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Court of Appeals
of the
State of New York

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.

BRIEF FOR *AMICUS CURIAE* NEW YORK STATE TRIAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether New York law should continue to impose a duty to warn on manufacturers when their products incorporate consumable – yet hazardous – aftermarket components and their products' ordinary use poses a danger therefrom.

INTEREST OF *AMICUS CURIAE*

The mission of the New York State Trial Lawyers is to promote a safer and healthier society, to assure access to the civil justice system by those who are wrongfully injured, and to advance representation of the public by ethical, well-trained lawyers. Accordingly, *amicus* has a compelling interest in ensuring that New York remains steadfast in requiring that manufacturers market and sell sound products.

To this end, a*micus* submits that the First Department's well-reasoned decision is consistent with 1) New York's negligence-based approach to failure to warn claims and its concurrent rejection of bright-line, single-factor tests, 2) numerous other jurisdictions that have imposed a duty to warn upon manufacturers who incorporate consumable yet hazardous aftermarket components into their own products, and 3) compelling public policy. Accordingly, the order appealed from should be affirmed in all respects.

STATEMENT OF THE CASE

Amicus adopts Respondent's Statement of the Case as relevant to its argument.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the context of failure to warn actions, this case presents a particularly troubling instance involving the latent dangers of asbestos. However, the Court's decision in this matter will affect the behavior of all types of manufacturers and their corresponding duty owed to their product users in this State. In particular, the Court should continue to hold manufacturers of all kinds to a duty to warn about dangers incident to the use of their products.

Appellant Crane Co. – in proposing a drastic departure from New York jurisprudence – seeks to impose a formulaic, single-factor test that would greatly diminish a manufacturer's duty to warn against the dangers incident to the use of its products. It is respectfully submitted that the Court should affirm this State's long-standing commitment to a standard of products liability law that ensures all manufacturers market and sell products that are safe for all end users.

Importantly, in the instant matter, there can be no dispute that Appellant's asbestos-containing valves were defective at the time of sale. Therefore, a duty to warn unquestionably existed at the time of sale – as they were sold with ultra-

hazardous asbestos components but without a warning. Critically, it is crystal clear that if there had been an original warning on Appellant's valves – as was its undisputed obligation – the injuries to subsequent and intended users of the product, like Ronald Dummitt, would have been prevented. Moreover, the Appellant – like many manufacturers – was not a passive actor. It had direct knowledge that its products would be used in a hazardous manner because it actually recommended and required the use of harmful aftermarket components.

Stated differently, Appellant, like many manufacturers, had the simple and inexpensive obligation to warn of the latent dangers of asbestos incident to the use of its products. However, instead of reducing the danger, Appellant consciously chose to enhance the danger. Now, when the extent of the resulting latent and grave injuries caused by Appellant's failure to warn has finally been revealed, Appellant asks this Court to "wash its hands" so that it can completely evade liability. It is respectfully submitted that the Court should decline Appellant's dubious invitation. Appellant's reckless conduct should not be an example for how manufacturers should act to maximize profit while avoiding any corporate responsibility and accountability.

To this end, manufacturers should not be permitted to incorporate fungible components necessary for the use of their products – which pose a danger when used in tandem with the product – without being held to a duty to warn of the

dangers attendant to use. The existence of this duty should not automatically turn on the semantics of whether the intended user of that product was injured by an original component, or an identical – yet equally dangerous – aftermarket component.

To this end, clear New York precedent, a substantial number of decisions from other jurisdictions, and compelling public policy considerations all support an affirmance of the Appellate Division's order.

ARGUMENT

Initially, the most perfunctory research reveals that this matter is part of Appellant's country-wide strategy to evade liability for the asbestos hazards created from the normal use of its products – despite that it supplied its products with hazardous asbestos components, sold those exact components aftermarket, and required the use asbestos insulation for its products to function as intended.[1] Because of its interest in the asbestos industry, it is not surprising that Crane now seeks a radical departure from New York jurisprudence by introducing a constricting, strict liability stream of commerce test.

[1] See, e.g., In re Eighth Jud. Dist. Asbestos Litig. [Suttner v Crane Co.], 2013 WL 9816609, aff'd for reasons stated below 115 A.D.3d 1218, 982 N.Y.S.2d 421 (4th Dept., 2014) lv granted 24 N.Y.3d 907 (noting Crane's "perennial attempts" to disclaim liability for asbestos gaskets and packing used in its valves); Tucholski v. Chesterton Co., 2013 WL 4771727 at *1 (Sup. Ct. Erie Co. 2013)("Crane argues, once again, as it has done unsuccessfully many times, that it is not legally responsible for the insulation, gaskets and packing used with its valves.").

The result of adopting Appellant's approach to failure to warn cases would be an erosion of fundamental considerations of policy, fairness, and decency, and would only serve to reward manufacturers' negligent conduct at the expense of countless aggrieved parties. New York products liability law has never, and should not, acquiesce to this unabashed corporate irresponsibility.

I. UNDER NEW YORK LAW'S NEGLIGENCE- INSPIRED APPROACH TO FAILURE TO WARN CLAIMS, A DUTY TO WARN MAY BE IMPOSED ON MANUFACTURERS THAT INCORPORATE CONSUMABLE – YET HAZARDOUS – AFTERMARKET COMPONENTS INTO THEIR PRODUCTS

More than 40 years ago, this Court, when speaking of the proliferation of the mass-manufactured products of the modern era, opined that:

> Today as never before the product in the hands of the consumer is often a most sophisticated and even mysterious article. Not only does it usually emerge as a sealed unit with an alluring exterior rather than as a visible assembly of component parts, but its functional validity and usefulness often depend on the application of electronic, chemical or hydraulic principles far beyond the ken of the average consumer. Advances in the technologies of materials, of processes, of operational means have put it almost entirely out of the reach of the consumer to comprehend why or how the article operates, and thus even farther out of his reach to detect when there may be a defect or a danger present in its design or manufacture. In today's world, it is often only the manufacturer who can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose.

See Codling v Paglia, 32 N.Y.2d 330, 340, 345 N.Y.S.2d 461 (1973). These statements ring doubly true today. The development of a flexible scheme for

products liability law in New York embodies the bedrock principle that manufacturers are in the best position to protect consumers from complex, unsound products that contain latent dangers.

Generally, a product may be defective by reason of a manufacturing flaw, improper design, or failure to warn for dangers incident to use. See Sukljian v Charles Ross & Son Co., 69 N.Y.2d 89, 94, 511 N.Y.S.2d 821(1983). Design defect and failure to warn are claims inspired by negligence principles. See Enright v. Eli Lilly & Co., 77 N.Y.2d 377, 385-87, 568 N.Y.S.2d 550 (1991); Denny v. Ford Motor Co., 87 N.Y.2d 248, 258, 662 N.E.2d 730 (1995). This negligence inspired approach is based upon the notion that while a failure to warn claim may be "couched in terms of strict liability, [it] is indistinguishable from a negligence claim [because c]oncepts of reasonable care and foreseeability are not divorced from this theory of liability, as they may be under other strict products liability predicates." (internal citation omitted) Enright supra at 387.

It is axiomatic that manufacturers have a duty to warn against latent dangers due to intended uses and foreseeable unintended uses of their products. See Liriano v. Hobart Corp., 92 N.Y.2d 232, 237, 677 N.Y.S.2d 764 (1998). The duty owed in this State is not inert, as it continues past the point of sale. See Cover v Cohen, 61 N.Y.2d 261, 275, 473 N.Y.S.2d 378 (1984) (a manufacturer's duty extends to warning post-sale for "risks thereafter revealed by user operation and

brought to the attention of the manufacturer."). Thus, the duty determination is flexible (Cover supra) and fact-specific (Liriano supra).

Indeed, based upon this State's negligence-inspired, tractable approach to failure to warn claims, this Court has both recently and consistently rejected bright line rules of law like the one Appellant seeks to impose herein. See, e.g., Hoover v. New Holland North America, Inc., 23 N.Y.3d 41, 59, 11 N.E.3d 693 (2014)(rejecting the implementation of any "automatic" or "broad" rules that "would lessen the manufacturer's duty to design effective safety devices that make products safe" in a design defect case); Liriano supra at 240, 243(duty to warn inquiry is "intensely fact-specific"); Espinal v Melville Snow Contrs., 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002); Cover supra at 270 ("We decline the single standard invitation because of the different inquiries involved in the different types of cases."); Sage v. Fairchild-Swearingen Corp, 70 N.Y.2d 579, 587, 517 N.E.2d 1304 (1987) (distribution of the injury-producing replacement component is "not dispositive" of a duty in a design defect case).

Importantly, New York Courts have always employed a fact-specific inquiry – rather than a single factor litmus test –when considering whether a duty is owed in failure to warn cases involving aftermarket parts. See, e.g., Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289, 591 N.E.2d 222 (1992). In Rastelli, Goodyear, a tire manufacturer, supplied its product with a sound rim. That sound

rim was later replaced with a defective rim that was one of dozens of different models of rims out of hundreds of types of rims sold in the United States. The defective rim was not supplied as an original component. Nor was it a specified component. The defective rim exploded, killing that plaintiff, and suit was brought against the tire manufacturer.

This Court concluded – under "*the circumstances of this case*" – that Goodyear owed no duty because its only connection to that plaintiff's injuries was as a manufacturer of a sound tire that was merely "*compatible for use*" with a defective product of the other manufacturer. (emphasis added) Id at 297-298.

In so holding, this Court identified the factual circumstances in which a duty would arise against a manufacturer where the actual injurious component was supplied by a third party – where the defendant contributed to the alleged defect in the product, had control over its production, had a role in placing it into the stream of commerce, and/or derived a benefit from its sale. Id at 298. Thus, Rastelli's holding is flexible, open to factual distinction, and a duty arises where there are significant and compelling connections tying together the manufacturer's product and the third party /replacement part.

Indeed, an examination of the facts on a case-by-case basis is precisely how New York Courts – *including all four Appellate Divisions* – have interpreted the Rastelli decision. See Suttner supra (Crane "liable based on a duty to warn theory

as a manufacturer who meant for its product to be used with a defective product of another manufacturer"). In Berkowitz v. A.C. & S., Inc., (288 A.D.2d 148, 733 N.Y.S.2d 410 (1st Dept., 2001)), for example, the plaintiffs were exposed to asbestos insulation applied to Naval pumps post-sale. The First Department concluded that, at the summary judgment stage, an issue of fact as to duty existed where the asbestos insulation was specified, the pumps could not operate safely without insulation, and the manufacturer knew the insulation would be asbestos. Specification meant that the pump was *more than merely* "compatible for use" with the insulation, which is distinct from Rastelli. See also Sawyer v. A.C.&S., Inc. [Crane Co.], 32 Misc.3d 1237(A), 938 N.Y.S.2d 230 (Sup. Ct., N.Y. Co., 2011) (Supreme Court, in holding that Crane owed a duty to warn for asbestos components used in its valves, determined that "Rastelli and Berkowitz are not mutually exclusive nor are they in conflict").

Importantly, these decisions finding that a duty may be owed by a manufacturer who incorporates hazardous third party and replacement components into its products are not limited to an asbestos context. They are found in all manner of products that New Yorkers use and consume on an everyday basis. In Rogers v. Sears, Roebuck & Co., (268 A.D.2d 245, 701 N.Y.S.2d 359 (1st Dept., 2000)) the Plaintiffs were injured from an explosion and fire that occurred when one of the plaintiffs attempted to replace an empty propane gas tank on a barbecue

grill with a filled gas tank. The First Department concluded that the grill manufacturer owed a duty to warn for the dangers at issue – despite that the manufacturer did not place the tank into the stream of commerce – because the grill could not be used without the tank, and its own warning to use the grill only outdoors was itself recognition of the danger of gas emission inherent in the use of the grill regardless of any defects. See also Young v. Robertshaw Controls Co., 101 A.D.2d 670, 476 N.Y.S.2d 24 (3d Dept, 1984) (finding a duty to warn for "abnormal dangers associated with the use of [defendant's] own or another company's propane gas in the cylinder").

In Penn v. Jaros, Baum & Bolles, (25 A.D.3d 402, 809 N.Y.S.2d 6 (1st Dept., 2006)), the Plaintiff's decedent was locked in a bank vault after regular business hours at her place of work. Unable to obtain assistance by telephone, she pulled a fire alarm activating a carbon dioxide suppression system that quickly filled the vault with gas and led to her death. The alarm manufacturer argued that it had no duty to place warning labels on the alarm because it did not supply the toxic gas. In determining that the alarm acted in the manner in which it was intended, and in conjunction with a suppression system that operated as it was intended, the First Department distinguished Rastelli, and held that the alarm manufacturer owed a duty to warn where the carbon dioxide suppression

component released deadly gas when the alarm was pulled, notwithstanding that the alarm manufacturer did not supply the gas or gas-containing component.

Likewise, the factual circumstances in Village of Groton v. Tokheim Corp., (202 A.D.2d 728, 608 N.Y.S.2d 565 (3d Dept., 1994)) gave rise to a duty to warn. There, the Third Department, in determining that a valve manufacturer owed a duty to warn even where the regulator that caused the injury was not supplied by it, found that the facts fell "within the category of cases distinguished by the Rastelli court…[where n]one of the products installed in plaintiff's fuel dispensing system was defective, but in combination the sound products…created a dangerous condition." See also Baleno v. Jacuzzi Research, Inc., 93 A.D.2d 982, 461 N.Y.S.2d 659 (4th Dept, 1983) (Therapeutic hot tub manufacturer had a duty to warn of the risk of severe electric shocks even where the defective electrical outlet was not supplied by it).

In Hess v. Mack Trucks, (159 A.D.2d 557, 558, 552 N.Y.S.2d 423 (2d Dept, 1990)), the Second Department concluded that a sanitation truck manufacturer owed a duty to warn of the dangers of filling a third-party "Packmaster" garbage compactor because "the appellants knew or should have known that the chassis would be used with the 'Packmaster,' [and/or]… the chassis was manufactured with the intent that it be used in conjunction with the 'Packmaster.'"

The Suttner, Berkowitz, Rogers, Penn, Village of Groton, and Hess cases, and many others, all stand for the proposition that where there are significant connections between a manufacturer's product and the injurious component – i.e., connections greater than the "merely compatible for use" situation in Rastelli – a duty may arise. Consequently, this New York's Courts have struck a fair and equitable balance by applying Rastelli in an intensely fact-specific, case-by-case basis.

Significantly, New York Courts have done *precisely* what they are required to do in applying Rastelli and declining to interpret it as an absolute litmus test. In balancing the considerations, Courts have determined that no duty exists where the manufacturer had no significant connection to the third-party or replacement component. See Tortoriello v. Bally Case, Inc., 200 A.D.2d 475, 606 N.Y.S.2d 625 (1st Dept, 1994) (no duty owed by refrigerator manufacturer for defective floor where there was "no evidence that [manufacturer] had anything to do with the actual choice of flooring made by the architect and general contractor."); Surre v. Foster Wheeler LLC, 831 F.Supp.2d 797, 801 (S.D.N.Y., 2011) (no duty owed unless the "circumstances strengthen the connection between the manufacturer's product and the third party's defective one.").

Here, the Appellate Division interpreted this caselaw as leading to the "unremarkable proposition" that where a manufacturer has no "active role, interest,

or influence in the types of products to be used in connection with its own product," it has no duty to warn. Thus, the Appellate Division simply reaffirmed the distinction between two products being merely "compatible for use" – warranting no duty to warn (Rastelli) – and two products having a significantly greater "connection" – warranting a duty to warn.

Accordingly, under New York law a duty to warn may be placed upon a manufacturer who incorporates hazardous aftermarket components into its products, which is determined by balancing considerations of policy on a case-by-case basis.

New York does not stand alone in applying a balancing test to determine duty in this context. Jurisdictions throughout the country have determined that a manufacturer owes a duty to warn where the normal use of its product produces an injury, notwithstanding that the particular injurious component happens to be supplied by another manufacturer. Notably, many courts have made that determination against Crane in particular.

II. NUMEROUS COURTS AROUND THE COUNTRY HAVE DETERMINED THAT MANUFACTURERS (INCLUDING APPELLANT) OWE A DUTY TO WARN FOR INCORPORATING CONSUMABLE – YET HAZARDOUS – AFTERMARKET COMPONENTS INTO THEIR PRODUCTS

Appellant's oft-stated, but unsupported, statement that a single-factor stream of commerce test is the "majority rule nationwide" is simply untrue. A grossly mislabeled "bare metal" defense has been permitted in a handful of jurisdictions – primarily Washington and California[2] – that follow an approach to failure to warn cases that is completely incongruous to decades of well-settled New York jurisprudence. See generally Sweredoski v Alfa Laval, Inc., 2013 WL 5778533 at *6-7 (R.I. Super. Ct, Oct. 21, 2013) (noting that numerous different jurisdictions, including New York, do not follow the California or Washington approach to failure to warn cases).

At the outset, it is important to note that even those courts that have applied a single-factor stream of commerce test have struggled with the inequitable – and at times confusing – results produced by that approach. See Macias v. Saberhagen Holdings, Inc., 175 Wash.2d 402, 282 P.3d 1069 (Wash. 2012); Shields v. Hennessy Industries, Inc., 205 Cal.App.4th 782, 140 Cal.Rptr.3d 268 (Cal.App. 1st Dist., 2012). The Washington Supreme Court even opined that an absolute stream

[2] See, e.g., O'Neil v. Crane Co., 53 Cal.4th 335, 266 P.3d 987 (Cal. 2012) ; Braaten v. Saberhagen Holdings, 165 Wash.2d 373, 198 P.3d 493 (2008); Simonetta v. Viad Corp., 165 Wash.2d 341, 197 P.3d 127 (2008).

of commerce approach – without exception – is completely unworkable and was not the intention of that court's holdings in Simonetta and Braaten. See Macias supra at 413. (In determining that a respirator manufacturer owed a duty to warn for asbestos fibers for which it did not supply, the Court noted that "it must be remembered that the general rule stated in Simonetta and Braaten is just this, a general rule to which there are exceptions"). Thus, even those limited jurisdictions which Appellant relies upon for legal support do not follow the inflexible, single-factor litmus test that Crane seeks to impose in this State. Appellant's proposed departure from New York law would sink this State into the same legal quagmire as Washington.

Derived in part from New York's balancing approach to setting the duty point, numerous jurisdictions throughout the country have determined that a duty may be imposed upon a manufacturer who incorporates fungible, hazardous aftermarket components into its products. In fact, many of these courts have determined that *Crane* owed a duty based upon its decades-long pattern of knowingly supplying, specifying, having actual knowledge of, and requiring the use of third-party or replacement asbestos packing, gaskets, and/or external insulation, with its valves, pumps, and boilers.[3] See e.g. Sweredoski supra

[3] In addition to the Naval valves at issue in this matter, Appellant sold valves for industrial applications that also utilized and specified asbestos components and insulation (See e.g. Suttner supra (Plaintiff exposed to asbestos while repairing Crane valves at the General Motors Power

("weight of jurisprudence across the country, including in Rhode Island, suggests that a defendant [i.e., Crane] cannot categorically avoid liability for a plaintiff's injuries for the sole reason that those injuries were directly caused by exposure to a third party's replacement parts"). See also Reidy v. Crane Co., 13-L-944 (Madison Cty. Cir.Ct., Feb. 4, 2014); Fehl v. Union Carbide Corp., Cause No. 1222-CC02316 (Mo. Cir.Ct. St. Louis City Dec. 4, 2013).[4] Amongst the many courts that have explicitly rejected the exact argument proffered by Appellant – both in the context of asbestos matters and as general matters of products liability in failure to warn cases – are:

Connecticut: Fortier v. A.O. Smith Corp., 2009 WL 455424 (Conn. Super. Ct. Jan. 13, 2009) (" a material issue of fact [as to duty] exists as to whether Griscom-Russell knew or should have known that external asbestos insulation would have to be fitted to its desalination units and/or evaporators when it sold said units to the United States Navy").

Train plant in Tonawanda, New York), and it also produced residential boilers that were supplied with, and required, internal asbestos components and external asbestos insulation (See e.g., In re New York City Asbestos Litigation [Peraica v Crane Co.], 2013 WL 6003218 at *3-5, 8 (Sup. Ct. NY Co., 2013)(noting substantial evidence that Crane boilers were supplied with asbestos components and insulation, and that Crane aggressively promoted the use of asbestos products with its boilers)). Appellant even sold its own rebranded asbestos gasket called "Cranite" which it sold for more than five decades. See Crane Co. v The Goodyear Tire & Rubber Company, (Case 2:14-cv-06509-DMG-AGR) (C.D.Cal.). Apparently, Crane never warned of the lethal dangers of asbestos in ***any*** product.

[4] All unpublished decisions are annexed hereto as Appendix.

Delaware (applying Virginia law): Phillips v. Hoffman/New Yorker, Inc., 2013 WL 4715263, 2013 Del.Super. LEXIS 378 (Del.Sur.Ct., Aug. 30, 2013) (Manufacturer of garment steam press machine owed a duty to warn of the dangers of exposure to replacement pads containing asbestos).

Hawaii : In re Asbestos Cases, 09-1-ACM1 (Cir.Ct. April 17, 2009) (See Appendix).

Illinois: Reidy supra (denying summary judgment to Crane on duty to warn issue) (See Appendix); Johnson v. Crane Co., No. 12-L-875 (Madison Cty. Cir.Ct. April 15, 2013) (Harrison, J.) (same) (See Appendix); Hamblett v. Crane Co., 12-L-821 (Cir.Ct. Madison Cty., Mar. 12, 2013) (Harrison, J.) (same) (See Appendix); Sether v. Agco Corp., 2008 WL 1701172 (S.D.Ill. Mar. 28, 2008) (Manufacturer of Naval ship turbines owed a duty to provide warnings of the dangers of asbestos insulation in order to make its product safe for its intended use).

Kentucky: Branon v. Gen. Elec. Co., 2005 WL 1792122, at *2, n.6 (Ky.App.Ct., 2005) (Despite that a turbine manufacturer did not manufacture or supply the injury-producing asbestos insulation, evidence that it specified asbestos insulation for use on its turbines sufficient to raise an issue of fact as to whether it owed a duty).

Missouri: Foreman v. A.O. Smith Corp., 2014 WL 1321057 (Mo. Cir.Ct. St. Louis City Jan. 16, 2014) (Dowd, J.) (denying summary judgment to valve

manufacturer on duty to warn issue); Fehl supra (denying summary judgment to Crane on duty to warn issue) (See Appendix).

Pennsylvania: Hoffeditz v Ford Motor Co., 2011 WL 5881008, Civ No. 2:09-70103 (E.D. Pa July 28, 2011) (Presiding Judge overseeing the Asbestos MDL in Federal Courts rejected vehicle manufacturer's argument that no duty to warn existed with respect to replacement asbestos brakes used in its vehicles that it did not supply because Defendant knew and/or required asbestos-containing replacement parts to be used in its products); Chicano v. Gen. Elec. Co., 2004 WL 2250990, at *6 (E.D.Pa. Oct. 5, 2004) (determining that turbine manufacturer may owe a duty to warn where it designed its turbine to be insulated with asbestos and had actual knowledge that it would be insulated with asbestos, even if the manufacturer itself did not supply or apply the insulation).

Rhode Island: Sweredoski supra (Crane owed a duty to warn under virtually identical circumstances to the instant case. The Superior Court distinguished Crane's foreign law and cited to Berkowitz v. A.C. & S., Inc., (288 A.D.2d 148, 733 N.Y.S.2d 410 (1st Dept., 2001) and Sage v. Fairchild-Swearingen Corp, (70 N.Y.2d 579, 587, 517 N.E.2d 1304 (1987)) in determining that its holding is consistent with the "weight of jurisprudence across the country"). Rhode Island Court adopted the reasoning of the First Department's decision in Rogers v. Sears, Roebuck & Co., (268 A.D.2d 245, 701 N.Y.S.2d 359 (1st Dept.,

2000)) and it concluded that a duty to warn of the dangers of asbestos was owed by a pump manufacturer where evidence suggested that the pumps could not operate without asbestos packing and gaskets, the manufacturer knew that its pumps originally included asbestos packing and gaskets, and the manufacturer knew these components would have to be routinely replaced over the course of the lifetime of the pump releasing asbestos fibers).

Virginia: Little v. Garlock Techs., Inc., No. 3702V-04 (Va.Cir.Ct. Oct. 13, 2004) (Conway, J.) (See Appendix); Pyatt v. Garlock, Inc., No. 36688H-02 (Va.Cir.Ct. Jan. 19, 2005) (Hubbard, J.) (See Appendix); Hicks v. Garlock Sealing Techs., LLC, No. 38116P-03 (Va.Cir.Ct. Feb. 13, 2006) (Pugh, J.) (See Appendix); see also In re Asbestos Litigation [Merritt], 2012 WL 1409225 (Del. Super. Ct. April 5, 2012) (citing three different Virginia trial courts).

New Jersey: Hughes v. A.W. Chesterton Co., 435 N.J.Super. 326, 89 A.3d 179 (N.J. A.D., 2014) (finding a duty but decided on causation grounds).

Federal Maritime Law: Quirin v. Lorillard Tobacco Company, 17 F.Supp.3d 760 (N.D. Ill., 2014) (Crane Co. owed a duty to warn for the dangers of asbestos used in its Naval valves where it "manufactured a product that, by necessity, contained asbestos components, where the asbestos-containing material was essential to the proper functioning of the defendant's product, and where the asbestos-containing material would necessarily be replaced by other asbestos-

containing material, whether supplied by the original manufacturer or someone else"). Cf. Salisbury v. Asbestos Corp. Ltd., 2014 WL 345214, Civ. No. 2:12–60168–ER (E.D.Pa, January 29, 2014) ("Regardless of who is ultimately found to have installed the [asbestos] insulation, if the jury finds that [shipbuilder's] failure to warn about the insulation that gave rise to Plaintiff's injury was not reasonable under the circumstances, then Defendant may be liable.").

Accordingly, numerous jurisdictions throughout the country have rejected the exact approach proffered by Appellant. That is because Crane's single-factor approach to failure to warn cases would result in a drastic erosion of the fundamental considerations of public policy that form the legal, moral, and practical bases of all products liability law.

III. COMPELLING PUBLIC POLICY CONSIDERATIONS MILITATE HEAVILY IN FAVOR OF IMPOSING A DUTY TO WARN ON A MANUFACTURER WHO INCORPORATES CONSUMABLE – YET HAZARDOUS – AFTERMARKET COMPONENTS INTO ITS PRODUCTS

The question of whether a duty is owed "is best expressed as 'whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.'" Pulka v Edelman, 40 N.Y.2d 781, 782, 358 N.E.2d 1019 (1976), citing Prossner, Torts (4th ed.), § 53, p 325. It is axiomatic that imposition of products liability against manufacturers "rests largely on public policy. The justification for it is that the seller, by marketing his product, has undertaken a special responsibility toward members of the consuming public who may be injured by it. The public has the right to expect that sellers will stand behind their goods… [and] manufacturers are best able to protect against defective products and bear the cost if they fail." (citations omitted) See Sage, supra at 585.

Indeed, it is not simply that manufacturers are best suited to create safe products, but rather, it is critical that products liability law *encourage* this behavior, and, conversely, *discourage* the creation of dangerous products. See Codling supra at 341 ("Pressures will converge on the manufacturer, however, who alone has the practical opportunity, as well as a considerable incentive, to turn out useful, attractive, but safe products. To impose this economic burden on the manufacturer should encourage safety in design and production."). This is

precisely why manufacturers are required to test their products and stay abreast of scientific technology and advancements. See Liriano v. Hobart Corp., supra; Sage v Fairchild-Swearingen Corp, supra; see also George v. Celotex Corp., 914 F.2d 26, 28 (2d. Cir. 1990). Manufacturers must even warn where there is no actual defect, but hidden dangers may be attendant to product use. See Alfieri v. Cabot Corp., 17 A.D.2d 455, 460, 235 N.Y.S.2d 753 (1st Dept., 1962), aff'd 13 N.Y.2d 1027 (1963).

Yet, the inflexible rule that Crane seeks to have implemented in New York would degrade these compelling policies, and would abrogate considerations of policy, fairness, and decency. See Hoover v. New Holland North America, Inc., supra at 59 (discouraging the use of broad rules that would lessen a manufacturer's duty to turn out safe products). In fact, in the instant matter, Appellant's argument would immunize even those manufacturers that knew of the dangers of its products and still failed to act to protect intended users solely because the injurious components were wear items.

Several examples cited below – including both innovative and mundane products – demonstrate the inequity that would result from Appellant's rigid test:

In the past decade, the use of "three dimensional" or "3D" printers for manufacturing and personal use has expanded dramatically. A 3D printer is a fabrication device in which a user essentially uploads a blueprint to a computer,

and the machine "prints" a customized product or component out of raw materials such as plastic or metal by successively layering them. In other words, it is "additive manufacturing (as opposed to the old, "subtractive" business of cutting, drilling and bashing metal)," and these machines have been used to make "medical implants, jewelry, football boots designed for individual feet, lampshades, racing-car parts, solid-state batteries and customized mobile phones,"[5] and have even been used to "print" functioning firearms,[6] custom clothing,[7] and patient-specific prescription drugs.[8]

The versatility of 3D printers is astounding, and use of new materials and techniques signifies that they will eventually reconfigure the manufacturing process. In fact, NASA sent a 3D printer to the International Space Station because of its potential for an object the "size of a small microwave" to completely

[5] See *The Printed World, Economist* (Feb. 10, 2011), Available online at http:// www.economist.com/node/18114221/print

[6] Nick Bilton "The Rise of 3-D Printed Guns" N.Y. Times (Aug. 13, 2014). Available online at http://www.nytimes.com/2014/08/14/fashion/the-rise-of-3-d-printed-guns.html?_r=0

[7] Madeline Stone "3D Printed Dresses Are Radically Changing The Meaning Of Haute Couture" Business Insider (Sept. 2, 2014). Available online at http://www.businessinsider.com/3d-printed-fashion-2014-8

[8] "3D printed drugs could revolutionize prescriptions" The Telegraph. Available online at http://www.telegraph.co.uk/health/11202016/3D-printed-drugs-could-revolutionise-prescriptions.html

replace an entire machine shop or assembly line,[9] and it has already begun "emailing" customized tools into space via transmitted blueprints to fix problems in real time.[10]

It is a near certainty that these 3D printers will soon be used to print an infinite number of replacement and components parts for machines already in use. Indeed, this would expand the functioning life of complex equipment – likely by decades – by providing an inexhaustible supply of spare and replacement parts, and tools to fix them.

However, under Appellant's proposed change in New York law, using a 3D printer to fabricate a component part would extinguish liability for ***all parties*** because the exact injurious component would technically be made by the end user – regardless of whether the component was necessary, required, or specified for the intended use of the manufacturer's product. A manufacturer could even evade liability simply by giving the consumers a blueprint for a known injurious component. This potential outcome is completely unwarranted under prevailing law, and it is contrary to all notions of fairness.

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[9] Jessica Eagan "*3-D Printer Could Turn Space Station into 'Machine Shop'*" (Sept. 2, 2014) Available online at http://www.nasa.gov/mission_pages/station/research/news/3D_in_space/#.VNjZJebF-So

[10] Mary Beth Griggs, "NASA is 3-D Printing Tools in Space Like Crazy: Wrenches, and Sample Containers, and Extruders Oh My" Popular Science (December 24, 2014), Available Online at http://www.popsci.com/3-d-printed-tools-space

Yet, it is not just space-age products that typically incorporate replaceable components. Children's toys, electronics, and industrial machinery – to name just a few products that would be affected by a change in New York law – all integrate consumable components.

For example, a toy maker may sell a toy crossbow designed to launch foam rubber arrows with plastic tips. However, under Appellant's rigid rule, the maker has no duty to warn of the hazards of firing the arrows at close range – despite industry custom and actual knowledge of prior incidents where children have injured their playmates – if a child fires an identical replacement arrow at his friend at close range causing permanent loss of vision and disfigurement. Under Crane's rule, the toy maker avoids liability for failing to warn on the technicality that it did not supply or manufacture the replacement arrows. But the arrow poses no danger without the toy crossbow. Certainly, this would not be an equitable result.

Or, a cellular phone manufacturer could simply not supply its phones with an antenna after learning that they emit cancer-causing radiation. Instead, rather than warning of the radiation danger, the manufacturer could simply ask its consumers to purchase the necessary phone antennas from a third-party supplier. Under Appellant's rule, the phone manufacturer is insulated from liability for not

supplying the exact injurious component, despite that its phones do not function as intended – or at all – without the antenna.

Or, an industrial manufacturer could sell drill presses with actual knowledge that the intended operation creates a tremendous amount of heat and friction that wears out the drill bits after just a few hours of use. However, under Appellant's rule, the manufacturer need not warn of the risks of severe burns that the intensely heated drill bits pose to the operator who must replace them hourly, because the drill press manufacturer would only be liable for injuries caused by the original drill bit, during the first few hours of drilling. This scenario would be completely inequitable.

Simply stated, under the current rule of law in New York – which permits our Courts the discretion to make a threshold determination of whether a duty exists based on a case-by-case inquiry – there is a greater chance that justice will be served to those who are injured from a defective product's use. Crane's proposed inflexible, single-factor test will lead to significant injustice – and permit manufacturers to evade even their most basic corporate responsibilities.

Furthermore, there is little chance that reaffirming the law of this jurisdiction would result in inequity or confusion. This Court has already demarcated the outer bounds of liability in Rastelli, and the lower courts have had no difficulty applying its precepts to all manner of products. See Suttner supra; Rogers supra; cf.

Tortoriello supra. Limiting a duty to warn to circumstances, like here, involving the normal and intended use of the product, which is a basic principle of our products liability jurisprudence, serves to limit manufacturers' liability in this context. These limitations weight heavily in favor of an affirmance.

Thus, New York Courts have applied the duty balancing test in a manner consistent with fundamental considerations of policy, fairness, and decency, and have rejected inflexible rules that permit a manufacturer to avoid liability despite inexcusable and irresponsible conduct. Since a decision in this case has the potential to affect countless products used by New Yorkers on a daily basis – from industrial valves to children's toys – the proper test to find that a duty is owed should be a balancing one as employed by the Appellate Division. Under that test, the facts of this case clearly fall within the orbit of a duty to warn.

CONCLUSION

New York's approach to failure to warn claims – in which a duty to warn arises if a significant connection exists between a manufacturer's product and third-party components – is supported by this Court's precedents and fundamental considerations of public policy. Thus, it is respectfully submitted that the order of the Appellate Division should be affirmed.

Dated: New York, New York
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Respectfully submitted,

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