IN THE SUPREME COURT OF OHIO

GENEVIEVE DICENZO, Executrix of the Estate of JOSEPH DICENZO, Deceased, and GENEVIEVE DICENZO, in Her Own Right,	:	**Case No. 07-1628**
Appellee,	:	**On Appeal From the Cuyahoga County Court of Appeals, Eighth Appellate District**
v.	:	
A-BEST PRODUCTS CO., INC., *ET AL.*, Appellants	:	**Court of Appeals Case No. CA 06-088583**

AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC., NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN INSURANCE ASSOCIATION, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF JURISDICTION

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IN THE SUPREME COURT OF OHIO

GENEVIEVE DICENZO, Executrix of the Estate of JOSEPH DICENZO, Deceased, and GENEVIEVE DICENZO, in Her Own Right,	:	**Case No. 07-1628**
Appellee,	:	**On Appeal From the Cuyahoga County Court of Appeals, Eighth Appellate District**
v.	:	
A-BEST PRODUCTS CO., INC., *ET AL.*,	:	**Court of Appeals Case No. CA 06-088583**
Appellants	:	

The Coalition for Litigation Justice, Inc.,[1] National Federation of Independent Business Legal Foundation, National Association of Wholesaler-Distributors, Chamber of Commerce of the United States of America, American Insurance Association, National Association of Mutual Insurance Companies, Property Casualty Insurers Association of America, and American Chemistry Council — collectively "*amici*" — respectfully request that this Court accept jurisdiction of Defendant's appeal and overturn the decision of the appellate court.

INTEREST OF *AMICI CURIAE*

As organizations that represent Ohio companies and their insurers, *amici* have a significant interest in this appeal. The appellate court's decision could augment the liability of countless Ohio non-manufacturer defendants (e.g., wholesalers, distributors, and retailers) in tens of thousands of asbestos and other product liability cases. Many of these companies are small and medium size businesses and would face potentially catastrophic liability unless the decision

[1] The Coalition for Litigation Justice, Inc. is a nonprofit association formed by insurers to address and improve the asbestos litigation environment. The Coalition includes Century Indemnity Company; Chubb & Son, a division of Federal Insurance Company, CNA service mark companies, Fireman's Fund Insurance Company, Liberty Mutual Insurance Group, and the Great American Insurance Company.

below is overturned. The impacts would extend to employees, retirees, and affected communities.

EXPLANATION OF WHY THIS CASE PRESENTS A MATTER OF PUBLIC OR GREAT GENERAL INTEREST

This Court first recognized *common law* strict liability against a *manufacturer* in *Lonzrick v. Republic Steel Corp.* (1966), 6 Ohio St. 2d 227, 218 N.E.2d 185. Eleven years later, in *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 364 N.E.2d 267, this Court formally adopted the Restatement (Second) of Torts § 402A (1965) and expanded the scope of strict liability to cover all involved in the chain of distribution, including non-manufacturer suppliers.

The appellate court below found that the rule of strict liability adopted in *Temple* applied retroactively to the *Lonzrick* decision, meaning that a supplier may be strictly liable for pre-1977 sales. The appellate court's decision is inconsistent with Ohio law before 1977 and will have significant negative impacts on smaller and medium size Ohio businesses unless it is overturned.

The appellate court's decision failed to recognize that the evolution of Ohio law prior to *Temple* was driven by an intent to lower traditional privity requirement barriers so that manufacturers could be held strictly liable for harms to end users. The pre-*Temple* case law gradually chipped away at the need for privity in a shift from contract to tort law claims for product-related injuries. In 1966, the *Lonzrick* Court imposed a form of strict liability on manufacturers through an implied warranty that their products were of good and merchantable quality, fit and safe for their ordinary intended use. The Court, however, did not go so far as to adopt the Restatement (Second) § 402A, which was newly-minted and had not been widely adopted in 1966. Instead, the *Lonzrick* Court simply cited Section 402A as one of several supporting authorities for permitting a plaintiff to state a tort claim for implied warranty regardless of whether he or she relied upon an advertisement or other material published *by a*

manufacturer in making the purchase. The Court was not focused on the liability of non-manufacturer suppliers. Rather than formally adopt the untested Restatement (Second) in whole cloth, the *Lonzrick* Court opted to follow the "slow, orderly and evolutionary development" of product liability law that has characterized Ohio jurisprudence. *Lonzrick,* 6 Ohio St. 2d at 239, 218 N.E.2d at 194. It was not until years later, in *Temple,* that this Court formally adopted the Restatement (Second) of Torts § 402A. Even after *Temple*, however, there continued to be confusion as to whether strict liability could attach to non-manufacturer suppliers. Eventually, in *Bakonyi v. Ralston Purina Co.* (1985), 17 Ohio St.3d 154, 478 N.E.2d 241, this Court clarified that the *Temple* Court's adoption of strict liability could be applied to product sellers.

The retroactive application of *Temple* to pre-*Temple* (pre-1977) sales would subject Ohio suppliers and distributors to potentially devastating liability in asbestos and other latent injury cases. Domestic use of asbestos peaked in 1973, and then essentially ceased because of increased awareness of dangers and new government regulations restricting workplace use of asbestos. Thus, the universe of potential strict liability claims against sellers and distributors for asbestos product sales in 1977 and thereafter would be limited, whereas the retroactive imposition of liability to 1966 (i.e., *Lonzrick*) would subject sellers to strict liability claims in a substantial number of cases. Strict liability causes the non-manufacturer supplier or distributor to defend the product of a manufacturer, whereas absent a strict liability claim, the supplier/distributor defendant is defending a negligence claim, which is based upon that company's own conduct.

Finally, the bankruptcy filings of almost all former manufacturers will make it likely that plaintiffs will begin targeting solvent non-manufacturing suppliers if a claim can easily be brought. Litigation against small and medium sized businesses would proliferate in Ohio.

For these reasons, this Court should accept jurisdiction of Defendant's appeal and overturn the decision of the appellate court.

STATEMENT OF THE CASE AND FACTS

Amici adopt Appellant George V. Hamilton, Inc.'s Statement of the Case and Facts.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law:

The Ohio Supreme Court's adoption of strict liability pursuant to Restatement (Second) of Torts § 402A in *Temple v. Wean United, Inc.*, (1977), 50 Ohio St.2d 317, 364 N.E.2d 267, may not be retroactively applied to non-manufacturer suppliers that sold asbestos-containing (or other) products before the *Temple* decision.

I. IN 1966, PRODUCT LIABILITY LAW HAD GRADUALLY DEVELOPED TO ELIMINATE THE NEED FOR PRIVITY AND ESTABLISH THE LIABILITY OF MANUFACTURERS TO END USERS OF THEIR PRODUCTS; OHIO COURTS DID NOT EXTEND STRICT LIABILITY TO SUPPLIERS OR DISTRIBUTORS.

A theme of American product liability jurisprudence over the past century is a gradual move away from the notion of *caveat emptor*, let the buyer beware, toward a system of strict product liability for defective products. This change did not occur overnight, or even over a decade, but occurred steadily over many decades. The law evolved first to eliminate the need for privity in negligence actions and then in warranty cases under contract law. It then moved the implied warranty of fitness into tort law thereby eliminating the contract-based defenses that created barriers in product liability claims. Each of these steps occurred for the purpose of imposing liability on *manufacturers* for harms to end users of their products, regardless of whether they were the direct purchaser or relied upon representations of safety. Ohio closely followed this national trend. Until the *Temple* Court's adoption of Section 402A in 1977, Ohio did not impose strict liability on non-manufacturer sellers and distributors.

A. The Evolution of Product Liability Law

At the turn of the twentieth century, product users faced distinct challenges in recovering for injuries resulting from unsafe products. Under established common law, an injured person could not hold a manufacturer liable for its negligence for putting a dangerous product on the market where he or she did not directly purchase the product from the defendant. *See, e.g.*, Dan B. Dobbs, *The Law of Torts* 973 (2000) (discussing *Winterbottom v. Wright* (Exch. Pl. 1842), 10 M. & W. 109, 152 Eng. Rep. 402). This began to change when Judge Cardozo, in the landmark case *MacPherson v. Buick Motor Co.* (1916), 217 N.Y. 382, 111 N.E. 1050, eliminated the privity rule in negligence cases. *MacPherson* held, "If [the manufacturer] is negligent where danger is to be foreseen, a liability will follow." 217 N.Y. at 390, 111 N.E. at 1053.

Nevertheless, even after abandonment of the privity requirement in negligence cases, plaintiffs faced a difficult task in proving that the manufacturer failed to exercise reasonable care to avoid unintended dangers occurring in the construction process. *See* W. Page Keeton *et al.*, *Prosser & Keeton on Torts* 685 (5th ed. 1984). Thus, many plaintiffs relied on a breach of warranty theory. *See* Dobbs, *supra*, at 973. Yet, in warranty cases, the rule of privity again came into play. *See* David Owen, *Product Liability Law Restated*, 49 S.C. L. Rev. 273, 275 (1998).

For a period of time, courts developed innovations allowing plaintiffs to recover in warranty actions against manufacturers without privity, particularly in cases involving contaminated food, *see* Victor E. Schwartz *et al.*, *Prosser, Wade & Schwartz's Torts* 730 (11th ed. 2005), such as glass in a bottle of Coca-Cola or a "foul, filthy, nauseating, and poisonous substance" in the center of a carton of cooked tongue. *See Coca-Cola Bottling Works v. Lyons* (1927), 145 Miss. 876, 111 So. 305; *Mazetti v. Amour & Co.* (1913), 75 Wash. 622, 135 P. 633, 633-34. By 1960, courts across the United States had established this strict liability rule in cases

involving flawed food products. *See Prosser & Keeton on Torts, supra*, at 690. In each of these instances, the driver expanding liability was holding *manufacturers* responsible for tainted or mismanufactured products that were not fit for the use in which they were intended.

A turning point in product liability law was the New Jersey Supreme Court's decision in *Henningsen v. Bloomfield Motors, Inc.* (1960), 32 N.J. 358, 369, 161 A.2d 69, 75. In that case, the purchaser's wife was driving an almost new car, when she suddenly lost control at twenty miles an hour after hearing a cracking noise from under the hood. The car veered sharply to the right and into a highway sign and brick wall, totaling the car and leaving it impossible to determine the cause of the accident. *Henningsen,* a leading case nationwide for extending the implied warranty of fitness for use to products beyond food without the need for privity, concluded that "under modern marketing conditions, when a *manufacturer* puts a new automobile in the stream of trade and promotes its purchase to the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser." 32 N.J. at 383-84, 161 A.2d at 83-84 (emphasis added).

Concepts of implied warranty, however, continued to be a source of considerable confusion in the courts. While courts had relaxed the privity requirement, other requirements of contract law, such as the applicability of defenses including disclaimers and the buyer's duty to notify the seller promptly of breach required under the Uniform Sales Act and its successor, the Uniform Commercial Code, came into play. *See* Prosser & Keeton, *supra*, at 691. In essence, implied warranties carried "far too much luggage in the way of undesired complications, and is more troublesome than it is worth." *Id.*

For this reason, the California Supreme Court in *Greenman v. Yuba Power Products Inc.* (1963), 27 Cal. Rptr. 697, 377 P.2d 897, adopted the doctrine of strict liability in tort. *Greenman*

speaks repeatedly of its purpose in extending the law to impose strict liability on a *manufacturer* that is not in a direct contractual relationship with the product user:

> Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the *manufacturer* to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the *manufacturer* to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

377 P.2d. at 901 (emphasis added) (internal citations omitted). Soon thereafter, the American Law Institute (ALI) adopted the Restatement (Second) of Torts § 402A. Although restatements ordinarily state black letter law, the ALI took a different approach when it adopted § 402A in 1964 and published the new section in 1965. At the time, *Greenman* was the only decision of its kind, not the majority approach. Thus, Section 402A represented a jump in tort law, not a true "restatement" of generally accepted doctrine. Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability – The American Law Institute's Process of Democracy and Deliberation*, 26 Hofstra L. Rev. 743, 745-48 (1998) (documenting the development of Section 402A). Moreover, Section 402A went further than even *Greenman*, applying not only to manufacturers, but to any seller of a defective product who is regularly engaged in such sales. *See* Restatement (Second) of Torts § 402A(1). It took twenty years following publication of Section 402A, from the mid-1960s to mid-1980s, for most courts and the occasional state legislature to adopt it. *See* Owen, *supra*, at 277.

B. The "Slow, Orderly and Evolutionary Development" of Ohio Product Liability Law Had Not Recognized the Applicability of Strict Liability to Suppliers or Distributors Prior to 1977

The driver behind the development of Ohio law was the same as the motivation leading other courts around the country: elimination of privity and extension of liability from the *manufacturer* to the end user of the product.

Lonzrick itself details the evolution of product liability law in Ohio, describing the process as a "slow, orderly and evolutionary development." 6 Ohio St. 2d at 239, 218 N.E.2d at 194. The Court first abandoned a rule requiring privity in *Rogers v. Toni Home Permanent Co.* (1958), 167 Ohio St. 244, 147 N.E.2d 612, allowing a consumer who suffered serious injuries to her scalp from a hair care product to state a claim for breach of warranty against the manufacturer despite having purchased the product through a retailer. The Court recognized that a breach of warranty claim may sound in tort, rather than contract, law. 167 Ohio St. at 247, 147 N.E.2d at 614. Seven years later, the Court in *Inglis v. American Motors Corp.* (1965), 3 Ohio St. 2d 132, 209 N.E.2d 583, extended this rule to allow a tort action based on breach of warranty to permit recovery for property damage where there was no privity between the plaintiff and the defendant manufacturer.

Lonzrick represented the next step in the evolution of product liability law in Ohio, not a giant leap forward. The *Lonzrick* Court noted that in *Rogers* and *Inglis*, it had considered representations of the manufacturer in national advertising as providing the basis of the plaintiff's obligation to the plaintiff, since the plaintiff theoretically could have relied upon such representations in purchasing the product. *See Lonzrick*, 6 Ohio St. 2d at 236, 218 N.E.2d at 192. The *Lonzrick* Court, in a case where the defendant manufacturer had not advertised its product, found reliance on such representations unnecessary. The Court found "essential injustice" in a potential scenario in which two consumers were harmed by the same product, but only the one who read the newspaper could recover. 6 Ohio St. 2d at 237. Thus, the Court imposed a type of limited strict liability on manufacturers, but it did not address the liability of sellers. While the Court cited Section 402A as among sources "[s]upporting the position of the plaintiff and the Court of Appeals" among a string cite of fourteen cases and a treatise, it did not adopt Section

402A at the time. 6 Ohio St. 2d at 239, 218 N.E.2d at 193-94. Instead, the Court immediately qualified its ruling by noting the "slow, orderly and evolutionary development" of product liability law in Ohio, *see id*, a statement emphasized yet again when the Court finally adopted Section 402A in *Temple*.

Thus, a supplier would not have been on notice prior to *Temple* in 1977 that it could be held strictly liable for failing to warn purchasers of the hazards of asbestos. In fact, it was not until 1985 that this Court explicitly recognized the application of strict liability to product sellers. *See Bakonyi v. Ralston Purina Co.* (1985), 17 Ohio St.3d 154, 478 N.E.2d 241.

II. RETROACTIVE APPLICATION OF STRICT LIABILITY TO NON-MANUFACTURER SUPPLIERS FOR PRE-1977 SALES WOULD HAVE DEVASTATING CONSEQUENCES FOR MANY SMALLER AND MEDIUM SIZE BUSINESSES IN OHIO

The devastating impact the appellate court's decision will have on Ohio non-manufacturer suppliers – many of them small and medium size businesses – becomes clear when one considers the path of recent asbestos litigation and the practical consequences of the ruling below.

A. An Overview of the Litigation Environment in Which This Appeal Must Be Considered

The United States Supreme Court has described asbestos litigation as a "crisis." *Amchem Prods., Inc. v. Windsor* (1997), 521 U.S. 591, 597; *see also In re Combustion Eng'g, Inc.* (3d Cir. 2005), 391 F.3d 190, 200 ("For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits.").[2] By 2002, approximately 730,000 claims had been

[2] *See also* Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, 6:6 Briefly 4 (Nat'l Legal Center for the Pub. Interest June 2002), *available at* http://www.nlcpi.org; Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

filed, *see* Stephen J. Carroll *et al., Asbestos Litigation* xxiv (RAND Inst. for Civil Justice 2005), *available at* http://www.rand.org/ publications/MG/MG162 [hereinafter RAND Rep.]. In August 2006, the Congressional Budget Office estimated that there were about 322,000 asbestos bodily injury cases in state and federal courts. *See* American Academy of Actuaries' Mass Torts Subcommittee, *Overview of Asbestos Claims and Trends* 5 (Aug. 2007), *available at* http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf [hereinafter American Academy of Actuaries]. "There are at least 35,000 asbestos personal-injury cases pending in Ohio state courts." *Wilson v. AC&S, Inc.* (Ohio Ct. App. 12th Dist. 2006), 169 Ohio App. 3d 720, 729, 864 N.E.2d 682, 694, *cause dismissed*, (Ohio 2007), 113 Ohio St. 3d 1457, 864 N.E.2d 645.[3]

The litigation has forced an estimated eighty-five employers into bankruptcy, *see* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29, "including nearly all major manufacturers of asbestos-containing products." American Academy of Actuaries, *supra*, at 5. These bankruptcies have had devastating impacts on defendant corporations, employees, retirees, affected communities, and the economy.[4] Ohio companies have been particularly hard hit. *See*

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[3] "By all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who . . . are completely asymptomatic." James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815, 823 (2002). In 2004, the Ohio General Assembly enacted H.B. 292, 125th Gen. Assem., Reg. Sess. (Ohio 2004), to preserve resources for meritorious asbestos claimants and allow those claims to be resolved more quickly by deferring the enormous number of asbestos claims involving persons who lack physical impairment and causation.

[4] *See* Joseph E. Stiglitz *et al.*, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51, 76, 83 (2003) (asbestos-related bankruptcies put up to 60,000 people out of work from 1997-2000; those workers and their families lost up to $200 million in wages, and employee retirement assets declined roughly 25%); Jesse David, *The Secondary Impacts of Asbestos Liabilities* 8, 11-13 (Nat'l Econ. Research Assocs., Jan. 23, 2003) (for every 10 jobs lost directly in a bankruptcy, the community may lose eight additional jobs; the shutting of plants and job cuts also decrease per capita income, leading to a decline in real estate values, and lower tax receipts); George S. Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. Tex. L. Rev. 981, 998 (2003) ("The cost of this unbridled litigation diverts capital from

(Footnote continued on next page)

Bill Curbing Asbestos Suits Signed into Law by Ohio Gov., Cong. Daily, June 7, 2004, *available at* 2004 WLNR 17660524 (quoting Ohio Senator Steve Stivers: "We are one of the states suffering the most from the asbestos crisis. Jobs have been lost. Otherwise healthy companies have gone bankrupt because of asbestos lawsuits.").

For example, Toledo-based Owens Corning filed for bankruptcy after facing over 400,000 asbestos-related injury claims. *See* John Seewer, *Owens Corning Files Chapter 11 Protection*, Assoc. Press, Oct. 6, 2000, *available at* 2000 WLNR 9027664. The company was forced to lay off 275 workers from its Granville plant, resulting in a total loss of 500 jobs in the community and a $150-$200 million annual reduction in regional income. *See* Kurtis A. Tunnell *et al.*, Commentary, *New Ohio Asbestos Reform Law Protects Victims and State Economy*, 26:22 Andrews Asbestos Litig. Rep. 10 (Aug. 26, 2004). Owens Corning's bankruptcy also affected the retirement planning of the 1,000 employees at the firm's Toledo headquarters and 19,000 others elsewhere. *See* Gary Pakulski, *Asbestos Lawsuits Hurt Defendants' Workers*, The Blade (Toledo), Dec. 27, 2002, *available at* 2002 WLNR 10599324.

Barberton-based Babcock & Wilcox faced a similar predicament. The company, which employs about 1,000 in Barberton, was forced to declare bankruptcy as a result of over 400,000 asbestos-related lawsuits. *See* Thomas Gerdel, *Babcock Seeks Bankruptcy Protection; Barberton Boilermaker Cites Asbestos Lawsuit Demands*, Cleveland Plain Dealer, Feb. 23, 2000, at C1, *available at* 2000 WLNR 9008572; *B&W Emerges From Chapter 11*, Akron Beacon J. (Ohio), Feb. 23, 2006, at D2, *available at* 2006 WLNR 3113250.

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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.").

As a result of these and other bankruptcies, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract available at* 2001 WLNR 1993314; *see also* Steven B. Hantler *et al.*, *Is the Crisis in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1151-52 (2005) (discussing spread of asbestos litigation to "peripheral defendants"). Over 8,500 defendants have been named. *See* Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*, HarrisMartin Columns: Asbestos, Aug. 2004, at 5. One well-known plaintiffs' attorney has described the litigation as an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs); *see also* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1, *abstract available at* 2000 WLNR 2042486. At least one company in nearly every U.S. industry is now involved in asbestos litigation. *See* American Academy of Actuaries, *supra*, at 5. Nontraditional defendants now account for over half of asbestos expenditures. *See* RAND Rep., *supra*, at 94.

B. Practical Consequences of the Appellate Court's Decision

1. Non-Manufacturer Supplier Asbestos Liability Would Mushroom

The retroactive application of strict liability to non-manufacturer suppliers for pre-1977 (i.e., pre-*Temple*) sales of asbestos-containing products would have potentially disastrous consequences for many smaller and medium size Ohio businesses. The growing trend of peripheral defendants being targeted would become a stampede. Here is why.

Domestic use of asbestos peaked in 1973, and then essentially ceased because of increased awareness of dangers and new government regulations restricting workplace use of asbestos. *See* American Academy of Actuaries, *supra*, at 1 ("Asbestos use in the United States

has been curtailed significantly since its peak of nearly 1 million tons in 1973."). As one commentator has explained:

> [I]t was through the epidemiological work conducted by Dr. Irving Selikoff and others at Mt. Sinai Hospital in the 1960s and 1970s that the risks for insulators and other heavily exposed workers were publicly identified. Partly in response, the federal government established the Occupational Safety & Health Administration (OSHA) in 1970, which issued its initial restrictions on the workplace use of asbestos in 1971. Subsequently, these regulations were modified to further reduce the allowed level of occupational asbestos exposure. *As Judge Weinstein has observed: "Because of the increased awareness of dangers and new government regulations, use of new asbestos essentially ceased in the United State in the early 1970's."*

James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 227 (2006) (internal citations omitted and emphasis added).

Thus, the universe of potential strict liability claims against sellers for sales in 1977 and thereafter would be limited, whereas a 1966 trigger could mean that sellers would face strict liability claims in a very substantial number of cases. Up until the appellate court's decision, non-manufacturer suppliers could be subject to strict liability only in the limited situations specified in R.C. 2307.78 (or, prior to 1988, in R.C. 2305.73).

Furthermore, the application of common law strict liability for pre-1977 sales would subject non-manufacturer suppliers to potentially bankrupting liability. Strict liability causes the non-manufacturer supplier or distributor to defend the product of a manufacturer, whereas absent a strict liability claim, the supplier/distributor defendant is defending a negligence claim, which is based upon that company's own conduct. Negligence claims against non-manufacturer suppliers are rarely pursued at trial because of the difficulty of proving that suppliers or distributors independently engaged in conduct that would subject them to liability.

If the appellate court's decision is permitted to stand, it will be the law in Ohio – or at least in Cuyahoga County where most Ohio asbestos cases are filed. Non-manufacturer suppliers would be subject to strict liability in many (if not most) of the 35,000 or more asbestos personal-injury cases pending in Ohio state courts. It is virtually certain that such massive liability would cause some Ohio businesses to join the growing list of companies that have been forced to seek bankruptcy court protection from asbestos-related liabilities.

This result is not only unsound, but also appears to be based on a false premise. One may speculate that the overriding factor which led the appellate court to dramatically expand common law strict liability was the desire to compensate plaintiffs where many at-fault companies have declared bankruptcy. Trusts, however, have been created to pay these claims. In fact, one recent study concluded: "For the first time ever, trust recoveries may fully compensate asbestos victims." *See* Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 Mealey's Asbestos Bankr. Rep. 1 (Nov. 2006). There is no reason for Ohio courts to impose catastrophic liability on suppliers given that plaintiffs have an alternate path to recovery.

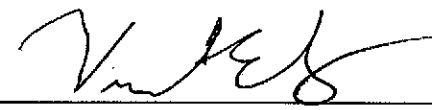
2. Non-Manufacturers Would Face Other Latent Injury Claims

The devastating consequences of the appellate court's decision will not be limited to asbestos cases. If the decision is permitted to stand, strict liability claims will be brought against suppliers of any pre-1977 products that may have contributed to a latent injury. Countless Ohio businesses would face liability beyond any amount they reasonably could have anticipated prior to 1977. This would be manifestly unjust.

CONCLUSION

For these reasons, this Court should accept jurisdiction of Defendant's appeal and overturn the decision of the appellate court.

Respectfully submitted,



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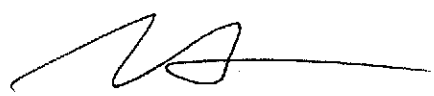

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