NO. S177401

IN THE SUPREME COURT OF CALIFORNIA

BARBARA J. O'NEIL, individually and as successor in interest to PATRICK J. O'NEIL et al.,
Plaintiffs and Appellants,

v.

CRANE CO. and WARREN PUMPS, LLC,
Defendants and Respondents.

Court of Appeal, Second Appellate District, Division Five, No. B208225
Los Angeles County Superior Court, No. BC360274
The Honorable Elihu Berle, Judge Presiding

AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN TORT REFORM ASSOCIATION, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, AMERICAN INSURANCE ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF DEFENDANTS-RESPONDENTS

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Amici file this brief to urge this Court to reverse the decision of the court below and order the entry of nonsuit for Defendants-Respondents.

QUESTION PRESENTED

Whether a manufacturer may be liable for failure to warn end users of hazards in (1) replacement parts manufactured or supplied by third parties or (2) new parts manufactured or supplied by third parties and affixed by the purchaser.

STATEMENT OF INTEREST

Amici are organizations that represent companies doing business in California and their insurers. Accordingly, *amici* have a substantial interest in ensuring that California's tort system is fair, follows traditional tort law

rules, and reflects sound public policy. *Amici* will show that the lower court's decision to impose liability on Defendants for harm caused by *other manufacturers'* asbestos-containing products is inconsistent with these principles, as well as California law, and should be reversed.

STATEMENT OF THE CASE

Amici adopt Defendants-Respondents' Statement of the Case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Asbestos litigation is the "longest-running mass tort" in U.S. history. Helen Freedman, *Selected Ethical Issues in Asbestos Litigation* (2008) 37 Sw. U. L. Rev. 511, 511. Since the litigation emerged over three decades ago, lawyers who bring asbestos cases have perpetuated the litigation by seeking out new defendants or raising new theories of liability. *See* Mark Behrens, *What's New in Asbestos Litigation?* (2009) 28 Rev. Litig. 501 (2009); 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), *available at* 2006 WLNR 25577320.

An emerging theory being promoted by some plaintiffs' counsel is that makers of nondefective products, such as pumps or valves, should be held liable for harms allegedly caused by asbestos-containing replacement parts manufactured or sold by third parties (*i.e.*, replacement internal

gaskets or packing or replacement external flange gaskets) or asbestos-containing external thermal insulation manufactured and sold by third parties and attached post-sale, *e.g.*, by the U.S. Navy.[1]

Ordinarily, manufacturers are named in asbestos cases only with respect to asbestos that was contained in their *own* products—not to hold them liable for products *made by others*. This is an important point to keep clear. Manufacturers in general may be subject to liability for failure to warn of the hazards of asbestos originally contained in their own products. The focus here is on replacement gaskets and packing made by others after the original equipment was removed or on new parts made by others and affixed to the Defendants' components post-sale.

Plaintiffs' third-party liability concept is so extreme that almost no plaintiff raised it until recently. Indeed, the lack of older case law on point, after decades of litigation and many hundreds of thousands of filings, by itself, speaks volumes about the exotic nature and recent vintage of Plaintiffs' theory. The driving force behind the theory, two appellate decisions from Washington State, is now gone—rejected by the Washington Supreme Court in *Simonetta v. Viad Corp.* (Wash. 2008)

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[1] The Court has accepted review of another appeal involving this theory, *Merrill v. Leslie Controls*, No. S178957 (*review granted* Feb. 3, 2010) (briefing deferred pending decision in the subject *O'Neil* case).

197 P.3d 127, and *Braaten v. Saberhagen Holdings* (Wash. 2008) 198 P.3d 493. Plaintiffs' lawyers then tried to export the theory to California, where it was also rejected by the First District Court of Appeal in *Taylor v. Elliott Turbomachinery Co., Inc.* (1st Dist. 2009) 171 Cal. App. 4th 564, 575, *review denied* (Cal. June 10, 2009). Apart from the decision below, the theory has been discredited and, properly, kept in its box.

Whether couched in terms of strict liability or negligence, it is black-letter law that manufacturers are not liable for harms caused by others' products except in limited situations not present here: (1) the component part maker substantially participated in the integration of its product into the design of a finished product or (2) two otherwise safe products combine to create a new, synergistic hazard.

Plaintiffs essentially seek to impose "rescuer liability" on Defendants for failure to warn about asbestos-related hazards in products made or sold by others. *See* James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products* (2008) 37 Sw. U. L. Rev. 595 (Professor Henderson is the Frank B. Ingersoll Professor at Cornell Law School and Co-Reporter for the Restatement Third, Torts: Products Liability). It is easy to see what is suddenly driving this novel theory: most major manufacturers of asbestos-containing products have filed bankruptcy and

the Navy enjoys sovereign immunity. As a substitute, Plaintiffs seek to impose liability on solvent manufacturers like Defendants for harms caused by products they never made, sold, installed, or profited from.

Plaintiffs' justification for this radical expansion of asbestos liability is "foreseeability." As every first-year law student knows, however, foreseeability can be a *Palsgraf*-like slippery slope that has no end. Courts must draw a reasonable line, and that line has been in place for the entire history of asbestos litigation and going back in time through the common law. As Professor Henderson, one of the nation's foremost authorities on tort law, explains: "Every student of American tort law knows that American courts will not impose a legal duty to rescue another merely because the would-be rescuer knows that the other requires help that the rescuer is in a position to render." Henderson, 37 Sw. U. L. Rev. at 602.

Specifically, Plaintiffs' strict liability claims must fail because a touchstone of strict products liability is that the defendant must have participated in the chain of distribution of a defective product. *See Kasel v. Remington Arms Co., Inc.* (2d Dist. 1972) 24 Cal. App. 3d 711, 725. Manufacturers have historically been responsible for products over which they retain some measure of control and responsibility. They are not responsible for hazards in others' products, even if the replacement of an

original part or the attachment of a new part was "foreseeable." *See Taylor,* 171 Cal. App. 4th at 575.

Plaintiffs' negligence claims also must fail. In negligence, a plaintiff must establish the existence of a duty owed directly to the injured person. Duty questions involve policy-laden judgments in which a line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit. Courts make duty determinations by balancing several factors. *See Rowland v. Christian* (1968) 69 Cal. 2d 108, 113. Under California law—and contrary to Plaintiffs' theory—"foreseeability is not coterminous with duty." *Sakiyama v. AMF Bowling Centers, Inc.* (2d Dist. 2003) 110 Cal. App. 4th 398, 407, *reh'g denied* (Aug. 6, 2003), *review denied* (Cal. Sept. 24, 2003). In *Thing v. La Chusa* (1989) 48 Cal. 3d 644, 656, 659, this Court rejected a "reasonable foreseeability" test for assessing duty because "foreseeability, like light, travels indefinitely in a vacuum" and because of "the importance of avoiding the limitless exposure to liability that the pure foreseeability test of 'duty' would create." The *Rowland* factors do not support a duty owed here, as the First District Court of Appeal held in *Taylor.*

This Court should reject Plaintiffs' extreme and unsound invitation to dramatically expand liability law and create a broad new duty rule

requiring manufacturers to warn about risks in products made or sold by others. Plaintiffs' theory is contrary to California law and the majority rule nationwide. *See Taylor, supra; Simonetta, supra; Braaten, surpa; Lindstrom v. A-C Prod. Liab. Trust* (6th Cir. 2005) 424 F.3d 488; Henderson, *supra*; Paul J. Riehle *et al.*, *Product Liability for Third Party Replacement or Connected Parts: Changing Tides From the West* (2009) 44 U.S.F. L. Rev. 33.

Furthermore, Plaintiffs' theory represents unsound public policy. The decision would worsen asbestos litigation and invite a flood of new cases into California. 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 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. For example, makers of bread or jam would be required to warn of peanut allergies, as a peanut butter and jelly sandwich is a foreseeable use of their products. 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. As this Court can appreciate, the only limit on such an expansive legal requirement would be the imagination of creative plaintiffs' lawyers.

In addition, consumer safety could be undermined by the potential for over-warning (the "Boy Who Cried Wolf" problem) and through conflicting information that may be provided by manufacturers of different components and by makers of finished products.

For these reasons, the appellate court's decision should be reversed and an order should be entered to grant nonsuit in favor of Defendants.

ARGUMENT

I. DEFENDANTS ARE NOT SUBJECT TO STRICT LIABILITY FOR HAZARDS IN OTHERS' PRODUCTS

California law provides generally that any entity *which participates in the chain of distribution* of a product *is strictly liable* for harms caused by *a defect* in *that product*, whether negligently or nonnegligently caused. *See Greenman v. Yuba Power Prods., Inc.* (1963) 59 Cal. 2d 57, 62; *Vandemark v. Ford Motor Co.* (1964) 61 Cal. 2d 256, 262-263; *see also*

Restatement (Second) of Torts § 402A (1965); Restatement Third, Torts: Products Liability §1 (1997). Here, however, Defendants were not in the chain of distribution of the asbestos-containing products that allegedly caused Plaintiffs' harm and, therefore, are not strictly liable for harms caused by those products. Strict liability "was never intended to make the manufacturer or distributor of a product its insurer." *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal. 3d 987, 994; *see also Carlin v. Superior Court* (1996) 13 Cal. 4th 1104, 1110. Such liability will not be imposed on an entity that does not manufacture or market the allegedly defective product that caused plaintiff's injury. *See Soule v. General Motors Corp.* (1994) 8 Ca. 4th 548, 568 n.5 ("we have consistently held that manufacturers are not insurers of their products; they are liable in tort only when 'defects' in their products cause injury."); *Peterson v. Superior Court* (1995) 10 Cal. 4th 1185, 1188.

This finding is supported by the policies underlying imposition of strict liability:

> 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). None of these interests support imposing strict liability on Defendants, who did not market or sell the asbestos-containing new or replacement parts which allegedly caused Plaintiffs' harm and who derived no income from the sale of those parts. "Further, '[i]f business [entities] believe that tort outcomes have little to do with their own behavior, then there is no reason for them to shape their behavior so as to minimize tort exposure.'" Riehle *et al.*, 44 U.S.F. L. Rev. at 61-62 (quoting Stephen J. Carroll *et al.*, *Asbestos Litigation* 129 (RAND Inst. for Civil Justice 2005)).

The First District's decision in *Taylor* is particularly instructive. There, the court held that makers of various equipment sold to the United States Navy for use in a ship's propulsion system could not be held strictly liable for asbestos-containing replacement parts (internal gaskets and packing or external flange gaskets) or new parts (externally affixed insulation) manufactured or supplied by third parties. The court gave three reasons for its decision, and all are applicable here as well.

First, as in *Taylor*, Defendants are not subject to strict liability because they "were simply 'not part of the manufacturing or marketing

enterprise of the allegedly defective product[s] that caused the injury in question.'" *Taylor*, 171 Cal. App. 4th at 577 (quoting *Peterson,* 10 Cal. 4th at 1188); *see also Daly v. General Motors Corp.* (1978) 20 Cal. 3d 725, 739 (the basis for imposing strict liability on a particular defendant is that "he has marketed or distributed a defective product."); *Edwards v. A.L. Lease & Co.* (1st Dist. 1996) 46 Cal. App. 4th 1029, 1033 (the purpose of this "'stream of commerce' approach to strict liability is to extend liability to all those engaged in the overall producing and marketing enterprise who should bear the social cost of the marketing of defective products.") (citation omitted); *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal. 4th 953, 958 (a plaintiff in an asbestos case "must, in accordance with traditional tort principles, demonstrate . . . that a product or products *supplied by the defendant*, to which he became exposed" causes injury) (emphasis added).

The *Taylor* court drew support from this Court's decision in *Peterson*, which held that a hotel owner could not be held strictly liable for injuries sustained when a guest slipped in the bathtub of her guestroom. The Court in *Peterson* held "it would be improper to impose strict liability under products liability principles upon a hotel proprietor for injuries caused by an alleged defect in the hotel premises that the hotel proprietor did not create or market." 10 Cal. 4th at 1188. The *Peterson* court

reasoned that the rationales for imposing strict liability on manufacturers or retailers did not apply to one who was not part of the injury-causing product's "chain of distribution." *Id.* at 1199; *see also Cadlo v. Owens-Illinois, Inc.* (1st Dist. 2004) 125 Cal. App. 4th 513, 524 (no liability where there was no evidence that defendant "played any role in the design, manufacture, distribution, or marketing" of the products that allegedly caused plaintiff's harm).

Plaintiffs here argue that strict liability should be imposed because their exposures were "foreseeable" to Defendants. Setting aside whether this is, in fact, true, it does not change the fact that manufacturers and sellers are responsible only for reasonably foreseeable harms caused by their own products; they are not liable for harms resulting from others' products except in limited situations not present here.

The court in *Taylor* wisely observed the basis for the bright-line rule that ties liability to the *injury-producing product*: "manufacturers cannot be expected to determine the relative dangers of various products they do not produce or sell and certainly do not have a chance to inspect or evaluate." *Taylor*, 171 Cal. App. 4th at 576. "This legal distinction acknowledges that overextending the level of responsibility could potentially lead to commercial as well as legal nightmares in product distribution." *Id.*

A second reason for holding that Defendants are not subject to strict liability here is that California law "has not imposed on manufacturers a duty to warn about the dangerous propensities of other manufacturers' products." *Id.* at 583; *see also Garman v. Magic Chef, Inc.* (2d Dist. 1981) 117 Cal. App. 3d 634, 638 ("To say that the absence of a warning [about defects] in other products makes the [defendant's product] defective is semantic nonsense."); *Blackwell v. Phelps Dodge Co.* (2d Dist. 1984) 157 Cal. App. 3d 372, 378 ("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..."); *Powell v. Standard Brands Paint Co.* (3d Dist. 1985) 166 Cal. App. 3d 357, 362 ("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."); *Zambrana v. Standard Oil Co. of Cal.* (2d Dist. 1972) 26 Cal. App. 3d 209, 217 (tire maker not liable for combination of parts attached to its tire which were said to be defective); *McGoldrick v. Porter-Cable Tools* (2d Dist. 1973) 34 Cal. App. 3d 885, 888 (power saw stand

manufacturer not liable for defective saw housing made by another and affixed to the stand); *In re Deep Vein Thrombosis* (N.D. Cal. 2005) 356 F. Supp. 2d 1055, 1068 ("no case law . . . supports the idea that a manufacturer, after selling a completed product to a purchaser, remains under a duty to warn the purchaser of potentially defective additional pieces of equipment that the purchaser may or may not use to complement the product bought from the manufacturer.").[2]

As correctly summarized in *Taylor*, "[t]he [defendant's own] product must, in some sense of the word, 'create' the risk.'" James Henderson, Jr. & Aaron Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn* (1990) 65 N.Y.U. L. Rev. 265, 284; *see also* Henderson, 37 Sw. U. L. Rev. at 601. Otherwise, "the manufacturer should not be required to supply warnings, even if the risks are not obvious to users or consumers." Henderson & Twerski, 65 N.Y.U. L. Rev. at 284. As Professor Henderson recently explained, if a manufacturer is required to warn about someone else's products, the manufacturer "is being required to perform a watchdog function in order to rescue product users from risks it

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[2] Likewise, a California trial court has held that, while a broom is commonly used to sweep up dust that might contain silica, a broom manufacturer is not required to warn of the hazards of silica exposure. *See* Thomas W. Tardy, III & Laura A. Frase, *Liability of Equipment Manufacturers for Products of Another: Is Relief in Sight?*, HarrisMartin's Columns–Raising the Bar in Asbestos Litigation, May 2007, at 6.

had no active part in creating and over which it cannot exert meaningful control." Henderson, 37 Sw. U. L. Rev. at 601. "Leading California commentators [also] agree that a manufacturer's duty to warn of defects is limited to the manufacturer's own products." *Taylor*, 125 Cal. App. 4th at 583 n.8; *see also* Riehle *et al.*, 44 U.S.F. L. Rev. at 62.

Finally, while the above reasons alone are enough to support an order to the entry of nonsuit here, the component supplier doctrine provides yet another reason for doing so. *See Lee v. Electric Motor Div.* (2d Dist. 1985) 169 Cal. App. 3d 375, 385, *review denied* (Cal. Aug. 29, 1985). The component parts doctrine provides that the manufacturer of a component is not liable for injuries caused by the finished product into which the component is incorporated unless the component itself was defective and causes harm, *see Jimenez v. Superior Court* (2002) 29 Cal. 4th 473, 481, or the seller or distributor substantially participates in the integration of the component into the design of the finished product, *see DeLeon v. Commercial Mfg. & Supply Co.* (5th Dist. 1983) 148 Cal. App. 3d 336. The *Taylor* court explained two policy considerations which support this rule:

> First, requiring suppliers of component parts to ensure the safety of their materials as used in other entities' finished products 'would require suppliers to 'retain an expert in the client's field of business to determine whether the client intends to develop a safe product.' Suppliers of "products that have multiple industrial uses" should not be forced 'to

> retain experts in a huge variety of areas in order to determine the possible risks associated with each potential use.' A second, related rationale is that 'finished product manufacturers know exactly what they intend to do with a component or raw material and therefore are in a better position to guarantee that the component or raw material is suitable for their particular applications.'

171 Cal. App. 4th at 584 (internal citations omitted); *see also Artiglio v. General Elec. Co.* (4th Dist. 1998) 61 Cal. App. 4th 830; *Wiler v. Firestone Tire & Rubber Co.* (3d Dist. 1979) 95 Cal. App. 3d 621, 629-30; *Fierro v. Int'l Harvestor Co.* (2d Dist. 1982) 127 Cal. App. 3d 862, 868-870.

The *Taylor* court rejected the narrow view that the component parts doctrine applies only to fungible, multi-use components and held that the defense applied regardless of whether defendants followed Navy specifications when producing their products. *See Taylor,* 171 Cal. App. 4th at 584. The court's analysis is supported by the Restatement Third, Torts: Products Liability: "A component seller who simply designs a component to its buyer's specifications, and does not substantially participate in the integration of the component into the design of the product, is not liable...." Restatement Third § 5 Cmt. e*; see also* Cmt. a (identifying "valves" as a component for which liability should not attach unless the product itself is defective). As long as there is no defect in the component itself, and the defendant did not play a substantial role in its integration into the finished product that caused the harm, the defense

should apply. *See Taylor,* 171 Cal. App. 4th at 585 (the conclusion that liability should not attach is "not affected by the fact that the use of asbestos-containing materials with [Defendants'] equipment was both foreseeable and anticipated by respondents.").[3]

* * *

In contrast, the cases relied upon by the court below "are distinguishable," *Id.* at 586, and are not precedent from this Court. For instance, in *DeLeon v. Commercial Manufacturing & Supply Co.* (5th Dist. 1983) 148 Cal. App. 3d 336, "the defendant manufacturer's potential liability turned on the factual question of whether it had participated in the design and location of the sorter bin" which plaintiff was cleaning when she

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[3] Decisions from other states are in accord. *See, e.g., Childress v. Gresen Mfg. Co.* (6th Cir. 1989) 888 F.2d 45, 49 (Mich. law) (component maker's knowledge of the design of the final product was insufficient to impose liability); *In re Silicone Gel Breast Implants Prods. Liab. Litig.* (N.D. Ala. 1997) 996 F. Supp. 1110, 1117 ("[t]he issue is not whether GE was aware of the use to be put by [breast] implant manufacturers of its [silicone gel] – clearly it knew this - . . . such awareness is irrelevant to the imposition of liability."); *Kealoha v. E.I. Du Pont de Nemours & Co.* (D. Haw. 1994) 844 F. Supp. 590, 595 ("The alleged foreseeability of the risk of the finished product is irrelevant to determining the liability of the component part manufacturer because imposing such a duty would force the supplier to retain an expert in every finished product manufacturer's line of business and second-guess the finished product manufacturer. . . ."); *Palermo v. Port of New Orleans* (La. Ct. App.) 951 So. 2d 425, 439 (shipping dock board had no duty to protect dock workers from raw asbestos shipped by other companies; "[w]hether the Dock Board knew generally that asbestos was being shipped through the port is *irrelevant to this inquiry*; absent a defect in its premises . . . the pertinent fact is that the Dock Board had no custody or control of the asbestos-containing cargo or of the loading, unloading or ship repair operations.") (emphasis added), *writ denied,* (La. 2007) 957 So. 2d 1289.

was injured by an exposed rotating line shaft located above the sorter bin. *Taylor*, 171 Cal. App. 4th at 589. The court held that a manufacturer which "participate[s] in the design of . . . custom-made equipment for a particular location in a processing line" must ensure that the placement of the product does not create a hazard. *DeLeon,* 148 Cal. App. 3d at 347. "There is nothing in *DeLeon* that suggests that a manufacturer may be liable for failing to warn of the dangerous qualities of another manufacturer's product." *Taylor*, 171 Cal. App. 4th at 589-590.

The court also relied on *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2d Dist. 2004) 129 Cal. App. 4th 577, claiming the case holds that a manufacturer must warn about dangers caused by another's product when it is foreseeable the other product will be used in connection with the intended purpose of the defendant's product. The opinion, however, does not contain this rule. *Tellez-Cordova* held that a manufacturer of power grinding tools designed to be used with abrasive wheels or discs had a duty to warn about the release of dust caused by the interaction of its power grinders with abrasive wheels or discs made by another. The court observed that the defendant's grinding tools "created the dust, even if the dust did not come directly from the tools." *Id.* at 585. The abrasive wheels or disks would not have been dangerous without the grinding tools.

Here, however, the subject injury was not caused by Defendants' products, but by the release of asbestos from products made by third parties. As stated, in *Tellez-Cordova,* it was the action of the grinding "*tools themselves* that created the injury-causing dust." *Taylor*, 171 Cal. App. 4th at 587 (emphasis in original). This is a key difference, because strict liability attaches only if the defendant's product causes or creates the risk of harm. Second, unlike the abrasive wheels and discs in *Tellez-Cordova,* which were not dangerous without the power of the grinding tools, the asbestos-containing products at issue here were themselves hazardous. "It was their asbestos content—not any feature of [Defendants'] equipment that made them hazardous." *Taylor*, 171 Cal. App. 4th at 588.

A third case involved a plaintiff injured when a deck gun on a fire truck broke loose and failed under the intense pressure generated by the deck gun and the inadequate capacity of the riser pipe attached to the deck gun. *See Wright v. Stang Mfg. Co.* (2d Dist. 1997) 54 Cal. App. 4th 1218, *review denied* (Cal. Aug. 13, 1997). In *Wright*, "the unexpected, immediate cause of injury was not, as in this case, a toxic agent contained in another manufacturer's product, but was either a design defect in Stang's product itself or a misuse of Stang's product, which Stang was in the best position to anticipate." *Taylor*, 171 Cal. App. 4th at 589. Furthermore, Defendants' products "functioned as intended, whereas an entire assembly in *Wright*

failed under water pressure." *Simonetta v. Viad Corp.* (Wash. 2008) 197 P.3d 127, 137.

II. DEFENDANTS-RESPONDENTS CANNOT BE HELD LIABLE IN NEGLIGENCE BECAUSE THEY OWED NO DUTY TO PLAINTIFFS-APPELLANTS

In negligence, it is well established that before a defendant may be liable to a plaintiff, it must be shown that the defendant owed a duty to the plaintiff. The existence and scope of a duty of care, if any, is a question of law to be determined by the court. Duty questions involve policy-laden judgments. "A person may have a moral duty to prevent injury to another, but no legal duty." *Pulka v. Edelman* (N.Y. 1976) 358 N.E.2d 1019, 1022, *reargument denied* (1977) 362 N.E.2d 640.

Here, the Court must determine whether it is fair and reasonable to require manufacturers of components in a ship to warn about asbestos-related hazards in *other manufacturers'* products. To make this determination, the Court must balance (1) the foreseeability of harm to the injured party; (2) the degree of certainty he or she suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant and consequences to the community of imposing a duty of care with resulting liability for breach; (7) and the availability, cost, and prevalence of

insurance for the risk involved. *Rowland,* 69 Cal. 2d at 113. The social utility of the defendants' conduct has also been deemed a relevant factor. *See Parsons v. Crown Disposal Co.* (1997) 15 Cal. 4th 456, 473-476.

Contrary to Plaintiffs' theory, "foreseeability alone is not sufficient to create an independent tort duty." *Erlich v. Menezes* (1999) 21 Cal. 4th 543, 552; *see also Coldwell Banker Residential Brokerage Co. v. Superior Court* (4th Dist. 2004) 117 Cal. App. 4th 158, 167 ("the mere existence of foreseeability of harm . . . is, for public policy reasons, not sufficient to impose liability."). In fact, California courts "may find that no duty exists, despite foreseeability of harm, because of other [*Rowland*] factors." *Sakiyama* 110 Cal. App. 4th at 407; *see also Elden v. Sheldon* (1988) 46 Cal. 3d 267, 274 (the determination of duty "recognizes that policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk."). As this Court explained in *Thing v. La Chusa*, "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which the foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury." *Thing*, 48 Cal. 3d at 668.

Here, the *Rowland* factors do not support a finding of a duty owed by the Defendants for harms caused by others' products. First, as the *Taylor* court appreciated, "the connection between [Defendants'] conduct

and [Plaintiff's] injury is remote." *Taylor*, 125 Cal. App. 4th at 438. "Any connection between [Defendants'] conduct and [Plaintiffs'] injury is thus highly attenuated." *Id; see also Lindstrom, supra.*

Second, "[l]ittle moral blame can be attached to the conduct for which [Plaintiffs] seek[] to impose liability." *Id.* "Given that to this day California law does not impose strict liability for the failure to warn of defects in the products of another manufacturer, it is difficult to view [Defendants'] conduct as morally blameworthy." *Id.*; *cf. Lineaweaver v. Plant Insulation Co.* (1st Dist. 1995) 31 Cal. App. 4th 1409, 1418 (1995) ("it serves no justice to fashion rules which allow responsible parties to escape liability while demanding others to compensate a loss they did not create."). Furthermore, as California commentators have recently 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 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."

Riehle *et al.*, 44 U.S.F. L. Rev. at 61 (quoting Stephen J. Carroll *et al.*, *Asbestos Litigation* 129 (RAND Inst. for Civil Justice 2005)).

Third, imposing liability in situations such as this appeal would not serve the policy of preventing future harm. As the *Taylor* court wisely appreciated, asbestos litigation today arises from exposures that took place long ago. "[I]mposing a duty to warn on [Defendants] will do nothing to prevent the type of injury [alleged by Plaintiffs]. *Taylor*, 125 Cal. App. 4th at 439. "Such exposures have already taken place, and in light of the heavily regulated nature of asbestos today, it is most unlikely that holding [Defendants] liable for failing to warn of the danger posed by other manufacturers' products will do anything to prevent future asbestos-related injuries." *Id.*

Indeed, 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, *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=9995. "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.* (4th

Cir. 1993) 4 F.3d 276, 280. 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.* (E. & S.D.N.Y. 2002) 237 F.Supp.2d 297, 310; *see also* Occupational Safety & Health Admin., *Regulatory History of Asbestos*, *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=PREAMBLES&p_id=784.

Fourth, as described in more detail later in this brief, "[i]mposing a duty in these circumstances would also impose significant burdens on defendants generally." *Taylor*, 125 Cal. App. 4th 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." *Id.* The broad new duty rule sought by Plaintiffs presumably would not be limited to asbestos cases, causing potentially limitless liability for any number of potential defendants in countless situations. *See infra.*

Fifth, "[b]ecause it may often be difficult for a manufacturer to know what kind of other products will be used or combined with its own product, [both Defendants-Respondents and defendants in general] might well face the dilemma of trying to insure against 'unknowable risks and hazards.'"

Taylor, 125 Cal. App. 4th at 439 (quoting *Anderson*, 53 Cal. 3d at 1003-1004 n.14).

Finally, "there can be little doubt" that Defendants' conduct in selling critical components to the Navy "was of high social utility." *Taylor*, 125 Cal. App. 4th at 440.

The court below chose not to consider any of these substantial policy grounds for absolving Defendants of liability. This Court should apply the *Rowland* factors as correctly applied in *Taylor* and order entry of nonsuit.

III. COURTS IN RECENT OUT-OF-STATE CASES HAVE REJECTED PLAINTIFFS' THEORIES

The reasoning of the Court of Appeal in *Taylor* is "strongly supported by other persuasive out-of-state authorities that are very closely on point." *Taylor*, 171 Cal. App. 4th at 592; *see also* Henderson, *supra.*

1. Washington Supreme Court: *Simonetta* and *Braaten*

An en banc panel of the Washington Supreme Court recently voted 6–3 to overturn an appellate court and held that manufacturers have no duty to warn about asbestos-related hazards in either new or replacement parts made by others. *See Simonetta v. Viad Corp.* (Wash. 2008) 197 P.3d 127; *Braaten v. Saberhagen Holdings* (Wash. 2008) 198 P.3d 493.[4] Among

[4] *See also Anderson v. Asbestos Corp., Ltd.* (Wash. Ct. App. July 13, 2009) 2009 WL 2032332 (following *Braaten* and *Simonetta* to dismiss claim against Caterpillar for asbestos insulation used with engines it manufactured).

other authorities, the court cited several California cases as support for its holdings: *Powell,* 166 Cal. App. 3d at 364; *Blackwell,* 157 Cal. App. 3d at 378; *Garman,* 117 Cal. App. 3d at 638; *In re Deep Vein Thrombosis*, 356 F. Supp. 2d at 1063.

In *Simonetta*, the court began its opinion with a discussion of plaintiff's negligence claim and the black-letter rule for the duty to disclose as set forth in the Restatement (Second) of Torts § 388 (1965). Section 388 provides:

> One who supplies directly or through a third person a chattel for another to use is subject to liability . . . if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that [users] . . . will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

The court said that "a careful review of case law interpreting failure to warn cases" found "little to no support under [Washington law] for extending the duty to warn to another manufacturer's product." *Id.* at 132, 133. In addition, "[c]ase law from other jurisdictions similarly limits the duty to warn in negligence cases to those in the chain of distribution of the hazardous product." *Id.* at 133.

Next, the court addressed plaintiff's strict liability claim. The court explained that strict liability is based on the rationale that imposition of liability is justified on "the defendant who, by manufacturing, selling, or

marketing a product, is in the best position to know of the dangerous aspects of the product and to translate that knowledge into a cost of production against which liability insurance can be obtained." *Id.* at 134. The court concluded that the "unreasonably dangerous product" which caused the plaintiff's harm was "the asbestos insulation," not the defendant's evaporator. *Id.* Thus, because the defendant "was not in the chain of distribution of the dangerous product" liability could not be imposed. *See id.*

Similarly, in *Braaten*, the Washington Supreme Court rejected negligence and strict liability failure to warn claims against pump and valve manufacturers for harm caused by plaintiff's exposure to asbestos-containing external insulation and asbestos-containing replacement packing and replacement gaskets made by third parties.

First, the court rejected plaintiff's theories relating 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." 198 P.3d at 498 (citing *Simonetta*, 197 P.3d at 136). The *Braaten* 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.* at 498.

For similar reasons, the court also 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 also considered whether defendants were required to warn of the danger of exposure to asbestos in replacement packing or replacement gaskets. Once again, the court found the law straightforward and easy to apply. 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, in *Braaten* the court 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 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.*

2. Sixth Circuit Court of Appeals: *Lindstrom*

The Sixth Circuit has similarly held that a pump manufacturer was not liable for injuries caused by asbestos-containing products made by third parties, In *Lindstrom v. A-C Product Liability Trust* (6th Cir. 2005) 424 F.3d 488, 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 sued a number of manufacturers. The central issue in *Lindstrom* was causation as it related to component parts, rather than the existence of a duty. Nevertheless, the court affirmed summary judgment for Coffin Turbo Pump, Inc., which did not manufacture or supply the external insulation used on the pumps where plaintiff worked or the replacement gaskets that may have caused his illness. The court held,

"Coffin Turbo cannot be held responsible for the asbestos contained in another product." *Id.* at 496. The court also affirmed summary judgment for other pump manufacturers with respect to exposures plaintiff may have had to asbestos in replacement gaskets and packing made by other companies. *See id.* at 495; *see also Stark v. Armstrong World Indus., Inc.* (6th Cir. 2001) 21 Fed. Appx. 371, 381 (unpublished) (rejecting claim that turbine and boiler manufacturers should be held liable because their equipment "is integrated into the machinery of the vessel, much of which uses and may release asbestos," because "[t]his form of guilt by association has no support in the law of products liability.").

3. Maryland Intermediate Appellate Court: *Wood*

Similarly, in *Ford Motor Co. v. Wood* (Md. Ct. Spec. App.) 703 A.2d 1315, *cert. denied*, (Md. 1998) 709 A.2d 139, *abrogated on other grounds, John Crane, Inc. v. Scribner* (Md. 2002) 800 A.2d 727, plaintiffs alleged asbestos exposure from replacement parts in older Ford vehicles. Unable to identify the maker of the replacement parts, plaintiffs sued Ford claiming that "regardless of who manufactured the replacement parts, there was sufficient evidence from which a jury could infer that Ford had a duty to warn of the dangers involved in replacing the brakes and clutches on its vehicles." *Id.* at 1130. The Maryland appellate court held that "a vehicle manufacturer [is liable only for defective components] incorporated...into

its finished product." *Id.* at 1331 (citing *Baughman v. General Motors Corp.* (4th Cir. 1986) 780 F.2d 1131). The court was "unwilling to hold that a vehicle manufacturer has a duty to warn of dangers of a product that it did not manufacture, market, or sell, or otherwise place into the stream of commerce." *Id.* at 1332.

In *Baughman,* the decision cited in *Wood*, the court refused to hold an automobile manufacturer liable for a mechanic's injuries when a tire mounted on a replacement wheel exploded. Plaintiff contended that even though the vehicle's manufacturer did not place the replacement wheel into the stream of commerce, the vehicle was nevertheless defective because the manufacturer failed to adequately warn of the dangers with similar wheels sold by others. The Fourth Circuit rejected this argument:

> 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); *see also Wiler,* 95 Cal. App. 3d at 629-30; *Reynolds v. Bridgestone/Firestone, Inc.* (11th Cir. 1993) 989 F.2d 465, 472; *Spencer v. Ford Motor Co.* (Mich. App. 1985) 367 N.W.2d 393, 396; *Acoba v. General Tire, Inc.* (Haw. 1999) 986 P.2d 288, 305.

4. Recent Decisions in Maine and Pennsylvania Add Support

Additional support for rejecting Plaintiffs' theories is found in trial court decisions from Pennsylvania and Maine. In *Schaffner v. Aesys Technologies, LLC* (Pa. Super. Jan. 21, 2010) 2010 WL 6052750, a Pennsylvania appellate court affirmed a Philadelphia trial court opinion rejecting the third party liability theory at issue here. The court relied upon prior Pennsylvania authority, *see Toth v. Economy Forms Corp.* (Pa. Super. 1990) 571 A.2d 420, 423, *appeal denied*, (Pa. 1991) 593 A.2d 422, to hold that "a manufacturer cannot be held liable for a product it neither manufactured or supplied." *Schaffner,* 2010 WL 6052750, at *6. The court also noted that the "holding in *Toth* is consistent with the majority rule nationwide that an equipment manufacturer can not be held liable for a product it neither manufactured nor supplied." *Id.* at *5; *see also Milich v. Anchor Packing Co.* (Pa. Ct. Com. Pl. Butler County Mar. 16, 2009) A.D. No. 08-10532, op. at 9 (to the extent Plaintiff was exposed to replacement packing supplied by a third party, "there is no authority that [defendant] can be held liable for such exposure as a matter of law.") (Appendix A).

In *Rumery v. Garlock Sealing Technologies, Inc.* (Me. Super. Ct. Cumberland County Apr. 24, 2009) 2009 WL 1747857, the court explained, "Maine case law has not imposed upon a manufacturer a duty to warn about the dangerous propensities of other manufacturer's products."

Id. at 5. The court added, "it was not the Defendant's product, but the dangers inherent in the asbestos-containing packing and gaskets, a product the Defendant did not manufacture or supply, that proximately caused the Plaintiff's alleged damages. As there is no strict liability for a failure to warn solely of the hazards inherent in another product, the foreseeability argument regarding the adequacy of warnings is not pertinent." *Id.* at 6.

IV. OTHER AUTHORITY SUPPORTS DEFENDANTS

Numerous other decisions from around the country that involve other products also support a finding that Plaintiffs' claims fail as a matter of law. For example, in *Rastelli v. Goodyear Tire & Rubber Co.* (N.Y. 1992) 591 N.E.2d 222, plaintiff's decedent was killed while inflating a Goodyear tire when a multipiece tire rim made by a different company separated explosively. Plaintiff's decedent claimed, among other things, that Goodyear had a duty to warn against its tire being used with allegedly defective multipiece tire rims made by others. New York's highest 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." *Id.* at 225-226.

Similarly, in *Brown v. Drake-Willock Int'l, Ltd.* (Mich. App. 1995) 530 N.W.2d 510, *appeal denied*, (Mich. 1997) 562 N.W.2d 198, 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 the machines. The court held: "The law does not impose upon manufacturers a duty to warn of the hazards of using products manufactured by someone else." *Id.* at 515.

Numerous other decisions are in agreement. *See, e.g., Mitchell v. Sky Climber, Inc.* (Mass. 1986) 487 N.E.2d 1374, 1376 ("we have never held a manufacturer liable . . . for failure to warn of risks created solely in the use or misuse of the product of another manufacturer."); *Firestone Steel Prods. Co. v. Barajas* (Tex. 1996) 927 S.W.2d 608, 616 ("A manufacturer does not have a duty to warn or instruct about another manufacturer's products, though those products might be used in connection with the manufacturer's own products."); *Shaw v. General Motors Corp.* (Colo. App. 1986) 727 P.2d 387, 390 ("The burden of guarding against the injury suffered here should appropriately be placed upon the entity that designed the final product, arranged for the acquisition of all the component parts, and directed their assembly."); *Walton v. Harnischfeger* (Tex. App.-San Antonio 1990) 796 S.W.2d 225, 226 (crane manufacturer had no duty to warn about rigging it did not manufacture, integrate into its crane, or place in the steam of commerce); *Sperry v. Bauermeister, Inc.* (E.D. Mo. 1992)

804 F. Supp. 1134, 1140 (seller not liable for incorporation of its parts into system designed by another), *aff'd* (8th Cir. 1993) 4 F.3d 596; *Fricke v. Owens-Corning Fiberglas Corp.* (La. App. 1993) 618 So. 2d 473, 475 (manufacturer not liable for inadequate warning on product it neither made nor sold); *Fleck v. KDI Sylvan Pools* (3d Cir. 1992) 981 F.2d 107, 118 (it would be "unreasonable" to impose liability on a manufacturer of a "safe pool" for injuries sustained as a result of a lack of depth warnings on a replacement pool liner made by another manufacturer), *cert. denied sub nom. Doughboy Recreational, Inc., Div. of Hoffinger Indus., Inc. v. Fleck* (1993) 507 U.S. 1005; *Petrucelli v. Bohringer and Ratzinger* (3d Cir. 1995) 46 F.3d 1298, 1309 (recycling machine component part manufacturer was not liable for a failure to warn of the danger of another component which it neither manufactured nor assembled); *Exxon Shipping Co. v. Pacific Res., Inc.* (D. Haw. 1991) 789 F. Supp. 1521, 1526 (chain manufacturer not liable for defectively designed replacement chain made by another even though the replacement part was "identical, in terms of make and manufacture, to the original equipment"); *Timm v. Indian Springs Recreation Assoc.* (Ill. App.) 543 N.E.2d 538, 542 ("Liability will not be imposed upon a defendant who is not a part of the original producing and marketing chain."), *appeal denied* (Ill. 1989)548 N.E.2d 1079; *Torres v. Wilden Pump & Eng'g Co.*, (N.D. Ill. 1009) 740 F. Supp. 1370, 1371 (no

liability where defendant did not make or distribute machine at issue); *Niemann v McDonnell Douglas Corp.* (S.D. Ill. 1989) 721 F. Supp. 1019, 1030 (airplane manufacturer had no duty to warn about replacement asbestos chafing strips it did not manufacture).

V. IMPOSITION OF A DUTY REQUIREMENT WOULD REPRESENT UNSOUND PUBLIC POLICY

"[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.)* (N.Y. 2005) 840 N.E.2d 115, 119 (quoting *Hamilton v. Beretta U.S.A. Corp.* (N.Y. 2001) 750 N.E.2d 1055). That policy would be significantly undermined by the theories Plaintiffs are promoting here. *See* Thomas W. Tardy, III & Laura A. Frase, *Liability of Equipment Manufacturers for Products of Another: Is Relief in Sight?*, HarrisMartin's Columns–Raising the Bar in Asbestos Litigation, May 2007, at 6; *see also Taylor,* 171 Cal. App. 4th at 595-596 ("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.").

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. . . ." 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. 7 (Defense Research Inst. Toxic Torts & Env'tl L. Comm. Winter 2005).

"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." Tardy & Frase, *supra*, at 6. Packaging companies might be held liable for hazards regarding contents made by others.

We will not belabor this exercise because similar scenarios could be developed for virtually any product. If a manufacturer's duty were defined by foreseeable uses of *other* products, the chain of warnings and liability would be so endless, so unpredictable, and so speculative as to be worthless. No rational manufacturer could operate under such a system. Manufacturers also cannot be expected to have R&D 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.

"Consumer safety also could be undermined by the potential for over-warning (the "Boy Who Cried Wolf" problem) and through conflicting information on different components and finished products." 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* (2008) 16 Brook. J.L. & Pol'y 589, 630 (urging courts to reject the duty Plaintiffs seek here); *see also* Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory* (1983) 52 U. Cin. L. Rev. 38, 43 ("The extension of workplace warnings liability unguided by practical considerations has the unreasonable potential to impose absolute liability. . . .").

VI. IMPOSITION OF A DUTY REQUIREMENT WOULD EXACERBATE ASBESTOS LITIGATION

"For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits." *In re Combustion Eng'g, Inc.* (3d Cir. 2005) 391 F.3d 190, 200. The United States Supreme Court in *Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 597, described the litigation as a "crisis."

So far, the litigation has forced over eighty-five employers into bankruptcy, *see* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29, and has had devastating impacts on defendant companies' employees, retirees, shareholders, and surrounding communities. *See*

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

As a result of these bankruptcies, "the net has 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, *abstract available at* 2001 WLNR 1993314.[5] One plaintiffs' attorney has described the litigation as an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs). Over 8,500 defendants have been named, *see* Deborah R. Hensler, *California Asbestos Litigation—The Big Picture*, HarrisMartin's Columns–Raising the Bar in Asbestos Litigation, Aug. 2004, at 5, up from 300 defendants in 1982, *see* James Kakalik *et al.*, *Variation in Asbestos Litigation Compensation and Expenses* 5 (RAND Inst. for Civil Justice 1984). Nontraditional defendants now account for more than half of asbestos expenditures. *See* Stephen J. Carroll *et al.*, *Asbestos Litigation* 94 (RAND Inst. for Civil Justice 2005); *see also* Steven B. Hantler *et al.*, *Is the Crisis in the Civil Justice System*

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[5] *See also* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1, *abstract available at* 2000 WLNR 2042486; Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos into a Court Perennial*, Wall St. J., Mar. 5, 2001, at A1.

Real or Imagined? (2005) 38 Loy. L.A. L. Rev. 1121, 1151-52 (discussing spread of asbestos litigation to "peripheral defendants").

California has not escaped these problems. *See* Alan Calnan & Byron G. Stier, *Perspectives on Asbestos Litigation: Overview and Preview* (2008) 37 Sw. U. L. Rev. 459, 462 ("[T]here is a sense locally among the bar that Southern California may be in the midst of a surge."); Patrick M. Hanlon & Anne Smetak, *Asbestos Changes* (2007) 62 N.Y.U. Ann. Surv. Am. L. 525, 599 ("[P]laintiffs' firms are steering cases to California, partly to the San Francisco-Oakland area, which is traditionally a tough venue for defendants, but also to Los Angeles, which was an important asbestos venue in the 1980s but is only recently seeing an upsurge in asbestos cases."); Steven D. Wasserman *et al.*, *Asbestos Litigation in California: Can it Change for the Better?* (2007) 34 Pepp. L. Rev. 883, 885 ("With plaintiff firms from Texas and elsewhere opening offices in California, there is no doubt that even more asbestos cases are on their way to the state."); Emily Bryson York, *More Asbestos Cases Heading to Courthouses Across Region*, 28:9 L.A. Bus. J. 8 (Feb. 27, 2006), *at* 2006 WLNR 4514441; Cortney Fielding, *Plaintiffs' Lawyers Turn to L.A. Courts for Asbestos Litigation*, Daily J., Feb. 27, 2009, at 1.

Judges in California have acknowledged the ever-increasing burden placed on the judicial system by the state's asbestos docket. For example,

San Francisco Superior Court Judge James McBride recently said that the length of asbestos trials causes hardship for jurors, leaving many citizens unable to serve and forcing the courts to "use jurors at an absolutely abominable rate." *Judicial Forum on Asbestos*, HB Litigation Conferences, New York City, June 3, 2009 (quoting Judge McBride), *available at* http:// litigationconferences.com/?p=6669.[6] Judge McBride said that the rate at which asbestos litigation depletes potential jurors from the overall pool could lead the jury system to "collapse" if the economy worsens significantly; these impacts would be most likely to occur in areas, such as Los Angeles County, which tend to have lower response rates on summonses. *See also Judges Roundtable: Where Is California Asbestos Litigation Heading?*, HarrisMartin's Columns–Raising the Bar in Asbestos Litigation, July 2004, at 3 (San Francisco Superior Court Judge Ernest Goldsmith stating that asbestos cases take up twenty-five percent of the court's docket); Dominica C. Anderson & Kathryn L. Martin, *The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis* (2004) 45 Santa Clara L. Rev. 1, 2 ("The sheer number of cases pending at any given time results in a virtually unmanageable asbestos docket.").

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[6] *See generally* Mark A. Behrens & M. Kevin Underhill, *A Call for Jury Patriotism: Why the Jury System Must Be Improved for Californians Called to Serve* (2003) 40 Cal. W. L. Rev. 135.

The broad new duty rule created by the appellate court would worsen asbestos litigation, fueling claims against defendants. Claimants are already drawn to California courts because of the belief that the state's asbestos litigation rules will give them an advantage. *See* Victor E. Schwartz *et al.*, *Litigation Tourism Hurts Californians*, 21:20 Mealey's Litig. Rep.: Asbestos 41 (Nov. 15, 2006) (stating that, in a 2006 sample of 1,047 California asbestos plaintiffs for whom address information was available, an astonishing *thirty percent* had addresses outside California); Steven D. Wasserman & Sunny S. Shapiro, *State's Courts Overburdened With Asbestos Suits*, The Recorder, July 24, 2009, at 5-6. If Plaintiffs prevail here, the decision will reinforce this perception and signal to plaintiffs throughout the country that they should file in California because they can obtain judgments based on a novel theory that has been rejected elsewhere.

Given that threat, there is no justification for allowing the state's courts to serve as a Mecca for plaintiffs' attorneys in asbestos cases. Nor it is necessary, because existing trusts may now provide adequate remedies. As this Court knows, the state's court system is facing serious challenges due to the unprecedented statewide fiscal crisis. The Judicial Council has ordered ALL California courts to close the third Wednesday of each month, starting September 16, 2009 and running through the fiscal year, which

ends June 30, 2010. *See* Judicial Council of California, *Judicial Council Approves Reallocation of $159 Million to Support Trial Courts*, July 30, 2009, *available at* http://www.courtinfo.ca.gov/presscenter/newsreleases/NR40-09.PDF. The Los Angeles Superior Court chose to observe a furlough day a month earlier, on August 19, 2009. *See* Los Angeles Superior Court, *Los Angeles Superior Court Scheduled Furlough Day, August 19, 2009*, *available at* http://www.lasuperiorcourt.org/courtnews/Uploads/142009724931111FURLOUGHDAYINFORMATION7-22-09.htm. As the enabling statute for these extreme actions explains: "The Legislature finds and declares that the current fiscal crisis, one of the most serious and dire ever to affect the state, threatens the continued operations of the judicial branch." Cal. Govt. Code § 68106(a).

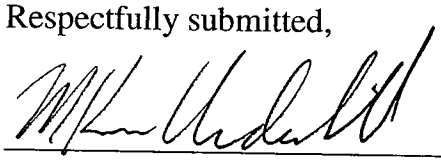
Finally, it is important to note that while Plaintiffs no doubt seek to impose liability on a solvent manufacturer as a substitute for proper entities that are now bankrupt, trusts have been established to pay claims involving those companies' products. In fact, one study concluded: "For the first time ever, trust recoveries may fully compensate asbestos victims." Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 Mealey's Asbestos Bankr. Rep. 1 (Nov. 2006); *see generally* William P. Shelley *et al.*, *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts* (2008) 17 Norton J. Bankr. L. &

Prac. 257. For example, it is estimated that mesothelioma plaintiffs in Alameda County will receive an average $1.2 million from active and emerging asbestos bankruptcy trusts, *see* Charles E. Bates *et al.*, *The Naming Game*, 24:15 Mealey's Litig. Rep.: Asbestos 1 (Sept. 2, 2009), and could receive as much as $1.6 million. *See* Charles E. Bates *et al.*, *The Claiming Game*, 25:1 Mealey's Litig. Rep.: Asbestos 27(Feb. 3, 2010).

CONCLUSION

For these reasons, this court should reverse the decision of the court below and order the entry of nonsuit in favor of Defendants-Respondents.

Respectfully submitted,



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Dated: March 9, 2010

APPENDIX A

Milich v. Anchor Packing Co., (Pa. Ct. Com. Pl. Butler County Mar. 16, 2009)A.D. No. 08-10532

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

WALTER MILICH, an individual,	:	CIVIL DIVISION-ASBESTOS
	:	
Plaintiff,	:	A.D. No. 08-10532
	:	
vs.	:	
	:	
ANCHOR PACKING COMPANY, et al.,	:	
	:	
Defendants.	:	

Attorney for Plaintiff: Carrie L. Furlan

Attorney for Crane Co.: Eric R. I. Cottle/David Shelton

Horan, J. March 16, 2009

MEMORANDUM OPINION AND ORDER OF COURT

Presently before the Court for consideration is the Motion for Summary Judgment of Crane Co. For the reasons set forth below, said Motion is GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced this action by filing a Complaint alleging that he developed mesothelioma as the result of exposure to asbestos-containing products manufactured, supplied, distributed or utilized by the above-captioned

Defendants, including valves manufactured and/or supplied by Defendant Crane.

Mr. Milich's deposition was conducted over the course of four days. Mr. Milich's testimony establishes that he was employed by Mine Safety Appliance ("MSA") at its Evans City, Pennsylvania facility from 1952 until 1987. He testified that he worked as a lead engineer in the Testing Facility. In this position, Mr. Milich worked with liquid metals projects and performed small scale experiments. From 1953 to 1956, he worked on a large liquid metals test unit called the "Missy Project" or "Missy System." He recalled that Crane valves were used in connection with liquid metals projects. Mr. Milich further testified that "[m]aybe on one or two occasions" he observed workers repacking the stems of Crane valves. (Deposition of Walter Milich, 5/1/08, 24 and 60). He stated that he never performed "hands-on" work with the Crane valves and did not know if the valve contained asbestos. (Deposition of Milich, 5/1/08, 50 and 59). He further testified that the valve packing was moist and "wasn't

brittle." Mr. Milich did not know if the packing was original to the valve. (Deposition of Milich, 5/1/08, 58-59).

Defendant Crane has filed a Motion for Summary Judgment, which is presently before the Court. Therein, Crane argues that the record in this case contains no evidence that Plaintiff worked in proximity of Crane asbestos-containing valves and/or packing on a regular and frequent basis during his tenure at MSA.

LEGAL STANDARD

Rule 1035.2 of the Pennsylvania Rules of Civil Procedure provides that a party may move for summary judgment "whenever there is no genuine issue of material fact as to a necessary element of the cause of action . . . ." Pa.R.C.P. 1035.2(1) Rule 1035.2(2) further provides that a party may move for summary judgment when "an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." Pa.R.C.P. 1035.2(2). Once a motion for summary

judgment is made, the non-moving party may not simply rest upon the mere allegations or denials in his pleadings, but is required to set forth specific facts showing that there is a genuine issue for trial. Pa.R.C.P. 1035.3. That is, once the motion for summary judgment has been properly supported, the burden then shifts to the non-movant to disclose evidence that is the "basis for his or her argument resisting summary judgment." *Samarin v. GAF Corp.*, 571 A.2d 398, 402 (Pa.Super. 1989). In *Samarin*, the Superior Court clarified the legal standard governing a motion for summary judgment:

> In passing upon a motion for summary judgment the court must examine the record in the light most favorable to the nonmoving party . . . . It is not part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried . . . . Any doubt must be resolved against the moving party . . . .

Id. at 401-402. (citations omitted).

The legal standard for summary judgment based upon a lack of product identification in an asbestos-related exposure case was established in the landmark decision of *Eckenrod v. GAF Corp*, 544 A.2d 50 (Pa.Super. 1988), *allocator denied*, 533 A.2d 968 (Pa. 1988). The *Eckenrod* court held that:

> In order for liability to attach in a products liability action, plaintiff must establish that the injuries were caused by a product of the particular manufacturer or supplier. *Berkebile vs. Brantley Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975). Additionally, in order for a plaintiff to defeat a motion for summary judgment, a plaintiff must present evidence to show that he inhaled asbestos fibers shed by the specific manufacturer's product. *Wible vs. Keene Corp.*, No. 86-4451 Slip Op. (E.D. Pa. August 19, 1987) [available on WESTLAW, 1987 W.L. 15833]; *Anastasi vs. Pacor, Inc.*, No. 6251 (C.P. Phila. Co. March 8, 1983); *aff'd* 349 Pa.Super. 610, 503 A.2d 44 (1985). Therefore a plaintiff must establish more than the presence of asbestos in the workplace; he must prove that he worked in the vicinity of the product's use. *Pongrac vs. Consolidated Rail Corp.*, 632 F.Supp. 126 (E.D.Pa. 1985).

Id. at 52. The *Eckenrod* court concluded by succinctly stating that "[w]hether a plaintiff could successfully . . . defeat a motion for summary judgment by showing circumstantial evidence depends upon the frequency of the use of the product and the regularity of plaintiff's employment in proximity thereto." *Eckenrod*, 544 A.2d at 53, (citation omitted).

In *Gregg v. V-J Auto Parts, Inc.* 943 A.2d 216 (Pa. 2007), the Supreme Court of Pennsylvania refined the summary judgment standard established in *Eckenrod*. There, the Supreme Court held that it is appropriate for courts at the summary judgment

stage to assess a plaintiff's evidence of exposure to a defendant's asbestos-containing product, whether direct or circumstantial, to determine whether the evidence meets the frequency, regularity, and proximity requirements developed in *Eckenrod* and its progeny. *Id.* at 226-227. The *Gregg* Court further noted that the trial court's role at the summary judgment stage is to assess a plaintiff's quantum of evidence. The court further held that summary judgment is proper where there is only evidence of a "de minimus" exposure to a defendant's product. *Id.* at 226. The Supreme Court in *Gregg* observed that:

> In summary, we believe that it is appropriate for courts, at the summary judgment stage, to make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff's/decedent's asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury.

Id. at 227.

The *Gregg* court also generally observed that plaintiffs commonly proffer expert opinions that any exposure to asbestos, "no matter how minimal," is a substantial

contributing factor to an asbestos-related disease. The court held that "such generalized opinions do not suffice to create a jury question in a case where the exposure to the defendant's product is *de minimus* . . . ." *Id.* at 226-227.

LEGAL ANALYSIS

In opposition to Crane's Motion for Summary Judgment, Plaintiff submitted, among other documents, the depositions of Plaintiff, the affidavit and deposition transcript of co-worker Jack Bicehouse, and Crane's answers to written discovery. As summarized above, Plaintiff's testimony establishes that he did not perform any hands-on work with Crane valves, but rather merely saw other workers repacking the valve stems on perhaps one or two occasions at most.

The affidavit and deposition testimony of Jack Bicehouse does not establish Plaintiff's frequent and/or regular exposure to an asbestos-containing product manufactured or supplied by Crane. Mr. Bicehouse worked at MSA during the relevant time period as an engineering aide. According to Mr.

Bicehouse's affidavit testimony, he and Mr. Milich worked on the Missy System and were "exposed to various asbestos-containing products," including Crane valves. Notwithstanding this generalized affidavit testimony, Mr. Bicehouse could not explain at his deposition why he associated Crane with valves, nor could he describe the valves or recall any characteristics thereof. Moreover, Mr. Bicehouse did not have any recollection of observing any persons working on Crane valves in Plaintiff's presence. (Deposition of Jack Bicehouse, 90-91). Further, Mr. Bicehouse's testimony does not indicate that the valve packing was original to the valve.

Plaintiff also relies on Crane's written discovery responses in this case and in an unrelated case. Therein, Crane generally indicates that it incorporated asbestos-containing packing into its valves and that it sold replacement packing to its valve customers. However, there is no indication whatsoever that Crane supplied such packing to MSA and that Plaintiff was exposed to such packing.

It should also be noted that Plaintiff has not presented competent evidence that Crane specified the use of asbestos

packing in its valves and/or specified that replacement packing must be asbestos-containing. Furthermore, to the extent that Plaintiff may have been exposed to replacement packing supplied by a third party, there is no authority that Crane can be held liable for such exposure as a matter of law. To the contrary, the authority relied upon by Crane in support of its Motion for Summary Judgment indicates that Crane is not subject to such liability. *See Toth v. Economy Forms Corp.*, 571 A.2d 420 (Pa.Super 1989) (scaffolding manufacturer not liable for defective planking that it did not manufacture or supply, but which was subsequently affixed to its product by a third party).

Finally, Plaintiff relies upon the generalized testimony of certain experts in opposition to Crane's Motion for Summary Judgment. These experts generally opine that each and every exposure, "however brief or trivial," contributes to asbestos-related diseases. (See e.g.; Affidavit of David Laman, M.D.; Exhibit 3 of Plaintiff's Consolidated Response to All Defendants' Motions for Summary Judgment). Under the *Gregg* decision, however, these generalized opinions are insufficient

to create an issue of fact where exposure is *de minimus*. 943 A.2d at 226-227.

Under Pennsylvania law, exposure must be "of such a nature as to raise a reasonable inference that [the plaintiff] inhaled asbestos fibers" from the product. *See Andalaro v. Armstrong World Industries, Inc.* 799 A.2d 71, 86 (Pa.Super. 2002) (citations omitted). Plaintiff must also produce evidence that he worked on a regular and frequent basis in the vicinity of a product manufactured or supplied by Crane. *See Wilson v. A.P. Green Industries*, 807 A.2d 922 (Pa.Super. 2002) (applying the *Eckenrod* principles to a mesothelioma claim).

In the case at bar, Plaintiff has failed to set forth specific facts that demonstrate that there is a genuine issue of fact relative to his inhalation of asbestos dust ~~shed from~~ valves or packing specifically manufactured or sold by Crane. Although there is evidence that Crane valves were present at MSA, Plaintiff has not identified evidence that he regularly and frequently worked with or around any Crane asbestos-containing product. As a result, Plaintiff has failed to satisfy the standard set forth in *Eckenrod* and its progeny

relative to successful opposition to a motion for summary judgment predicated on lack of product identification. Accordingly, the Defendant's Motion for Summary Judgment is GRANTED.

Accordingly, We Enter the Following:

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

WALTER MILICH, an individual,	:	CIVIL DIVISION-ASBESTOS
	:	
Plaintiff,	:	A.D. No. 08-10532
	:	
vs.	:	
	:	
ANCHOR PACKING COMPANY, et al.,	:	
	:	
Defendants.	:	

ORDER OF COURT

AND NOW, March 16, 2009, it is hereby ORDERED that the Motion for Summary Judgment of Crane Co. is GRANTED.

BY THE COURT,

Marilyn J. Horan
Judge

CERTIFICATE OF COMPLIANCE

I, Kevin Underhill, an attorney duly admitted to practice before all courts of the State of California and a member of Shook, Hardy & Bacon L.L.P., counsel of record for *amici curiae,* certify that the foregoing complies with the requirements of Rules 8.520 and 8.204 of the California Rules of Court in that it was prepared in proportionally spaced type in Times Roman 13-point font, double spaced, and contains less than 14,000 words as measured using the word count function of "Word 2000."

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Dated: March 9, 2010

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF SAN FRANCISCO)

I am a California resident, over the age of 18, and not a party to the within action. I filed an original and 14 copies of the foregoing Brief by hand delivery with:

Clerk, Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

In addition, I served a copy on the parties in this action, the Court of Appeal, and the Superior Court by placing true and correct copies therefore in sealed envelopes sent by U.S. Mail in first-class postage-prepaid envelopes addressed to:

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