No. 17-1104

In The Supreme Court of the United States

AIR AND LIQUID SYSTEMS, CORP., ET AL.,

Petitioners,

v.

ROBERTA G. DEVRIES, ADMINISTRATRIX OF THE ESTATE OF JOHN B. DEVRIES, DECEASED, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RICHARD A. EPSTEIN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AIR AND LIQUID SYSTEMS, CORP., ET AL.

NEVIN M. GEWERTZ, *Counsel of Record*
REID M. BOLTON
IGNACIO SOFO
BARTLIT BECK HERMAN PALENCHAR & SCOTT LLP
54 West Hubbard Street, Suite 300
Chicago, IL 60654
Phone: (312) 494-4400
nevin.gewertz@bartlit-beck.com

RICHARD A. EPSTEIN
800 North Michigan Avenue
Apartment 3502
Chicago, IL 60611

July 13, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*[1]

Amicus is the Laurence A. Tisch Professor of Law at NYU School of Law, the Peter and Kirsten Bedford Senior Lecturer at the Hoover Institution, and the James Parker Hall Distinguished Service Professor Emeritus and Senior Lecturer at the University of Chicago. Professor Epstein has taught torts to generations of law students around the country and has a strong interest in maintaining clear rules and incentives for how economic actors should behave in the face of potential liability. He has no stake in the parties or in the outcome of this case.

STATEMENT OF FACTS

Asbestos historically was considered a "magic mineral."[2] A naturally occurring silicate, it possesses uniquely useful physical and chemical attributes:

> Its tensile strength surpasses that of steel. It has tremendous thermal stability, thermal and electrical resistance and is non-flammable. It can be subdivided into fine fibers that are

[1] Pursuant to Supreme Court Rule 37, all parties received timely notice of *Amicus's* intent to file and consented to the filing of this brief. *Amicus* states that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amicus* and his counsel—contributed money intended to fund preparing or submitting the brief.

[2] Paul Brodeur, *Magic Mineral*, The New Yorker, 117 (Oct. 12, 1968).

> strong enough and flexible enough to be spun into material that is a flame retardant, chemically inert thermal and electrical insulator.[3]

Because of its unique physical and chemical properties, asbestos was used for decades as a building and construction material, including in the automotive industry, homebuilding industry, and of particular relevance here, in naval ship construction.

History also has revealed that the positive attributes of asbestos are paired with a substantial health risk to those involved in its manufacture or maintenance. "The very quality that has made asbestos useful for so long, its indestructibility, also accounts for the problems that result in asbestos-related disease." *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, 52 Cal. Rptr. 2d 690 (Cal. Ct. App. 1996) (internal quotation marks omitted).

As early as 1924, a British medical journal published the first of many studies that documented the incidence of asbestos-related injuries suffered by those exposed to its fibers. *See* W.E. Cooke, *Fibrosis of the Lungs Due to The Inhalation of Asbestos Dust*, 2 Br. Med. J. 147 (1924). And by the 1940s, additional research had connected asbestos fiber inhalation to various respiratory diseases, including cancer. *See Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1083–84

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[3] Roberta C. Barbalace, *Asbestos, its Chemical and Physical Properties* (October 2004), https://environmentalchemistry.com/yogi/environmental/asbestosproperties2004.html (last visited June 26, 2018).

(5th Cir. 1973) ("By the mid-1930's, the hazard of asbestosis as a pneumoconiotic dust was universally accepted. Cases of asbestosis in insulation workers were reported in this country as early as 1934. The U.S. Public Health Service fully documented the significant risk involved in asbestos textile factories in a report by Dreessen et al., in 1938.") (footnotes omitted).

Despite the known risks associated with asbestos use, the United States Navy mandated that naval vessels built before and after World War II include asbestos as an insulating material throughout their ships. *See*, *e.g.*, *Rust Eng'g Co. v. United States*, 95 Ct. Cl. 125, 133 (1941) (noting that "[t]he flameproof insulation described in Navy specifications 15C1G was asbestos"). Decisions about what insulation to use, and how, were made by the Navy.

The naval specifications that led to the installation of thousands of tons of asbestos insulation in commissioned vessels were undoubtedly responsible for saving thousands of soldiers and sailors from death or serious injury during wartime service. And the Navy's decision to require the use of asbestos necessarily balanced the risk of immediate death at sea in the course of military maneuvers with the long-term risk to sailors exposed to the substance.

As a result of the decisions the Navy made in creating and implementing the asbestos specifications, a percentage of the workers and sailors exposed to asbestos during the construction and use of naval vessels suffered health problems, either years or decades after

their exposure; roughly 14 out of every 1,000 workers exposed to asbestos are ultimately killed by mesothelioma, asbestosis, or other related diseases.[4]

The United States Navy utilizes an extensive system of benefits for veterans who were injured or disabled in the line of duty. In particular, it provides for health care and compensation to veterans who can show (1) that they were exposed to asbestos during their service, and (2) that they were not dishonorably discharged.[5]

Respondents John DeVries and Kenneth McAfee both served in the United States Navy in the second half of the 20th Century (DeVries from 1957 to 1960, McAfee from 1969 to 1993). They both allege that they were exposed to asbestos fibers during their service as part of their duties maintaining equipment in their respective ship's engine rooms (the *U.S.S. Turner* in the case of DeVries and the *U.S.S. Wanamassa* in the case of McAfee). McAfee also alleges that he was exposed to asbestos while working at a Philadelphia naval shipyard. According to DeVries and McAfee, their asbestos exposure led them both to suffer serious health ailments decades after their exposure.

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[4] *See*, *e.g.*, Bengt Järvholm and Evelina Åström, *The Risk of Lung Cancer After Cessation of Asbestos Exposure in Construction Workers Using Pleural Malignant Mesothelioma as a Marker of Exposure*, 56 J. Occup. Environ. Med. 12, 1297 tbl. 2 (Dec. 2014).

[5] *See* https://www.vets.gov/disability-benefits/conditions/exposure-to-hazardous-materials/asbestos/ (last visited July 8, 2018).

Petitioners did not provide any of the asbestos that Respondents were allegedly exposed to. Petitioners also did not manufacture, supply, or distribute any of the asbestos-containing products DeVries and McAfee came into contact with while maintaining the engine rooms on the *Turner* and *Wanamassa*. Rather, Naval specifications required that Petitioners provide the purchased materials as "bare metal," that is, without any insulation. Furthermore, any asbestos-containing internal components within those products had been repeatedly replaced prior to Respondents coming into contact with those components.

SUMMARY OF ARGUMENT

One of the fundamental premises of tort law rests on the fact that dangerous instrumentalities typically move downstream through a distribution chain, where each party sequentially handles the instrumentality out of the sight of others. In such a circumstance, the parties adjust their price to reflect the risk that the instrumentality (or product) will subsequently cause injury. Where dangerous products change hands, the challenge is to find an efficient but general way to describe what each party is entitled to expect of the other, and when liability will attach to that parties' actions. The way to approach the problem is to ask, in this sequential game, which steps taken by each party will minimize the harm suffered by society. In that way, the parties will organize their conduct most efficiently.

Applying this understanding to asbestos litigation, suppliers should be liable for asbestos exposure only if they were responsible for providing the asbestos that caused the harm. Although the past 50 years has seen an expansion of asbestos liability to include more manufacturers and expanded causes of action, a bright line has always protected parties that had no involvement in the manufacture, installation, or maintenance of the asbestos itself, where that asbestos was added later by other independent parties.

Such a rule is sensible in this case. Since Petitioners were "bare metal" manufacturers, the products could not be dangerous (or defective) at the time the products were sold. Indeed, Petitioners had no control over whether the Navy made modifications to the metal after the fact. In turn, Petitioners could have taken no additional steps, or provided no additional warnings, to limit Respondents' injuries.

The Third Circuit opinion below departs from these basic principles in favor of a standard that assesses liability when justified by unspecified "facts and circumstances." Such a standard is neither sensible nor efficient. It insists upon a level of warning *ex post* that is far higher than what was in fact demanded by the Navy *ex ante*, and which assumes the Navy would have been sensitive to small changes in phraseology or nuance of a manufacturer's warnings when such was almost certainly not the case given the wartime exigencies balanced by the Navy's specifications.

The obvious defendants to this asbestos suit are the Navy and the asbestos supplier. That they are immune and insolvent, respectively, should not alter the apportionment of liability between tortfeasors. Finally, any concerns over Respondents' ability to recover are misplaced, as the government has long maintained—as a matter of public policy—a compensation system for veterans that provides compensation while avoiding litigation.

ARGUMENT

I. The Only Clear, Workable, and Efficient Rule Is One in Which Bare Metal Manufacturers Are Not Liable for Asbestos Installed by Downstream Third Parties

A. First principles of tort law do not support liability for parties who retain no control of a product after it moves downstream in the stream of commerce

The central task of tort law is to maximize social welfare, which translates into the proposition that the assignment of liability in any given setting should be aligned so as to minimize both the costs of accidents and the costs of their prevention. *See* Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale 1970). *See also* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1, 19–28 (1960); William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law*, 7 (1987); Richard A. Epstein, *Toward A*

General Theory of Tort Law: Strict Liability in Context, 3 J. Tort L. 6 (2010). In some cases, especially those in which there is only one active party, both objectives are achieved as a first approximation by concentrating liability on that active party.

In ordinary trespass cases, that proposition means the person who applied direct force to another should be liable. This puts the incentives on the party that can do most to prevent the harm while also simplifying the costs needed to adjudicate these harms. Of course, the prima facie case can be offset by showing, for example, that the plaintiff had assumed the risk of such injuries, but the system works best by placing the initial burden on the party that applied the force.

In structured environments, such as highways, the general principles of negligence typically translate into a rule of negligence per se where the party (or parties) who are in violation of the rules of the road bear their own losses and the losses to other parties. *See* H. Laurence Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment* (Transaction Publishers, 1980).

This same basic concept is critical in dealing with products liability cases, where the control of any given dangerous product passes from hand to hand before it causes harm. In the typical asbestos case, the usual chain of responsibility has four parties. The party who mined and prepared the asbestos; the party who included it in some product; the firm, typically an employer (here, the United States Navy), which applies

the product within the workplace; and the individual worker whose own conduct (for example, using safety equipment such as a respirator) can influence the risk.

The correct rule of thumb in these cases is that the party or parties in control of the product at the time that it causes harm should bear the loss. In suits brought by military personnel who work in a closed environment, that objective is today achieved via the compensation system put into place by the military. *Feres v. United States*, 340 U.S. 135, 144 (1950).

Like standard workers' compensation systems, the military compensation system simplifies matters by broadening the scope of coverage to all harms that arise within the course of service, and removes any defenses based on contributory negligence or assumption of risk, except in those instances, not relevant here, where the claimant willfully or recklessly disregarded his own safety. Where such a system exists, the presumption should be against extending any form of tort liability further back up the chain to upstream parties.

Current torts doctrine is fully in accord with these basic principles and optimal approach. Thus, where a party puts a product into the stream of commerce, which is free of defects when it leaves the party's control, that party has no duty towards others to control the misconduct of subsequent actors, whatever they may do. *See*, *e.g.*, RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 5 cmt. a (1998) ("If the component is not itself defective, it would be unjust and inefficient to impose liability solely on the ground that the manufacturer of

the integrated product utilizes the component in a manner that renders the integrated product defective."). Particularly where the subsequent actors have better knowledge of their own actions, the original party cannot be held responsible for monitoring and warning subsequent parties about the risks of those actions. *See* Richard A. Epstein, *The Perils of Posnerian Pragmatism*, 71 U. Chi. L. Rev. 639, 647 (2004) (discussing various theories of tort law, including the benefits of "shift[ing] responsibility downstream to the party with the greater knowledge and capacity for avoidance").

Tort law should not—and does not—create a police state or require all actors to be responsible for each other's conduct. *See*, *e.g.*, *O'Neil v. Crane Co.*, 266 P.3d 987, 997 (Cal. 2012) ("[W]e have never held that a manufacturer's duty to warn extends to hazards arising exclusively from *other* manufacturers' products. A line of Court of Appeal cases holds instead that the duty to warn is limited to risks arising from the manufacturer's own product.") (quotations omitted).

B. The history of asbestos litigation does not support expanding liability to bare metal manufacturers

Under longstanding precedent, the United States is immune from tort suits by individuals whose injuries are incident to military service. *See Feres*, 340 U.S. at 146. In *Feres*, three different servicemen brought negligence suits against the U.S. Government for harm

they suffered while on active duty. The Court held that the Federal Government was traditionally immune from suit and that the Federal Tort Claims Act did not create an exception to that rule. *Id.* at 144–46.

The *Feres* decision was supported by the Court's observation that the Navy already has a comprehensive compensation system in place for providing recovery to injured or disabled veterans. *See id.* at 144 (noting that the Court "cannot escape" attributing some weight to the fact that Congress created a system "of simple, certain, and uniform compensation for injuries or death of those in armed services"). Such a system is efficient in that it is (1) administratively simpler than litigation and (2) creates the right incentives for the Navy, which already is in possession of the relevant information from all sources, and not just the supplier, to balance potential harm to its servicemen from various causes, while allowing it to make the appropriate trade-off between the damage caused and lives saved from asbestos use.

Thus, the reason for this far-fetched litigation is that long-established law prevents the plaintiffs from suing the Navy, while allowing them to file suit against the companies that provided the asbestos-laden equipment for the ships.

There are of course cases in which imposing liability on these remote suppliers who are not in privity with the plaintiff makes sense. Even from the first half of the 20th Century, courts have held that products entering the market must be safe regardless of whether

the manufacturer is in privity with the consumer. *See MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916) (Cardozo, J.) (holding that an automobile manufacturer could be sued in negligence for subpar construction or design of its automobile tire, even though the customer who purchased the tire had no direct interaction with the manufacturer); *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring) (holding the bottle manufacturer strictly liable to consumers for a defective bottle).

But even those mid-century holdings put sharp limitations on the potential liability of remote parties. For example, in *Escola*, the concurrence specifically noted that a strict liability theory still requires a plaintiff to prove that the product reaching the market was defective when it left the manufacturer's hands. *Id.* at 444 ("The manufacturer's liability should, of course, be defined in terms of the safety of the product in normal and proper use, and should not extend to injuries that cannot be traced to the product as it reached the market."). And such a standard would typically block any lawsuit brought against the suppliers of asbestos products for use in the Navy or elsewhere, given the forms and mode of use—and hence the levels of exposure.

Indeed, the *Escola* rule governed without exception, largely shielding asbestos suppliers from suit. Thus, as late as 1971, some courts did not impose liability on asbestos suppliers because asbestos is not inherently dangerous. In *Bassham v. Owens-Corning Fiber Glass Corp.*, the court granted summary judgment to the defendant, writing that "[t]here is nothing

about the products which makes them imminently or inherently dangerous to human safety. There was nothing sudden or rapid that happened and, in fact, it would be impossible to determine when the plaintiff contracted the disease." 327 F. Supp. 1007, 1008 (D.N.M. 1971).

But the 1973 Fifth Circuit decision in *Borel v. Fibreboard Corp.*, changed all that. 493 F.2d 1076 (5th Cir. 1973). *Borel* blew past all of the *Escola* concurrence's earlier restrictions by holding that a supplier of asbestos had a "duty to warn industrial insulation workers of dangers associated with the use of asbestos." *Id.* at 1081. Of course, asbestos suppliers (and the Navy) knew of these risks, but so too did Respondents, as the basic information was publicly available. *Borel* itself acknowledged that fact, by noting that "there is ample evidence in the record that the danger of inhaling asbestos, including the disease of asbestosis, was widely recognized at least as early as the 1930's." *Id.* at 1092. But the *Borel* majority then failed to connect the dots, by contenting itself with the observation that some unspecified additional warning would have changed worker behavior.

The *Borel* opinion also ignored both the relevant trade-offs involved in asbestos use and the risk of adding additional inefficiency to the tort system by asserting that "a true choice situation arises, and a duty to warn attaches, whenever a reasonable man would want to be informed of the risk in order to decide whether to expose himself to it." *Id.* at 1089. At no point did the court explain why that information is

better supplied by a remote manufacturer rather than the employer who supervises the work (or the direct supplier for that matter). And at no point did it explain why workers' compensation did not provide prompt and adequate relief in all these cases.

There is good reason to question the wisdom of *Borel* and its progeny, which imposed liability on suppliers of asbestos for use by others, including the United States Navy. Asbestos is a generic product whose risks are as well known to the Navy as to the upstream supplier, who in any event can warn only about risks that are already known by downstream parties. The asbestos supplier cannot control the ventilation systems or the mode of application, which influence the amount of asbestos that is released into the working environment. The upstream supplier also cannot decide whether to require respirators in the face of the evident hazard that any airborne particles present.

In time, the excesses of *Borel* bankrupted virtually all the asbestos suppliers. *See* Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for A Solvent Bystander*," 23 Widener L.J. 59, 60 (2013) ("Most of the primary historical asbestos defendants, including virtually all manufacturers of asbestos-containing insulation products, eventually sought bankruptcy court protection, resulting in a wave of bankruptcies between 2000 and 2002."). In fact, although no asbestos suits were reported as filed in federal court in 1980, by 1997 over 7,000 new suits were filed, amounting to 22% of new personal injury products liability cases; by 2009, the number of

asbestos cases filed in federal courts skyrocketed to 41,785. *See* Richard A. Epstein & Catherine M. Sharkey, *Cases and Materials on Torts*, 644 (11th ed. 2016). Those cases resulted in massive judgments against the asbestos suppliers, including punitive damages. *See*, *e.g.*, *Poage v. Crane Co.*, 523 S.W.3d 496, 506 (Mo. Ct. App. 2017), cert. denied, 138 S. Ct. 1326 (2018) (affirming judgment in favor of plaintiff, including punitive and compensatory damages, where plaintiff alleged that "gaskets and packing were asbestos-laden products produced by Crane, which caused [decedent] to inhale asbestos dust and eventually develop mesothelioma").

C. Nearly all jurisdictions have applied the rule that bare metal manufacturers are not liable for downstream conduct by asbestos suppliers

Notwithstanding the aggressive application of product liability against asbestos suppliers, precedents have provided a clear line beyond which asbestos liability would not extend: "bare metal" manufacturers that had nothing to do with the asbestos that harmed the plaintiffs. The only reason plaintiffs have recently sought to recover from them is because previous litigation has bankrupted all asbestos suppliers. Arguing that "[as] a substitute, plaintiffs seek to impose liability on defendants for harms caused by products they never made, sold, installed, or profited from." Schwartz, 23 Widener L.J. at 88. But the bankruptcy of

parties that should be liable is no reason to impose onerous liability on parties that should not be liable.

Courts in numerous jurisdictions have therefore rejected this onslaught of lawsuits by recognizing the "bare metal" rule, which adopts the correct position that manufacturers of bare metal are not liable for injuries caused by other asbestos added after the product was out of defendant's control. *See O'Neil v. Crane Co.*, 266 P.3d 987, 999 (Cal. 2012) (rejecting "the notion that a manufacturer has a duty to warn whenever the intended use of its product will expose consumers to risks arising from the product of another"); *Faddish v. Buffalo Pumps*, 881 F. Supp. 2d 1361, 1371 (S.D. Fla. 2012) ("In short, a manufacturer's duty to warn, whether premised in negligence or strict liability theory, generally does not extend to hazards arising exclusively from *other* manufacturer's products, regardless of the foreseeability of the combined use and attendant risk.") (emphasis in original); *see also* Schwartz, 23 Widener L.J. at 88–91 (collecting the numerous jurisdictions that have upheld versions of the bare metal rule).

Most notably, in 2005, the Sixth Circuit flatly rebuffed this theory of liability in *Lindstrom v. A-C Prod. Liab. Tr.*, 424 F.3d 488, 496 (6th Cir. 2005). Lindstrom was employed as a merchant seaman. *Id.* at 491. As part of his job, he was exposed to equipment containing asbestos and was later diagnosed with mesothelioma. *Id.* He sued an assortment of bare metal manufacturers, asserting products liability claims. *Id.* In *Lindstrom*, the Sixth Circuit agreed with the

various courts that have applied the bare metal rule, holding that because asbestos-containing material was incorporated into the defendant's product post-manufacture, the bare metal manufacturer could not be held responsible. *Id.* at 496.

D. Protecting bare metal manufacturers from liability for asbestos sold by third parties correctly applies tort principles

The line of cases flatly rejecting liability for bare metal manufacturers is unquestionably the correct result both as a matter of black letter tort law as well as economic efficiency.

First, a clear rule in this situation protects manufacturers who are not involved in supplying asbestos from bearing additional costs that could drive them out of business, thereby depriving both the Navy and other private parties of much needed services, which other firms, going forward, will be reluctant to supply without a safe harbor against crushing liabilities.

In essence, Respondents' lawsuits represent an effort to expand liability, moving one additional step back up the chain of distribution to impose it on parties that have no control over how equipment will be used, and no opportunity to make a sensible warning to other parties, all of whom are already under a duty to warn because of their knowledge of the risk. Typically, these bare metal parts have a long useful life, so that the additions to them, although foreseeable, and indeed planned, are made by parties whose identities are

not known to the bare metal manufacturers and whose detailed modifications are not shared.

It is idle to attach warnings to a piece of equipment and impossible to prepare leaflets or booklets that can be used by others years later who will attach various pieces of equipment to the bare metal part. That is especially true here. There is, in short, no useful information that the bare metal manufacturer can provide that will reduce accidents. But there are enormous administrative costs to implementing what is in effect a disguised welfare scheme that is inferior in every way to that which is already in place through the United States Navy, which follows its own protocols and is thus virtually certain not to take into account any supposed warnings that the bare metal manufacturer could issue.

Yet none of these issues were acknowledged in the decision below, which rejected the Sixth Circuit's approach in *Lindstrom* and traditional bright line rule in favor of a test that allows liability to be determined by all facts and circumstances, without specifying which facts and which circumstances matter. That amorphous test, moreover, can be in any given case applied cumulatively against multiple bare metal manufacturers of different components, thereby creating a litigation quagmire of the worst order. The correct bright-line rule requires summary judgment in all these cases. The ad hoc rule allows different juries to reach inconsistent judgments, without rhyme or reason, and should for that reason be rejected.

Second, the bare metal rule concentrates liability on downstream parties who are better able to control these risks. Anytime a system imposes liability on parties, it should be because that liability improves the overall expected outcomes of the system. Here, any asbestos supplier and especially the Navy are in the best position to understand the risks and rewards of asbestos, and in particular whether the material should be used (and under what circumstances). They are the parties in control of the dangerous material. Putting liability on the upstream producer of bare metal parts imposes huge administrative costs for no loss prevention gains.

This last principle has special weight in this case because the Navy takes active control over the use of asbestos on the one hand and offers its own compensation system for injured Navy personnel on the other. It has no need for any warning or input from the bare metal manufacturer about the risks of asbestos. Nor is there any reason to believe that any diffuse warning those bare metal manufacturers could provide would somehow alter military specifications for military-grade equipment use.

Third, a clear rule protecting bare metal manufacturers avoids the uncertainty and fear that would be embedded in a precedent that exposes countless manufacturers to liability for the actions of third parties over which they, both individually and collectively, have no control. Clear rules allow all manufacturers to organize their behavior rationally. Onerous liability just drives them from the system, retarding technical

progress, thereby ultimately increasing the risk of untoward harms.

Finally, it is critical to distinguish between the manufacturers of products that are used by ordinary consumers (like soda bottles) from the manufacturers of equipment sold to industrial purchasers. The level of downstream sophistication in the first case is low, so that it often makes sense to impose tight liabilities on suppliers, especially in the case of latent defects. But where manufacturers sell to other sophisticated parties, it is downstream, not upstream control that is critical. Thus in this case, the exposed sailors were not consumers, but military employees whose actions were controlled by United States Navy regulations, which took responsibility for its own actions through its own compensation system.

II. A "Facts and Circumstances" Standard That Allows Asbestos Liability for Bare Metal Manufacturers Is Cumbersome, Inefficient, and Unworkable

Notwithstanding the soundness of current institutional arrangements for bare metal manufacturers, the Third Circuit adopted a far more dangerous approach by injecting gratuitous uncertainty into the realm of asbestos litigation. Its misguided decision allows any fact-finder to decide whether the facts and circumstances of each individual case permitted recovery if it was "reasonably foreseeable" that a bare metal item would eventually be equipped with some

asbestos-containing product, without which it could not function effectively. *See In re: Asbestos Prod. Liab. Litig. (No. VI)*, 873 F.3d 232, 240 (3d Cir. 2017).

The Third Circuit's rule expanding liability to bare metal manufacturers in this context is misguided in at least two key respects.

First, its own "reasonably foreseeable" test is an open invitation to routinely impose liability. It is always foreseeable that some downstream party will misuse equipment that has been properly designed and manufactured, so that this test does not allow for any sensible limitation on liability based on the differential ability to control against key hazards. In so doing, it unwisely expands liability to parties that have no control over the addition of asbestos.

Second, it arbitrarily establishes a duty to warn on bare metal manufacturers, even though it is known beyond a doubt that those manufacturers have no clear target to warn, no clear warnings to provide, and no reason to believe that either the Navy or the asbestos suppliers would heed such a warning.

A. Bare metal manufacturers have no control over the insulation process that would warrant expansion of asbestos liability under a "reasonably foreseeable" test

In holding that bare metal manufacturers *might* be liable for the asbestos installed by other suppliers,

the Third Circuit identified five "fact-specific" factors that the parties would need to litigate against multiple suppliers simultaneously, though it also admitted that those factors "may or may not be the only facts on which liability can arise." *Id.* It further noted that the "keystone is the concept of foreseeability." *Id.* at 236. But the Third Circuit never addressed the issue of control, even though that is the most fundamental question for establishing the proper assignment of liability.

The Navy is the party in control. It mandated that its manufacturers conform to precise specifications—including a requirement that the turbines and pumps provided by the bare metal manufacturer be free of exterior insulation, and that it would specify how particular asbestos insulation would be subsequently added. Once the parts were delivered, the Navy then took the bare metal parts and chose how to insulate them. The Navy also mandated the specifications for internal components and how they would be installed, maintained, and replaced. And when the internal components containing asbestos wore out, the Navy once again had control over their replacement.

Imposing asbestos liability on bare metal manufacturers is inefficient because it does not lead to any improvement in safety in any individual case. Given that the bare metal manufacturer was not involved in setting any of the specifications or installing any of the asbestos at issue, the foreseeability rule expands liability without limitation, and without social justification. *See Bond v. E.I. DuPont De Nemours & Co.*, 868 P.2d 1114, 1120–21 (Colo. App. 1993) ("[T]here

is little social utility in placing the burden on a manufacturer of component parts or supplier of raw materials of guarding against injuries caused by the final product when the component parts or raw materials themselves were not unreasonably dangerous."). As described more fully above, this inefficiency is the rationale for why manufacturers typically do not have a duty of care with respect to another's products. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 5 cmt. a (1998) ("Imposing liability would require the component seller to scrutinize another's product which the component seller has no role in developing.").

Nor do bare metal manufacturers have superior knowledge of the risks of asbestos that *Borel* found true of asbestos suppliers, who worked constantly with the substance and thus had knowledge of its risks and possible techniques for risk minimization. *Borel*, 493 F.2d at 1089–90. The *Borel* opinion underscores a belief that placing liability on the asbestos suppliers could lead them to acquire more information which they could then share with downstream users. That rationale does not apply here. It would be most inefficient to impose that responsibility on hundreds of bare metal manufacturers who have never installed the insulation or dealt with replacement components, especially when other parties have already assumed that responsibility. Bare metal manufacturers are in a worse position than any other parties—including individual sailors—who actually handle, install, maintain, and replace asbestos-containing equipment as part of their activities. Once its parts are shipped, the bare

metal manufacturer does not know what type of insulation will be used, how the insulation will be installed, what protections will be put in place to ensure employee safety, or how the insulation will be maintained and replaced. Making the Petitioners subject to liability does nothing to extract information that would otherwise be unknown. There is no information to be had. Put simply, even if it was correctly decided, *Borel* is inapt.

B. Foreseeability fails to address the lack-of-control problem and creates unnecessary uncertainty

Foresight is a useless tool in cases like this. For starters, the foreseeability requirement does not change the position that bare metal manufacturers are in. Without any control over the decision of what insulation to use or how it is added to the product, these manufacturers are powerless to influence even foreseeable injuries. That is why courts do not use foreseeability as the only determinant of a tort duty. Manufacturers who do not have control over downstream additions to their products are in no better position to take socially beneficial precautions, regardless of whether injuries are foreseeable or not.

Courts routinely refuse to impose a duty—even when it is foreseeable that a plaintiff may be harmed—if the defendant was not in a position to warn or act on the potential harm. Take, for instance, *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 297, 591 N.E.2d

222, 225 (1992). An employee was killed when a multipiece wheel rim exploded during a tire change. The tire manufacturer was sued on the theory that it should have warned about the dangers of multipiece wheel rims because its tires were made for installation on such rims. *Id.* The court refused to assign liability solely on the basis that the injury was foreseeable. Instead, the court focused on the fact that the tire manufacturer had "no control over the production of the subject multipiece rim, had no role in placing that rim in the stream of commerce, and derived no benefit from its sale." *Id.* at 298. It is no more efficient to assign liability to bare metal manufacturers merely because injury caused by later-added asbestos is foreseeable.

Putting aside that foreseeability should not be enough to establish a duty, the Third Circuit's test creates an enormous amount of unnecessary and avoidable uncertainty (which even it acknowledges). *See In re: Asbestos Prod. Liab. Litig. (No. VI)*, 873 F.3d at 238 (admitting that a standards-based approach is "bound to be less predictable and less efficient.").

For example, after bare metal manufacturers deliver the parts to the Navy's specifications, they are left to guess what decisions the Navy will make for years after the delivery. The Third Circuit set out a (non-exhaustive) set of circumstances that may make injury to Navy employees foreseeable, including that insulation is replaced with asbestos during the product's lifetime. *Id.* at 240. Or that the product requires an asbestos-containing part to function properly. *Id.* But what *ex ante* precautions can a bare metal

manufacturer take based on its own predictions of the Navy's decisions? Or to determine how the Navy will use the product once it leaves the manufacturer's control. Once again, the bare metal manufacturers are in no better position to divine what the Navy will do than the employees the rule is seeking to protect.

When the facts and circumstances under which a duty will attach are unknowable, potential defendants will either over-protect themselves against liability, or choose to exit the activity altogether. Neither of those options are socially beneficial. So even assuming the bare metal manufacturers could in some way exercise control over the insulation that is added to their products, the foreseeability test leaves them unable to take the optimal precaution before acting. They just cannot know what steps to take.

C. Bare metal manufacturers do not have the ability to craft any intelligent system of warnings

The case against creating liability for bare metal manufacturers becomes clearer still by looking at the difficulties of its implementation.

The first element that needs to be defined is whom should be warned. There are two possible answers to this question: the employee or the employer (in this case, the Navy or the asbestos suppliers). The employee is removed from the bare metal manufacturers both temporally and along the distribution chain. The employees aboard the Naval vessels are coming into

contact with the product years or decades after they left Respondents' control, had insulation added to them, and have been put into use by the Navy, and had internal components replaced. By the time an employee comes into contact with the product, the bare metal manufacturer has no knowledge of what insulation was used, how it was maintained, how many times it was replaced, or even whether the product is in the same condition as when it was sold to the Navy.

The second possible targets of the warning are the asbestos suppliers or the Navy itself. But here, the asymmetry of information tilts so heavily in the other direction as to make the warning ludicrous. The Navy is the one that requires that the parts be provided by Petitioners free of insulation and then makes the decision of what insulation to use. And the Navy has known the dangers of asbestos since the 1920s. It is pointless to warn the Navy of what it already knows in the supposed effort to influence its decision over what equipment to purchase and how to install or maintain it thereafter. We would expect the asbestos suppliers themselves to be even more well-informed. They certainly do not need any warning from the bare metal manufacturers.

Even if the warning somehow reached the employees and was adequate, the duty to warn ignores the special position of the parties in the military. Tort law's treatment of products that are unavoidably dangerous acknowledges that it would be impractical for manufacturers to remove them from the market or alter the design because doing so may undermine the

effectiveness of the product. Instead, a warning that allows informed consumer choice is the best alternative. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).

In *Borel*, the expansion of liability to asbestos suppliers rested on the view that workers could leave their jobs if they did not like its risks. 493 F.2d at 1089 ("The rationale for [imposing a duty to warn in cases of unavoidably unsafe products] is that the user or consumer is entitled to make his own choice as to whether the product's utility or benefits justify exposing himself to the risk of harm."); *id.* ("An insulation worker, no less than any other product user, has a right to decide whether to expose himself to the risk."). That option is not similarly available in the military framework, where other extensive systems control the risks of employment.

CONCLUSION

The expansion of liability to bare metal manufacturers would ignore the existing first-best solution and create a rule that flies in the face of tort law's goal of creating socially beneficial incentives. The rule expands liability to a group with no ability to control the decisions or actions that give rise to potential harm. To avoid liability, the rule requires bare metal manufacturers to provide a warning that has no ability to change the behavior of the Navy (which already knows of the dangers) or the employees (with whom the

manufacturer has no contact). Lastly, the rule incorrectly uses reasonable foreseeability as the test for doling out the duty to warn—adding uncertainty without any corresponding benefit in terms of producing beneficial behavior by manufacturers.

Courts focusing on the concepts of foreseeability, duty, or the reasonableness of warnings can sometimes lose sight of the fundamental purposes of tort law: to provide clear rules to potential tortfeasors so that they can understand the expected costs of their risky behavior. The Sixth Circuit's bright-line rule in *Lindstrom* does just that. Applied here, Petitioners' liability would be defined in terms of the safety of the product it sold in its normal and proper use without asbestos, but not extend to DeVries' and McAfee's asbestos-related injuries.

Affirming the Third Circuit would take bare metal manufacturers down a different and more treacherous path. Rather than focusing on warnings and maintenance necessary for the products they sell, manufacturers such as Air and Liquid Systems would have to answer for the risk/benefit decisions of regulators and other downstream suppliers. But it is impossible for a bare metal manufacturer to know the facts and circumstances underlying those decisions, let alone craft appropriate language to warn such stakeholders of what they already know—for example, what equipment to purchase and how to install or maintain it thereafter. Far from the sensible social welfare function on which the foundations of tort law are premised, the facts and circumstances at the heart of the Third

Circuit's foreseeability standard places a duty on bare metal manufacturers to monitor the behavior of other individuals and firms over whom they have no control.

Respectfully submitted,

NEVIN M. GEWERTZ, *Counsel of Record*
REID M. BOLTON
IGNACIO SOFO
BARTLIT BECK HERMAN
PALENCHAR & SCOTT LLP
54 West Hubbard Street, Suite 300
Chicago, IL 60654
Phone: (312) 494-4400
nevin.gewertz@bartlit-beck.com

RICHARD A. EPSTEIN
800 North Michigan Avenue
Apartment 3502
Chicago, IL 60611

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