New York Court of Appeals

Docket No. APL-2014-00261
Appellate Division, Fourth Department Docket No. CA-13-01373
Erie County Clerk's Index No. I2010-12499

JOANNE H. SUTTNER, Executrix of the Estate of GERALD W. SUTTNER, Deceased, and Individually as the Surviving Spouse of GERALD W. SUTTNER

Respondent,

– against –

A.W. CHESTERTON COMPANY, *et al.*,

Defendants,

and

CRANE CO.,

Appellant.

AMICI CURIAE BRIEF OF BUSINESS COUNCIL OF NEW YORK STATE, MANUFACTURERS ALLIANCE OF NEW YORK STATE, LAWSUIT REFORM ALLIANCE OF NEW YORK, COALITION FOR LITIGATION JUSTICE, INC., NATIONAL ASSOCIATION OF MANUFACTURERS, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN TORT REFORM ASSOCIATION, AMERICAN INSURANCE ASSOCIATION, NORTHEAST RETAIL LUMBER ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, WASHINGTON LEGAL FOUNDATION, AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF APPELLANT CRANE CO.

Victor E. Schwartz
Mark A. Behrens (*pro hac* pending)
SHOOK, HARDY & BACON, LLP
1155 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 783-8400
Fax: (202) 783-4211
vschwartz@shb.com
mbehrens@shb.com

DISCLOSURE STATEMENT

Pursuant to 22 NYCRR 500.1(f), the associations represented on this brief have no parents, subsidiaries, or affiliates.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

QUESTION PRESENTED 1

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 7

I. UNDER NEW YORK LAW, MANUFACTURERS ARE NOT LIABLE FOR FAILURE TO WARN ABOUT HAZARDS IN OTHERS' PRODUCTS 7

II. OUT-OF-STATE CASES HOLD THAT MANUFACTURERS ARE NOT LIABLE FOR HARMS CAUSED BY POST-SALE ADDITION OF ASBESTOS-CONTAINING ADJACENT OR REPLACEMENT PARTS FROM THIRD PARTIES 14

III. COURTS IN NON-ASBESTOS CASES HAVE REFUSED TO EXTEND LIABILITY TO MANUFACTURERS OF PRODUCTS THAT ARE USED IN CONJUNCTION WITH PRODUCTS BY THIRD PARTIES THAT CAUSE HARM 29

IV. IT IS UNSOUND PUBLIC POLICY TO IMPOSE LIABILITY ON MANUFACTURERS FOR ASBESTOS PRODUCTS MADE OR SOLD BY THIRD PARTIES 33

V. ASBESTOS LITIGATION WILL WORSEN IF LIABILITY IS IMPOSED ON MANUFACTURERS FOR OTHERS' PRODUCTS 38

VI. TRUSTS EXIST TO PAY FOR HARMS CAUSED BY EXPOSURE TO DEBTORS' ASBESTOS PRODUCTS 42

CONCLUSION 47

AFFIDAVIT OF SERVICE ..... End

TABLE OF AUTHORITIES

NEW YORK CASES **Page**

Berkowitz v. A.C. & S., Inc., 288 A.D.2d 148, 733 N.Y.S.2d 410 (1st Dep't 2001) ..... *passim*

Cleary v. Reliance Fuel Oil Assoc., Inc., 17 A.D.3d 503, 793 N.Y.S.2d 468 (2d Dep't 2005) 9

Defazio v. A.W. Chesterton, 32 Misc.3d 1235(A), 938 N.Y.S.2d 226 (Table), 2011 WL 3667717 (N.Y. Sup. Ct. New York Cnty. Aug. 12, 2011) 12

Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222, 750 N.E.2d 1055, 727 N.Y.S.2d 7 (2001) 34

Hansen v. Honda Motor Co., Ltd., 104 A.D.2d 850, 480 N.Y.S.2d 244 (2d Dep't 1984) 8

In re New York City Asbestos Litig., 121 A.D.3d 230, 990 N.Y.S.2d 174 (1st Dep't 2014), *motion to dismiss appeal denied*, 28 N.E.3d 33, 4 N.Y.S.3d 598 (2015) 40-41

In re New York City Asbestos Litig., 2014 WL 1767314 (N.Y. Sup. Ct. N.Y. Cnty. Apr. 8, 2014) 40

In re New York City Asbestos Litig., 37 Misc.3d 1232(A), 966 N.Y.S.2d 347, 2012 WL 6554893 (N.Y. Sup. Ct. N.Y. Cnty. Nov. 15, 2012) 40

In re New York City Asbestos Litig. (Holdampf v. A.C. & S., Inc.), 5 N.Y.3d 486, 840 N.E.2d 115, 806 N.Y.S.2d 146 (2005) 33-34

Kaloz by Kaloz v. Risco, 120 Misc.2d 586, 466 N.Y.S.2d 218 (N.Y. Sup. Ct. Orange Cnty. 1983) 10

Matter of Eighth Jud. Dist. Asbestos Litig. (Drabczyk v. Fisher Controls Int'l), 92 A.D.3d 1259, 1260, 938 N.Y.S.2d 715 (4th Dep't), *leave denied*, 969 N.E.2d 222 (N.Y. 2012) 10

Passaretti v. Aurora Pump Co., 201 A.D.2d 475, 607 N.Y.S.2d 688 (2d Dep't 1994) 10

Porter v. LSB Indus., Inc., 192 A.D.2d 205, 600 N.Y.S.2d 867 (4th Dep't 1993) 10

Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289, 591 N.E.2d 222, 582 N.Y.S.2d 373 (1992) ..... *passim*

Rogers v. Sears, Roebuck & Co., 268 A.D.2d 245, 701 N.Y.S.2d 359 (1st Dep't 2000) 11-12

Sawyer v. A.C. & S., Inc., 32 Misc.3d 1237(A), 938 N.Y.S.2d 230 (Table), 2011 WL 3764074 (N.Y. Sup. Ct. New York Cnty. June 24, 2011), *motion to vacate denied*, 2011 WL 11707702 (N.Y. Sup. Ct. New York Cnty. Sept. 6, 2011) 12

Smith v. Johnson Prods. Co., 95 A.D.2d 675, 463 N.Y.S.2d 464 (1st Dep't 1983) 10

Tortoriello v Bally Case, Inc., 200 A.D.2d 475, 606 N.Y.S.2d 625 (1st Dep't 1994) ..... *passim*

CASES FROM OTHER JURISDICTIONS

Abate v. AAF-McQuay, Inc., 2013 WL 812066 (Conn. Super. Ct. Fairfield Cnty. Jan. 29, 2013), *reconsideration denied*, 2013 WL 5663462 (Conn. Super. Ct. Sept. 24, 2013) 17

Abate v. Advanced Auto Parts, Inc., 2014 WL 683843 (Conn. Super. Ct. Fairfield Cnty. Jan. 23, 2014) 17

Abbay v. Armstrong Int'l, Inc., 2012 WL 975837 (E.D. Pa. Feb. 29, 2012) 19

Acoba v. Gen. Tire, Inc., 986 P.2d 288 (Haw. 1999) 32

Alexander v. A.W. Chesterton Co., 2014 WL 7190244 (Ohio Ct. Com. Pl. Cuyahoga Cnty. July 23, 2014) 18

Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997) 2

Anderson v. Asbestos Corp., 151 Wash. App. 1005, 2009 WL 2032332 (Wash. Ct. App. July 13, 2009) 16

Barker v. Hennessy Indus., Inc., 141 Cal. Rptr. 3d 616 (Ct. App. 2012) 15

Baughman v. Gen. Motors Corp., 780 F.2d 1131 (4th Cir. 1986) ..... *passim*

Bell v. Arvin Meritor, Inc., 2013 WL 5549540 (E.D. Pa. Oct. 4, 2013) 18

Bernhardt v. Ford Motor Co., 2010 WL 3005580 (Del. Super. Ct. New Castle Cnty. July 30, 2010) 17

Bettencourt v. Hennessy Indus., Inc., 141 Cal. Rptr. 3d 167 (Ct. App. 2012) 15

Blackwell v. Phelps Dodge Co., 157 Cal. App. 3d 372 (1984) 30

Braaten v. Saberhagen Holdings, 198 P.3d 493 (Wash. 2008) ..... *passim*

Branon v. Gen. Elec. Co., 2005 WL 1792122 (Ky. Ct. App. July 29, 2005) 19

Brewer v. Crane Co., 2012 WL 3126523 (Cal. Ct. App. Aug. 2, 2012) 15

Brown v. Drake-Willock Int'l, Ltd., 530 N.W.2d 510 (Mich. App. 1995), *appeal denied*, 562 N.W.2d 198 (Mich. 1997) 29-30

Cabasug v. Crane Co., 989 F. Supp. 2d 1027 (D. Haw. 2013) 19

Campbell v. A.W. Chesterton, 2012 WL 5392873 (E.D. Pa. Oct. 16, 2012)..... 19

Cardarg v. Aerojet Gen. Corp., 2012 WL 3536243 (E.D. Pa. July 27, 2012)..... 19

Chicano v. Gen. Elec. Co., 2004 WL 2250990 (E.D. Pa. Oct. 5, 2004)..... 16

Childress v. Gresen Mfg. Co., 888 F.2d 45 (6th Cir. 1989)..... 31

Conner v. Alfa Laval, Inc., 842 F. Supp. 2d 791 (E.D. Pa. 2012) ..... *passim*

Cousineau v. Ford Motor Co., 363 N.W.2d 721 (Mich. Ct. App. 1985) 32

Crews v. Air & Liquid Sys. Corp., 2014 WL 639685 (N.D.N.Y. Feb. 18, 2014) 19

Cullen v. Indus. Holdings Corp., 2002 WL 31630885 (Cal. Ct. App. Nov. 21, 2002) ..... *passim*

Dalton v. 3M Co., 2013 WL 4886658 (D. Del. Sept. 12, 2013), *report and recommendation adopted*, 2013 WL 5486813 (D. Del. Oct. 1, 2013) 14, 18

DeVries v. Gen. Elec. Co., 2014 WL 6746960 (E.D. Pa. Oct. 3, 2014) 19

Dombrowski v. Alfa Laval, Inc., 2010 WL 4168848 (Mass. Super. Middlesex Cnty. July 1, 2010) 16

Donnelly v. Kerr-McGee Refining Corp., 1992 WL 208016 (W.D. Okla. Apr. 13, 1992), *aff'd*, 993 F.2d 1551, 1993 WL 176605 (10th Cir. May 21, 1993) 30

Doucet v. Asbestos Corp., 2013 WL 5548108 (E.D. Pa. May 30, 2013) 18

Dreyer v. Exel Indus., S.A., 326 F. App'x 353 (6th Cir. 2009) 31

Ferguson v. Air & Liquid Sys. Corp., 2014 WL 7652953 (E.D. Pa. Dec. 3, 2014) 19

Eckenrod v. GAF Corp., 544 A.2d 50 (Pa. Super.), *appeal denied*, 553 A.2d 969 (Pa. 1988) 16

Estate of Quirin v. Lorillard Tobacco Co., 17 F. Supp. 3d 760 (N.D. Ill. 2014) 19

Exxon Shipping Co. v. Pacific Resources, Inc., 789 F. Supp. 1521 (D. Haw. 1991) 33

Faddish v. Buffalo Pumps, 881 F. Supp. 2d 1361 (S.D. Fla. 2012) 15, 18

Farrall v. Ford Motor Co., 2013 WL 4493568 (Del. Super. Ct. New Castle Cnty. Aug. 19, 2013) 17

Firestone Steel Prods. Co. v. Barajas, 927 S.W.2d 608 (Tex. 1996) 32

Fleck v. KDI Sylvan Pools, 981 F.2d 107 (3d Cir. 1992) 33

Floyd v. Air & Liquid Sys. Corp., 2012 WL 975359 (E.D. Pa. Feb. 8, 2012) 18

Floyd v. Air & Liquid Sys. Corp., 2012 WL 975615 (E.D. Pa. Feb. 8, 2012) 19

Floyd v. Air & Liquid Sys. Corp., 2012 WL 975684 (E.D. Pa. Feb. 9, 2012) 21

Ford Motor Co. v. Wood, 703 A.2d 1315 (Md. Ct. Spec. App.), *cert. denied*, 709 A.2d 139 (Md. 1998), *abrogated on other grounds, John Crane, Inc. v. Scribner* 800 A.2d 727 (Md. 2002) 16

Fortier v. A.O. Smith Corp., 2009 WL 455424 (Conn. Super. Ct. Fairfield Cty. Jan. 13, 2009) 17

Garman v. Magic Chef, Inc., 173 Cal. Rptr. 20 (Ct. App. 1981) 30

Hall v. Warren Pumps, LLC, 2010 WL 528489 (Cal. Ct. App. Feb. 16, 2010) 15

Harris v. Ajax Boiler, Inc., 2014 WL 3101941 (W.D.N.C. July 7, 2014) 18

Henry v. Am. Honda Motor Co., 2014 WL 691049 (D.R.I. Dec. 3, 2014) 19

Horne v. Owens-Corning Fiberglas Corp., 4 F.3d 276 (4th Cir. 1993) 29

Hughes v. A.W. Chesterton Co., 89 A.3d 179 (N.J. Super. A.D.), *cert. denied*, No. 074353 (N.J. Oct. 17, 2014) 16

In re Asbestos Litig., 2011 WL 5340597 (Del. Super. Ct. New Castle Cnty. Oct. 5, 2011) 17

In re Asbestos Litig. (Kenneth Carlton), 2012 WL 2007291 (Del. Super. Ct. New Castle Cnty. June 1, 2012) 17

In re Asbestos Litig. (Anita Cosner), 2012 WL 1694442 (Del. Super. Ct. New Castle Cnty. May 14, 2012) 16-17

In re Asbestos Litig. (Ralph Curtis and Janice Wolfe), 2012 WL 1415706 (Del. Super. Ct. New Castle Cnty. Feb. 28, 2012) 17

In re Asbestos Litig. (Wesley K. Davis), 2011 WL 2462569 (Del. Super. Ct. New Castle Cnty. June 7, 2011) 19

In re Asbestos Litig. (Reed Grgich), 2012 WL 1408982 (Del. Super. Ct. New Castle Cnty. Apr. 2, 2012), *reargument denied*, 2012 WL 1593123 (Del. Super. Ct. New Castle Cnty. Apr. 11, 2012), *appeal refused sub nom. Crane Co. v. Grgich,* 44 A.3d 921 (Del. Super. Ct. New Castle Cnty. 2012) 17

In re Asbestos Litig. (Harold and Shirley Howton), 2012 WL 1409011 (Del. Super. Ct. New Castle Cnty. Apr. 2, 2012), *appeal refused sub nom. Crane Co. v. Howton*, 44 A.3d 921 (Del. Super. Ct. New Castle Cnty. 2012) 19

In re Asbestos Litig. (Darlene K. Merritt & James Kilby Story), 2012 WL 1409225 (Del. Super. Ct. New Castle Cnty. Apr. 5, 2012) 17

In re Asbestos Litig. (Thomas Milstead), 2012 WL 1996533 (Del. Super. Ct. New Castle Cnty. June 1, 2012) 16-17

In re Asbestos Litig. (Arland Olson), 2011 WL 322674 (Del. Super. Ct. New Castle Cnty. Jan. 18, 2011 ..... 14, 17

In re Asbestos Litig. (Frederick and Patricia Parente), 2012 WL 1415709 (Del. Super. Ct. New Castle Cnty. Mar. 2, 2012 17

In re Asbestos Litig. (James Petroski), No. N10C-11-139 ASB (Del. Super. Ct. New Castle Cnty. June 27, 2012) 17

In re Asbestos Litig. (Dorothy Phillips) (Limited to Hoffman/New Yorker Inc.), 2013 WL 4715263 (Del. Super. Ct. New Castle Cnty. Aug. 30, 2013) 17

In re Asbestos Litig. (Irene Taska), 2011 WL 379327 (Del. Super. Ct. New Castle Cnty. Jan. 19, 2011 17

In re Asbestos Prods. Liab. Litig. (No. VI) (Hoffeditz v. Am. Gen. LLC), 2011 WL 5881008, (E.D. Pa. July 29, 2011) 16-17

In re Asbestos Prods. Liab. Litig (No. VI) (Sweeney v. Saberhagen Holdings, Inc.), 2011 WL 346822 (E.D. Pa. Jan. 13, 2011), *report and recommendation adopted*, 2011 WL 359696 (E.D. Pa. Feb. 3, 2011) 19

In re Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2005) 38

In re Deep Vein Thrombosis, 356 F. Supp. 2d 1055 (N.D. Cal. 2005) 30

In re Garlock Sealing Techs., LLC, 504 B.R. 71 (Bankr. W.D.N.C. 2014) ..... *passim*

In re Joint E. & S. Dists. Asbestos Litig., 237 F. Supp. 2d 297 (E. & S.D.N.Y. 2002) 29

Johnson v. Jones-Blair Paint Co., 607 S.W.2d 305 (Tex. App. 1980)..... 31

Kiefer v. Crane Co., 2014 WL 6778704 (S.D.N.Y. Feb. 3, 2014..... 13

Kolar v. Buffalo Pumps, Inc., 15 Pa. D. & C. 5th 38 (Pa. Com. Pl. Phila. Cnty. Aug. 2, 2010) 16

Lee v. Clark Reliance Corp., 2013 WL 3677250 (Cal. Ct. App. July 15, 2013)..... 15

Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488 (6th Cir. 2005)..... *passim*

Lyautey v. Alfa Laval, Inc., 2012 WL 2877377 (E.D. Pa. Mar. 20, 2012) 19

Lytell v. Goodyear Tire & Rubber Co., 439 So. 2d 542 (La. Ct. App. 1983).... 32

May v. Air & Liquid Sys. Corp., 100 A.3d 1284 (Md. Ct. Spec. App. 2014), *cert. granted*, 441 Md,. 217 (2015 16

McGoldrick v. Porter-Cable Tools, 110 Cal. Rptr. 481 (Ct. App. 1973) 31

McGuire v. Honeywell, Int'l, Inc., No. 62-CV-09-10102 (Minn. 2d Dist. Ct. Ramsey Cnty. Aug. 10, 2010)..... 18

McNaughton v. Gen. Elec. Co., 2012 WL 5395008 (E.D. Pa. Aug. 9, 2012..... 18, 21

Merrill v. Leslie Controls, Inc., 101 Cal. Rptr. 3d 614 (Ct. App. 2009) 15

Miller v. A.W. Chesterton Co., 2012 WL 2914180 (E.D. Pa. May 14, 2012) 19

Mitchell v. Sky Climber, Inc., 487 N.E.2d 1374 (Mass. 1986..... 16, 30

Montoney v. Cleaver-Brooks, Inc., 2012 WL 359523 (Pa. Com. Pl. Phila. Cnty. Jan. 5, 2012)..... 16

Morgan v. Bill Vann Co., Inc., 969 F. Supp. 2d 1358 (S.D. Ala. 2013) ..... *passim*

Morin v. Autozone Northeast, Inc., 943 N.E.2d 495 (Mass. Ct. App.), *review denied*, 949 N.E.2d 925 (Mass. 2011) 16

Mortimer v. A.O. Smith Corp., 2015 WL 1606149 (E.D. Pa. Jan. 6, 2015) 18-19

Nelson v. Air & Liquid Sys. Corp., 2014 WL 6982476 (W.D. Wash. Dec. 9, 2014) 19

Nelson v. 3M Co., 2011 WL 3983257 (Minn. 2d Dist. Ct. Ramsey Cnty. Aug. 16, 2011) 18

Niemann v McDonnell Douglas Corp., 721 F. Supp. 1019 (S.D. Ill. 1989) 18

Nolen v. A.W. Chesterton Co., 2004 WL 5047437 (Tex. Dist. Ct. 153d Jud. Dist. Tarrant Cnty. July 26, 2004) 18

Nolen v. A.W. Chesterton Co., 2004 WL 5047438 (Tex. Dist. Ct. 153d Jud. Dist. Tarrant Cnty. Aug. 11, 2004) 18

Nolen v. Foster Wheeler Energy Corp., 2012 WL 3126765 (Cal. Ct. App. Aug. 2, 2012) 15

Olds v. 3M Co., 2013 WL 5675509 (C.D. Cal. Oct. 16, 2013) 18

Oneal v. Alfa Laval, Inc., 2014 WL 5341878 (S.D. Fla. Oct. 19, 2014) 19

O'Neil v. Crane Co., 266 P.3d 987 (Cal. 2012) ..... *passim*

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 2

Ottinger v. Am. Standard, Inc., 2007 WL 7306556 (Pa. Com. Pl. Phila. Cnty. Sept. 11, 2007) 16

Paulus v. Crane Co., 169 Cal. Rptr. 3d 373 (Ct. App. 2014) 15

Peterson v. Superior Court, 10 Cal. 4th 1185 (1995) 21

Petros v. 3M Co., 2009 WL 6390885 (Cal. Super. Ct. Alameda Cnty. Sept. 30, 2009) 15

Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298 (3rd Cir. 1995) 32

Powell v. Standard Brands Paint Co., 166 Cal. App. 3d 357 (1985) 30

Reed v. Am. Steel and Wire Co., 2014 WL 3674678 (Ga. Super. Ct. Chatham Cnty. July 21, 2014) 16

Reynolds v. Bridgestone/Firestone, Inc., 989 F.2d 465 (11th Cir. 1993) 32

Richards v. Armstrong Int'l, Inc., 2013 WL 1845826 (Me. B.C.D. Cumberland Cnty. Jan. 25, 2013) 18

Roberts v. Adience, Inc., 2014 WL 7190246 (Ohio Ct. Com. Pl. Cuyahoga Cnty. Mar. 4, 2014) 18

Robinson v. Air & Liquid Sys. Corp., 2014 WL 3673030 (D.N.J. July 23, 2014) 16

Rollin v. Foster Wheeler, LLC, 2012 WL 3126742 (Cal. Ct. App. Aug. 2, 2012) 15

Rumery v. Garlock Sealing Tech., Inc., 2009 WL 1747857 (Me. Super. Ct. Cumberland Cnty. Apr. 24, 2009) 18

Salisbury v. Asbestos Corp., Ltd., 2014 WL 345214 (E.D. Pa. Jan. 29, 2014) 19

Sanders v. Ingram Equip., Inc., 531 So. 2d 879 (Ala. 1988) 31-32

Schaffner v. Aesys Tech., LLC, 2010 WL 605275 (Pa. Super. Jan. 21, 2010 16

Schwartz v. Abex Corp., 2015 WL 3387824 (E.D. Pa. May 27, 2015) 16

Serini v. A.W. Chesterton Co., 2012 WL 2914188 (E.D. Pa. May 14, 2012).... 19

Sether v. Agco Corp., 2008 WL 1701172 (S.D. Ill. Mar. 28, 2008) 19

Shaw v. Gen. Motors Corp., 727 P.2d 387 (Colo. App. 1986) 30-31

Shields v. Hennessy Indus., Inc., 140 Cal. Rptr. 3d 268 (Ct. App. 2012) 15

Simonetta v. Viad Corp., 197 P.3d 127 (Wash. 2008) ..... *passim*

Smith v. Lead Indus. Ass'n, Inc., No. 2368 (Md. Ct. Spec. App. 2002), *vacated on other grounds*, 871 A.2d 545 (Md. 2005) 36

Sparkman v. Goulds Pumps, Inc., 2015 WL 727937 (D.S.C. Feb. 19, 2015) ... 19

Spencer v. Ford Motor Co., 367 N.W.2d 393 (Mich. Ct. App. 1985) 32

Stark v. Armstrong World Indus., Inc., 21 F. App'x 371 (6th Cir. 2001) ..... *passim*

Stevens v. CBS Corp., 2012 WL 5844704 (W.D. Wash. Nov. 19, 2012) 18

Straley v. United States, 887 F. Supp. 728 (D.N.J. 1995 ..... 28, 38

Surre v. Foster Wheeler L.L.C., 831 F. Supp. 2d 797 (S.D.N.Y. 2011) ..... *passim*

Taylor v. Elliott Turbomachinery Co., Inc., 90 Cal. Rptr. 3d 414 (Ct. App. 2009) ..... *passim*

Thing v. La Chusa, 48 Cal. 3d 644 (Cal. 1989) 6

Thurmon v. A.W. Chesterton, Inc., 2014 WL 6621262 (N.D. Ga. Nov. 21, 2014) 18

Toole v. Georgia-Pacific, LLC, 2011 WL 7938847 (Ga. App. 2011) 16

Toth v. Econ. Forms Corp., 571 A.2d 420 (Pa. Super. Ct. 1990), *appeal denied*, 593 A.2d 422 (Pa. 1991 31

Urian v. Ford Motor Co., 2010 WL 3005539 (Del. Super. Ct. New Castle Cnty. July 30, 2010) 17

Various Plaintiffs v. Various Defendants, 856 F. Supp. 2d 703 (E.D. Pa. 2012) 19

Vedros v. Northrop Grumman Shipbuilding, Inc., 2014 WL 1093678 (E.D. La. Mar. 14, 2014) 19

Walton v. Harnischfeger, 796 S.W.2d 225 (Tex. App. 1990) 31

Walton v. The William Powell Co., 108 Cal. Rptr. 3d 412 (Ct. App. 2010) 15

Wangen v. A.W. Chesterton Co., 163 Wash. App. 1004, 2011 WL 3443962 (Wash. Ct. App. Aug. 8, 2011) 16

Whiting v. CBS Corp., 2013 WL 530860, 982 N.E.2d 1224 (Table) (Mass. Ct. App. 2013) 16

Wiler v. Firestone Tire & Rubber Co., 95 Cal. App. 3d 621 (1979) 32

Wilkerson v. Am. Honda Motor Co., Inc., 2008 WL 162522 (Del. Super. Ct. New Castle Cnty. Jan. 17, 2008) 17

Woodard v. Crane Co., 2011 WL 3759923 (Cal. Ct. App. Aug. 25, 2011) 15

Yankee v. APV N. Am., Inc., 262 P.3d 515 (Wash. Ct. App. 2011) 16

Zambrana v. Standard Oil Co. of Cal., 26 Cal. App. 3d 209 (1972) 32

OTHER AUTHORITIES

ABA TIPS Section Task Force on Asbestos Litigation and the Bankruptcy Trusts, Hearing, June 6, 2013, *available at* http://www.americanbar.org/content/dam/aba/administrative/tips/asbestos_tf/revised_task_force_on_asbestos_litigation_and_the_bankruptcy_trusts_06-06-2013.authcheckdam.pdf 40

63A *Am. Jur. 2d Products Liability* § 1027 6

Peggy Ableman *et al.*, *The Consolidation Effect: New York City Asbestos Verdicts, Due Process, and Judicial Efficiency*, 14 Mealey's Asbestos Bankr. Rep. 1 (Apr. 2015), *available at* http://asbestoslitigationwatch.org/sites/default/files/NYCAL%20Consolidation%20-%20Mealey%27s%20BK%20Report.pdf 41

James M. Beck, *Little in Common*, 53 No. 9 DRI For The Def. 28 (Sept. 2011) 41

Mark A. Behrens & Margaret Horn, *Liability for Asbestos-Containing Connected or Replacement Parts Made by Third Parties: Courts Are Properly Rejecting this Form of Guilt by Association*, 37 Am. J. Trial Advoc. 489 (2014) 15

Joseph W. Belluck *et al.*, *7th Annual Judicial Symposium on Civil Justice Issues: George Mason Judicial Education Program: Edited Transcripts: The Asbestos Litigation Tsunami - Will It Ever End?*, 9 J.L. Econ. & Pol'y 489 (2013) 40

Best's Special Report, *Asbestos Losses Persist; A.M. Best Raises Industry's Loss Estimate to $85 Billion* 1 (A.M. Best Co., Inc. Dec. 10, 2012) 39

Jenni Biggs *et al.*, *A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated* (Towers Watson June 2013), *available at* http://www.towerswatson.com/DownloadMedia.aspx?media=%7B67C014AD-30A0-43A8-BF7D-987809C35E76%7D..... 39

Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071 (2014) 44-45

S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299 (2013 .....3, 38, 44

29 C.F.R. § 1910.1001, *at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=9995 29

Alan Calnan & Byron G. Stier, *Perspectives on Asbestos Litigation: Overview and Preview*, 37 Sw. U. L. Rev. 459 (2008) 5

Stephen J. Carroll *et al.*, *Asbestos Litigation* (RAND Corp. 2005), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf ..... *passim*

George Scott Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. Tex. L. Rev. 981 (2003)..... 42

Lloyd Dixon *et al.*, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* (Rand Corp. 2010), *available at* http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR872.pdf..... 43

Lloyd Dixon & Geoffrey McGovern, *Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases* (Rand Corp. 2015), *available at* http://www.rand.org/pubs/research_reports/RR907.html.... 45

Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* (Rand Corp. 2011), *available at* http://www.rand.org/pubs/monographs/MG1104.html..... 43

Michael Drahos *et al.*, *Danger Ahead: The Changing Face of Failure to Warn Claims*, 33 No. 1 Trial Advoc. Q. 28 (Winter 2014), *available at* http://www.fowler-white.com/uploads/illumanet/news/TAQ%20Winter%202014.pdf 36

Editorial, *The Double-Dipping Legal Scam*, Wall St. J., Dec. 25, 2014, at A12, *available at* http://www.wsj.com/articles/the-double-dipping-legal-scam-1419535915 46

Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, 2001 WLNR 1993314 2

Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511 (2008) 1

Furthering Asbestos Claim Transparency (Fact) Act of 2013, H.R. Rep. No. 113-254 (Oct. 30, 2013) 38

Peter Geier, *Asbestos Litigation Moves On With World War II Shipyard Cases 'Dying Off', Plaintiff Attorneys Dig Deeper to Find New Strategies*, 130:5 Recorder (San Francisco) (Jan. 9, 2006), *available at* 2006 WLNR 25577320 4

Heather Isringhausen Gvillo, *Database Provides Insight Into How Much Asbestos Claims Are Worth*, Madison-St. Clair Record, May 14, 2015, *available at* http://madisonrecord.com/issues/302-asbestos/270770-database-provides-insight-into-how-much-asbestos-claims-are-worth 46

Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525 (2007) 2, 41

James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 Sw. U. L. Rev. 595 (2008) ..... *passim*

Michael Hoenig, *No Liability for Another's Asbestos Products*, N.Y.L.J. (online) (Feb. 17, 2012) 29

Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. of Applied Psychol. 909 (2000) 42

Irwin A. Horowitz & Kenneth S. Bordens, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 L. & Psychol. Rev. 43 (1998) 42

Joseph W. Hovermill *et al.*, *Targeting of Manufacturers*, 47 No. 10 DRI For Def. 52 (Oct. 2005) 36

James S. Kakalik *et al.*, *Costs of Asbestos Litigation*3 (Rand Corp. 1983) 2

Dwight A. Kern & David S. Kostus, *The Controversial Contradiction Between Traditional Precedent and Recent Failure to Warn Jurisprudence in New York*, 74 Alb. L. Rev. 793 (2010-2011) 14

Adrienne Bramlett Kvello, *The Best of Times and the Worst of Times: How Borg-Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas*, 40 The Advoc. (Tex.) 80 (2007) 44

David C. Landin *et al.*, *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Public Policy in Asbestos Litigation*, 16 Brook. J.L. & Pol'y 589 (2008) 37

'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz, 17:3 Mealey's Litig. Rep.: Asbestos 19 (Mar. 1, 2002) 3

John W. Petereit, *The Duty Problem With Liability Claims Against One Manufacturer for Failing to Warn About Another Manufacturer's Product*, Toxic Torts & Env'tl L. 4 (DRI Toxic Torts & Env'tl L. Comm. Winter 2005) ..... *passim*

Restatement (Second) of Torts § 402A (1965) 9

Restatement (Second) of Torts § 388 (1965) 23-24

Restatement Third, Torts: Products Liability § 1 (1997) 9

Restatement Third, Torts: Products Liability § 5 (1998) 33

Paul Riehle *et al.*, *Products Liability for Third Party Replacement or Connected Parts: Changing Tides From the West*, 44 U.S.F. L. Rev 33 (2009) ..... *passim*

Eduardo Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 Widener L.J. 97 (2013) 2

Marc C. Scarcella *et al.*, *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts And Changes in Exposure Allegations From 1991-2010*, 27:19 Mealey's Litig. Rep.: Asbestos 1 (Nov. 7, 2012)..... 2-3

Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12:11 Mealey's Asbestos Bankr. Rep. 33 (June 2013)..... 42-43

Dionne Searcy & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, Wall St. J., Mar. 11, 2013, at A1, *available at* http://www.wsj.com/articles/SB10001424127887323864304578318611662911912..... 43

U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 3 (Sept. 2011), *available at* http://www.gao.gov/products/GAO-11-81)..... *passim*

William P. Shelley *et al.*, *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 Widener L.J. 675 (2014)..... 43

William P. Shelley *et al.*, *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 J. Bankr. L. & Prac. 257 (2008) 46

Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made Over the Past Decade and Hurdles You Can Vault in the Next*, 36 Am. J. of Trial Advoc. 1 (2012) 5

Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander,"* 23 Widener L.J. 59 (2013) 3

Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. Cin. L. Rev. 38 (1983) 37

Mary Elizabeth Stern & Lucy P. Allen, *Defense Costs Dropped in 2014, While Claim Filings, Dismissal Rates, and Indemnity Dollars Remained Steady*, at 1 (NERA Econ. Consulting June 4, 2015), *available at* http://www.nera.com/content/dam/nera/publications/2015/PUB_Asbestos_Litigation_Trends_0615.pdf 39

Joseph E. Stiglitz *et al.*, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003) 39

Thomas W. Tardy, III & Laura A. Frase, *Liability of Equipment Manufacturers for Products of Another: Is Relief in Sight?*, HarrisMartin Columns, May 2007 35

James K. Toohey & Rebecca L. Matthews, *Liability for the Post-Sale Installation of Asbestos-Containing Replacement Parts or Insulation*, 25:21 Mealey's Litig. Rep.: Asbestos 20 (Dec. 1, 2010) 18

Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. Legal Stud. 365 (June 2006) 42

Michelle J. White, *Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle*, 70 U. Cin. L. Rev. 1319 (2002) 41

Year-in-Review, O'Neil v. Crane Co., 53 Cal. 4th 335 (2012), 39 W. St. U. L. Rev. 251 (Spring 2012) 21

QUESTION PRESENTED

Whether a manufacturer has a duty to warn with respect to asbestos-containing products manufactured, supplied, or placed in the stream of commerce entirely by third parties.

INTEREST OF *AMICI CURIAE*

Amici are organizations that represent companies doing business in New York and their insurers, civil justice and policy organizations, and an association of attorneys whose practice is concentrated on civil litigation defense. Accordingly, *amici* have a substantial interest in ensuring that New York's tort system is fair, follows traditional tort law rules, and reflects sound public policy. *Amici* will show that the appellate court's decision to impose liability on Appellant Crane Co. for harm caused by *other manufacturers'* asbestos-containing products is inconsistent with these principles, as well as New York precedent, and should be reversed.

STATEMENT OF THE CASE

Amici adopt Appellant's Statement of the Case as relevant to our argument.

INTRODUCTION AND SUMMARY OF ARGUMENT

Now into its fourth decade, the asbestos litigation is the "longest-running mass tort."[1] Originally and for many years, asbestos litigation typically pitted a "dusty trades" worker "against the asbestos miners, manufacturers, suppliers, and

[1] Helen Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 511 (2008).

processors who supplied the asbestos or asbestos products that were used or were present at the claimant's work site or other exposure location." James S. Kakalik *et al.*, *Costs of Asbestos Litigation* 3 (Rand Corp. 1983).[2] By the late 1990s, the asbestos litigation had reached such proportions that the United States Supreme Court noted the "elephantine mass" of cases, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999), and referred to the litigation as a "crisis." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997). Mass filings pressured many primary historical defendants into bankruptcy, including virtually all manufacturers of asbestos-containing thermal insulation.

As a result of these bankruptcies, "the net . . . spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14.[3] "[P]laintiff attorneys shifted their litigation strategy away from the traditional

---

[2] *See also* Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 Widener L.J. 97, 103 (2013) ("Miners, ship workers, construction workers, and those involved in manufacturing other asbestos-based products were at the highest risk of contracting such [asbestos-related] diseases.").

[3] *See also* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 556 (2007) ("The surge of bankruptcies in 2000-2002...triggered higher settlement demands on other established defendants, including those attempting to ward off bankruptcy, as well as a search for new recruits to fill the gap in the ranks of defendants through joint and several liability."); Stephen J. Carroll *et al.*, *Asbestos Litigation* xxiii (RAND Corp. 2005) ("When increasing asbestos claims rates encouraged scores of defendants to file Chapter 11 petitions . . . the resulting stays in litigation . . . drove plaintiff attorneys to press peripheral non-bankrupt defendants to shoulder a larger share of the value of asbestos claims and to widen their search for other corporations that might be held liable for the costs of asbestos exposure and disease.").

thermal insulation defendants and towards peripheral and new defendants associated with the manufacturing and distribution of alternative asbestos-containing products such as gaskets, pumps, automotive friction products, and residential construction products." Marc C. Scarcella *et al.*, *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts And Changes in Exposure Allegations From 1991-2010*, 27:19 Mealey's Litig. Rep.: Asbestos 1, 1 (Nov. 7, 2012).[4] One plaintiffs' attorney described the 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 19 (Mar. 1, 2002) (quoting Mr. Scruggs).[5]

This trend was described in a significant ruling that is achieving nationwide notoriety. *See In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 96 (W.D.N.C. Bankr. 2014) ("Beginning in early 2000s, the remaining large thermal insulation defendants filed bankruptcy cases and were no longer participants in the tort system. As the focus of plaintiffs' attention turned more to Garlock as a remaining

---

[4] *See also* S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299, 306 (2013) ("Defendants who were once viewed as tertiary have increasingly become lead defendants in the tort system, and many of these defendants have also entered bankruptcy in recent years.").

[5] *See also* Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander,"* 23 Widener L.J. 59 (2013) (discussing quote from Mr. Scruggs and ways plaintiffs' lawyers have tried to expand the asbestos litigation to impose liability on defendants for harms caused by others, including the theory discussed in this brief).

solvent defendant, evidence of plaintiffs' exposure to other asbestos products often disappeared. Certain plaintiffs' law firms used this control over the evidence to drive up the settlements demanded of Garlock.").

In an attempt to further stretch the liability of solvent manufacturers, some plaintiffs' counsel (as in this case) are promoting the theory that makers of uninsulated products in "bare metal" form – such as turbines, boilers, pumps, valves, and evaporators used on ships to desalinate sea water – should have warned about potential harms from exposure to asbestos-containing external thermal insulation manufactured and sold by third parties and attached post-sale, such as by the Navy. Plaintiffs' lawyers are also claiming that manufacturers of products such as pumps and valves that originally came with asbestos-containing gaskets or packing should have warned about potential harms from exposure to replacement internal gaskets or packing or replacement external flange gaskets manufactured and sold by third parties.[6]

Plaintiffs' lawyers are promoting this novel theory because most major manufacturers of asbestos-containing products have filed bankruptcy and the Navy

---

[6] *See* Peter Geier, *Asbestos Litigation Moves On With World War II Shipyard Cases 'Dying Off', Plaintiff Attorneys Dig Deeper to Find New Strategies*, 130:5 Recorder (San Francisco) 12 (Jan. 9, 2006).

enjoys sovereign immunity.[7] "As a substitute, plaintiffs seek to impose liability on solvent manufacturers for harms caused by products they never made or sold." Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made Over the Past Decade and Hurdles You Can Vault in the Next*, 36 Am. J. of Trial Advoc. 1, 24-25 (2012).[8]

Ordinarily, manufacturers are named in asbestos cases with respect to asbestos that was contained in their *own* products—*not* to hold them liable for products *made by others*. It is black-letter product liability law that manufacturers are not liable for harms caused by others' products except in very limited situations not present here. *See* James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 Sw. U. L. Rev. 595, 602 (2008).

Plaintiffs' lawyers justify the radical expansion of liability they seek based on *foreseeability*. But, foreseeability can be a *Palsgraf*-like slippery slope. Courts must draw a line limiting tort liability in order to avoid the problems that a

---

[7] *See also* Paul Riehle *et al.*, *Product Liability for Third Party Replacement or Connected Parts: Changing Tides From the West*, 44 U.S.F. L. Rev 33, 38 (2009) ("Unable to collect against insolvent manufacturers, asbestos personal injury attorneys began searching for alternative and ancillary sources of recovery.").

[8] *See also* Riehle *et al.*, 44 U.S.F. L. Rev at 38 ("Not content with the remedies available through bankruptcy trusts and state and federal worker compensation programs, claimants' lawyers have extended the reach of products liability law to 'ever-more peripheral defendants' who used asbestos-containing materials on their premises or contemplated the use of asbestos-containing parts in connection with their products.") (quoting Alan Calnan & Byron G. Stier, *Perspectives on Asbestos Litigation: Overview and Preview*, 37 Sw. U. L. Rev. 459, 463 (2008)).

foreseeability standard would inevitably create.[9] That line is logically drawn at the point where a plaintiff is harmed by a product that was neither made nor sold by the defendant.[10]

Furthermore, Plaintiffs' theory represents unsound public policy. If adopted, Plaintiffs' theory would worsen the four-decades-long asbestos litigation and invite a flood of new cases. Hundreds of companies made products that arguably were used in the vicinity of some asbestos insulation, which in earlier years was ubiquitous in industry and buildings. Many of these companies may have never manufactured a product containing asbestos (*e.g.,* manufacturers of steel pipe and pipe hangers; makers of nuts, bolts, washers, wire, and other fasteners of pipe systems; makers of any equipment attached to and using the pipe system; and paint manufacturers), but they could nonetheless be held liable under Plaintiffs' theory.

Civil defendants in other types of cases would also be adversely affected, as the broad new duty rule sought here presumably would not be limited to asbestos

---

[9] As the California Supreme Court explained in *Thing v. La Chusa*, 48 Cal. 3d 644, 656, 659 (Cal. 1989), "foreseeability, like light, travels indefinitely in a vacuum," raising the potential for "the limitless exposure to liability."

[10] *See* 63A *Am. Jur. 2d Products Liability* § 1027 ("The manufacturer's duty to warn is restricted to warnings based on the characteristics of the manufacturer's own products. The law generally does not require a manufacturer to study and analyze the products of others and warn users of the risks of those products. Consequently, even where the manufacturer erroneously omits warnings, the most the manufacturer could reasonably be expected to foresee is that consumers might be subject to the risks of the manufacturer's own product, since those are the only risks the manufacturer is required to know. The manufacturer is not required to warn of dangers posed by use of another manufacturer's product in the same vicinity as its product was used.").

litigation but could require manufacturers to warn about all conceivable dangers relating to hazards in others' products that might be used in conjunction with or near their own. Consumer safety could be undermined by the potential for over-warning and through conflicting information that may be provided by manufacturers of different components and by makers of finished products.

For these reasons, this Court should reverse the Appellate Division's decision and direct entry of judgment for Crane Co.

ARGUMENT

I. UNDER NEW YORK LAW, MANUFACTURERS ARE NOT LIABLE FOR FAILURE TO WARN ABOUT HAZARDS IN OTHERS' PRODUCTS

In *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 591 N.E.2d 222, 582 N.Y.S.2d 373 (1992), this Court defined the circumstances under which the manufacturer or seller of a product that itself caused no injury can be held liable for another's injury-causing defective product when the two products are used together. Under the *Rastelli* doctrine, in a combined-use scenario, a manufacturer can only be held liable for a harm caused by an injurious defective product made or sold by a third party when the manufacturer: (1) controlled the production of the injury-producing product, (2) derived a benefit from the sale of the injury-producing product, or (3) placed the injury-producing product in the stream of commerce. 79 N.Y.2d at 298, 591 N.E.2d at 226, 582 N.Y.S.2d at 377.

In *Rastelli*, plaintiff's decedent was killed inflating a truck tire made by Goodyear when a multipiece tire rim made by another company separated explosively. Plaintiff claimed that Goodyear had a duty to warn against its tire being used in conjunction with allegedly defective multipiece tire rims made by others because Goodyear was aware that those rims could be used with its tires. This Court explained that "a plaintiff may recover in strict products liability or negligence when a manufacturer fails to provide adequate warnings regarding the use of its product." 79 N.Y.2d at 297, 582 N.Y.S.2d at 376, 591 N.E.2d at 225. The Court rejected plaintiff's foreseeability-based theory and said there could be no liability because "Goodyear 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. Goodyear's tire did not create the alleged defect in the rim that caused the rim to explode." 79 N.Y.2d at 298, 582 N.Y.S.2d at 377, 591 N.E.2d at 226. The Court "decline[d] to hold that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of another manufacturer." 79 N.Y.2d at 297-298, 582 N.Y.S.2d at 376-377, 591 N.E.2d at 225-226.[11]

---

[11] *See also Hansen v Honda Motor Co., Ltd.*, 104 A.D.2d 850, 851, 480 N.Y.S.2d 244, 246 (2d Dep't 1984) ("Although a manufacturer is under a duty to design and manufacture a product

The *Rastelli* doctrine reflects traditional principles of tort law[12] and is firmly established in New York in non-asbestos cases. *See, e.g., Cleary v Reliance Fuel Oil Assoc., Inc.*, 17 A.D.3d 503, 505, 793 N.Y.S.2d 468 (2d Dep't 2005) (affirming dismissal of claims against manufacturer of water heater where device inserted into heater that controlled temperature of water was manufactured and supplied by others). A manufacturer's knowledge that its product may be used in conjunction with a third party's product does not turn the manufacturer into an insurer for harms caused by the other's product. *See, e.g., Tortoriello v Bally Case, Inc.*, 200

---

which is safe at the time of sale, it is not responsible for injuries caused by subsequent modifications by another however foreseeable such modifications may have been to the manufacturer.").

[12] Product liability law generally provides that any entity *which participates in the chain of distribution* of a product is liable for harms caused by *a defect* in *that product*, whether negligently or nonnegligently caused. *See* Restatement (Second) of Torts § 402A (1965); Restatement Third, Torts: Products Liability § 1 (1997). As a comment to § 402A explains:

> On whatever theory, *the justification for strict liability has been* said to be *that the seller, by marketing his product* for use and consumption, *has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it*; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that *public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them*, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

Restatement (Second) of Torts § 402A cmt. *c* (emphasis added); *see also* Restatement (Second) of Torts § 402A cmt. *f* (1965) (noting that § 402A applies to "any person engaged in the business of selling" product causing harm); Restatement (Third) of Torts: Prods. Liab. § 1 (1997) ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.").

A.D.2d 475, 477, 606 N.Y.S.2d 625 (1st Dep't 1994) (dismissing claims against kitchen manufacturer for slip-and-fall injury to plaintiff caused by accumulation of ice on quarry tile floor the defendant did not "manufacture, deliver or install" even though the manufacturer's literature showed quarry tile as one of three available floor materials for walk-in freezers); *Kaloz by Kaloz v. Risco*, 120 Misc.2d 586, 588, 466 N.Y.S.2d 218, 220-21 (N.Y. Sup. Ct. Orange Cnty. 1983) (pool manufacturer not liable for injury caused by allegedly defective ladder it did not manufacture, control or maintain; failure-to-warn theory cannot be "stretched to require a warning as to a conjunctive product manufactured by another even though such other product may be a *sine qua non* to the use of the first.").[13]

Rastelli was applied in a New York asbestos case decided by the Fourth Department, *Matter of Eighth Jud. Dist. Asbestos Litig. (Drabczyk v. Fisher Controls Int'l)*, 92 A.D.3d 1259, 1260, 938 N.Y.S.2d 715, 716 (4th Dep't), *leave denied*, 969 N.E.2d 222 (N.Y. 2012). Federal courts interpreting New York law in asbestos cases have also found *Rastelli* to be in harmony with the clear majority rule nationwide, and have refused to impose legal responsibility upon a

---

[13] *See also Passaretti v. Aurora Pump Co.*, 201 A.D.2d 475, 475, 607 N.Y.S.2d 688, 688 (2d Dep't 1994) ("Liability may not be imposed ... upon a party that is outside the manufacturing, selling, or distributive chain."); *Porter v. LSB Indus., Inc.*, 192 A.D.2d 205, 211, 600 N.Y.S.2d 867 (4th Dep't 1993) ("Products liability cannot be imposed on a party that is outside the manufacturing, selling, or distribution chain."); *Smith v. Johnson Prods. Co.*, 95 A.D.2d 675, 677, 463 N.Y.S.2d 464 (1st Dep't 1983) (hair-straightening comb manufacturer not liable for injury to plaintiff whose hair ignited while using the hot comb with a flammable hair conditioner made by a third-party).

manufacturer for an allegedly injurious product that the manufacture did not manufacture, sell, or otherwise place in the stream of commerce.[14]

The case most often cited by plaintiffs, *Berkowitz v. A.C. & S., Inc.*, 288 A.D.2d 148, 733 N.Y.S.2d 410 (1st Dep't 2001), considered whether a trial court properly granted summary judgment to a manufacturer of metal pumps that were alleged to have caused Navy sailors to have been exposed to asbestos. In what has been characterized as "a one-paragraph [memorandum] opinion with no clear holding,"[15] the First Department appellate court reversed the trial court, but did not modify or reject the *Rastelli* rule. Rather, the *Berkowitz* opinion accepted *Rastelli* as controlling, and cited *Rastelli* to illustrate the distinction between situations in which the defendant's equipment *required* the use of the allegedly injurious material and situations in which the allegedly injurious material was one that *could* be, but did not need to be, used with the defendant's equipment.[16] In the end, the

---

[14] *See, e.g., Surre v. Foster Wheeler L.L.C.*, 831 F. Supp. 2d 797, 801 (S.D.N.Y. 2011) ("Generally, a manufacturer has no duty to warn against defects in such third-party products so long as the manufacturer had no control over the production of the defective product and did not place it into the stream of commerce.") (citing *Rastelli*).

[15] *Surre*, 831 F. Supp. 2d at 802. The manager of the federal asbestos MDL found the *Berkowitz* opinion, "without any explanation as to the New York court's reasoning, unconvincing, especially in light of the authorities" that decline to impose liability on a defendant for a third-party's asbestos products. *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 798 n.9 (E.D. Pa. 2012).

[16] *Berkowitz* draws this distinction by distinguishing the First Department's opinion in *Rogers v. Sears, Roebuck & Co.*, 268 A.D.2d 245, 701 N.Y.S.2d 359 (1st Dep't 2000), with *Rastelli*. In *Rogers*, the manufacturer of a gas barbeque grill was held to be potentially responsible for a defective propane tank valve, because the gas grill could not be used without

panel was unable to determine which combined-use scenario prevailed so the case was permitted to proceed to the fact-finding stage (during which the matter settled).

In the years following *Berkowitz*, various judges, primarily in New York City Asbestos Litigation ("NYCAL") cases, have applied *Berkowitz* to provide a rule that an equipment manufacturer has a legal duty to warn for every asbestos-containing product that could have been foreseeably (in hindsight) used with that equipment,[17] even though the *Berkowitz* opinion stands for no such proposition.[18]

In *Surre v. Foster Wheeler L.L.C.*, 831 F. Supp. 2d 797, 801 (S.D.N.Y. 2011), a New York City federal court concluded that the "foreseeability" analysis that had permeated numerous NYCAL decisions was flawed under New York law.[19] After surveying a broad spectrum of New York decisions, Second Circuit Court of Appeals Judge Denny Chin, sitting by designation on the district court,

---

the propane tank. Conversely, in *Rastelli*, no liability was imposed because the defendant's tire could be used with or without multipiece rims. Thus, the "rule," if any, coming out of *Berkowitz* is that a product manufacturer is legally responsible in a combined-use scenario only when the combined use was *necessary* to the operation of the defendant's product. *See, e.g., Tortoriello,* 200 A.D.2d at 477.

[17] *See, e.g., Sawyer v. A.C. & S., Inc.*, 32 Misc.3d 1237(A), 938 N.Y.S.2d 230 (Table), 2011 WL 3764074, at *2 (N.Y. Sup. Ct. New York Cnty. June 24, 2011), *motion to vacate denied*, 2011 WL 11707702 (N.Y. Sup. Ct. New York Cnty. Sept. 6, 2011); *Defazio v. A.W. Chesterton*, 32 Misc.3d 1235(A), 938 N.Y.S.2d 226 (Table), 2011 WL 3667717 (N.Y. Sup. Ct. New York Cnty. Aug. 12, 2011).

[18] *See Surre*, 831 F. Supp. 2d at 802-03 (stating that *Berkowitz* "hardly stands for the broad proposition that a manufacturer has a duty to warn whenever it is foreseeable that its product will be used in conjunction with a defective one. Rather, the specifications there apparently *prescribed* the use of asbestos.").

[19] *Id.* at 802 (citing *Tortoriello*). Judge Chin reconciled his conclusion with both *Rastelli* and *Berkowitz*.

held that, under New York law, a manufacturer of equipment that did not require the use of asbestos to function is not responsible for asbestos materials made and sold by others that were used with that equipment—even if the use of asbestos was foreseeable—unless the equipment manufacturer had control over the production of the asbestos-containing material or otherwise placed the asbestos-containing material to which the plaintiff was exposed into the stream of commerce.[20]

In *Kiefer v. Crane Co.*, 2014 WL 6778704 (S.D.N.Y. Feb. 3, 2014), U.S. District Court Judge Katherine Forrest said that the *Rastelli* doctrine continues to be a correct statement of New York law:

> Under New York law, it is clear that one manufacturer cannot be held liable for the products of another. That is Judge Chin's decision in the *Surre v. Foster Wheeler* case [citation omitted]. That is true even if it is known that the asbestos-containing product would be used in conjunction with the defendant manufacturer's own product unless it was necessary that only the particular product could be used or there was involvement in the selection of the asbestos-containing product. Neither of these facts are present here.

Id. at *5. Judge Forrest agreed "with the *Surre* case that under the prevailing case law the correct rationale is that the stream-of-commerce test applies, not the foreseeability test, thereby requiring the grant of summary judgment." *Id.* at *6.

The Court should reaffirm its *Rastelli* "stream-of-commerce" precedent, confirm that New York law is in harmony with the clear majority rule nationwide,

---

[20] *Id.* at 801.

and hold that a manufacturer has no duty to warn about asbestos-containing products sold by third parties and used near or in conjunction with the manufacturer's product.[21]

II. OUT-OF-STATE CASES HOLD THAT MANUFACTURERS ARE NOT LIABLE FOR HARMS CAUSED BY POST-SALE ADDITION OF ASBESTOS-CONTAINING ADJACENT OR REPLACEMENT PARTS FROM THIRD PARTIES

The highest courts of two major states and numerous appellate courts, among others, have applied the *Rastelli* "stream of commerce" doctrine to provide the "majority rule nationwide." *Braaten v. Saberhagen Holdings,* 198 P.3d 493, 498 (Wash. 2008).[22] The courts have held a manufacturer is not responsible for

---

[21] *See* Dwight A. Kern & David S. Kostus, *The Controversial Contradiction Between Traditional Precedent and Recent Failure to Warn Jurisprudence in New York*, 74 Alb. L. Rev. 793, 804, 818 (2010-2011) ("That the language of the First Department's decision in *Berkowitz* has continued to be influential is remarkable when viewed against the backdrop of the seminal decisions of the Court of Appeals on failure to warn in both a negligence and strict liability context..... In New York, [an] examination of historic products-liability decisions should limit the duty to warn to those who had a hand in placing a product into the stream of commerce, thus overturning *Berkowitz*.").

[22] *See also Dalton v. 3M Co.*, 2013 WL 4886658, at *10 (D. Del. Sept. 12, 2013) ("The majority of courts embrace the principles of the bare metal defense and refuse to impose liability upon manufacturers for the dangers associated with asbestos-containing products manufactured and distributed by other entities."), *report and recommendation adopted*, 2013 WL 5486813 (D. Del. Oct. 1, 2013); *In re Asbestos Litig. (Arland Olson),* 2011 WL 322674, at *2 (Del. Super. Ct. New Castle Cnty. Jan. 18, 2011) (following "the persuasive weight of decisions from other jurisdictions declining to impose a duty" where the defendant failed to warn or protect against hazards arising from a product it did not manufacture, distribute, or sell, "even if the defendant's product incorporated component parts that posed similar risks and would require replacement."); *Morgan v. Bill Vann Co., Inc.,* 969 F. Supp. 2d 1358, 1366-67 (S.D. Ala. 2013) ("the prevailing majority rule in other jurisdictions is to recognize the 'bare metal defense' (under which a pump manufacturer...cannot be liable for a third party's asbestos materials used with its products, where the pump manufacturer was not in the chain of distribution of such asbestos-containing materials)" and that "the trend in other jurisdictions favors adoption of that defense for sound

allegedly injurious asbestos-containing materials made and sold by third parties simply because it was foreseeable that those products would be used near or in conjunction with the manufacturer's equipment post-sale.[23]

In cases virtually identical to this one, courts have almost uniformly rejected asbestos third-party duty to warn claims, including many courts perceived to be favorable to plaintiffs. These courts include the Supreme Courts of California[24]

---

and even compelling policy reasons...."); Mark A. Behrens & Margaret Horn, *Liability for Asbestos-Containing Connected or Replacement Parts Made by Third Parties: Courts Are Properly Rejecting this Form of Guilt by Association,* 37 Am. J. Trial Advoc. 489 499 (2014).

[23] *See Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 800 (E.D. Pa. 2012) ("products-liability theories rely on the principle that a party in the chain of distribution of a harm-causing product should be liable because that party is in the best position to absorb the costs of liability into the cost of production."); *Faddish v. Buffalo Pumps*, 881 F. Supp. 2d 1361, 1374 (S.D. Fla. 2012) ("Because defendants were not in the chain of distribution of the dangerous asbestos-containing products causing injury to Mr. Faddish, they cannot be charged with a duty to warn under negligence or strict liability theory.").

[24] *See O'Neil v. Crane Co.*, 266 P.3d 987, 1005 (Cal. 2012); *see also Paulus v. Crane Co.*, 169 Cal. Rptr. 3d 373, 378-79 (Ct. App. 2014); *Lee v. Clark Reliance Corp.*, 2013 WL 3677250, at *6 (Cal. Ct. App. July 15, 2013); *Brewer v. Crane Co.*, 2012 WL 3126523, at *8 (Cal. Ct. App. Aug. 2, 2012); *Nolen v. Foster Wheeler Energy Corp.*, 2012 WL 3126765, at *4 (Cal. Ct. App. Aug. 2, 2012). For pre-*O'Neil* decisions rejecting asbestos third-party duty to warn claims, *see Cullen v. Indus. Holdings Corp.*, 2002 WL 31630885, at *7 (Cal. Ct. App. Nov. 21, 2002); *Taylor v. Elliott Turbomachinery Co., Inc.*, 90 Cal. Rptr. 3d 414, 418 (Ct. App. 2009); *Hall v. Warren Pumps, LLC*, 2010 WL 528489, at *9 (Cal. Ct. App. Feb. 16, 2010); *Merrill v. Leslie Controls, Inc.*, 101 Cal. Rptr. 3d 614, 617 (Ct. App. 2009); *Walton v. The William Powell Co.*, 108 Cal. Rptr. 3d 412, 415 (Ct. App. 2010); *Petros v. 3M Co.*, 2009 WL 6390885, at *1 (Cal. Super. Ct. Alameda Cnty. Sept. 30, 2009); *Woodard v. Crane Co.*, 2011 WL 3759923, at *3 (Cal. Ct. App. Aug. 25, 2011). For post-*O'Neil* cases permitting liability in the limited instance where the defendant's product was solely associated with third-party asbestos-containing products, *see Shields v. Hennessy Indus.*, Inc., 140 Cal. Rptr. 3d 268, 281 (Ct. App. 2012); *Bettencourt v. Hennessy Indus., Inc.*, 141 Cal. Rptr. 3d 167, 177-78 (Ct. App. 2012); *Rollin v. Foster Wheeler, LLC*, 2012 WL 3126742, at *9 (Cal. Ct. App. Aug. 2, 2012); *compare Barker v. Hennessy Indus., Inc.*, 141 Cal. Rptr. 3d 616, 629 (Ct. App. 2012).

and Washington,[25] appellate courts in Georgia,[26] Maryland,[27] Massachusetts,[28] New Jersey (on causation grounds),[29] and Pennsylvania;[30] and state trial courts in

---

[25] *See Simonetta v. Viad Corp.*, 197 P.3d 127, 138 (Wash. 2008); *Braaten v. Saberhagen Holdings,* 198 P.3d 493, 504 (Wash. 2008); *see also Yankee v. APV N. Am., Inc.*, 262 P.3d 515, 520-21 (Wash. Ct. App. 2011); *Wangen v. A.W. Chesterton Co.*, 163 Wash. App. 1004, 2011 WL 3443962, at *7 (Wash. Ct. App. Aug. 8, 2011); *Anderson v. Asbestos Corp.*, 151 Wash. App. 1005, 2009 WL 2032332, at *2 (Wash. Ct. App. July 13, 2009).

[26] *See Toole v. Georgia-Pacific, LLC,* 2011 WL 7938847, at *7 (Ga. App. 2011); *Reed v. Am. Steel & Wire Co.,* 2014 WL 3674678, at *2 (Ga. Super. Ct. Chatham Cnty. July 21, 2014).

[27] *See May v. Air & Liquid Sys. Corp.*, 100 A.3d 1284, 1285 (Md. Ct. Spec. App. 2014), *cert. granted*, 441 Md. 217 (2015); *Ford Motor Co. v. Wood,* 703 A.2d 1315, 1331 (Md. Ct. Spec. App.), *cert. denied*, 709 A.2d 139 (Md. 1998), *abrogated on other grounds, John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002); *see also In re Asbestos Litig. (Thomas Milstead),* 2012 WL 1996533, at *2 (Del. Super. Ct. New Castle Cnty. June 1, 2012) (applying Maryland law).

[28] *See Whiting v. CBS Corp.*, 2013 WL 530860, at *1, 982 N.E.2d 1224 (Table) (Mass. Ct. App. 2013); *Dombrowski v. Alfa Laval, Inc.*, 2010 WL 4168848, at *1 (Mass. Super. Middlesex Cnty. July 1, 2010) (quoting *Mitchell v. Sky Climber, Inc.*, 487 N.E.2d 1374, 1376 (Mass. 1986)); *see also In re Asbestos Litig. (Anita Cosner),* 2012 WL 1694442, at *1 (Del. Super. Ct. New Castle Cnty. May 14, 2012) (applying Mass. law) (citing *Dombrowski*); *see also Morin v. Autozone Northeast, Inc.*, 943 N.E.2d 495, 505 n.10 (Mass. Ct. App.) ("Considerations against the imposition of a duty to warn about replacement parts include (1) the original manufacturer's lack of preventive control over the design and marketing of the later component; (2) its lack of any economic benefit from the sale of the replacement component; (3) the perishability of warnings in manuals during the span between the original sale and the later or remote owner's acquisition of the product; and (4) the greater suitability in these circumstances of a duty to warn by the component manufacturer by reason of its control, benefit, and clear accountability."), *review denied*, 949 N.E.2d 925 (Mass. 2011).

[29] *See Hughes v. A.W. Chesterton Co.*, 89 A.3d 179, 190 (N.J. Super. A.D.), *cert. denied*, No. 074353 (N.J. 2014); *see also Robinson v. Air & Liquid Sys. Corp.*, 2014 WL 3673030, at *1 (D.N.J. July 23, 2014).

[30] *See Schaffner v. Aesys Tech., LLC,* 2010 WL 605275, at *6 (Pa. Super. Jan. 21, 2010); *see also Montoney v. Cleaver-Brooks, Inc.*, 2012 WL 359523 (Pa. Com. Pl. Phila. Cnty. Jan. 5, 2012); *Kolar v. Buffalo Pumps, Inc.*, 15 Pa. D. & C. 5th 38, 45-46 (Pa. Com. Pl. Phila. Cnty. Aug. 2, 2010); *Ottinger v. Am. Standard, Inc.*, 2007 WL 7306556 (Pa. Com. Pl. Phila. Cnty. Sept. 11, 2007); *Eckenrod v. GAF Corp.*, 544 A.2d 50, 52 (Pa. Super.) ("a plaintiff must present evidence to show that he inhaled asbestos fibers shed by the specific manufacturer's product."), *appeal denied*, 553 A.2d 969 (Pa. 1988); *cf. Schwartz v. Abex Corp.*, 2015 WL 3387824 (E.D. Pa. May 27, 2015). An older decision to the contrary, *Chicano v. Gen. Elec. Co.*, 2004 WL 2250990, at *9 (E.D. Pa. Oct. 5, 2004), cited in *In re Asbestos Prods. Liab. Litig. (No.*

Connecticut,[31] Delaware (applying the law of Delaware and numerous other states),[32] Maine,[33] Minnesota,[34] Ohio,[35] and Texas.[36] Federal courts applying

---

VI) (Hoffeditz v. Am. Gen. LLC), 2011 WL 5881008, at *1 (E.D. Pa. July 29, 2011), and *Urian v. Ford Motor Co.*, 2010 WL 3005539, at *2 (Del. Super. Ct. New Castle Cnty. July 30, 2010), misapplies Pennsylvania law as stated in *Schaffner.*

[31] *See Abate v. AAF-McQuay, Inc.*, 2013 WL 812066, at *5 (Conn. Super. Ct. Fairfield Cnty. Jan. 29, 2013), *reconsideration denied*, 2013 WL 5663462, at *5 (Conn. Super. Ct. Sept. 24, 2013); *see also In re Asbestos Litig. (Irene Taska)*, 2011 WL 379327, at *1 (Del. Super. Ct. New Castle Cnty. Jan. 19, 2011) (applying Conn. law); *In re Asbestos Litig. (Frederick and Patricia Parente)*, 2012 WL 1415709, at *2 (Del. Super. Ct. New Castle Cnty. Mar. 2, 2012) (applying Conn. law). For cases permitting liability in the limited instance where the defendant's product was solely associated with third-party asbestos-containing products, *see Fortier v. A.O. Smith Corp.*, 2009 WL 455424, at *2 (Conn. Super. Ct. Fairfield Cty. Jan. 13, 2009); *Abate v. Advanced Auto Parts, Inc.*, 2014 WL 683843, at *1 (Conn. Super. Ct. Fairfield Cty. Jan. 23, 2014).

[32] *See Farrall v. Ford Motor Co.*, 2013 WL 4493568, at *1 n.5 (Del. Super. Ct. New Castle Cnty. Aug. 19, 2013); *In re Asbestos Litig.*, 2011 WL 5340597, at *3 (Del. Super. Ct. New Castle Cnty. Oct. 5, 2011); *Bernhardt v. Ford Motor Co.*, 2010 WL 3005580, at *2 (Del. Super. Ct. New Castle Cnty. July 30, 2010); *Wilkerson v. Am. Honda Motor Co., Inc.*, 2008 WL 162522, at *2 (Del. Super. Ct. New Castle Cnty. Jan. 17, 2008); *In re Asbestos Litig. (James Petroski)*, No. N10C-11-139 ASB (Del. Super. Ct. New Castle Cnty. June 27, 2012) (applying Ariz. law); *In re Asbestos Litig. (Irene Taska)*, 2011 WL 379327, at *1 (Del. Super. Ct. New Castle Cnty. Jan. 19, 2011) (applying Conn. law); *In re Asbestos Litig. (Frederick and Patricia Parente)*, 2012 WL 1415709, at *2 (Del. Super. Ct. New Castle Cnty. Mar. 2, 2012) (applying Conn. law); *In re Asbestos Litig. (Arland Olson)*, 2011 WL 322674, at *2 (Del. Super. Ct. New Castle Cnty. Jan. 18, 2011) (applying Idaho law); *In re Asbestos Litig. (Thomas Milstead)*, 2012 WL 1996533, at *2 (Del. Super. Ct. New Castle Cnty. June 1, 2012) (applying Md. law); *In re Asbestos Litig. (Anita Cosner)*, 2012 WL 1694442, at *1 (Del. Super. Ct. New Castle Cnty. May 14, 2012) (applying Mass. law); *In re Asbestos Litig. (Ralph Curtis and Janice Wolfe)*, 2012 WL 1415706, at *5 (Del. Super. Ct. New Castle Cnty. Feb. 28, 2012) (applying Or. law); *In re Asbestos Litig. (Reed Grgich)*, 2012 WL 1408982, at *4 (Del. Super. Ct. New Castle Cnty. Apr. 2, 2012) (applying Utah law), *reargument denied*, 2012 WL 1593123 (Del. Super. Ct. New Castle Cnty. Apr. 11, 2012), *appeal refused sub nom. Crane Co. v. Grgich*, 44 A.3d 921 (Del. Super. Ct. New Castle Cnty. 2012). *But see In re Asbestos Litig. (Kenneth Carlton)*, 2012 WL 2007291, *3-4 (Del. Super. Ct. New Castle Cnty. June 1, 2012) (applying Ark. law); *In re Asbestos Litig. (Dorothy Phillips) (Limited to Hoffman/New Yorker Inc.)*, 2013 WL 4715263, at *2 (Del. Super. Ct. New Castle Cnty. Aug. 30, 2013) (applying Va. law); *In re Asbestos Litig. (Darlene K. Merritt & James Kilby Story)*, 2012 WL 1409225, at *3 (Del. Super. Ct. New Castle Cnty. Apr. 5, 2012) (applying Va. law).

Alabama,[37] California,[38] Florida,[39] Georgia,[40] Illinois,[41] Mississippi,[42] North Carolina,[43] and Washington law,[44] and federal courts applying maritime law—including the Sixth Circuit Court of Appeals and the manager of the federal asbestos MDL—have also rejected asbestos third-party duty to warn claims.[45]

---

[33] *See Rumery v. Garlock Sealing Tech., Inc.*, 2009 WL 1747857, at *1 (Me. Super. Ct. Cumberland Cnty. Apr. 24, 2009); *Richards v. Armstrong Int'l, Inc.*, 2013 WL 1845826, at *21, 25-26 (Me. B.C.D. Cumberland Cnty. Jan. 25, 2013).

[34] *See Nelson v. 3M Co.*, 2011 WL 3983257 (Minn. 2d Dist. Ct. Ramsey Cnty. Aug. 16, 2011); *see also McGuire v. Honeywell, Int'l, Inc.*, No. 62-CV-09-10102 Minn. 2d Dist. Ct. Ramsey Cnty. Aug. 10, 2010) (cited in James K. Toohey & Rebecca L. Matthews, *Liability for the Post-Sale Installation of Asbestos-Containing Replacement Parts or Insulation*, 25:21 Mealey's Litig. Rep.: Asbestos 20 n.82 (Dec. 1, 2010)).

[35] *See Alexander v. A.W. Chesterton Co.*, 2014 WL 7190244 (Ohio Ct. Com. Pl. Cuyahoga Cnty. July 23, 2014); *Roberts v. Adience, Inc.*, 2014 WL 7190246 (Ohio Ct. Com. Pl. Cuyahoga Cnty. Mar. 4, 2014).

[36] *See Nolen v. A.W. Chesterton Co.*, 2004 WL 5047437, at *1 (Tex. Dist. Ct. 153d Jud. Dist. Tarrant Cnty. July 26, 2004); *Nolen v. A.W. Chesterton Co.*, 2004 WL 5047438, at *1 (Tex. Dist. Ct. 153d Jud. Dist. Tarrant Cnty. Aug. 11, 2004).

[37] *See Morgan v. Bill Vann Co., Inc.*, 969 F. Supp. 2d 1358, 1366-67 (S.D. Ala. 2013).

[38] *See Bell v. Arvin Meritor, Inc.*, 2013 WL 5549540, at *1 (E.D. Pa. Oct. 4, 2013); *Olds v. 3M Co.*, 2013 WL 5675509, at *1 (C.D. Cal. Oct. 16, 2013); *Doucet v. Asbestos Corp.*, 2013 WL 5548108, at *1 (E.D. Pa. May 30, 2013); *McNaughton v. Gen. Elec. Co.*, 2012 WL 5395008, at *1 (E.D. Pa. Aug. 9, 2012); *Floyd v. Air & Liquid Sys. Corp.*, 2012 WL 975359 (E.D. Pa. Feb. 8, 2012).

[39] *See Faddish v. Buffalo Pumps*, 881 F. Supp. 2d 1361, 1374 (S.D. Fla. 2012).

[40] *See Thurmon v. A.W. Chesterton, Inc.*, 2014 WL 6621262, at *4 (N.D. Ga. Nov. 21, 2014).

[41] *See Niemann v McDonnell Douglas Corp.*, 721 F. Supp. 1019, 1030 (S.D. Ill. 1989).

[42] *See Dalton v. 3M Co.*, 2013 WL 4886658, at *10 (D. Del. Sept. 12, 2013), *report and recommendation adopted*, 2013 WL 5486813 (D. Del. Oct. 1, 2013).

[43] *See Harris v. Ajax Boiler, Inc.*, 2014 WL 3101941, at *5-6 (W.D.N.C. July 7, 2014).

[44] *See Stevens v. CBS Corp.*, 2012 WL 5844704, at *3 (W.D. Wash. Nov. 19, 2012).

[45] *See Stark v. Armstrong World Indus., Inc.*, 21 F. App'x 371, 381 (6th Cir. 2001); *Lindstrom v. A-C Prods. Liab. Trust*, 424 F.3d 488, 496, 497 (6th Cir. 2005); *Mortimer v. A.O.*

The Supreme Court of California's unanimous decision in *O'Neil v. Crane Co.*, 266 P.3d 987 (Cal. 2012), is perhaps the most significant of these decisions. The court held that "a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products." *Id.*

Smith Corp., 2015 WL 1606149, at *1 (E.D. Pa. Jan. 6, 2015); *Nelson v. Air & Liquid Sys. Corp.*, 2014 WL 6982476, at *13 (W.D. Wash. Dec. 9, 2014); *Henry v. Am. Honda Motor Co.*, 2014 WL 691049, at *7 (D.R.I. Dec. 3, 2014); *Ferguson v. Air & Liquid Sys. Corp.*, 2014 WL 7652953, at *5 (E.D. Pa. Dec. 3, 2014); *Oneal v. Alfa Laval, Inc.*, 2014 WL 5341878, at *5 (S.D. Fla. Oct. 19, 2014); *DeVries v. Gen. Elec. Co.*, 2014 WL 6746960, at * 1 (E.D. Pa. Oct. 3, 2014); *Vedros v. Northrop Grumman Shipbuilding, Inc.*, 2014 WL 1093678, at *3 (E.D. La. Mar. 14, 2014); *Crews v. Air & Liquid Sys. Corp.*, 2014 WL 639685, at *5 (N.D.N.Y. Feb. 18, 2014); *Cabasug v. Crane Co.*, 989 F. Supp. 2d 1027, 1041 (D. Haw. 2013); *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 801 (E.D. Pa. 2012); *Campbell v. A.W. Chesterton*, 2012 WL 5392873,*1 (E.D. Pa. Oct. 16, 2012); *Cardarg v. Aerojet Gen. Corp.*, 2012 WL 3536243, at *1 (E.D. Pa. July 27, 2012); *Miller v. A.W. Chesterton Co.*, 2012 WL 2914180, at *1 (E.D. Pa. May 14, 2012); *Lyautey v. Alfa Laval, Inc.*, 2012 WL 2877377, at *1 (E.D. Pa. Mar. 20, 2012); *Serini v. A.W. Chesterton Co.*, 2012 2914188 (E.D. Pa. May 14, 2012); *Abbay v. Armstrong Int'l, Inc.*, 2012 WL 975837, at *1 (E.D. Pa. Feb. 29, 2012); *Floyd v. Air & Liquid Sys. Corp.*, 2012 WL 975615 (E.D. Pa. Feb. 8, 2012); *Various Plaintiffs v. Various Defendants*, 856 F. Supp. 2d 703, 709 (E.D. Pa. 2012); *In re Asbestos Litig. (Wesley K. Davis)*, 2011 WL 2462569, at *5 (Del. Super. Ct. New Castle Cnty. June 7, 2011); *In re Asbestos Litig. (Harold and Shirley Howton)*, 2012 WL 1409011, at *6 (Del. Super. Ct. New Castle Cnty. Apr. 2, 2012), *appeal refused sub nom. Crane Co. v. Howton*, 44 A.3d 921 (Del. Super. Ct. New Castle Cnty. 2012); *In re Asbestos Prods. Liab. Litig (No. VI) (Sweeney v. Saberhagen Holdings, Inc.)*, 2011 WL 346822, at *7 (E.D. Pa. Jan. 13, 2011), *report and recommendation adopted*, 2011 WL 359696 (E.D. Pa. Feb. 3, 2011). For cases permitting liability where the defendant manufactured a product that necessitated asbestos components, where the asbestos was essential to the functioning of the defendant's product, and where the asbestos material would necessarily be replaced by other asbestos-containing material, *see Estate of Quirin v. Lorillard Tobacco Co.*, 17 F. Supp. 3d 760 (N.D. Ill. 2014); *Salisbury v. Asbestos Corp., Ltd.*, 2014 WL 345214 (E.D. Pa. Jan. 29, 2014); *see also Sparkman v. Goulds Pumps, Inc.*, 2015 WL 727937, at *3 (D.S.C. Feb. 19, 2015); *Sether v. Agco Corp.*, 2008 WL 1701172, at *3 (S.D. Ill. Mar. 28, 2008); *Branon v. Gen. Elec. Co.*, 2005 WL 1792122, at *2 n.6 (Ky. Ct. App. July 29, 2005).

at 991.[46] The case involved a former sailor who died from mesothelioma that he claimed was caused by exposure to asbestos in the engine and boiler rooms of a World War II-era naval ship in the late 1960s. The sailor's family sued two companies that sold valves and pumps to the Navy at least twenty years before he worked on the ship. Like here, it was "undisputed that defendants never manufactured or sold any of the asbestos-containing materials to which plaintiffs' decedent was exposed." *Id.* at 991. Instead, the decedent's asbestos exposures came from "external insulation and internal gaskets and packing, all of which were made by third parties and added to the pumps and valves post-sale." *Id.*

Applying general principles of product liability law, the court said that while "manufacturers, distributors, and retailers have a duty to ensure the safety of their products . . . we have never held that these responsibilities extend to preventing injuries caused by *other* products that might foreseeably be used in conjunction with a defendant's product." *Id.* (emphasis in original). The court added that it has not held "that manufacturers must warn about potential hazards in replacement parts made by others when . . . the dangerous feature of these parts was not integral to the product's design." *Id.* The court reasoned that requiring manufacturers to

---

[46] *See also O'Neil*, 266 P.3d at 1005 ("We reaffirm that a product manufacturer generally may not be held strictly liable for harm caused by another manufacturer's product. The only exceptions to this rule arise when the defendant bears some direct responsibility for the harm, either because the defendant's own product contributed substantially to the harm or because the defendant participated substantially in creating a harmful combined use of the products.").

warn about hazards with respect to products they did not design, make, or sell would be contrary to the purposes of strict products liability and sound policy.[47]

The California Supreme Court said that "the reach of strict liability is not limitless" and does not extend to harm "from entirely distinct products that the consumer can be expected to use with, or in, the defendant's nondefective product." *Id.* at 995. The court said, "It is fundamental that the imposition of liability requires a showing that the plaintiff's injuries were caused by an act of the defendant or an instrumentality under the defendant's control." *Id.* at 996.[48] "[T]he foreseeability of harm, standing alone, is not a sufficient basis for imposing strict liability on the manufacturer of a nondefective product, or one whose arguably defective product does not actually cause harm." *Id.* at 1005.

---

[47] *See also Year-in-Review, O'Neil v. Crane Co., 53 Cal. 4th 335 (2012),* 39 W. St. U. L. Rev. 251, 253 (Spring 2012) ("Th[e] [*O'Neil*] decision by the Supreme Court of California is consistent with prior decisions in which they have, 'stressed that strict product liability should be imposed only on those entities responsible for placing a defective product into the stream of commerce. . . those outside the marketing enterprise generally have no continuing business relationship with the manufacturer of the defective product, they cannot exert pressure upon the manufacturer to make the product safe and cannot share with the manufacturer the costs of insuring the safety of the product's user.'") (quoting *O'Neil*, 266 P.3d at 995, citing *Peterson v. Superior Court*, 10 Cal. 4th 1185, 1199 (1995)).

[48] In a footnote, the court said that "[a] stronger argument for liability might be made in the case of a product that *required* the use of a defective part in order to operate" or "if the product manufacturer specified or required the use of a defective replacement part. . . ." *Id.* at 996 n.6. In *O'Neil*, the defendants' products did not require asbestos gaskets or packing to function, but even if they did, the court said, "the policy rationales against imposing liability on a manufacturer for a defective part it did not produce or supply would remain." *Id.*; *see also McNaughton v. Gen. Elec. Co.*, 2012 WL 5395008, at *1 (E.D. Pa. Aug. 9, 2012) ("Plaintiff's reliance upon footnote 6 of *O'Neil* to establish Defendant's liability fails because, as this Court has noted previously, footnote 6 is merely dicta and does not reflect California law.") (citing *Floyd v. Air & Liquid Sys. Corp.*, 2012 WL 975684, at *1 (E.D. Pa. Feb. 9, 2012) ("footnote 6 of *O'Neil* is dictum.")).

The court said that this conclusion was "most consistent" with the policies served by the strict liability doctrine, fundamental fairness, and sound public policy. *Id.* "A contrary rule would require manufacturers to investigate the potential risks of all other products and replacement parts that might foreseeably be used with their own product and warn about all of these risks." *Id.* at 1006. The court said that such a duty "would impose an excessive and unrealistic burden on manufacturers." *Id.* (citing *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 501-02 (Wash. 2008)). The court also was concerned that such an expanded duty "could undermine consumer safety by inundating users with excessive warnings." *Id.*

The Supreme Court of California also held that defendants had no duty in negligence to warn about the hazards of asbestos dust released from surrounding products that was a foreseeable consequence of maintenance work on defendants' pumps and valves. The court said, "[W]e have never held that a manufacturer's duty to warn extends to hazards arising exclusively from *other* manufacturers' products." *Id.* at 997. The court found support in California cases "that hold[] instead that the duty to warn is limited to risks arising from the manufacturer's own product." *Id.* The court found additional support in a California appellate decision in a prior asbestos case, *Taylor v. Elliott Turbomachinery Co., Inc.*, 90 Cal. Rptr. 3d 414 (Ct. App. 2009), and decisions from other jurisdictions, including this Court's decision in *Rastelli* and the Fourth Circuit's decision in *Baughman v.*

General Motors Corp., 780 F.2d 1131 (4th Cir. 1986). *See O'Neil*, 266 P.3d at 1000-05. The Supreme Court of California concluded that "expansion of the duty of care as urged [by plaintiffs] would impose an obligation to compensate on those whose products caused the plaintiffs no harm. To do so would exceed the boundaries established over decades of product liability law." *Id.* at 1007.

Prior to the *O'Neil* decision, the Washington Supreme Court was the first court of last resort to hold that a manufacturer is not liable for a third party's asbestos-containing products when the manufacturer is not part of the chain of distribution of that product. In *Simonetta v. Viad Corp.,* 197 P.3d 127 (Wash. 2008), the court held that the successor corporation to the manufacturer of an evaporator used to desalinize water on a ship had no duty to warn a former naval machinist of the danger posed by externally applied asbestos insulation sold by a third party. The court reviewed Washington case law interpreting failure to warn cases under the Restatement (Second) of Torts § 388 (1965) and found that there was "little to no support . . . for extending the duty to warn to another manufacturer's product." *Id.* at 132-33. The court further noted that the "[c]ase law from other jurisdictions similarly limits the duty to warn in negligence cases to those in the chain of distribution of a hazardous product." *Id.* at 133. The court concluded that because the defendant "did not manufacture, sell, or supply the asbestos insulation . . . as a matter of law it had no duty to warn." *Id.* at 134.

Next, the court in *Simonetta* addressed the plaintiff's strict liability claim. The court concluded that the product that caused the plaintiff's harm was the asbestos insulation, not the defendant's evaporator. Based on its review of Washington case law, the court concluded that "our precedent does not support extending strict liability for failure to warn to those outside the chain of distribution of a product." *Id.* at 137. The court refused to hold the evaporator manufacturer's successor liable for failure to warn because the predecessor company was not in the chain of distribution of the asbestos insulation to which plaintiff was exposed.

In *Braaten v. Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008), the Washington Supreme Court extended the *Simonetta* holding to reject failure to warn claims against pump and valve manufacturers for harm caused by asbestos-containing replacement packing and replacement gaskets made by third parties. The court began its opinion by rejecting plaintiff's liability theories with respect to externally applied third-party asbestos insulation. With respect to plaintiff's strict liability claim, the court said, "We held in *Simonetta* that a manufacturer is not liable for failure to warn of the danger of exposure to asbestos in insulation applied to its products if it did not manufacture the insulation and was not in the chain of distribution of the insulation." *Id.* at 498 (citing *Simonetta*, 197 P.3d at 136). The court noted that its decision in *Simonetta* was "in accord with *the majority rule*

nationwide: a 'manufacturer's duty to warn is restricted to warnings based on the characteristics of the manufacturer's own products.'" *Id.* (citation omitted) (emphasis added). For similar reasons, the court dismissed plaintiff's negligence claim. The court explained that, "'Because 'the duty to warn is limited to those in the chain of distribution of the hazardous product,' the defendants here had no duty to warn of the danger of exposure to asbestos in the insulation applied to their products." *Id.* at 501 (quoting *Simonetta*, 197 P.3d at 133).

The court then rejected liability theories relating to plaintiff's exposure to asbestos in replacement packing or gaskets. As the court had explained in *Simonettta*, a manufacturer does not have an obligation to warn of the dangers of another manufacturer's product. Accordingly, the court in *Braaten* held, "The defendant-manufacturers are not in the chain of distribution of asbestos-containing packing and gaskets that replaced the original packing and gaskets and thus fall within the general rule." *Id.* at 500. "Moreover, whether the manufacturers knew replacement parts would or might contain asbestos makes no difference because such knowledge does not matter, as we held in *Simonetta*." *Id.* (citing *Simonetta*, 197 P.3d at 136).

Finally, the court rejected plaintiff's negligence claim relating to the replacement packing and gaskets. "As in the case of the asbestos-containing insulation," the court said, "the general rule is that there is no duty to warn of the

dangers of another manufacturer's product, the breach of which is actionable in negligence." *Id.* at 504. Because the defendant pump and valve companies were not in the chain of distribution of the replacement gaskets and packing they "had no duty to warn of the danger of exposure to asbestos in packing and gaskets, the breach of which would be actionable negligence." *Id.*

In *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488 (6th Cir. 2005), the Sixth Circuit confirmed that a manufacturer is not liable under maritime law for asbestos-containing components and replacement parts it did not manufacture or distribute. Lindstrom was a merchant seaman who worked in the engine rooms of various ships and developed mesothelioma as an alleged result of maintenance work on pumps and valves. Lindstrom claimed that he was exposed to asbestos while replacing gaskets on pumps manufactured by Coffin Turbo Pump, Inc. But, the replacement gaskets were not manufactured by Coffin Turbo. The court stated, "Coffin Turbo cannot be held responsible for the asbestos contained in another product." *Id.* at 496. Lindstrom also alleged exposure to asbestos packing that was attached to pumps manufactured by Ingersoll Rand Co. The court held "that Ingersoll Rand [could] not be held responsible for asbestos-containing material [attached to Ingersoll Rand's] products post-manufacture. *Id.* at 497.[49]

---

[49] *See also Stark v. Armstrong World Indus., Inc.*, 21 F. App'x 371, 381 (6th Cir. 2001) (rejecting claim that turbine and boiler manufacturers should be held liable because their

These cases appreciate that product liability law was never intended to impose *absolute* liability on manufacturers. In contrast, plaintiffs' theory in the "bare metal" and third-party replacement part cases "would make all manufacturers the guarantors not only of their *own* products, but also of each and every product that could conceivably be used in connection with or in the vicinity of their product." John W. Petereit, *The Duty Problem With Liability Claims Against One Manufacturer for Failing to Warn About Another Manufacturer's Product*, Toxic Torts & Env'tl L. 4 (DRI Toxic Torts & Env'tl L. Comm. 2005).

Cornell Law School Professor James Henderson, Jr. has explained that if a manufacturer is required to warn about someone else's product, the manufacturer "is being required to perform a watchdog function in order to rescue product users from risks it had no active part in creating and over which it cannot exert meaningful control." James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 Sw. U. L. Rev. 595, 601 (2008). Other commentators have explained:

> Manufacturers of equipment derive no financial benefit from the sale of replacement or affixed parts manufactured by others, nor do they have the financial leverage to influence the design of those parts. As the replacement and affixed parts manufacturers have their own

---

equipment "is integrated into the machinery of the vessel, much of which uses and may release asbestos," and stating that "[t]his form of guilt by association has no support in the law of products liability."); *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791 (E.D. Pa. 2012) (surveying cases and rejecting duty to warn for asbestos products made or sold by a third party).

> motives for the design and manufacture of their products, the equipment manufacturers are not a necessary factor in bringing the replacement or affixed products to market. Thus, in requiring companies that played no more than a relatively small or attenuated "role in exposing workers to asbestos to bear substantial costs of compensating for asbestos injuries not only raises fundamental questions of fairness but undercuts the deterrence objectives of the tort system."

Paul Riehle *et al.*, *Products Liability for Third Party Replacement or Connected Parts: Changing Tides From the West*, 44 U.S.F. L. Rev 33, 61 (2009) (quoting Stephen J. Carroll *et al.*, *Asbestos Litigation* 129 (RAND Corp. 2005)).

A California appellate court also explained that imposing liability on a defendant for asbestos-containing connected or replacement parts made by third parties would not serve the policy of preventing future harm.[50] The court said:

> It is doubtful respondents had any ability to control the types of products that were used with their equipment so long after it was sold. They delivered various parts to the Navy during World War II and had no control over the materials the Navy used with their products twenty years later when [plaintiff] was exposed to asbestos. Indeed, imposing a duty to warn on respondents now will do nothing to prevent the type of injury before us – latent asbestos-related disease resulting from exposure four decades ago. Such exposures have already taken place, and in light of the heavily regulated nature of asbestos today, it is most unlikely that holding respondents liable for failing to warn of the danger posed by other manufacturers' products will do anything to prevent future asbestos-related injuries.

---

[50] *See also Straley v. United States*, 887 F. Supp. 728, 747 (D. N.J. 1995) ("Courts have held that it is unreasonable to impose a duty upon a manufacturer to warn of all possible dangers posed by all possible uses of a product because such 'billboard' warnings would deprive the user of an effective warning.").

Taylor, 90 Cal. Rptr. 3d at 439;[51] *see also* Michael Hoenig, *No Liability for Another's Asbestos Products*, N.Y.L.J. (online) (Feb. 17, 2012) (stating that decisions rejecting third-party duty to warn claims "reflect that bedrock evidentiary and products liability principles and the policies that underlie them out not be compromised even though the claim is labeled as one involving 'asbestos.'").

III. COURTS IN NON-ASBESTOS CASES HAVE REFUSED TO EXTEND LIABILITY TO MANUFACTURERS OF PRODUCTS THAT ARE USED IN CONJUNCTION WITH PRODUCTS BY THIRD PARTIES THAT CAUSE HARM

Courts in non-asbestos cases have refused to impose liability on manufacturers of products used in conjunction with others' harm-causing products.

For example, in *Brown v. Drake-Willock Int'l , Ltd.*, 530 N.W.2d 510 (Mich. App. 1995), *appeal denied*, 562 N.W.2d 198 (Mich. 1997), the court held that dialysis machine manufacturers owed no duty to warn hospital employees of the risk of exposure to formaldehyde supplied by another company even though the dialysis machine manufacturers had recommended the use of formaldehyde to clean their machines. The court said "[t]he law does not impose upon

---

[51] In 1972, the federal Occupational Safety and Health Administration ("OSHA") first issued permanent standards regulating occupational exposure to asbestos. *See* 29 C.F.R. § 1910.1001. "The 1972 OSHA regulations established standards for exposure to asbestos dust and mandated methods of compliance with the exposure requirements, including monitoring work sites, compelling medical examinations, and, for the first time, labeling products with warnings." *Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276, 280 (4th Cir. 1993). After 1972, OSHA's asbestos regulations "became increasingly stringent over time" and most uses of asbestos ceased in the United States. *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 310 (E. & S.D.N.Y. 2002).

manufacturers a duty to warn of the hazards of using products manufactured by someone else." *Id.* at 515.

Additional cases have held that an airplane manufacturer was not liable to passengers for circulatory problems caused by seats made by a third party and installed post-sale, *In re Deep Vein Thrombosis*, 356 F. Supp. 2d 1055, 1068 (N.D. Cal. 2005); a gasoline pump manufacturer had no duty to warn of the dangers of misuse of gasoline and gasoline containers made by third parties, *Donnelly v. Kerr-McGee Refining Corp.*, 1992 WL 208016, at *5 (W.D. Okla. Apr. 13, 1992), *aff'd*, 993 F.2d 1551, 1993 WL 176605, at *3 (10th Cir. May 21, 1993); a stove manufacturer had no duty to warn that a lighted stove might ignite gas leaking from some other place, *Garman v. Magic Chef, Inc.*, 173 Cal. Rptr. 20, 22 (Ct. App. 1981);[52] a manufacturer of electrically powered lift motors used in conjunction with scaffolding equipment had no duty to warn of risks created by scaffolding made by others, *Mitchell v. Sky Climber, Inc.*, 487 N.E.2d 1374, 1376 (Mass. 1986); a manufacturer of a truck cab and chassis was not liable when a dump bed

---

[52] *See also Powell v. Standard Brands Paint Co.*, 166 Cal. App. 3d 357, 362 (1985) ("To our knowledge, no reported decision has held a manufacturer liable for its failure to warn of risks of using its product, where it is shown that the immediate efficient cause of injury is a product manufactured by someone else."); *Blackwell v. Phelps Dodge Co.*, 157 Cal. App. 3d 372, 378 (1984) ("The product alleged to have been dangerous and hence defective . . . was not the acid supplied by defendant, but the tank car in which the acid was shipped by defendant to [plaintiff's employer]...under these circumstances, defendant incurred no liability to plaintiffs for its failure to warn them of danger from formation of pressure in the acid allegedly caused by the defective design of the tank car...").

and hoist made by a third party were added post-sale without a back-up alarm and resulted in an injury, *Shaw v. Gen. Motors Corp.*, 727 P.2d 387, 390 (Colo. App. 1986); a crane manufacturer had no duty to warn about rigging it did not manufacture, integrate into its crane, or place in the stream of commerce, *Walton v. Harnischfeger*, 796 S.W.2d 225, 226 (Tex. App. 1990); a hydraulic valve manufacturer was not liable for a defective log splitter used in conjunction with its product, *Childress v. Gresen Mfg. Co.*, 888 F.2d 45, 46, 49 (6th Cir. 1989); a manufacturer of a paint sprayer was not liable when a solvent sold by a third party and used to clean the sprayer ignited and burned a user, *Dreyer v. Exel Indus., S.A.*, 326 F. App'x 353, 358 (6th Cir. 2009); a metal forming equipment manufacturer was not liable for a defective wood planking used in conjunction with its product, *Toth v. Econ. Forms Corp.*, 571 A.2d 420, 423 (Pa. Super. Ct. 1990), *appeal denied*, 593 A.2d 422 (Pa. 1991); a manufacturer and seller of paint had no duty to warn users that dried paint should not be removed by the use of gasoline near an open flame, *Johnson v. Jones-Blair Paint Co.*, 607 S.W.2d 305, 306 (Tex. App. 1980); a power saw stand manufacturer was not liable for an injury caused by a defective saw housing made by another and affixed to the stand, *McGoldrick v. Porter-Cable Tools*, 110 Cal. Rptr. 481, 482 (Ct. App. 1973); a manufacturer of a garbage packer mounted on a truck chassis made by another company was not liable for a defect in the chassis, *Sanders v. Ingram Equip., Inc.*, 531 So. 2d 879,

880 (Ala. 1988); a recycling machine component manufacturer was not liable for a malfunction in a different component made by another company, *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298, 1309 (3d Cir. 1995).

Similarly, courts have refused to impose liability on manufacturers for harms caused by replacement parts sold by third parties. For example, in *Baughman v. General Motors Corp.*, 780 F.2d 1131 (4th Cir. 1986), the Fourth Circuit, applying South Carolina law, refused to hold a truck manufacturer liable for a tire mechanic's injuries when a tire mounted on a replacement wheel rim assembly exploded. The court stated "[t]he duty to warn must properly fall upon the manufacturer of the replacement component part," *id.* at 1333, and explained:

> Where, as here, the defendant manufacturer did not incorporate the defective component part into its finished product and did not place the defective component into the stream of commerce, the rationale for imposing liability is no longer present. The manufacturer has not had the opportunity to test, evaluate, and inspect the component; it has derived no benefit from its sale; and it has not represented to the public that the component part is its own.

Id. at 1132-33 (emphasis added).[53]

---

[53] *See also Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 616 (Tex. 1996); *Acoba v. Gen. Tire, Inc.*, 986 P.2d 288, 305 (Haw. 1999); *Zambrana v. Standard Oil Co. of Cal.*, 26 Cal. App. 3d 209, 217 (1972); *Wiler v. Firestone Tire & Rubber Co.*, 95 Cal. App. 3d 621 (1979); *Lytell v. Goodyear Tire & Rubber Co.*, 439 So. 2d 542, 546 (La. Ct. App. 1983); *Spencer v. Ford Motor Co.*, 367 N.W.2d 393 (Mich. Ct. App. 1985); *Cousineau v. Ford Motor Co.*, 363 N.W.2d 721, 727-28 (Mich. Ct. App. 1985); *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 472 (11th Cir. 1993).

In *Fleck v. KDI Sylvan Pools*, 981 F.2d 107, 118 (3d Cir. 1992), the Third Circuit held that it would be "unreasonable" to impose liability on a swimming pool manufacturer for injuries sustained by a diver as a result of a lack of depth markers and warnings on a replacement pool liner made by another manufacturer.

In *Exxon Shipping Co. v. Pacific Resources, Inc.*, 789 F. Supp. 1521 (D. Haw. 1991), a manufacturer of a chain used to moor a large ship was not liable for an accident stemming from a defectively designed replacement chain made by another company even though the replacement was "identical, in terms of make and manufacture, to the original equipment." *Id.* at 1526. The court discussed the various justifications for holding manufacturers and sellers strictly liable for defects in their products and concluded that "a position in the chain of title is a critical link for the imposition of liability." *Id.* at 1527.[54]

IV. IT IS UNSOUND PUBLIC POLICY TO IMPOSE LIABILITY ON MANUFACTURERS FOR ASBESTOS PRODUCTS MADE OR SOLD BY THIRD PARTIES

"[C]ourts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree." *In re New York City Asbestos Litig. (Holdampf v. A.C. & S., Inc.)*, 85

---

[54] Courts have also long held that component part manufacturers are not liable for harms caused by products into which their components are integrated unless the component itself is defective or the component part maker substantially participated in the integration of its component into the design of the finished product and that integration caused the finished product to be defective. *See* Restatement Third, Torts: Products Liability § 5 (1998).

N.Y.3d 486, 493, 840 N.E.2d 115, 119, 806 N.Y.S.2d 146, 150 (2005) (quoting *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232, 750 N.E.2d 1055, 1060, 727 N.Y.S.2d 7, 12 (2001)). That policy would be significantly undermined by holding a manufacturer liable for products made or sold by third parties.[55]

In the real world of product design and usage, virtually every product is connected in some manner with many others in ways that could conceivably be anticipated if courts were willing to extend foresight far enough. Such a duty rule would lead to "legal and business chaos—every product supplier would be required to warn of the foreseeable dangers of numerous other manufacturers' products. . . ." Petereit, *supra*, at 7; *see also Taylor v. Elliott Turbomachinery Co., Inc.*, 90 Cal. Rptr. 3d 414, 422-23 (Ct. App. 2009) ("a bright-line legal distinction tied to the *injury-producing product* in the stream of commerce . . . acknowledges that over-extending the level of responsibility could potentially lead to commercial as well as legal nightmares in product distribution.") (emphasis in original).

Hundreds of companies made products that arguably were used in the vicinity of some asbestos insulation, which in earlier years was ubiquitous in

---

[55] *See Cullen v. Indus. Holdings Corp.*, 2002 WL 31630885, at *7 (Cal. Ct. App. Nov. 21, 2002) ("The social consequences of a rule imposing a duty in these circumstances would be to widen the scope of potential liability for failure to warn far beyond persons in the distribution chain of the defective product to whole new classes of defendants whose safe products happen to be used in conjunction with a defective product made or sold by others. Manufacturers, distributors, and retailers would incur potential liabilities not only for the products they make and sell, but also for every other product with which their product might be used.").

industry and buildings. Many of these companies may have never manufactured a product containing asbestos (e.g., manufacturers of steel pipe and pipe hangers; makers of nuts, bolts, washers, wire, and other fasteners of pipe systems; makers of any equipment attached to and using the pipe system; and paint manufacturers), but they could nonetheless be held liable under the theory being promoted by some plaintiffs' counsel. *See Taylor*, 90 Cal. Rptr. 3d at 439 ("Defendants whose products happen to be used in conjunction with defective products made or supplied by others could incur liability not only for their own products, but also for every other product with which their product might foreseeably be used.").

Presumably, the duty rule sought by plaintiffs' counsel would not be limited to asbestos cases, but could result in the broad imposition of liability against any defendant whose product is foreseeably used in conjunction with a hazardous product made by a third party that causes harm.

"For example, a syringe manufacturer would be required to warn of the danger of any and all drugs it may be used to inject, and the manufacturer of bread [or jam] would be required to warn of peanut allergies, as a peanut butter and jelly sandwich is a foreseeable use of bread." Thomas W. Tardy, III & Laura A. Frase, *Liability of Equipment Manufacturers for Products of Another: Is Relief in Sight?*, HarrisMartin Columns, May 2007, at 6. Packaging companies might be held liable for hazards regarding contents made by others. Valve and pump manufacturers, as

well as door or drywall manufacturers, could be held liable for failure to warn about the dangers of lead paint made by others and applied to their products post-sale. "Can't you just see a smoker with lung cancer suing manufacturers of matches and lighters for failing to warn that smoking cigarettes is dangerous to their health?" Petereit, *supra*, at 4.[56]

> A Maryland appellate court has said that if such a duty rule were the law,
>
> > [a] power saw maker must warn of the risks of asbestos exposure (because a power saw could foreseeably be used to cut into asbestos-containing insulation); manufacturers of paint brushes must caution against the hazards of breathing mineral spirits (because mineral spirits are commonly used to clean paint brushes); orange juice producers must warn of the dangers of alcohol intoxication (because orange juice is often mixed with vodka).

Joseph W. Hovermill *et al.*, *Targeting of Manufacturers*, 47 No. 10 DRI For Def. 52, 54 (Oct. 2005) (quoting *Smith v. Lead Indus. Ass'n, Inc.*, No. 2368, at 15 (Md. Ct. Spec. App. 2002), *vacated on other grounds*, 871 A.2d 545 (Md. 2005)).[57]

---

[56] *See also Cullen v. Indus. Holdings Corp.*, 2002 WL 31630885, at *7 (Cal. Ct. App. Nov. 21, 2002) (stating that "[a]s but one example, [the defendant] points out that makers of cigarette lighters, matches and other products associated with cigarette smoking would thereby become liable for smoking-related injuries"); Michael Drahos *et al.*, *Danger Ahead: The Changing Face of Failure to Warn Claims*, 33 No. 1 Trial Advoc. Q. 28 (Winter 2014) ("Foreseeability alone is not a sufficient basis to justify a wholesale expansion of the basic tenets of a manufacturer's duty to warn. If foreseeability alone set that benchmark, manufacturers of lighters could be liable for harm caused by cigarettes and bullet manufacturers for injuries caused by accidental gun discharge.").

[57] Years ago, the manager of the federal silica MDL responded with "much skepticism" to a request by plaintiffs' lawyers to name concrete saw manufacturers as defendants in that litigation, stating that 'to sue the saw people, it's like suing somebody who sold them shoes to go work in the middle of silica.'" Hovermill *et al.*, *supra* (quoting *In re* Silica Prods. Liab. Litig., MDL No. 1553, Trans. of Status Conf., Aug. 19, 2004, at 72).

Perhaps the only limit on such an expansive legal requirement would be the imagination of creative plaintiffs' lawyers. Indeed, if a manufacturer's duty were defined by foreseeable uses of *other* products, the chain of warnings and liability would be so endless, unpredictable, and speculative as to be worthless. No rational manufacturer could operate under such a system. Manufacturers cannot be expected to have research facilities to identify potential dangers with respect to all products that may be used in conjunction with or in the vicinity of their own products. Also, "[b]ecause it may often be difficult for a it may often be difficult for a manufacturer to know what kind of other products will be used or combined with its own product, [manufacturers] might well face the dilemma of trying to insure against 'unknowable risks and hazards.'" *Taylor*, 90 Cal. Rptr. 3d at 439 (citation omitted).

Additionally, consumer safety could be undermined by the potential for over-warning and through conflicting information on different components and finished products. *See* David C. Landin *et al., Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Public Policy in Asbestos Litigation*, 16 Brook. J.L. & Pol'y 589, 630 (2008).[58] As the California

---

[58] *See also* Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory,* 52 U. Cin. L. Rev. 38, 43 (1983) ("The extension of workplace warnings liability unguided by practical considerations has the unreasonable potential to impose absolute liability. . . ."). "Further, '[i]f business [entities] believe that tort outcomes have little to do with their own behavior, then there is no reason for

Supreme Court said in *O'Neil,* "To warn of all potential dangers would warn of nothing." *O'Neil*, 266 P.3d at 1006 (citation omitted).[59]

V. ASBESTOS LITIGATION WILL WORSEN IF LIABILITY IS IMPOSED ON MANUFACTURERS FOR OTHERS' PRODUCTS

"For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005). So far, "roughly 100 companies have entered bankruptcy to address their asbestos liabilities,"[60] leading to devastating impacts on employees, retirees, shareholders, and surrounding communities. *See* Joseph E. Stiglitz *et al.*, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms,* 12 J. Bankr. L. & Prac. 51 (2003).

Imposition of liability for asbestos-related injuries to defendants outside the chain of distribution of those products would worsen the asbestos litigation and lead to a flood of claims against solvent manufacturers for asbestos products made by third parties. This is especially problematic because the influx of asbestos

---

them to shape their behavior so as to minimize tort exposure.'" Riehle *et al.*, 44 U.S.F. L. Rev at 61-62 (quoting Carroll *et al.*, *supra*, at 129).

[59] *See also Straley v. United States*, 887 F. Supp. 728, 747 (D. N.J. 1995) ("Courts have held that it is unreasonable to impose a duty upon a manufacturer to warn of all possible dangers posed by all possible uses of a product because such 'billboard' warnings would deprive the user of an effective warning.").

[60] S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299, 301 (2013); *see also Furthering Asbestos Claim Transparency (Fact) Act of 2013*, H.R. Rep. No. 113-254, at 5 (Oct. 30, 2013) ("more than half" of the asbestos-related bankruptcies have occurred since "the beginning of the year 2000.").

claims shows no signs of abating. A 2015 review of asbestos-related liabilities reported to the Securities and Exchange Commission by more than 150 publicly traded companies showed that "[f]ilings have shown no decline in the last seven years, a finding that is perhaps inconsistent with predictions of epidemiological models." Mary Elizabeth Stern & Lucy P. Allen, *Defense Costs Dropped in 2014, While Claim Filings, Dismissal Rates, and Indemnity Dollars Remained Steady*, at 1 (NERA Economic Consulting June 4, 2015); *see also* Jenni Biggs *et al.*, *A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated* 1 (Towers Watson June 2013) (mesothelioma claim filings have "remained near peak levels since 2000."). "Typical projections based on epidemiology studies assume that mesothelioma claims arising from occupational exposure to asbestos will continue for the next 35 to 50 years." Biggs *et al.*, *supra*, at 5; *see also* Best's Special Report, *Asbestos Losses Persist; A.M. Best Raises Industry's Loss Estimate to $85 Billion* 1 (A.M. Best Co., Inc. Dec. 10, 2012) ("it is clear that the asbestos problem will persist for many years to come."). Industry analysts predict that approximately 28,000 mesothelioma claims will be filed. Biggs *et al.*, *supra*, at 1.

New York could expect substantially more asbestos filings. One reason is that, as explained, other courts have almost uniformly rejected third-party duty to warn claims. A liability-creating decision by this Court would make New York an extreme outlier. Such a ruling would magnify other recent changes in the NYCAL

that have tilted the balance to heavily favor plaintiffs. These changes include recent NYCAL trial court rulings that (1) end the nearly twenty-year practice of deferring punitive damages,[61] and (2) are being interpreted by plaintiffs' counsel to erode an important NYCAL Case Management Order provision that compels the filing of asbestos bankruptcy trust claim forms before trial to promote honesty in litigation and allow defendants to obtain setoffs.[62]

Additionally, the First Department has approved an approach to trial consolidations that could be viewed as so permissive and deferential that it borders on standardless. *See In re New York City Asbestos Litig.*, 121 A.D.3d 230, 990 N.Y.S.2d 174 (1st Dep't 2014) (finding consolidation appropriate in two unrelated cases simply because the plaintiffs were exposed to asbestos in a workplace

---

61 *See In re New York City Asbestos Litig.*, 2014 WL 1767314 (N.Y. Sup. Ct. N.Y. Cnty. Apr. 8, 2014).

62 In *In re New York City Asbestos Litig.*, 37 Misc. 3d 1232(A), 966 N.Y.S.2d 347, 2012 WL 6554893, at *9 (N.Y. Sup. Ct. N.Y. Cnty. Nov. 15, 2012), stating, "The CMO requires Plaintiffs to file their *intended* claims with the various bankruptcy trusts within certain time limitations, not claims they may or may not *anticipate* filing." Plaintiffs' lawyers have interpreted this statement to permit the filing of bankruptcy trust claims to be delayed until after trial or settlement, contrary to the spirit of the CMO. *See* ABA TIPS Section Task Force on Asbestos Litigation and the Bankruptcy Trusts, June 6, 2013, Hrg. Trans. at 114-115 (testimony of Joseph W. Belluck, Esq.) ("[Judge Heitler] put in what is in effect an intent standard into the disclosure.... So in New York, even though claims against bankruptcy trusts may be probable, I can predict that they are going to be filed, I am not under any requirement to file them. I only have to file the claims that my client intends to file before the trial."); Joseph W. Belluck *et al.*, *7th Annual Judicial Symposium on Civil Justice Issues: George Mason Judicial Education Program: Edited Transcripts: The Asbestos Litigation Tsunami - Will It Ever End?*, 9 J.L. Econ. & Pol'y 489, 512 (2013) ("In my practice, the way we do things, we do not file the bankruptcy claims until after the case is resolved. In New York, we are not obligated to do it before. And unless my client is in a particular situation where he would benefit from the filing of the claims we do not file them during the pendency of the action.") (quoting Joseph W. Belluck, Esq.).

(though not the same workplace) and were represented by the same counsel), *motion to dismiss appeal denied*, 28 N.E.3d 33, 4 N.Y.S.3d 598 (2015). That decision is being reviewed by this Court.

"Of all the discretionary rulings that a judge can make concerning the course of a trial, few are as pervasively prejudicial to a product liability defendant as deciding to consolidate cases if they bear little similarity other than that the same product resulted in an alleged injury in each case." James M. Beck, *Little in Common*, 53 No. 9 DRI For The Def. 28, 29 (Sept. 2011). Empirical evidence shows that consolidated trials of small groups of plaintiffs, such as those in New York City, "significantly improve outcomes for plaintiffs." Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 574 (2007); Peggy Ableman *et al.*, *The Consolidation Effect: New York City Asbestos Verdicts, Due Process, and Judicial Efficiency,* 14 Mealey's Asbestos Bankr. Rep. 1 (Apr. 2015) ("The NYCAL data suggests that consolidated trial settings create administrative and jury biases that result in an artificially inflated frequency of plaintiff verdicts at abnormally large amounts."); Michelle J. White, *Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle*, 70 U. Cin. L. Rev. 1319 (2002) (finding that asbestos plaintiffs' probability of winning in small consolidated trials

compared to individual trials" is "statistically significant.").[63] "In consolidated trials, there is a higher probability that at least one defendant will appear callous, and this benefits all plaintiffs." Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. Legal Stud. 365, 373 (June 2006).

Furthermore, the unpredictability that would be created by the imposition of liability for third parties' products would make it harder for businesses to grow and create jobs. *See* George Scott Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. Tex. L. Rev. 981, 998 (2003) ("Uncertainty about how future claims may impact their finances has made it more difficult for affected companies to raise capital and attract new investment....").

VI. TRUSTS EXIST TO PAY FOR HARMS CAUSED BY EXPOSURE TO DEBTORS' ASBESTOS PRODUCTS

Today, many of the companies that filed for bankruptcy protection due in part to asbestos litigation "have emerged from the 524(g) bankruptcy process leaving in their place dozens of trusts funded with tens of billions in assets to pay

---

[63] *See also* Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. of Applied Psychol. 909, 916 (2000) (study of jury behavior in controlled setting found that juries in small trial consolidations were significantly more likely on a statistical basis to find for the plaintiff and render a larger award than if the cases were tried individually); Irwin A. Horowitz & Kenneth S. Bordens, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 L. & Psychol. Rev. 43, 66 (1998) ("empirical research shows clearly that consolidation can alter the patterns of verdicts and awards handed down by jurors" and these changes "are generally more favorable to the plaintiffs than the defense.").

claims." Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12:11 Mealey's Asbestos Bankr. Rep. 33, 33-34 (June 2013) (emphasis added). "These trusts answer for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades." William P. Shelley *et al.*, *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update—Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 Widener L.J. 675, 675-76 (2014).

Over sixty trusts—which collectively held *$36.8 billion* as of 2011—have been established to collectively form a privately-funded asbestos personal injury compensation system that operates parallel to, but wholly independent of, the civil tort system. *See* U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 3 (Sept. 2011).[64]

Asbestos trusts are designed to settle claims quickly. *See* Dionne Searcy & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, Wall St. J., Mar. 11, 2013, at A1 ("Unlike court, where plaintiffs can be cross-examined and evidence scrutinized by a judge, trusts generally require victims or their attorneys

---

[64] *See also* Lloyd Dixon *et al.*, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (Rand Corp. 2010); Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* 2 (Rand Corp. 2011).

to supply basic medical records, work histories and sign forms declaring their truthfulness. The payout is far quicker than a court proceeding and the process is less expensive for attorneys."). If a claimant meets a trust's criteria for payment—criteria which are less rigorous than the tort system—the claimant will receive a payment. *See* U.S. GAO, *supra*, at 21.[65] "Thus, it is possible that some claims may be approved even if the evidence supporting exposure may not survive early dispositive motions in the relevant state court." Brown, *supra*, at 317.

It is common for a person to receive multiple trust payments since each trust operates independently and workers were often exposed to different asbestos products. Cardozo Law School Professor Lester Brickman has said:

> I estimate that mesothelioma victims (and nonmalignant claimants) with exposures to industrial and commercial asbestos-containing products distributed nationally will typically qualify for payment from fifteen to twenty trusts. This estimate does not include three trusts pending confirmation, with billions of dollars in assets to add to the trust compensation system, which also have national industrial or commercial exposure profiles. Finally, thirteen trusts have been formed from the assets of companies that sold or distributed their products only regionally or that had other limited exposures profiles. Trust claimants who allege exposure to products associated with these companies may, in addition to all their other trust filings, also file claims with the trusts formed by the regional companies if they can show the requisite exposure.

---

[65] *See also* Adrienne Bramlett Kvello, *The Best of Times and the Worst of Times: How Borg-Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas*, 40 The Advoc. (Tex.) 80, 80 (2007) ("it is much easier to collect against a bankruptcy trust than a solvent defendant.").

Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071, 1078-79 (2014).

Thus, asbestos plaintiffs today have two completely separate paths to obtain compensation. In addition to tort system payments, billions of dollars are available in the asbestos bankruptcy trust system to pay claimants for harms caused by exposures to the former insulation defendants and others that provided the primary compensation to asbestos plaintiffs for many years. *See* Lloyd Dixon & Geoffrey McGovern, *Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases* iii (Rand Corp. 2015) ("Plaintiffs now often receive compensation both from the trusts and through a tort case.").[66] In the recent *Garlock* bankruptcy proceeding, for example, a typical mesothelioma plaintiff's total recovery was estimated to be $1-1.5 million, "including an average of $560,000 in tort recoveries and about $600,000 from 22 trusts." *In re Garlock Sealing Techs.*, 504 B.R. at 96.

Most recently, an unsealed database from the Garlock bankruptcy estimation trial showed that awards to asbestos claimants represented by a dominant plaintiffs' law firm in one of the most active asbestos "magnet" jurisdictions in the U.S. (Madison County, Illinois) have received on average more than $800,000 apiece,

---

[66] *See also* U.S. GAO, *supra*, at 15 ("Although 60 companies subject to asbestos-related liabilities have filed for bankruptcy under Chapter 11 and established asbestos bankruptcy trusts in accordance with § 524(g), asbestos claimants can also seek compensation from potentially liable solvent companies (that is, a company that has not declared bankruptcy) through the tort system.").

with a substantial portion of those funds (approximately 41%) from bankruptcy trusts. *See* Heather Isringhausen Gvillo, *Database Provides Insight Into How Much Asbestos Claims Are Worth*, Madison-St. Clair Record, May 14, 2015 (thirty-eight plaintiffs in Madison County had lawsuits with a total value of $21.7 million and also received $8,859,879 from various bankruptcy trusts). The recently unsealed database also showed that a sample of 850 asbestos claimants from across the country—"representing just a sliver of the asbestos claimant universe—have so far been awarded $334,711,143 in the court system and $182,259,276 from the bankruptcy trust system, for a total of $516,970,419." *Id.*

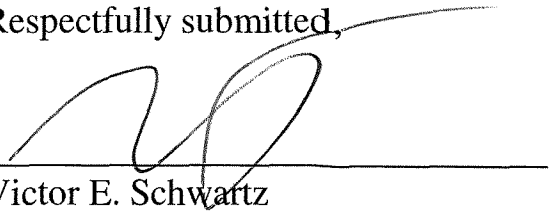
In fact, the present lack of coordination between the asbestos bankruptcy trust claim and civil tort systems often leads to "double dipping" as plaintiffs manipulate the timing of their trust claim filings in order to maximize their tort system recoveries and then receive additional asbestos trust payments for the same injury. *See* William P. Shelley *et al.*, *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 J. Bankr. L. & Prac. 257 (2008); *see also* Editorial, *The Double-Dipping Legal Scam*, Wall St. J., Dec. 25, 2014, at A12 (describing "'double-dipping'—in which lawyers sue a company and claim its products caused their clients' disease, even as they file claims with asbestos trusts blaming other products for the harm. This lets them get double or multiple payouts for a single illness, with a huge cut for the lawyers each time.").

There is no need to stretch New York tort law to provide compensation to persons injured through products made or sold by third parties.

CONCLUSION

For these reasons, this Court should reverse the Appellate Division's decision and direct entry of judgment for Appellant Crane Co.

Respectfully submitted,



Victor E. Schwartz
Mark A. Behrens (*pro hac* pending)
SHOOK, HARDY & BACON, LLP
1155 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 783-8400
Fax: (202) 783-4211
vschwartz@shb.com
mbehrens@shb.com

Counsel for *Amici Curiae*

Dated: June 18, 2015

IN THE NEW YORK COURT OF APPEALS
Docket No. APL-2014-00209

IN THE MATTER OF NEW YORK CITY ASBESTOS LITIGATION DORIS KAY DUMMITT, Individually and as Executrix of the Estate of RONALD DUMMITT, deceased, *Respondent,* *– against –* A.W. CHESTERTON, *et al.,* *Defendants,* CRANE CO., *Appellant.*	Erie County Clerk's Index No. I2010-12499 Appellate Division, Fourth Department Docket No. CA-13-01373 **AFFIDAVIT OF SERVICE**

WASHINGTON, DISTRICT OF COLUMBIA) ss:

VICTOR E. SCHWARTZ, being duly sworn, deposes and says:

That deponent is an attorney duly admitted to practice before the Courts of the State of New York, that he is not a party to this action, he is over the age of eighteen years and resides in Virginia, and that on June 18, 2015, as counsel of record for *amici* the Business Council of New York State *et al.* in the above-captioned matter, he served three copies of the attached *AMICI CURIAE* BRIEF OF THE BUSINESS COUNCIL OF NEW YORK STATE *ET AL.* IN SUPPORT OF APPELLANT CRANE CO. on the following attorneys for the parties by depositing a true copy of the same enclosed in a depository under the exclusive care and custody of Federal Express in Washington, DC:

John N. Lipsitz
Dennis P. Harlow
LIPSITZ & PONTERIO, LLC
135 Delaware Avenue, 5th Floor
Buffalo, NY 14202

Counsel for Plaintiff-Respondent

Eric R.I. Cottle
Angela DiGiglio
K&L GATES LLP
599 Lexington Avenue
New York, NY 10022

Counsel for Appellant

Nicholas P. Vari
Michael J. Ross
K&L GATES LLP
210 Sixth Avenue
Pittsburgh, PA 15222

Counsel for Appellant

Caitlin J. Halligan
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166

Counsel for Appellant

Victor E. Schwartz

Sworn to before me on the 18th day of June, 2015:

Notary Public

ALAN ROBERT STARNER
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires January 14, 2018

ALAN ROBERT STARNER NOTARY PUBLIC EXP. 1-14-2018 DISTRICT OF COLUMBIA