm has identified "more than 10,000 companies, including subsidiaries, named in asbestos litigation." Towers Watson, *A Synthesis of Asbestos Disclosures From Form 10-Ks – Updated* 1 (June 2013). "Parties formerly viewed as peripheral defendants are now bearing the majority of the costs of awards relating to decades of asbestos use." Am. Academy of Actuaries' Mass Torts Subcomm., *Overview of Asbestos Claims Issues and Trends* 1, 3 (Aug. 2007).

The influx of asbestos claims shows no signs of abating. A 2014 review of asbestos-related liabilities reported to the Securities and Exchange Commission by more than 150 publicly traded companies showed that "[s]ince 2007, filings have been fairly stable" and "continued at this level in 2013." Mary Elizabeth C. Stern & Lucy P. Allen, *Snapshot of Recent Trends in Asbestos Litigation: 2014 Update* 7 (NERA Econ. Consulting May 22, 2014); *see also* Towers Watson, *supra*, at 1 (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." Towers Watson, *supra*, at 5; *see also* Bibeka Shrestha, *Expected Asbestos Losses For Insurers Climb By $10B*, Law360, Dec. 12, 2012 (quoting A.M. Best Special Report that drastically raised estimates for how much insurers face in net ultimate asbestos losses, stating, "With no end to these losses in sight...it is clear that the asbestos problem will persist for many years to come."). Industry analysts predict that approximately 28,000 mesothelioma claims will be filed. *See* Towers Watson, *supra*, at 1.[11]

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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.").

[11] The business of mesothelioma litigation and the lucrative fees such cases produce for plaintiffs' lawyers has resulted in "mesothelioma" and "asbestos" being two of the

II. IMPACT OF BANKRUPTCIES ON TORT DEFENDANTS

The "Bankruptcy Wave" that occurred in the early 2000s had dramatic impacts on the evolution of the asbestos litigation. In particular, that wave "removed from the tort system the source of most of the compensation plaintiffs had heretofore been receiving." *O'Neil v. Crane Co.*, 2010 WL 2984322, at *9 (Cal. July 28, 2010) (Application and *Amicus Curiae* Brief of Bates White LLC Supporting Respondents) [hereinafter Bates White *amicus*]. These impacts continue to affect tort system defendants today.

When a company files bankruptcy due to asbestos-related liabilities, tort litigation against the debtor is stayed by the Bankruptcy Court. After the bankruptcy reorganization is complete, the debtor's asbestos liabilities—including future claims—are channeled into trusts set up to pay claims and the reorganized company emerges immune from asbestos-related tort litigation. As explained by the United States Government Accountability Office:

> Generally, filing for bankruptcy halts civil lawsuits and other actions against the debtor company (the company filing for bankruptcy) for the duration of the bankruptcy process. For those companies seeking to reorganize pursuant to Chapter 11 of the federal bankruptcy code, 11 U.S.C. § 524(g) affords the debtor company an opportunity to channel (by way of a channeling injunction) all future asbestos-related liabilities to an asbestos personal injury trust established as part of the company's reorganization and in accordance with § 524(g). Pursuant to § 524(g), the asbestos personal injury trust assumes the debtor company's asbestos-related liabilities while assets of the debtor company are transferred to the asbestos trust for investment and management. The trusts then pay present and future asbestos-related claims, thus relieving the reorganized company of all present and future asbestos-related liabilities.

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most expensive Google AdWords, with "mesothelioma settlement" commanding almost $143 per click. *See* Barry Schwartz, *Mesothelioma, Asbestos, Annuity: Google's Most Expensive Keywords*, Search Engine Land (Nov. 9, 2012).

U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 2-3 (Sept. 2011); *see also* Lloyd Dixon *et al.*, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* (Rand Corp. 2010). "Normally, the trust distribution plans evolve into an administrative process run by claim processing professionals that requires a claim form to be filed containing the basic exposure, medical, and personal history necessary to evaluate a claim." Francis E. McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, 62 N.Y.U. Ann. Surv. Am. L. 163, 167 (2006).

The asbestos plaintiffs' bar adapted to the "Bankruptcy Wave" and began to target "peripheral defendants" to replace the "top-tier defendants that had produced thermal insulation and refractory products and had accounted for a substantial share of the compensation paid by defendants in the tort system." Lester Brickman, Testimony on H.R. 526, the "Furthering Asbestos Claim Transparency (FACT) Act of 2015, Hearing Before the House Judiciary Comm. Subcomm. on Reg. Reform, Com. & Antitrust L., Feb. 4, 2015, *available at* 2015 WLNR 3578295. Some of these defendants were new to the tort system; others were previously named in tort cases but had played a relative minor role in the litigation. *See* Bates White *amicus, supra,* at *11 ("the defendants that remained in the tort system after the bankruptcy wave saw a dramatic increase in the frequency with which they were named, and new defendants, thousands of whom had never been named in an asbestos case, were brought into the litigation."); Peggy L. Ableman, *A Case Study From a Judicial Perspective: How Fairness and Integrity in Asbestos Tort Litigation Can Be Undermined by Lack of Access to Bankruptcy Trust Claims*, 88 Tul. L. Rev. 1185, 1209 (2014) ("After the primary asbestos insulation manufacturers, who had previously been responsible in tort for the lion's share of the liability, went bankrupt, the payments by the peripheral defendants increased, even though the extent of their responsibility for exposure remained unchanged.").

Another shift that occurred was a dramatic increase in the asbestos-related payments made by the companies that remained in the tort system because of their new position as targets of asbestos litigation. Defendants have struggled to muster evidence

necessary to show that alternative exposures were entirely, or at least partially, responsible for plaintiffs' injuries. *See* Lloyd Dixon & Geoffrey McGovern, *Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases* (Rand Corp. 2015); Marc C. Scarcella *et al.*, *The Philadephia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations From 1991-2010*, 27:19 Mealey's Litig. Rep.: Asbestos 1 (Nov. 7, 2012). With the removal of the primary historical defendants from the tort system, it was no longer in the strategic interest of plaintiffs' firms to refresh their clients' recollections as to exposures to those companies' products. Plaintiffs' firms appreciated that such testimony would provide a basis for placing the fault for a plaintiffs' injury on nonparties at trial.

Furthermore, once it became clear to plaintiffs' firms that courts would compel the production of asbestos trust claims (with their admissions of other exposures) in tort cases,[12] many plaintiffs' firms simply stopped filing their trust claims until after their tort cases were resolved. Trust claim submissions allow defendants to overcome the persistence of plaintiff "I don't recall" testimony and serve as a powerful admission by the plaintiff about other exposures to asbestos[13]—except when plaintiffs' firms manipulate the timing of these filings to prevent their disclosure.

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[12] *See, e.g., Porter Hayden Co. v. Bullinger*, 713 A.2d 962, 969 (Md. 1998) ("Given the broad scope and purpose of Maryland's discovery rules, the relevancy of the amounts of the [bankruptcy trust] settlements to the damages petitioners were required to pay, the fact that the settlement agreements are not privileged, and the persuasive authority from other jurisdictions, we conclude that the relevant portions of such settlement agreements are discoverable."); *Scapa Dryer Fabrics, Inc. v. Saville*, 16 A.3d 159, 179 (Md. 2011) ("*Bullinger* establishes that § 524(g) Trust settlement agreements and payment amounts are discoverable...."); *see also Willis v. Buffalo Pumps, Inc.*, 2014 WL 2458247, *1-2 (S.D. Cal. June 2, 2014) ("Federal and state courts have routinely held that claims submitted to asbestos bankruptcy trusts are discoverable.").

[13] *See* Mark D. Plevin, *The* Garlock *Estimation Decision: Why Allowing Debtors and Defendants Broad Access to Claimant Materials Could Help Promote the Integrity of the Civil Justice System*, 23 J. Bankr. L. & Prac. 458 (2014) ("Because they require sworn statements that the claimant was exposed to a particular debtor's asbestos, the trust submissions may be the most important documents for a defendant attempting to undermine the credibility of a plaintiff's tort system assertions."); Ableman, 88 Tul. L.

These trends were recently described in *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 96 (W.D.N.C. Bankr. 2014) (in bankruptcy hearing to estimate gasket and packing manufacturer Garlock Sealing Technologies, LLC's liability for present and future mesothelioma claims, the court explained: "Beginning in early 2000s, the remaining large thermal insulation defendants filed bankruptcy cases and were no longer participants in the tort system. As the focus of plaintiffs' attention turned more to Garlock as a remaining solvent defendant, evidence of plaintiffs' exposure to other asbestos products often disappeared. Certain plaintiffs' law firms used this control over the evidence to drive up the settlements demanded of Garlock."); *see also* Peggy L. Ableman, *The Garlock Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases*, 37 Am. J. Trial Adv. 479 (2014).

III. PLAINTIFF COMPENSATION AND ASBESTOS TRUSTS

Today, many of the companies that filed for bankruptcy protection due, in part, to asbestos litigation "have emerged from the 524(g) bankruptcy process leaving in their place dozens of trusts funded with tens of billions in assets to pay claims." Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12:11 Mealey's Asbestos Bankr. Rep. 33, 33-34 (June 2013). "These trusts answer for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades." William P. Shelley *et al.*, *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 Widener L.J. 675, 675-76 (2014).

Over sixty trusts have been established to form a privately-funded asbestos personal injury compensation system that operates parallel to, but wholly independent of, the civil tort system. *See* U.S. GAO, *supra*, at 3; *see also* Lloyd Dixon *et al.*, *supra* at 25.

Rev. at 1209 ("[A]s plaintiffs reach out to more fringe levels of defendants, it becomes increasingly difficult to know what other exposures have taken place. It is the trust submissions that will provide an efficient means of identifying these other exposures.").

As of 2011, these trusts collectively held *$36.8 billion* in assets. *See* U.S. GAO, *supra*, at 3.

Asbestos trusts are designed to settle claims quickly. *See* Dionne Searcy & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, Wall St. J., Mar. 11, 2013, at A1 ("Unlike court, where plaintiffs can be cross-examined and evidence scrutinized by a judge, trusts generally require victims or their attorneys to supply basic medical records, work histories and sign forms declaring their truthfulness. The payout is far quicker than a court proceeding and the process is less expensive for attorneys."). If a claimant meets a trust's criteria for payment—criteria which are less rigorous than the tort system—the claimant will receive a payment. *See* U.S. GAO, *supra*, at 21.[14] "Thus, it is possible that some claims may be approved even if the evidence supporting exposure may not survive early dispositive motions in the relevant state court." Brown, *supra*, at 317.

It is common for a person to receive multiple trust payments since each trust operates independently and workers were often exposed to different asbestos products. Cardozo Law School Professor Lester Brickman, an asbestos litigation expert, has said:

> I estimate that mesothelioma victims (and nonmalignant claimants) with exposures to industrial and commercial asbestos-containing products distributed nationally will typically qualify for payment from fifteen to twenty trusts. This estimate does not include three trusts pending confirmation, with billions of dollars in assets to add to the trust compensation system, which also have national industrial or commercial exposure profiles. Finally, thirteen trusts have been formed from the assets of companies that sold or distributed their products only regionally or that had other limited exposures profiles. Trust claimants who allege exposure

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[14] *See also* Adrienne Bramlett Kvello, *The Best of Times and the Worst of Times: How Borg-Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas*, 40 The Advoc. (Tex.) 80, 80 (2007) ("it is much easier to collect against a bankruptcy trust than a solvent defendant.").

> to products associated with these companies may, in addition to all their other trust filings, also file claims with the trusts formed by the regional companies if they can show the requisite exposure.

Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071, 1078-79 (2014).

Thus, asbestos plaintiffs today have two completely separate paths to obtain compensation. In addition to tort system payments, billions of dollars are available in the asbestos bankruptcy trust system to pay claimants for harms caused by exposures to the former insulation defendants and others that provided the primary compensation to asbestos plaintiffs for many years. *See* Dixon & McGovern, *supra*, at iii ("Plaintiffs now often receive compensation both from the trusts and through a tort case.").[15] In the recent *Garlock* bankruptcy proceeding, for example, a typical mesothelioma plaintiff's total recovery was estimated to be $1-1.5 million, "including an average of $560,000 in tort recoveries and about $600,000 from 22 trusts." *In re Garlock Sealing Techs.*, 504 B.R. at 96.

Most recently, an unsealed database from the Garlock bankruptcy estimation trial showed that awards to asbestos claimants represented by a dominant plaintiffs' law firm in one of the most active asbestos "magnet" jurisdictions in the U.S. (Madison County, Illinois) have received on average more than $800,000 apiece, with a substantial portion of those funds (approximately 41%) from bankruptcy trusts. *See* Heather Isringhausen Gvillo, *Database Provides Insight Into How Much Asbestos Claims Are Worth*, Madison-St. Clair Record, May 14, 2015 (thirty-eight plaintiffs in Madison County had lawsuits with a total value of $21.7 million and also received $8,859,879 from various bankruptcy trusts). The recently unsealed database also showed that a sample of 850 asbestos claimants from across the country—"representing just a sliver of the asbestos claimant

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[15] *See also* U.S. GAO, *supra*, at 15 ("Although 60 companies subject to asbestos-related liabilities have filed for bankruptcy under Chapter 11 and established asbestos bankruptcy trusts in accordance with § 524(g), asbestos claimants can also seek compensation from potentially liable solvent companies (that is, a company that has not declared bankruptcy) through the tort system.").

universe—have so far been awarded $334,711,143 in the court system and $182,259,276 from the bankruptcy trust system, for a total of $516,970,419." *Id.*

In fact, the present lack of coordination between the asbestos bankruptcy trust claim and civil tort systems in Maryland and many other states often leads to "double dipping" as plaintiffs manipulate the timing of their trust claim filings in order to maximize their tort system recoveries and then receive additional asbestos trust payments for the same injury. *See* William P. Shelley *et al.*, *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 J. Bankr. L. & Prac. 257 (2008); *see also* Editorial, *The Double-Dipping Legal Scam*, Wall St. J., Dec. 25, 2014, at A12 (describing "'double-dipping'—in which lawyers sue a company and claim its products caused their clients' disease, even as they file claims with asbestos trusts blaming other products for the harm. This lets them get double or multiple payouts for a single illness, with a huge cut for the lawyers each time."); Daniel Fisher, *Double-Dippers*, Forbes, Sept. 4, 2006, at 136, *available at* 2006 WLNR 14529626.

There is no need to upend Maryland tort law to provide compensation to persons injured through products made or sold by third-parties.

CONCLUSION

For these reasons, this Court should affirm the decision below.

STATEMENT OF RULE 8-504 COMPLIANCE

I certify that the foregoing brief is in Times New Roman 13-point typeface.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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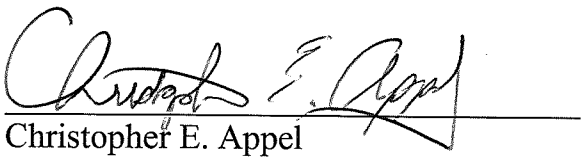

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