Nos. 20-1774, 20-1776, 20-1777, 20-1780, 20-1781, 20-1782, 20-1783, 20-1784, and 20-1785

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

GLENN BURTON, JR., RAVON OWENS, *AND* CESAR SIFUENTES

Plaintiffs-Appellees,

V.

ARMSTRONG CONTAINERS INC.,

E.I. DUPONT DE NEMOURS & CO., AND

THE SHERWIN-WILLIAMS CO.

Defendants-Appellants.

On Appeal from final judgments of the U.S. District Court for the Eastern District of Wisconsin

Nos. 07-303, 07-441, and 10-75 (consolidated)

Honorable Lynn Adelman

AMICI CURIAE BRIEF OF WISCONSIN MANUFACTURERS AND COMMERCE, NATIONAL ASSOCIATION OF MANUFACTURERS, AND COALITION FOR LITIGATION JUSTICE, INC. IN SUPPORT OF DEFENDANTS AND REVERSAL

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: Nos. 20-1774, 20-1776, 20-1777, 20-1780, 20-1781, 20-1782, 20-1783, 20-1784, and 20-1785

Short Caption: Glenn Burton, Jr. et al., Plaintiffs-Appellees v. Armstrong Container, Inc., et al., Defendants-Appellants

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DISCLOSURE STATEMENT PURSUANT TO RULES 26.1 AND 29

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby states that the Wisconsin Manufacturers and Commerce, National Association of Manufacturers, and Coalition for Litigation Justice, Inc. are the only parties appearing as *amici* on this brief, have no parent corporations, and have issued no stock.

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby states that (1) no party's counsel authored this brief in whole or in part; (2) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person — other than the *amici curiae*, their members, or their counsel — contributed money that was intended to fund the preparation or submission of the brief.

Shook, Hardy & Bacon LLP is the only firm appearing for *amici* in this case.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are business associations and insurers concerned that the District Court's departure from long-standing tort liability principles for products with inherent risks, including under Wisconsin's risk contribution theory, will lead to open-ended, industry-wide category liability based solely on those inherent risks. Manufacturers of a wide variety of products, from pharmaceuticals to household chemicals, engage in commerce of such products every day. *Amici* are concerned the District Court's rulings could lead to more litigation against makers of beneficial products that have inherent, foreseeable risks, regardless of society's tolerance for those risks and how and when knowledge of those risks emerged.

Wisconsin Manufacturers and Commerce (WMC) is Wisconsin's chamber of commerce and manufacturers association. With approximately 3,800 members statewide, WMC is the largest general business trade association in Wisconsin. WMC members represent all sizes of business and every sector of Wisconsin's economy. Since its founding in 1911, WMC has been dedicated to making Wisconsin the most competitive state in the nation in which to conduct business. To make Wisconsin a great place to do business, WMC advocates on behalf of its members before the Legislature, administrative agencies, and in the courts to promote statutory, regulatory and legal certainty.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Coalition for Litigation Justice, Inc. (Coalition) is a nonprofit association formed by insurers in 2000 to address and improve the litigation environment for toxic tort claims.[1] The Coalition has filed more than 150 *amicus curiae* briefs in cases that may significantly impact toxic tort litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal presents the Court with a critical question: how to address recent harms allegedly caused by lawful products manufactured, marketed and sold at a time when the products were valued despite generally known risks. In this and

[1] The Coalition includes Century Indemnity Company; Great American Insurance Company; Nationwide Indemnity Company; Allianz Reinsurance America, Inc., Resolute Management, Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

other such cases, the risks at issue are often inherent to the products themselves and created by product misuse, improper disposal, or, as here, lack of maintenance and then deterioration after they outlived their useful lives. Rather than pursue the party who created the actual hazardous condition causing the injury, this lawsuit and others like it target the manufacturers merely for having sold the products, often many years ago. Contrary to the District Court's rulings, Wisconsin's product liability and negligence law, including under its novel risk contribution theory, does not impose industry-wide manufacturer liability in these situations.

The three cases consolidated for trial here all involve the manufacture of white lead carbonate pigments used in interior paints in the first half of the twentieth century. During this time, there was long-standing general knowledge about the hazards of ingesting lead, but white lead carbonate pigments were still added to residential paints—and often required by federal and Wisconsin governments—because its washability was important for sanitation. These pigments in paint helped reduce the spread of infectious disease. When early-known risks of elevated blood lead levels in children from ingesting white lead carbonate pigments from deteriorated paints began to be understood, the manufacturers, medical community and government worked together to effectively

withdraw white lead carbonate from interior household paint.[2] To manage the risks from white lead carbonate that had already been applied in people's houses, Wisconsin and other state governments put the burden on property owners to maintain lead safe homes.[3]

Nevertheless, a series of lawsuits has arisen targeting the few remaining companies that manufactured white lead carbonate pigments 50-120 years ago. The Wisconsin Supreme Court provided a road map in *Thomas ex rel. Gramling v. Mallett*, 701 N.W.2d 523 (Wis. 2005), and *Godoy v. E.I. Du Pont de Nemours & Co.*, 768 N.W.2d 674 (Wis. 2009), for how risk contribution theory can apply to such white lead carbonate pigments cases. The District Court ignored this road map, making two critical sets of errors. First, it allowed risk contribution theory to apply here, thereby spreading liability across multiple companies even if they did not make the product at issue, without following Wisconsin's requirements for doing so. Second, it relaxed or reversed the burdens of proof for key elements of the underlying causes of action—negligence and warning defect—to impose

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[2] *See* American Nat'l Standards Ass'n, American Standards Specifications to Minimize Hazards to Children from Residual Surface Coating Materials (Z66.1-1955) (approved Feb. 16, 1955) (setting forth a voluntary standard worked on by industry and American Academy of Pediatrics that effectively removed lead pigments from interior consumer paints); "Lead-Based Paint Poisoning Prevention Act," Pub. L. No. 91-695, 84 Stat. 2078 (1971) (codified at 42 U.S.C. §§ 4801 et seq.) (leading to the 1978 ban of lead from paints for residential use).

[3] *See* Wis. Stat. §§ 254.11(8g), 254.166, and 704.07.

liability solely because the companies were part of an industry that made or sold products that a jury, sitting with decades of hindsight, could find had unacceptable risks. Wisconsin law provides no basis for creating such new retroactive, open-ended, industry-wide category liability.

Amici respectfully urge the Court to reverse the rulings below. The resulting liability is of major concern to manufacturers and insurers. Plaintiffs following the District Court's rulings could bear little to no burdens of proof. It would be inconsequential that companies did not know of the specific risks at issue; the public had comparable knowledge of the hazards; the products were sold when the risks were socially tolerated; or the harm was caused by another person, consumer misuse, or product deterioration. Plaintiffs could argue the manufacturers should share in paying compensation solely because they sold the products despite some foreseeable risk. Wisconsin law does not allow these fundamental liability standards to be cast aside to turn manufacturers into industry-wide insurers of last resort for downstream risks of lawful products.

ARGUMENT

Wisconsin's novel risk contribution theory was developed in the 1980s as an alternative causation theory only for a specific factual situation where, among other things, it was *impossible* to identify the manufacturer of a harm-causing product. *See Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (Wis. 1984). Under traditional

liability law, without product identification a plaintiff has no avenue for recovery against a manufacturer. *See* Dan B. Dobbs, *The Law of Torts* § 180, at 443 n.2 (2001) ("cause limitations are fundamental and can apply in any kind of case").

In developing risk contribution theory, the Wisconsin Supreme Court carved out a narrow circumstance where the theory could apply because of its potential to make a company pay for a harm caused by another's product. The plaintiff must prove product identification was impossible and identify equally positioned manufacturers that (1) are all culpable (under negligence or product liability), (2) made completely fungible products, and (3) sold them in a time and place that could have led to the alleged harm. *See Collins*, 342 N.W.2d at 37. Only then would the burden shift to each defendant to show its product was not or reasonably could not have been the actual product that caused the harm. *See id.* at 52. The court was clear that risk contribution did not eliminate causation and plaintiffs still needed to prove all other elements of their cause of action. *See id.* at 50.

The District Court misapplied this theory, which even in the forms that have been allowed, remains controversial, has not been embraced by any other state, and was severely limited by the Wisconsin Legislature in several respects. *See* Wis. Stat. § 895.046 (2011-2012).

I. RISK CONTRIBUTION THEORY'S STANDARDS AND REQUIREMENTS WERE SPECIFICALLY INTENDED TO PREVENT INDUSTRY-WIDE CATEGORY LIABILITY

A. Risk Contribution Theory Has Specific Burdens of Proof

The Wisconsin Supreme Court developed risk contribution theory in the 1980s in response to litigation over the drug diethylstilbestrol (DES), which caused reproductive harm in daughters of women who took DES during pregnancy. The situation was highly unusual. After being diagnosed with the injury, the daughters often could not identify the manufacturer of the DES their mothers ingested 20-30 years earlier. The drugs not only were marketed by generic companies often interchangeably, they also looked the same, were chemically identical, and had bottles lacking brand labels. In fact, pharmacists often could not determine which manufacturers made the drugs the mothers took. Even still, courts initially denied the daughters' claims because of the traditional tort law requirement that a plaintiff must prove a harm caused by a particular defendant.[4]

In the limited context of DES, some courts broke from this orthodoxy, adopting alternatives to factual causation based on the drug manufacturers' market share of DES at the time and location where the mother was prescribed DES. *See Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980). Under this novel theory, the

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[4] *See*, *e.g.*, *Morton v. Abbott Labs.*, 538 F. Supp. 593 (M.D. Fla. 1982); *Payton v. Abbott Labs.*, 512 F. Supp. 1031 (D. Mass. 1981); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D. S.C.1981); *Lyons v. Premo Pharm. Labs, Inc.*, 406 A.2d 185 (N.J. Super. Ct. App. Div. 1979).

daughters had to join a "substantial share" of DES manufacturers and prove each was negligent in manufacturing and marketing DES. *Id.* at 937. If a defendant could not exculpate itself, it could be liable for the portion of the plaintiff's damages corresponding to its share of the DES market. *See id.*

The Wisconsin Supreme Court chose not to adopt *Sindell's* market share liability approach, and, instead, created the risk contribution theory. *See Collins*, 342 N.W.2d at 37. The court held that if a plaintiff could satisfy the other elements of her tort claim, the causation element could correspond with each manufacturer's contribution to her risk. As in *Sindell*, the court justified its ruling by explaining that the situation was highly unusual because each manufacturer's DES was "a fungible drug produced with a chemically identical formula," there were only a few manufacturers of DES, the manufacturers would likely have records of where and when their drugs were sold, and the daughters' injuries were distinct to DES. *Id.* at 44. Further, a defendant could exculpate itself from liability by proving it did not produce DES during the limited period and geographical area of the mother's pregnancy. *See id.* at 53. To restrict this departure from traditional causation law, the court specifically cautioned that risk contribution theory could be applied only "in situations which are factually similar to the DES cases." *Id.* at 49.

In subsequent years, the Wisconsin courts held this line, affirming that risk contribution theory could be invoked only when there is an "insurmountable

obstacle" preventing a plaintiff from identifying the manufacturer of the product that actually caused the harm. *Rogers v. AAA Wire Prods., Inc.*, 513 N.W.2d 643, 646 (Wis. Ct. App. 1994). In *Rogers*, the plaintiff was injured while pulling a wire bread cart that collapsed. The court found that merely being unable to identify the source of the cart is not sufficient and that excusing her of the bedrock element of causation "would be a drastic and unwarranted departure" of the law. *Id*. For risk contribution theory to apply, the plaintiff must diligently attempt to identify the manufacturer, but be prevented by *inherent* problems. Product identification must be and have been impossible. In addition, the products sold by all of the manufacturers named must be completely fungible, not merely similar. *See Drezdzon v. AA Ins. Co.*, 121 Wis. 2d 697 (Wis. Ct. App. 1984) (unpublished).

The Wisconsin Supreme Court caused a state and national stir when it issued a ruling that could have expanded risk contribution theory in a case that also involved allegations over white lead carbonate pigments in deteriorated residential interior paints. *See Thomas*, 701 N.W.2d at 527. The court allowed the theory to be applied even though white lead carbonate does not create an injury traceable only to lead in household paints and plaintiffs could not point to a specific, defined time-frame when such paints were applied to their house. *See id.* at 563, 552-53. Also, the plaintiff could have sought to recover from a direct, culpable party,

namely whoever allowed the paint to deteriorate and the pigments to become hazardous. Intact lead paint on the walls does not create that same risk.

Even still, the *Thomas* court underscored the requirements that it must be factually impossible for plaintiffs to identify the manufacturers of the white lead carbonate pigments they allegedly ingested and all of the manufacturers' white lead carbonate pigments must be completely fungible (even if not chemically identical). *See id*. at 560-61. The court also reinforced that risk contribution theory only provided an alternative to this one aspect of factual causation; the plaintiffs still had to prove the defendants were all culpable, through the other elements of causation, as well as the elements of negligence or product defect. *See id.* When the *Thomas* case was remanded for trial, the plaintiff failed to prove all of these elements and was awarded no damages from the manufacturers.

A few years after *Thomas*, the Wisconsin Supreme Court clarified a central concern that manufacturers and others had with that decision. *See Godoy*, 768 N.W.2d at 674 (also involving claims over white lead carbonate). Among other things, *Godoy* cautioned against the misapplication of risk contribution to create category liability, which is of concern here. Specifically, the Wisconsin Supreme Court held that plaintiffs in white lead carbonate cases could not prevail under a design defect theory "where the presence of lead is the alleged defect in design, and its very presence is a characteristic of the product itself." *Id.* at 685-86.

Liability based on an inherent characteristic of the product would not be allowed. Plaintiffs must prove culpability.

B. Risk Contribution Theory Cannot Create "Automatic" or Category Liability

In response to concerns *amici* and others raised that *Thomas* could still be turned into "a dangerous precedent"[5] leading to category liability, the Wisconsin Legislature expressly overturned *Thomas*, explaining such a potential impact of the ruling was not in the "public interest." Wis. Stat. § 895.046(1g). The legislation stated that applying risk contribution theory to former manufacturers of white lead carbonate pigments could lead to "an improperly expansive application" of Wisconsin tort law. *Id.* The Legislature's intent was to "assure[] that business may conduct activities in [Wisconsin] without fear of being sued for indefinite claims of harm from products which businesses may never have manufactured, distributed, sold or promoted, or which were made and sold decades ago." *Id.*

Under this statute, the Legislature affirmed that risk contribution theory could be invoked only in cases factually similar to DES, as *Collins* said. If a claimant cannot prove who manufactured, distributed, sold, or promoted the actual

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[5] *See* Editorial, *Alabama North*, Wall St. J., Aug. 9, 2005; *see also* Donald G. Gifford, *The Death of Causation: Mass Products Torts' Incomplete Incorporation of Social Welfare Principles*, 41 Wake Forest L. Rev. 943, 944, 988 (2006) (explaining risk contribution "seek[s] to turn mass products tort law into the equivalent of a social welfare program, not unlike workers' compensation or Social Security" and "fails to offer discernable and fair liability boundaries").

product that caused the claimant's harm, risk contribution theory could be invoked only if the claimant can establish the following factual predicates:

- no process exists for the claimant to seek redress from another person;
- all products are "chemically identical" to the one causing the harm;
- the products were sold without labeling or distinctive characteristics that identified the manufacturer, distributor, seller or promotor of the product;
- the plaintiff must define the relevant geographical market and time period of manufacture;
- the action names manufacturers that collectively constituted at least 80% of all products sold in the relevant market; and
- each party's liability is distinct from the liability of any other party.

See id. at 895.046(4)(a). In 2013, the Legislature clarified that these restrictions were to apply to all actions "whenever filed or accrued." Wis. Stat. § 895.046(2). Thus, the Legislature set forth clear statements cautioning against broad applications of risk contribution theory, including potential category liability.[6]

In 2014, in assessing the application of Wis. Stat. § 895.046 to another white lead carbonate case, this Court stated that it appreciated this concern. In *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600 (7th Cir. 2014), the Court issued two rulings. First, it would not apply the statute to cases arising before enactment. *Id*. at 610

[6] The Court must consider whether the liability established here violates Wisconsin public policy. *See Fandrey ex rel. Connell v. Am. Family Mut. Ins. Co.*, 680 N.W.2d 345 (Wis. 2004) (setting forth such public policy factors).

(presuming the Wisconsin Supreme Court would not do so).[7] Second, even though "most states" have rejected risk contribution and other causation alternatives, the theory was not unconstitutional as applied there. *Id*. at 625, 627. In doing so, though, the Court reaffirmed that causation requirements were not "entirely eliminate[d]," nor was the plaintiff's obligation to prove "duty, breach of duty" and the other elements of the negligence or product liability claims. *Id*. at 624, 614. Echoing *Godoy's* admonition against category liability, the Court reiterated that courts cannot use risk contribution theory to make liability "automatic." *Id*. at 624.

II. THE DISTRICT COURT'S RULINGS FAILED TO UPHOLD THE REQUIREMENTS FOR RISK CONTRIBUTION AND OPENED THE DOOR TO INDUSTRY-WIDE CATEGORY LIABILITY

Despite clear admonitions from this Court, the Wisconsin Supreme Court, and the Wisconsin Legislature, the District Court's rulings allowed Plaintiffs to recover from Defendants without proving all elements of their claims. The result created the industry-wide "automatic" liability prohibited under Wisconsin law and disfavored nationally.

First, Plaintiffs were not required to lay the predicate foundation for invoking risk contribution, namely that it was impossible to identify the manufacturers of the product that caused their alleged harm and that Defendants'

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[7] The Court should reconsider its ruling as to whether the Wisconsin Supreme Court would allow Wis. Stat. § 895.046 to be applied to this and other such cases given developments since *Gibson*. Defendant Armstrong Containers, Inc.'s brief provides the bases for doing so. *See* p. 23-26.

products were fungible. Unlike with DES, purchasers of paints containing white lead carbonate pigments knew or could have identified the manufacturer of the paint or white lead carbonate pigments they used. When paints were mixed by master painters, the painters knew the manufacturers of the pigments. In later years, a painter, landlord or homeowner could identify the brand of ready-mixed paint through labeling. Product identification was not an unknowable fact. Further, today, it may be possible to detect through scientific analysis whether the paint or pigment in a house matches the formulas used by a specific manufacturer. Yet, Plaintiffs were not required to show they could not identify the manufacturer, making this case similar to the wire bread carts in *Rogers* where the court refused to apply risk contribution.[8] In sum, Plaintiffs' claims fail because they cannot show that product identification in this case was an "insurmountable obstacle."

The District Court also allowed Plaintiffs to evade the requirement that they prove Defendants' white lead carbonate pigments were fungible. The District Court took this issue away from the jury, deciding "fungibility for risk contribution purposes is a question of law for resolution by the courts" and that Defendants' white lead carbonate pigments were "fungible." Decision and Order, 407 F. Supp. at 798. But white lead carbonate pigments are not fungible; they have different

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[8] Defendants presented chemical analyses that the paint in Plaintiff's houses did not match any of the formulas they used. *See* DJA3197/5644 (Armstrong); DJA3022-23/4776-80 (Sherwin Williams); and DJA3013/4743 (DuPont).

chemical formulations and physical properties, and the products containing those pigments were marketed with prominent brand labels.

Of additional concern to manufacturers is that the District Court allowed Plaintiffs to interchangeably reference component parts (white lead carbonate pigments) and end-products (paints). *Godoy* makes clear that paints, even those that include white lead carbonate pigments, are not fungible. *See* 768 N.W.2d at 682 (stating the product cannot be residential paint pigments because Godoy is proceeding under the *Collins* risk-contribution theory). This makes sense; final products cannot be subject to risk contribution theory merely because they share a component with other, different products (*e.g.*, sugar and candies).

Second, Plaintiffs were not required to prove other essential elements of their claims, leading to category liability. With respect to the negligence claims, the District Court essentially eliminated Plaintiffs' burden of proving that Defendants owed them a legal duty, asserting that Defendants owed a duty "to the world at large" to refrain from engaging in any "acts that may unreasonably threaten the safety of others." Decision and Order, 2020 WL 956471, at *3 (E.D. Wis. Feb. 27, 2020). The District Court misapplied *Brenner v. Amerisure Mut. Ins. Co.*, 893 N.W.2d 193 (Wis. 2017), which cautioned against any such "over-simplification" of the State's duty law. *Id.* at 198-99 (reaffirming a negligence claim cannot "arrive[] at the court with the first element already proven as a matter

of law"). Courts must still assess "the relationship between the parties" or "whether the alleged tortfeasor assumed a special role in regard to the injured party." *Id.* at 199. Otherwise, there would be no just stopping point for liability, as manufacturers would owe a duty to all people into perpetuity for the sale of products with inherent risks—and all products present some risk, especially if misused or not maintained. *See* Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*, 8 Cornell J.L. & Pub. Pol'y 421 (1999).

For the defect claims, the District Court created an impossible standard for Defendants; it shifted the burden to *them* to prove their warnings were sufficient to caution against an unknown risk. *See* Decision and Order, 2020 WL 956471, at *7. Here, the District Court excused Plaintiffs from proving that Defendants' warnings were defective based on knowledge at the time. It required them to show only that the currently understood risk to children from ingesting white lead carbonate in paint chips or "household dust" was not contemplated by household consumers then. *Id.* As discussed above, Defendants and government agencies were also not in a position to know of this specific risk and removed white lead carbonate pigments from interior household paints when risks from deteriorated lead paints first became understood. Reversing the burden to defendants to prove their warnings were *not* defective violates universal product liability principles.

The sum total of these shortcuts created the exact type of liability the Wisconsin Supreme Court rejected in *Godoy* and this Court rejected in *Gibson*, namely that manufacturers of hazardous products can be subject to industry-wide liability for inherent product risks with few, if any, defenses. Such category liability has been widely rejected. *See* Richard C. Ausness, *Product Category Liability: A Critical Analysis*, 24 N. Ky. L. Rev. 423, 424 (1997) (examining "product category liability and chronicles its universal rejection by the courts"). As Professors James Henderson and Aaron Twerski explained:

> [P]laintiffs have urged courts to adopt what we refer to as product-category liability—strict liability for producing and marketing certain categories of risky products. . . . In effect, the plaintiffs in these cases seek to prohibit altogether the continued commercial distribution of such products by holding producers liable for all the harm their products proximately cause. Both institutional and substantive considerations strongly support rejection of product-category liability. . . . Consistent with our analysis, most courts that have considered product-category liability claims have rejected them.

James A. Henderson & Aaron Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1263, 1329 (1991). The District Court's assertions that the jury need only find Defendants should have "ceas[ed] to manufacture and market" their products and that had white lead carbonate "not been present in the paint on the walls, the children would not have suffered lead exposure from ingesting the paint" are clear iterations of category liability. 2020 WL 956471 at *4-5, 407 F. Supp. 3d at 794. The Court

should reject liability premised on the idea that it was unreasonable for Defendants to have ever sold white lead carbonate pigments or paints for interior use.

In the end, the court created an unacceptable Cuisinart of industry-wide category liability. All manufacturers and products were blended together without the Plaintiffs meeting the required standards for risk contribution, Plaintiffs were absolved of proving fundamental elements of their claims, and Defendants had little recourse to exculpate themselves from liability. The Court should reject this departure from Wisconsin law.

III. THE DISTRICT COURT'S RULINGS CREATED DEEP POCKET JURISPRUDENCE AT THE EXPENSE OF SAFETY AND JUSTICE

Altering causation and other elements of tort and product liability law to create industry-wide category liability undermines the way technology develops and safety measures are undertaken. When juries make decisions about whether a product was unreasonably dangerous many years after it was sold, it is impossible to properly balance the risks and benefits "in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution." Restatement of Torts, Third: Prods. Liab. § 2(b) (1998). "Courts are not suited to making the sorts of judgments required to be made." Henderson & Twerski, *supra*, at 1329. Legislators and regulators are better positioned to make decisions about public risks in real time as these risks become known and validated. They can

regulate a product's manufacture, sale, and use; remove a product from the market; or tax a product to generate revenues for programs to alleviate harms.

The liability ruling here creates a particular predicament for companies that manufacture chemicals and other products in reliance on government regulations. Government agencies regularly set maximum exposure levels for these products. Manufacturers rely on currently applicable industry and governmental standards, with the understanding they will adapt their market behavior as the standards evolve based on new scientific studies and public risk tolerance. Category liability, as imposed here, punishes companies merely because new or greater risks are later discovered or social tolerance for a risk lessens, leading a product to be subject to increased restrictions, including market withdrawal.

Also, the practical result of this ruling is to put manufacturers in the impossible role of policing customers *in perpetuity* to ensure products they made or sold are not misused or neglected in ways that could create harm. As Dean John Wade explained years ago, "[s]trict liability for products is clearly not that of an insurer. If it were, a plaintiff would only need to prove that the product was a factual cause in producing his injury. Thus, the manufacturer of a match would be liable for anything burned by a fire started by a match produced by him." John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 828 (1973). Simply put, a manufacturer is not "an insurer for all injuries which may

result from the use of its product"—or anyone else's product. *Kim v. Toyota Motor Corp.*, 424 P.3d 290, 296 (Cal. 2018).

CONCLUSION

The Court should reverse and direct judgment as a matter of law on all claims in Defendants' favor or, at a minimum, order a new trial.

Respectfully submitted,

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Dated: July 24, 2020

CERTIFICATE OF COMPLIANCE

I certify that this *amici curiae* brief complies with the length limits permitted by Seventh Circuit Rule 29. The brief contains 4616 words, excluding the portions exempted by Fed. R. App. P. 32(f), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman 14-point font.

/s/ Philip S. Goldberg
Philip S. Goldberg
Counsel for the Wisconsin Manufacturers and Commerce, National Association of Manufacturers, and Coalition for Litigation Justice, Inc.

Dated: July 24, 2020

CERTIFICATE OF SERVICE

I certify that on this 24th day of July, 2020, I caused to be electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit via the Court's CM/ECF system. All parties are registered CM/ECF users, have consented to receive electronic service, and will be served by the CM/ECF system.

Respectfully submitted,

/s/ Philip S. Goldberg
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