

IN THE SUPREME COURT OF OHIO

IN RE ALL CASES AGAINST SAGER : Case No. 2010-1705
CORPORATION, :
: On Appeal from the Cuyahoga County
SAGER CORPORATION, : Court of Appeals,
A Dissolved Illinois Corporation : Eighth Appellate District
Appellant :
: Court of Appeals Case No. CA-09-093567

AMICI CURIAE BRIEF OF THE OHIO INSURANCE INSTITUTE, COALITION FOR LITIGATION JUSTICE, INC., PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF APPELLANT

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INTEREST OF AMICI CURIAE

Amici are interested in this case because it represents the latest in a series of attempts by plaintiffs' lawyers to alter well-established rules of law and procedure to expand the pool of asbestos defendants. Unless overturned, the appellate court's ruling would fundamentally and unnecessarily alter corporate law and choice-of-law principles. Ohio could become a magnet for asbestos claims against long-defunct corporations from other states.

The Coalition for Litigation Justice, Inc. ("Coalition") is a nonprofit association formed by insurers to address and improve the asbestos litigation environment.¹ The Coalition files *amicus* briefs in important cases that may have a significant impact on the asbestos litigation environment and may reduce or eliminate inequities that exist in the current civil justice system.

The Ohio Insurance Institute ("OII") represents property and casualty insurance companies and organizations conducting business throughout the State of Ohio. Its members include approximately fifty domestic property and casualty insurers, foreign insurers, and reinsurers, who collectively account for approximately one-half the property and casualty insurance business written in Ohio, as well as other insurance trade groups and organizations. OII provides a wide range of insurance-related services to its members and the public, media, and government officials in three primary areas: education and research; legislative and regulatory affairs; and public information. In connection with these services, OII and its members closely monitor litigation and judicial decisions that address important issues of insurance law.

¹ The Coalition includes Century Indemnity Company, Chubb & Son, a division of Federal Insurance Company, Fireman's Fund Insurance Company, Liberty Mutual Insurance Group, and the Great American Insurance Company.

The American Insurance Association (“AIA”), founded in 1866 as the National Board of Fire Underwriters, is a leading national trade association representing major property and casualty insurers writing business nationwide and globally. AIA members range in size from small companies to the largest insurers with global operations. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and files *amicus curiae* briefs in significant cases, including before this Court.

The Property Casualty Insurers Association of America (“PCI”) represents more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. Its member companies account for \$184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners’ premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. PCI’s membership is literally a cross-section of the United States property and casualty insurance industry.

Founded in 1895, National Association of Mutual Insurance Companies (“NAMIC”) represents more than 1,400 member companies that underwrite more than 40% of the property/casualty insurance premium in the United States. NAMIC members account for 47% of the homeowners market, 39% of the automobile market, 39% of the workers’ compensation market, and 34% of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

STATEMENT OF THE CASE AND FACTS

Amici adopt Appellant's Statement of the Case and Statement of Facts.

INTRODUCTION

The first basic step in civil litigation is for a plaintiff to identify the person or business he or she is suing. If the potential defendant is an individual, and that individual is deceased and the estate has wound up his or her affairs, then the plaintiff no longer has a viable lawsuit. The same principle holds true with respect to corporations. A corporation is "born" by virtue of filing a certificate of incorporation with a particular state. The corporation "dies" by filing a certificate of dissolution with that state, which effectively provides a wind-up period for the company's "estate" to address any outstanding debts. When this statutory period expires, the corporation no longer exists. The dead, whether an individual or corporation, cannot be brought back to life for purposes of a lawsuit. The appointment of a receiver does not alter the situation because the receiver is not and cannot be liable to plaintiffs for the debts of the corporation.

Here, the lower court attempted to resurrect a dead corporation over a decade after its dissolution and six years following the conclusion of the wind-up period established by applicable state law. The trial court allowed plaintiffs in Ohio, through the appointment of a receiver, to sue a long-defunct corporation and then seek to enforce a judgment against the business's prior insurer. Application of the law in this manner essentially permits direct actions against insurers as stand-ins for businesses that no longer exist, even though Ohio law does not permit direct actions. *See* R.C. 2721.02(B) (claimant may not seek declaratory judgment against a defendant's insurer until he or she has a final judgment against the defendant).

Appellant Sager Corporation ("Sager") has addressed these corporate and choice of law principles in depth. This brief will show that this case is the latest in a series of recent efforts to

improperly stretch substantive and procedural law in asbestos litigation in Ohio and across the nation. The dispute is part of a never-ending quest to reach new assets. If allowed to stand, the appellate court's decision would further denigrate the stability of the law and could have adverse implications outside of the asbestos context.

Because Sager was formed and dissolved under Illinois law, this case should be decided under Illinois law governing corporate existence and capacity for suit, in accordance with near universal state-law decisions and with U.S. Constitutional requirements. Sager has addressed these issues extensively. We will focus, therefore, on the consequences of circumventing settled law by the contrivance of treating an insurance policy as an "asset" of a defunct corporation that permits the corporation to be sued (as the Court of Appeals did, without analysis). That contrivance is wrong. An insurance contract is premised on the existence of an insured corporation and its capacity for suit. Such policies have no continuing value when the insured has dissolved and the wind-up period has expired. Ohio courts have no authority to appoint a receiver over a dissolved foreign corporation, but even if they did, a receiver cannot distribute payments under policies whose obligations terminated with the end of the insured company.

Not only is the Court of Appeals' reading of the law contrary to well-settled principles, stretching the law in this manner is wholly unnecessary because there are substantial assets available to those who have experienced asbestos-related injury. Here, Sager is just 1 of 197 defendants named in the Plaintiff's Complaint. Plaintiff may seek compensation from those defendants as well as through trusts established by companies that have declared bankruptcy under the weight of asbestos liability. Significant compensation is available to Plaintiff through these sources. There is no public policy justification supporting the drastic act of appointing a

receiver over a defunct foreign corporation, on the pretext that any unexhausted insurance policies are “assets” of the dead company.

ARGUMENT

Proposition of Law: Ohio courts may not resurrect dissolved foreign corporations, after expiration of the wind-up period set by the state of its incorporation, by appointing a receiver for the purpose of seeking purported “assets” in the form of unexhausted insurance policies.

I. THE DECISION BELOW, WHICH ATTEMPTS TO RESURRECT A DEFUNCT CORPORATION AS A DEFENDANT, IS THE LATEST IN A SERIES OF ATTEMPTS TO ABANDON WELL-SETTLED SUBSTANTIVE LAW AND COURT PROCEDURES IN ASBESTOS CASES

Asbestos litigation is the “longest-running mass tort” in U.S. history. Helen Freedman, *Selected Ethical Issues in Asbestos Litigation* (2008) 37 Sw. U. L. Rev. 511, 511. Now in its fourth decade, asbestos litigation has been sustained by a relentless search for new defendants and new theories of liability. The case before this Court is another instance of the litigation evolving once again, and without any legal foundation. Given asbestos litigation’s history of flowing to favored forums, should Ohio permit lawsuits against the former insurers of dissolved corporations, more asbestos litigation can be expected to burden the state’s courts.

A. The Road From Traditional to Peripheral to Dissolved Defendants

In the earlier years of asbestos litigation, most cases were filed by people suffering from cancer and other serious conditions. See Mark A. Behrens, *What’s New in Asbestos Litigation?* (2009) 28 Rev. Litig. 500, 502. From the late 1990s until more recently, the vast majority of asbestos claims were brought on behalf of unimpaired claimants diagnosed largely through attorney-sponsored mass screenings. See *Owens Corning v. Credit Suisse First Boston* (D. Del. 2005) 322 B.R. 719, 723. Many of those mass screening practices, however, have recently been shown to be questionable, at best, and to be part of an effort to recruit new plaintiffs, en masse.

At the same time, state legislatures have enacted minimum criteria for impairment that must be met before suits can proceed. These two developments have substantially reduced such claims. *See* Mark A. Behrens, *Asbestos Litigation Screening Challenges: An Update* (2009) 26 T.M. Cooley L. Rev. 721. Now that mass recruitment of non-malignant claims has essentially ceased, *see* Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, Mealey's Asbestos Bankr. Rep., Nov. 2006, at 21, most new litigation once again involves persons actually suffering from mesothelioma and other serious conditions, *see* Behrens, 28 Rev. Litig. at 526-27.

The target defendants have changed too. First, the litigation focused on companies that manufactured asbestos-containing products, often called "traditional defendants," such as Johns Manville or Owens Corning Fiberglas. To date, asbestos litigation has forced at least ninety-six companies into bankruptcy. *See* Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (RAND Inst. for Civil Justice 2010), *available at* http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf. As these companies went bankrupt, the litigation spread to "peripheral defendants," including "processors who supplied the asbestos or asbestos products that were used or were present at the claimant's work site or other exposure location," *see* James S. Kakalik et al., *Variation in Asbestos Litigation Compensation and Expenses* 5 (RAND Inst. for Civil Justice 1984), and eventually to premises owners in claims brought by independent contractors. *See* Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract available at* 2001 WLNR 1993314 ("[T]he net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing."); *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").

The litigation has moved far beyond the era in which manufacturers and producers of friable asbestos-containing products or raw asbestos were the defendants. See Congressional Budget Office, *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003) (asbestos suits have expanded “from the original manufacturers of asbestos-related products to include customers who have used those products in their facilities.”), available at <http://www.cbo.gov/doc.cfm?index=4641>; Susan Warren, *Asbestos Quagmire: Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J., Jan. 27, 2003, at B1, abstract available at 2003 WLNR 3099209; 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 involved in the litigation. See American Academy of Actuaries’ Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends* 5 (Aug. 2007), available at http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf.

Attorneys representing asbestos claimants are also asserting new theories of liability as a means to further widen the net for additional defendants. Such theories include alleging that makers of nonhazardous component parts, such as pumps or valves, should be held liable for asbestos products made by others and attached to the components post-sale. See, e.g., *Simonetta v. Viad Corp.* (Wash. 2008) 197 P.3d 127; *Braaten v. Saberhagen Holdings* (Wash. 2008) 198 P.3d 493; see also James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products* (2008) 37 Sw. U. L. Rev. 595. In addition, plaintiffs’ lawyers have targeted property owners for alleged harms to secondarily exposed “peripheral plaintiffs,” though without success in Ohio. See *Boley v. Goodyear Tire & Rubber Co.* (2010) 125 Ohio St. 3d 510, 929 N.E.2d 448.

One former plaintiffs' attorney described asbestos litigation as an "endless search for a solvent bystander." *Medical Monitoring and Asbestos Litigation*—A Discussion with Richard Scruggs and Victor Schwartz, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs). Indeed, the present case targeting a dissolved foreign corporation shows that even those bounds have been broken. This appeal illustrates another attempt to develop yet another new target.

B. History Shows that Asbestos Litigation Migrates to Favored Forums

Asbestos claims have a history of ebbing and flowing to favored forums. For instance, the RAND Institute for Civil Justice found that between 1970 and 1987, four states accounted for 61 percent of asbestos claimants who filed in state courts: California, Illinois, New Jersey, and Pennsylvania. See Stephen J. Carroll et al., *Asbestos Litigation* 61 (RAND Inst. for Civil Justice 2005). By the late 1990s, however, filings of asbestos claims in these states accounted for only eight percent of the total. Between 1998 and 2000, Ohio emerged as among five states that hosted 66 percent of filings. These states, which also included Texas, Mississippi, New York, and West Virginia, accounted for only nine percent of asbestos claims filed before 1988. *Id.*

In fact, a single law firm represented clients in 32,000 to 35,000 asbestos claims in Cuyahoga County, as needed legislative reforms took effect in 2004. See William Hershey, *Asbestos Bill Foes Go to Court*, Dayton Daily News, Aug. 19, 2004, at 1D, available at 2004 WLNR 1594612; Elizabeth Auster, *Bill Would Free Courts of Asbestos Lawsuits*, Cleveland Plain Dealer, June 19, 2005, at G1, available at 2005 WLNR 24029120. There was a backlog of as many as 40,000 asbestos claims pending in Ohio courts at that time. See Jim Provance, *Widow Challenges Ohio Ruling on Asbestos: 2004 Law Raises Bar for Illness Cases*, The Blade (Toledo, Ohio), Nov. 29, 2007, available at 2007 WLNR 23555673.

Since the enactment of reforms in Ohio and some of the other jurisdictions once favored by plaintiffs, plaintiffs' lawyers are actively seeking out alternative jurisdictions in which to file their claims. As a result, asbestos claims are now flowing to jurisdictions that have rendered liability-expanding rulings or failed to address excesses in litigation.

It is in this environment that Plaintiff asks that this Court recognize a new type of defendant, a corporation that has lawfully ceased to exist for many years, in an effort to secure recovery from their former insurers. Rules of law that are out of the mainstream may again lead to an influx of asbestos claims in Ohio courts.

II. OHIO SHOULD CONTINUE ITS APPROACH OF AVOIDING EXCESSES IN ASBESTOS LITIGATION

Although Ohio was a magnet for asbestos litigation in the late 1990s and early 2000s, the judiciary's refusal to compromise traditional principles of tort law, combined with reforms enacted by the legislature, have helped it emerge from that status, and return reason and fairness to the litigation.

In 2004, the Ohio General Assembly was the first state to require, by statute, that claimants demonstrate actual impairment under objective medical criteria before proceeding with claims. R.C. 2307.91-.96.² This Court upheld the law and found that the evidentiary filing requirements applied to pending claims. *See Ackison v. Anchor Packing Co.* (2008) 120 Ohio St. 3d 228, 897 N.E.2d 1118. As a result, the Cuyahoga County Common Pleas Court dismissed the

² Ohio lawmakers also approved a comprehensive tort reform package in 2005. Among other things, the 2005 law limits punitive damages to two times compensatory damages for larger employers, prohibits multiple punitive damages for the same act or course of conduct, limits noneconomic damages for non-catastrophic injuries at the greater of \$250,000 or three times the amount of economic damages up to \$350,000 per plaintiff and \$500,000 per occurrence, and permits the introduction of collateral source evidence. *See* R.C. 2315.18; R.C. 2315.20; R.C. 2315.21; *see also* *Arbino v. Johnson & Johnson* (2007), 116 Ohio St. 3d 468, 880 N.E.2d 420 (upholding limits on noneconomic and punitive damages).

claims of 30,000 unimpaired asbestos plaintiffs, permitting them to re-file should they develop evidence of impairment in the future. *See* Patrick O'Donnell, *30,000 Cuyahoga Asbestos Cases Dismissed*, Cleveland Plain Dealer, Oct. 21, 2008, at B1, *available at* 2008 WLNR 20103090. In July 2005, this Court also amended the Ohio Rules of Civil Procedure to preclude the joinder of pending asbestos-related actions. *See* Ohio R. Civ. P. 42(A)(2).

In addition, this Court has found that nonmanufacturing suppliers of defective products, such as wholesalers, distributors, and contractors, are not strictly liable for sales that occurred prior to 1977, when the Court first extended strict liability to nonmanufacturing sellers of defective products. *See DiCenzo v. A-Best Prods. Co.* (2008) 120 Ohio St. 3d 149, 897 N.E.2d 132, *cert. denied* (2009) 129 S. Ct. 1673.

Most recently, this Court considered the issue of take-home exposure, ruling that an employer is not liable for injury to a family member of a worker from secondary exposure to asbestos pursuant to language in Ohio's medical criteria statute. *See Boley v. Goodyear Tire & Rubber Co.* (2010) 125 Ohio St. 3d 510, 929 N.E.2d 448 (applying R.C. 2307.941).

In addition, Ohio courts have taken action against fraudulent asbestos claims. *See, e.g., Kananian v. Lorillard Tobacco Co.* (Ohio Ct. Com. Pl. Cuyahoga County Jan. 19, 2007) No. CV 442750, 2007 WL 4913164 (trial court order revoking *pro hac vice* admission of California law firm after finding that the firm and one of its partners failed to abide by the rules of the court proscribing dishonesty, fraud, deceit, and misrepresentation when the firm presented conflicting versions of how its client was exposed to asbestos in open court and in documents submitted to trusts set up by bankrupt companies to pay asbestos-related claims); *see also* Thomas J. Sheeran, *Ohio Judge Bans Calif. Lawyer in Asbestos Lawsuit*, Cincinnati Post, Feb. 20, 2007, at A3, *available at* 2007 WLNR 3480283. An Ohio Court of Appeals and this Court let the trial court's

ruling stand. *See Kananian v. Lorillard Tobacco Co.* (Ohio App. 8th Dist. Feb. 21, 2007) No. 89448 (dismissing appeal as moot, sua sponte), *review denied* (Ohio 2007) 116 Ohio St.3d 1457, 878 N.E.2d 34 (Table).

Ohio courts have also, properly, reaffirmed the requirement that plaintiffs provide evidence of actual exposure to a defendant's product to establish that the exposure was a substantial factor in causing the plaintiff's harm. *See Cantrell v. Adience, Inc.* (Ohio App. 8th Dist. Aug. 5, 2010) No. 93944, 2010 WL 3046112.

Each of these actions has contributed to the development of a sound system for resolution of asbestos claims in Ohio, discouraged forum shopping and fraudulent claims, and ensured that asbestos claims do not unduly clog Ohio courts. Abandoning traditional, established principles of corporate law for the purpose of providing a new class of defendants that plaintiffs' lawyers may sue – foreign dissolved corporations – would be a marked departure from this Court's sound jurisprudence and recent legislative enactments. Taking the radical step of permitting lawsuits against businesses that no longer exist would adversely affect Ohio's asbestos litigation environment. Furthermore, the result could chill incentives to insure, or affect premiums, in Ohio because there could never be any finality after dissolution and wind-up.

III. AN INSURANCE POLICY IS NOT AN "ASSET" SUBJECT TO DISTRIBUTION.

As it takes into account the asbestos litigation environment in which this case presents itself, this Court should consider the important underlying issue of whether insurance policies qualify as undistributed assets following the dissolution and wind-up of a corporation. This appears to be an issue of first impression in Ohio. As pointed out in Sager's brief, the court below should have applied Illinois law to conclude that Sager is no longer susceptible to suit, and should not have appointed a receiver to circumvent that law. To the extent Ohio law would

apply, however, the Court should find that insurance policies are not assets subject to distribution by a receiver.

A. The Trial Court Should Have Determined Whether Insurance Policies Constitute “Property” Before Appointing a Receiver

The Plaintiff’s brief in support of the motion to appoint a receiver stated, “Upon information and belief, Sager has insurance policies which have not been exhausted, and are assets of Sager.” The Court of Common Pleas of Cuyahoga County appointed a receiver on this basis without examining whether insurance policies are “assets” of a corporation that no longer exists and lacks the capacity to be sued under the laws of the state of its incorporation. *See Slip Op.* at 1-2 (noting Plaintiff’s belief that Sager has unexhausted assets without mentioning insurance policies). The Court of Appeals understood the trial court’s opinion to appoint a receiver “in order to process the insurance assets that remain available to compensate persons who Sager injured in Ohio.” *Slip op.* at ¶ 15. Like the trial court, the Court of Appeals simply accepted without analysis that unexhausted insurance policies of a defunct corporation constitute remaining assets. *See id.* at ¶ 20 (“Sager does not claim it has no remaining assets, nor has it disputed Bevan’s contention that unexhausted insurance policies remain in effect.”).³

Ohio law provides receivers with the power to “bring and defend actions in his own name as receiver, *take and keep possession of property*, receive rents, collect, compound for, and compromise demands, make transfers, and generally do such acts respecting *the property* as the court authorizes.” R.C. 2735.04 (emphasis added). If such insurance policies are not “property,” however, then there are no assets for the receiver to collect and distribute.

³ Sager does, in fact, challenge the notion that unexhausted insurance policies constitute remaining assets. *See Appellant’s Memorandum in Support of Jurisdiction* at 14.

Whether insurance policies constitute property of a defunct corporation subject to distribution should be determined prior to the appointment of a receiver. *See Equity Ctrs. Dev. Co. v. South Coast Ctrs., Inc.* (1992) 83 Ohio App.3d 643, 666-68, 615 N.E.2d 662 (finding that trial court erred by not making a determination with respect to the rights, claims, and charges made by and between the parties prior to appointing a receiver and by instead leaving that determination for final hearing on the merits and because there was no showing that appointing a receiver would make a material difference toward preservation of partnership assets). A party that seeks appointment of a receiver must first establish a “probable right or interest in the properties at issue.” *See Westbrook v. Swiatek* (Ohio App. 5th Dist. Dec. 10, 2008) Nos. 07 CAE 09 0046, 07 CAE 11 0058, 2008 WL 5182611, at * 6. For instance, in *Westbrook*, the Court of Appeals for the Fifth District found that a trial court abused its discretion when it appointed a receiver over real estate projects before it determined whether the party seeking a receiver had a legal interest in the properties at issue. The court reached this conclusion based on its finding that the partnership by which the appellee based his property interest dissolved upon the death of a partner. “A receiver cannot protect Appellee’s rights or interests until those rights or interests are established.” *Id.* *6 (citing *Equity Ctrs. Dev. Co.*, 83 Ohio App.3d at 667, 615 N.E.2d 674). Thus, Ohio law does not support the appointment of a receiver prior to determining whether an insurance policy is an asset of a dissolved corporation whose wind-up period has expired under the law of the state of incorporation.

B. Insurance Policies are Contracts Protecting the Insured from Liability, Not Funds for Claimants

The lower courts in this appeal appear to have equated the insurance policy of a dissolved corporation with funds remaining in a bank account. They are not the same. An insurance policy exists by virtue of a contractual relationship between two parties. *See Westfield Ins. Co. v.*

Galatis (2003) 100 Ohio St. 3d 216, 797 N.E.2d 1256. In exchange for payment of insurance premiums, the insurer agrees to provide coverage when the insured is “legally obligated” to pay damages. See *Penn Traffic Co. v. AIU Ins. Co.* (2003) 99 Ohio St. 3d 227, 231, 790 N.E.2d 1199 (quoting standard policy language). Thus, the purpose of an insurance contract is to protect the insured. It only holds value when a contingency occurs – when the insured incurs liability. After a corporation dissolves and the wind-up period expires, this contingency can no longer arise. There is no insured. There is no liability. Therefore, there is no continuing value in the insurance policy. Third parties, such as the Plaintiff here, are not beneficiaries of the policy. The former policy existed to provide coverage from liability to the insured corporation. An insurance policy is not a fund for claimants. Appointment of a receiver cannot bridge this gap.

While Ohio courts have not considered this question, courts in other jurisdictions have found that insurance policies of dissolved corporations do not constitute assets or property of the corporation subject to distribution by a receiver. The most thorough and thoughtful decision to address this issue is *Gilliam v. Hi-Temp Prods. Inc.* (Mich. Ct. App. 2003) 677 N.W.2d 856. There, an asbestos bodily injury plaintiff attempted to reach the insurance of a dissolved corporation under a Michigan statute that permits a creditor, “for good cause shown,” to commence a proceeding against a dissolved corporation that “has not made complete distribution of all its assets.” *Id.* at 862. The *Gilliam* court examined the meaning of the word “asset” in the context of a dissolved corporation and found that an “asset” must have intrinsic value. Once a corporation is dissolved and no longer subject to suit, the policy ceases to have any value:

[T]he contracts of insurance existed to provide indemnification to Hi-Temp in the event it was found liable for a tort claim [citation omitted]. That is, their *only* value is the protection they provided from tort liability judgments. We cannot accept plaintiffs’ contention that an asset is simply something that the corporation owns or has. In fact the definition of the word “asset” is “[a] useful or valuable quality or thing” [citation omitted]. If there have been no tort claims triggering

defense or indemnification by [the insured], **or the deadline for the filing of any claims covered by the policies has expired, the policies are of no value. They cannot be “distributed.” They are no longer assets of the corporation.**

Id. at 870 (italicized emphasis in original, bold emphasis added). The Michigan court held that a contract of insurance is not an “asset” once the dissolved company can no longer be sued because at that point the policy has no value. Once “existing claims were satisfied during liquidation and the deadline for filing future claims had expired,” the insurer ceased to have any obligation. *Id.* An insurance policy is not “an asset that a corporation could distribute in the process of winding up its affairs,” and “[t]herefore it is not an undistributed asset.” *Id.* at 866.

Gilliam is not alone in reaching this conclusion. A federal court has held that a Delaware corporation that dissolved over three years prior to suit could not be sued because the corporation’s liability insurance did not constitute an asset that would subject it to liability to federal environmental liability. *AM Prop. Corp. v. GTE Prods. Corp.* (D.N.J. 1994) 844 F. Supp. 1007, 1015. An Indiana appellate court has likewise ruled that insurance is not an asset of a long-dissolved corporation because “there was no liability for the insurance to cover.” *City of S. Bend v. Century Indem. Co.* (Ind. Ct. App. 2005) 821 N.E.2d 5, 13. Further, the Indiana court denied a motion to appoint a receiver for the dissolved corporation, holding that, as claims against the corporation had been barred for many years, there was nothing for a receiver to do. *Id.* at 14-15. An Illinois appellate court has similarly held that an “undistributed insurance asset” would not provide the basis for an action against a corporation outside the statutory period for suit. *See Blankenship v. Demmler Mfg. Co.* (Ill. Ct. App. 1980) 411 N.E.2d 1153.

There is no Ohio authority for the proposition that “an expired third-party liability policy is property that [the corporation] could transfer in the process of liquidating its assets.” *Gilliam*, 677 N.W.2d at 870. Nor is an insurance contract a “debt” owing to the policyholder in the

absence of an established liability. In the absence of existing rights to property or debts, there is no statutorily-sanctioned role for a receiver to play. In effect, the Court of Appeals' conclusion under review is that the Court can create a substitute for the defunct company and thereby restore contractual obligations that are long dead. This is not what R.C. 2735.01 contemplates.

Moreover, allowing such claims is unwise public policy. Litigation requires a *real* defendant. Typically, when a lawsuit arises, an insurer works closely with the insured corporation to defend the claim. The insured has incentive to defend itself – its product line and reputation is at stake, and its policy limits are subject to exhaustion. The corporation can mount evidence to defend itself. For example, in asbestos cases, a corporation may be able to show that its products were not used in the plaintiff's workplace. After dissolution, however, the defendant does not exist, records are likely discarded, and witnesses, if they can be located, lack motivation to defend a defunct employer. The adversarial process is likely to fall apart due to the inability to present a viable defense in this situation. Such litigation may unfairly impose liability on insurers when the insured was not responsible for the plaintiff's injury. Particularly in the context of asbestos litigation, where plaintiffs often name a laundry list of defendants, and courts have recognized questionable claims-generating practices and even fraud, there is certain danger in going down this path.

**IV. EXPANSION OF THE LAW HERE IS NOT ONLY UNWISE
BUT ALSO UNNECESSARY BECAUSE ASBESTOS CLAIMANTS
HAVE OTHER SIGNIFICANT SOURCES OF RECOVERY**

The lower courts' use of a receiver to proceed on a claim against a dissolved foreign corporation's purported insurance assets may be motivated by an understandable desire to ensure that victims of asbestos exposure receive adequate compensation for their injuries. Such stretching of the law is unwarranted as a matter of public policy, since financial resources are available to compensate asbestos claimants through many sources.

It is estimated that a typical mesothelioma plaintiff may recover between \$1 million and \$1.4 million through the tort system, an amount that has increased about four percent each year since 2000. *See* Charles E. Bates & Charles H. Mullin, *Show Me the Money*, 21 Mealey's Litig. Rep.: Asbestos 1 (2007), *available at* <http://www.bateswhite.com/media/pnc/5/media.285.pdf>.

In addition, individuals are able to obtain compensation through asbestos-related personal injury trusts established pursuant to § 524(g) of the Bankruptcy Code. *See* William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts* (2008) 17 Norton J. Bankr. L. & Prac. 257. In fact, one study concluded: "For the first time ever, trust recoveries may fully compensate asbestos victims." Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 Mealey's Asbestos Bankr. Rep. 1 (Nov. 2006). For example, it is estimated that mesothelioma plaintiffs in Alameda County (Oakland) will receive an average \$1.2 million from active and emerging asbestos bankruptcy trusts, *see* Charles E. Bates et al., *The Naming Game*, 24:15 Mealey's Litig. Rep.: Asbestos 1 (Sept. 2, 2009), *available at* <http://www.bateswhite.com/media/pnc/9/media.229.pdf>, and could receive as much as \$1.6 million. *See* Charles E. Bates et al., *The Claiming Game*, 25:1 Mealey's Litig. Rep.: Asbestos 27 (Feb. 3, 2010), *available at* <http://www.bateswhite.com/media/pnc/2/media.2.pdf>. Ohio claimants presumably could recover similar sums.

A recent study by the RAND Institute for Civil Justice identified sixty-three trusts from a group of ninety-six asbestos-related bankruptcies that have been established or proposed, then closely examined twenty-six of the largest trusts. *See* Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* (RAND Inst. for Civil Justice 2010), *available at* http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf. These trusts paid approximately 575,000 claims, for a total value of

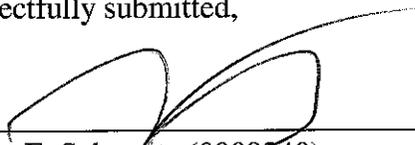
\$3.3 billion, in 2008. *Id.* at 31. To put these numbers in perspective, a 2005 RAND report estimated that \$7.1 billion was paid by asbestos defendants in the tort system in 2002. *Id.* (citing Stephen J. Carroll et al., *supra*, at 92. Assets under trust control indicate that significant payments will continue. The twenty-six selected trusts had assets totaling \$18.2 billion at the conclusion of 2008. *Id.* at 36. This total does not include the assets of four recently formed trusts that had not filed financial statements as of 2009. The total also does not include the estimated assets of currently proposed trusts. Estimates of the initial assets of eight of the nine proposed trusts for which information is available total \$14.5 billion. *Id.* at 30.

In sum, there is no public policy justification for altering well-established principles of corporate law that could have significant implications beyond the context of asbestos litigation.

CONCLUSION

For the foregoing reasons, *amici curiae* urge this Court to reverse the decision below.

Respectfully submitted,



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CERTIFICATE OF SERVICE

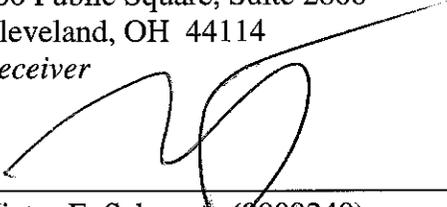
I hereby certify that I served two copies of the foregoing Brief upon counsel by depositing a copy in a first-class postage-prepaid envelope into a depository under the exclusive care and custody of the U.S. Postal Service on March 7, 2011, addressed to the following:

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