

NO. S219534

IN THE SUPREME COURT OF CALIFORNIA

JOHNNY BLAINE KESNER, JR.,

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA,

Respondent,

=====
PNEUMO ABEX, LLC,

Real Party in Interest.

=====
AFTER A DECISION BY THE COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION THREE, CASE NO. A136378
(CONSOLIDATED WITH A136416)

**AMICI CURIAE BRIEF OF COALITION FOR LITIGATION
JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED
STATES OF AMERICA, NATIONAL ASSOCIATION OF
MANUFACTURERS, AMERICAN TORT REFORM
ASSOCIATION, AND NFIB SMALL BUSINESS LEGAL CENTER
IN SUPPORT OF REAL PARTY IN INTEREST**

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ISSUES PRESENTED

1. Whether an employer owes a duty of care to persons claiming injury from exposure to asbestos solely through off-site contact with employees who carry asbestos fibers on their work clothing, tools, vehicles or persons.
2. Whether, if an employer owes such a duty, the duty is limited to immediate family members living full-time with the employee in the home or extends to visitors, guests, or others the employee may come into contact with.

STATEMENT OF INTEREST

Amici are business associations and a civil justice organization whose members include California employers and their insurers. *Amici* seek to use their broad perspective to educate the Court about the adverse impacts of imposing a broad new duty rule on employers to protect against remote, off-site exposures to asbestos or other toxic substances emitted in the workplace. If the Court imposes such a duty—contrary to the majority rule nationwide—California employers would be subject to potentially limitless and indefinite liability.

Further, as we will explain, there is no need for the Court to stretch California tort law to provide a remedy to persons such as Plaintiff. Plaintiff's claim here supplements claims against many other settling defendants that included "manufacturers of pumps, turbines, oil purifiers,

generators, and other industrial and shipboard machinery, or supplies, as well as a ship builder, suppliers of raw asbestos fiber, repair and decking contractors, and insulation suppliers and contractors.” Real Party in Interest’s Opening Brief on the Merits, at 7. Also, while Plaintiff seeks to impose liability on a solvent peripheral defendant as a substitute for proper entities that are now bankrupt, trusts that collectively hold billions of dollars in assets have been established to pay claims involving those companies’ products.

STATEMENT OF THE CASE

Amici adopt Real Party in Interest’s Statement of the Case to the extent relevant to the arguments in this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This brief provides an overview of the recent history and current state of the asbestos litigation, including the emergence of claims for “take home” exposures. The brief also 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 composed of 524(g) bankruptcy trusts 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”¹ until they reorganized in bankruptcy and emerged immune from further tort liability.

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 so far, yet the litigation marches on, sustained by changes in claiming practices by plaintiffs’ lawyers and new theories of liability. Over time, the connection between plaintiffs and asbestos-containing products has become increasingly remote, and the liability connection more attenuated. This appeal is an example.

Premises owner and employer liability for off-site exposure to asbestos is of relatively recent vintage.² In earlier years, asbestos litigation

¹ *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).

² It is telling that the issue of an employer’s liability for take home asbestos exposure is just now before this Court, because California is certainly no stranger to asbestos litigation. California has experienced asbestos litigation for decades and consistently has been among the top states in the nation for asbestos filings, often serving as a magnet for cases from around the country. See Steven D. Wasserman et al., *Asbestos Litigation in California: Can it Change for the Better?* (2007) 34 *Pepp. L. Rev.* 883; Victor E. Schwartz et al., *Litigation Tourism Hurts Californians* (Nov. 15, 2006) 21 *Mealey’s Litig. Rep.: Asbestos* 41 (sample of 1,047 California asbestos plaintiffs for whom address information was available revealed that *thirty percent* had addresses outside California).

was focused mostly on the manufacturers of asbestos-containing products, often called “traditional defendants.” Most of those companies have exited the tort system through bankruptcy. As a result, plaintiffs’ lawyers began to target “peripheral defendants,” including premises owners for alleged harms to independent contractors exposed to asbestos on the owners’ premises. Plaintiffs’ lawyers are now targeting employers for harms to secondarily exposed “peripheral plaintiffs.”

Like this action, these “peripheral defendant-peripheral plaintiff” cases involve nonoccupational, offsite exposure to asbestos through contact with a directly exposed worker or that person’s work clothes. They are not limited to mesothelioma cases, but can include lung and other cancers as well as nonmalignant conditions such as asbestosis. Also, while these cases often involve members of the worker’s household, they can include extended family (as in this case), guests, and conceivably many others. The highly permissive standard for asbestos causation applied by some California courts makes the prospect of take home exposure cases particularly problematic for employers.³

³ See Wasserman et al., *supra*, at 897-99 (discussing California cases involving *de minimis* exposures); *Jones v. John Crane, Inc.* (Ct. App. 2005) 35 Cal. Rptr. 3d 144, 151-52 (finding that evidence of exposure to defendant’s asbestos products, regardless of level of exposure, was sufficient to establish causation).

“Most of the courts which have been asked to recognize a duty to warn household members of employees of the risks associated with exposure to asbestos conclude that no such duty exists.” *Van Fossen v. MidAmerican Energy Co.* (Iowa 2009) 777 N.W.2d 689, 697. “[T]he courts are...wary of the consequences of extending employers’ liability too far, especially when asbestos litigation has already rendered almost one hundred corporations bankrupt.” Meghan E. Flinn, Note, *Continuing War With Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure* (2014) 71 Wash. & Lee L. Rev. 707, 710.⁴

The relevant case law is discussed in the parties’ briefs and is well documented in the literature. See Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The “Endless Search for a Solvent Bystander”* (2013)

⁴ See also *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas (Miller v. Ford Motor Co.)* (Mich. 2007) 740 N.W.2d 206, 217 (“no duty should be imposed because protecting every person with whom a business’s employees . . . come into contact, or even with whom their clothes come into contact, would impose an extraordinary and unworkable burden.”); *In re New York City Asbestos Litig. (Holdampf v. A.C. & S., Inc.)* (N.Y. 2005) 840 N.E.2d 115, 122 (“While logic might suggest (and plaintiffs maintain) that the incidence of asbestos-related disease allegedly caused by the kind of secondhand exposure at issue in this case is rather low, experience counsels that the number of new plaintiffs’ claims would not necessarily reflect that reality.”); *CSX Transp., Inc. v. Williams* (Ga. 2005) 608 S.E.2d 208, 209 (recognition of cause of action for take home asbestos exposure would “expand traditional tort concepts beyond manageable bounds and create an infinite universe of potential plaintiffs.”).

23 Widener L.J. 59, 79-87 (detailed survey of the case law).⁵ In the interest of judicial economy, we do not survey that case law again here. It is important to note, however, that “[i]n nearly every instance where courts *have* recognized a duty of care in a take home exposure case, the decision turned on the court’s conclusion that the foreseeability of risk was the primary (if not only) consideration in the duty analysis.” *In re Asbestos Litig.* (Del. Super. Ct. Dec. 21, 2007) 2007 WL 4571196, at *11 (emphasis in original), *aff’d sub nom. Riedel v. ICI Americas Inc.* (Del. 2009) 968 A.2d 17. This is not the approach that should be taken in California. *See, e.g., Campbell v. Ford Motor Co.* (Ct. App. 2012) 141 Cal. Rptr. 3d 390.

Further, as this brief will explain, there is no need to stretch California tort law to provide compensation to persons injured through offsite exposures to asbestos emitted in the workplace. First, as this case demonstrates, there are usually many other defendants in asbestos cases that are named under traditional product liability theories. Second, a separate multi-billion dollar compensation system exists to compensate plaintiffs for exposures to asbestos products made or sold by the scores of

⁵ *See also* Victor E. Schwartz, *A Letter to the Nation’s Trial Judges: Asbestos Litigation, Major Progress Made Over the Past Decade and Hurdles You Can Vault in the Next* (2012) 36 Am. J. of Trial Advoc. 1; 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* (2008) 16 Brook. J.L. & Pol’y 589.

companies that reorganized in bankruptcy and emerged immune for further tort litigation. In fact, the present lack of coordination between the asbestos bankruptcy trust claim and civil tort systems can lead to “double dipping” as plaintiffs obtain tort recoveries for their injuries then bring additional claims against asbestos trusts for the same injury. See William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts* (2008) 17 J. Bankr. L. & Prac. 257.

For these reasons, this Court should reject Plaintiff’s invitation to create a broad new duty rule in California that would subject employers to limitless and indefinite liability.

ARGUMENT

I. THE ASBESTOS LITIGATION ENVIRONMENT

The asbestos litigation is the longest-running mass tort. Originally and for many years, asbestos litigation typically pitted a “dusty trades” worker “against the asbestos miners, manufacturers, suppliers, and processors who supplied the asbestos or asbestos products that were used or were present at the claimant’s work site or other exposure location.” James S. Kakalik et al., *Costs of Asbestos Litigation* 3 (Rand Corp. 1983). Occupations such as shipbuilders and Navy personnel working around heavy amphibole asbestos exposures on World War II ships; insulators blowing large clouds of free amphibole or mixed fibers; and asbestos factory workers exposed to “snowstorms” of raw asbestos were classic

settings for older cases and for known sources of asbestos disease. *See id.* at vi-vii.

By the late 1990s, the asbestos litigation had reached such proportions that the Supreme Court of the United States noted the “elephantine mass” of cases in *Ortiz v. Fibreboard Corp.* (1999) 527 U.S. 815, 821 (1999), and referred to the litigation as a “crisis” in *Amchem Prods. Inc. v. Windsor* (1997) 521 U.S. 591, 597. Mass filings pressured many primary historical defendants into bankruptcy, including virtually all manufacturers of asbestos-containing thermal insulation.

Each of these bankruptcies put mounting and cumulative financial pressure on other primary defendants, creating a domino effect. *See In re Collins* (3d Cir. 2000) 233 F.3d 809, 812, *cert. denied*, (2001) 532 U.S. 1066. The result was a flood of bankruptcies between 2000-2002. *See* Mark D. Plevin et al., *Where Are they Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases* (Feb. 2012) 11:7 Mealey’s Asbestos Bankr. Rep. 1, Chart 1 (documenting four asbestos-related bankruptcies in 2000, twelve in 2001, and thirteen in 2002 – nearly as many as in the previous two decades combined).

So far, “roughly 100 companies have entered bankruptcy to address their asbestos liabilities,” S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation* (2013) 23 Widener L.J. 299, 301, and counting. *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.”); *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.”).⁶

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* (2007) 62 N.Y.U. Ann. Surv. Am. L. 525, 556 (“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

⁶ 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* (2003) 12 J. Bankr. L. & Prac. 51. Commentators have also explained:

The uncertainty of how remaining claims may be resolved, how many more may ultimately be filed, what companies may be targeted, and at what cost, casts a pall over the finances of thousands and possibly tens of thousands of American businesses. The cost of this unbridled litigation diverts capital from productive purposes, cutting investment and jobs. Uncertainty about how future claims may impact their finances has made it more difficult for affected companies to raise capital and attract new investment, driving stock prices down and borrowing costs up.

George S. Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, (2003) 44 S. Tex. L. Rev. 981, 998.

search for new recruits to fill the gap in the ranks of defendants through joint and several liability.”).⁷ One plaintiffs’ attorney has said that the litigation became an “endless search for a solvent bystander.” *Medical Monitoring and Asbestos Litigation’ - A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey’s Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).

The 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).

As the pool of defendants has expanded so has the universe of plaintiffs. There has been an increase in mesothelioma cases claiming

⁷ See also Stephen J. Carroll et al., *Asbestos Litigation* xxiii (RAND Corp. 2005) (“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 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.”).

nontraditional exposures in settings outside the workplace. This case involving a take home exposure plaintiff is just one example. Other cases involve plaintiffs exposed to asbestos through projects such as home remodeling or “shade tree” automotive brake repair. See Mark Behrens, *What’s New in Asbestos Litigation?* (2009) 28 Rev. Litig. 501. In a few jurisdictions, including Southern California, there has also been a jump in the number of lung cancer suits, see A.M. Best Co., Inc., Special Rep., *Asbestos Losses Fueled by Rising Number of Lung Cancer Cases* 1 (Oct. 28, 2013); Marc C. Scarcella et al., *Asbestos Litigation, Attorney Advertising & Bankruptcy Trusts: The Economic Incentive Behind the New Recruitment of Lung Cancer Cases*, 13:4 Mealey’s Asbestos Bankr. Rep. 1 (Nov. 2013) (“Since 2010, the annual number of lung cancer lawsuits filed in Los Angeles, Orange, and San Diego counties has nearly doubled based on annualized data through September of 2013.”), including cases with questionable connections to asbestos. See, e.g., Paul M. Barrett, *The Smoking Congresswoman and Her Asbestos Suit*, Bloomberg Bus. Week, Nov. 11, 2013.

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 1.⁸

II. IMPACT OF BANKRUPTCIES ON TORT DEFENDANTS

As explained, the “Bankruptcy Wave” that occurred in the early 2000s had dramatic impacts on the evolution of the asbestos litigation. These impacts continue to affect tort system defendants today, and would

⁸ 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 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).

impact employer defendants if the Court finds that a duty was owed to nonemployees for offsite asbestos exposures.

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.

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). Thus, the Bankruptcy Wave “removed from the tort system the source of most of the compensation plaintiffs had heretofore been receiving.” *O’Neil v. Crane Co.* (Cal. July 28, 2010) 2010 WL 2984322, at *9 (Application and *Amicus Curiae* Brief of Bates White LLC Supporting Respondents) [hereinafter Bates White *amicus*].

In response, plaintiffs’ lawyers began to target “peripheral defendants” to replace “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 while 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* (2014) 88 Tul. L. Rev. 1185, 1209 (“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 struggled to muster evidence necessary to show that alternative exposures were entirely, or at least partially, responsible for plaintiffs’ injuries. 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 apportioning liability to 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,⁹ many plaintiffs’ firms simply stopped filing their trust claims until after their tort cases were resolved. Trust

⁹ See *Volkswagen of Am., Inc. v. Superior Court of San Francisco* (Ct. App. 2006) 43 Cal. Rptr.3d 723; see also *Willis v. Buffalo Pumps, Inc.* (S.D. Cal. June 2, 2014) 2014 WL 2458247, at *1 (“Federal and state courts have routinely held that claims submitted to asbestos bankruptcy trusts are discoverable....”).

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 asbestos¹⁰—except when plaintiffs’ firms manipulate the timing of these filings to prevent their disclosure.

These trends were recently described in *In re Garlock Sealing Techs., LLC* (W.D.N.C. Bankr. 2014) 504 B.R. 71. Before the early 2000s, gasket and packing manufacturer Garlock Sealing Technologies, LLC had been a relatively small player in the asbestos tort system and was “very successful in settling (and rarely trying) [its] cases.” *Id.* at 73. Things changed when “the remaining large thermal insulation defendants filed bankruptcy cases and were no longer participants in the tort system.” *Id.*

In this new environment, where plaintiffs’ counsel could control exposure evidence, Garlock was put at a major disadvantage. The judge explained: “As the focus of plaintiffs’ attention turned more to Garlock as a remaining solvent defendant, evidence of plaintiffs’ exposure to other

¹⁰ 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* (2014) 23 J. Bankr. L. & Prac. 458 (“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. 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.”).

asbestos products often disappeared.” *Id.* The judge said, “This occurrence was a result of the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants’ asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants).” *Id.* at 84. The judge bluntly characterized Garlock’s tort litigation as infected by a “startling pattern of misrepresentation” that unfairly inflated plaintiffs’ recoveries following the surge of asbestos bankruptcies by insulation defendants in the early 2000s. *Id.* at 86. Garlock had a few large verdicts and was forced to pay higher values to settle cases until its insurance was exhausted and it declared bankruptcy.¹¹

If this Court imposes a duty in this case, California employers will face the same types of challenges that Garlock faced in its tort litigation, and that other asbestos defendants face today. The present lack of transparency and coordination between the asbestos bankruptcy trust claim

¹¹ The *Garlock* case has “laid bare the massive fraud that is routinely practiced in mesothelioma litigation,” says Lester Brickman, a Cardozo School of Law professor who has researched asbestos litigation for more than 20 years and testified on behalf of Garlock. Michael Tomsic, *Case Sheds Light On The Murky World Of Asbestos Litigation*, Nat’l Pub. Radio, All Things Considered, Feb. 4, 2014, available at 2014 WLNR 3168502; see also Peggy L. Ableman, *The Garlock Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases* (2014) 37 Am. J. Trial Adv. 479 (2014); Sara Warner, *Court Order Disrupts Asbestos World, But What of the ‘Perjury Pawns’?*, Huffington Post, Feb. 28, 2014, available at 2014 WLNR 5632432.

and civil tort systems is a big problem. It prevents defendants from being able to fully educate juries about the totality of a plaintiff's asbestos exposures, thus saddling today's tort defendants with a disproportionate share of responsibility for injuries caused at least in part by immune entities.

III. PLAINTIFF COMPENSATION AND ASBESTOS TRUSTS

In addition to tort system payments, substantial funds are now 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.¹²

Today, many of the companies that filed for bankruptcy protection due, in part, to asbestos litigation “hav[ing] 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* (June 2013) 12:11 Mealey's Asbestos Bankr. Rep. 33, 33-34. “These trusts answer for the tort liabilities of the great

¹² See 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.”).

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* (2014) 23 *Widener L.J.* 675, 675-76.

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. 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. “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. Professor Lester Brickman has said:

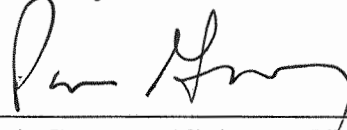
I estimate that mesothelioma victims (and nonmalignant claimants) with exposures to industrial and commercial asbestos-containing products distributed nationally will typically qualify for payment from fifteen to twenty trusts. This estimate does not include three trusts pending confirmation, with billions 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 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* (2014) 88 Tul. L. Rev. 1071, 1078-79. In the recent *Garlock* bankruptcy proceeding, 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.

CONCLUSION

For these reasons, the Court should reverse the Court of Appeal and uphold the trial court's judgment of nonsuit.

Respectfully submitted,



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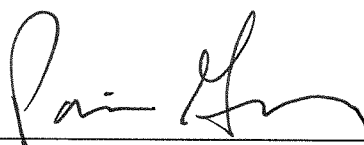
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CERTIFICATE OF COMPLIANCE

I, Patrick Gregory, an attorney duly admitted to practice before all courts of the State of California and a member of Shook, Hardy & Bacon L.L.P., counsel of record for *amici curiae*, certify that the foregoing complies with the requirements of Rules 8.520 and 8.204 of the California Rules of Court in that the brief was prepared in proportionally spaced type in Times Roman 13-point font, double spaced, and contains less than 14,000 words as measured using the word count function of "Word 2000."



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I, Patrick Gregory, declare as follows:

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