Without Oral Argument

APL-2014-00209
New York County Clerk's Index No. 190196-2010

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,

Respondents,

- against -

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

Defendants,

CRANE CO.,

Appellant.

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF CRANE CO.

THEODORE HADZI-ANTICH
Counsel of Record
DEBORAH J. LA FETRA
Of Counsel

PACIFIC LEGAL FOUNDATION
930 G STREET
SACRAMENTO, CALIFORNIA 95814
TELEPHONE: (916) 419-7111
FACSIMILE: (916) 419-7747

Attorneys for Amicus Curiae Pacific Legal Foundation

Date Completed: December 8, 2014

CORPORATE DISCLOSURE STATEMENT

In compliance with Rule 500.1(f) of the Rules of Practice for the Court of Appeals of the State of New York, Pacific Legal Foundation states the following:

1. *Amicus* is a nonprofit corporation organized under 26 U.S.C. § 501(c)(3).

2. *Amicus* has neither parents nor subsidiaries.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Miscellaneous

Page

PRELIMINARY STATEMENT

Ronald Dummitt worked aboard Navy ships in the boiler rooms for two decades, during which time he was exposed to asbestos dust during the maintenance of valves and gaskets, some of which were insulated with asbestos-containing materials. Crane Co. manufactured other valves on which Dummitt worked, containing no asbestos whatsoever. Thirty years after leaving the Navy, Dummitt contracted mesothelioma. He sued Crane Co., and 67 other defendants, 65 of whom settled before trial and one of whom settled after trial. Although Dummitt worked with at least 20 other manufacturers' equipment used with or containing asbestos, a jury found Crane 99% at fault for Dummitt's illness and awarded him $32 million in non-economic damages, reduced to $8 million by the court. The Appellate Division affirmed and this Court granted review.

Pacific Legal Foundation's amicus brief addresses the policy implications of imposing on a manufacturer a duty to warn against dangers presented by other products that might be expected to be used in tandem with the manufacturer's own product, which in itself presents no danger of harm. While it is entirely consistent with New York tort doctrines that manufacturers have a duty to warn about maintenance procedures regarding their own products, no decision other than that of the court below has held that manufacturers have a duty to warn about dangers of

other products manufactured by other companies that, when disturbed in general maintenance procedures, result in potential hazards.

The court below failed to consider the important public policies that justify line-drawing when it comes to imposition of a duty. There was nothing about the maintenance of the pumps, valves, and turbines themselves that necessitated a warning about its safety. It was only because the insulation for the machinery the Navy chose to use was asbestos insulation, that Dummitt was exposed to asbestos fibers. It is perfectly consistent to hold that manufacturers or suppliers have a duty to warn ultimate users of the hazards inherent in their own products, but not when the missing warning is regarding a product that is not manufactured or distributed by the defendants.

INTEREST OF AMICUS CURIAE

Founded in 1973, PLF is the oldest and largest public interest foundation of its kind in the United States, providing a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and economic liberty. PLF actively engages in research and litigation nationwide over a broad spectrum of public interest issues. In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation created its Free Enterprise Project. The Project seeks to protect the free enterprise system from abusive

regulation, a civil justice system that grants excessive liability awards, and barriers to freedom of contract.

Pursuant to this Project, PLF has participated as amicus in New York courts in cases involving the reach and scope of civil liability systems. *See, e.g.*, *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 944 N.Y.S.2d 452, 967 N.E.2d 675 (2012); *Jamarillo v. Weyerhaeuser*, 12 N.Y.3d 181, 878 N.Y.S.2d 659, 906 N.E.2d 387 (2009). PLF also filed amicus briefs in other state high courts on the issues presented in this case. *See, e.g.*, *O'Neil v. Crane Co.*, 53 Cal. 4th 335, 266 P.3d 987 (2012); *Simonetta v. Viad Corp.*, 165 Wash. 2d 341, 197 P.3d 127 (2008); *Braaten v. Saberhagen Holdings*, 165 Wash. 2d 373, 198 P.3d 493 (2008). PLF attorneys also have published scholarly articles discussing how the expansion of tort liability can hinder the vitality of the free enterprise system. *See, e.g.*, Deborah J. La Fetra, *Medical Marijuana and the Limits of the Compassionate Use Act: Ross v. Ragingwire Telecommunications*, 12 Chap. L. Rev. 71 (2008); Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003).

ARGUMENT

I

LIABILITY SHOULD NOT ATTACH TO MANUFACTURERS FOR FAILING TO WARN OF THE DANGERS RESULTING FROM A SAFE PRODUCT USED WITH DANGEROUS PRODUCTS MANUFACTURED BY OTHERS

The court below held that the manufacturer of a product that contains no asbestos can nonetheless be strictly liable for someone's asbestos-related illness if "the manufacturer of an otherwise safe product purposely promotes the use of that product with components manufactured by others that it knows not to be safe." *In re New York City Asbestos Litigation*, 121 A.D.3d 230, 252, 990 N.Y.S.2d 174 (2014). Specifically the court below found Crane liable because "Crane itself promoted its valves for use with asbestos parts, which could not be considered inherently safe." *Id.* The evidence of this "purposeful" promotion was that, at a time when asbestos insulation was the commonplace industry standard, Crane also anticipated the use of asbestos insulation with its valves, identifying it in certain publications.[1]

[1] Manufacturers first used asbestos in the United States in the late nineteenth century; it was first used commercially as insulation in the 1860s. Paul D. Carrington, *Asbestos Lessons: The Consequences of Asbestos Litigation*, 26 Rev. Litig. 583, 585 (2007). Asbestos use increased significantly over time. United States consumption of asbestos rose dramatically from less than 135,000 metric tons in 1935, to nearly 800,000 metric tons at its highest point in 1974. Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brichman*, 13 Cardozo L. Rev. 1967, 1973 (1992). During the second World War, the Navy was the largest consumer of asbestos, using it for various purposes aboard the expanding fleet. Carrington, *supra*, at 586.

According to the court's analysis, the only way Crane—a manufacturer of a safe, non-asbestos-containing product—could avoid liability is if it had, against all industry practices of decades past, recommended non-asbestos insulation of its valves. For its failure to depart from the then-best practices in the industry, the court held that Crane acted recklessly, and had a duty to warn Dummitt about the dangers of asbestos. *Id.* at 248-55.

The court below attempts to distinguish *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289 (1992), and other cases where this Court limited liability to those manufacturers that actually place a dangerous product into the stream of commerce, on the grounds that Crane knew that asbestos was dangerous and further knew that valves were likely to be insulated with asbestos-containing materials. The court says that Crane was not "*indifferent*" as to the type of insulation used, but affirmatively expected and promoted asbestos insulation. *New York City Asbestos*, 121 A.D.3d at 251. Crane's corporate state of mind regarding the dangers of asbestos, however, do not alter the key fact, which should be dispositive, that Crane's own product was entirely asbestos-free. *See* 4 Toxic Torts Litigation Guide § 33:18 (describing the generally accepted "bare metal" defense); *Faddish v. Buffalo Pumps*, 881 F. Supp. 2d 1361, 1377 (S.D. Fla. 2012) (defendants that were not in the chain of distribution of the dangerous asbestos-containing products that caused injury to the plaintiff could

not be charged with a duty to warn under either negligence or strict liability theories); *Conner v. Alfa Laval, Inc*., 842 F. Supp. 2d 791, 801 (E.D. Pa. 2012) (same).

Instead, the decision below invites asbestos plaintiffs to expand their kitchen-sink approach to finding a solvent defendant and sue manufacturers who cannot be proven to be "indifferent" to the use of complementary asbestos-containing products within their industry. As a practical matter, the holding below would require all manufacturers to warn against *any* possible materials that, when used in conjunction with theirs, could result in malfunction. Courts across the country have uniformly rejected this result, which is particularly pernicious in the asbestos context because the duties are assigned only in retrospect. *See O'Neil*, 53 Cal. 4th at 347-51, 135 Cal. Rptr. 288, 266 P.3d 987 (no liability under strict liability or negligence theories where the defendant neither manufactured nor distributed the asbestos products to which the plaintiff was exposed); *Braaten v. Saberhagen Holdings*, 165 Wash. 2d 373, 198 P.3d 493, 495, 504 (2008) (no liability where asbestos plaintiff failed to show he was exposed to asbestos products manufactured by this particular defendant); *Simonetta v. Viad Corp*., 165 Wash.2d 341, 197 P.3d 127, 137-38 (2008) (no strict liability for failure to warn of products outside the chain of distribution of the dangerous, asbestos-containing products).

A. The Concept of Duty Is a *Limiting* Factor in Tort Law

The law of torts is about line-drawing. *Di Ponzio v. Riordan*, 89 N.Y.2d 578, 583, 657 N.Y.S.2d 377, 679 N.E.2d 616 (1997). It is achieved by formulating rules that, taking into account public policy, balance the interests of economic productivity (which contain the risks inherent in all human endeavor) against the needs of injured plaintiffs. *See, e.g., Bocre Leasing Corp. v. General Motors Corp. (Allison Gas Turbine Div.)*, 84 N.Y.2d 685, 694-95, 621 N.Y.S.2d 497, 645 N.E.2d 1195 (1995) ("Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily upon social policy.") (citations omitted). Courts have long understood that the line of potential liability must be drawn somewhere. *See Prado v. City of New York*, 19 A.D.3d 674, 674-75, 798 N.Y.S.2d 94 (2005) ("[T]he law draws a line between remote possibilities and those that are reasonably foreseeable because '[n]o person can be expected to guard against harm from events which are . . . so unlikely to occur that the risk . . . would commonly be disregarded.' ") (citation omitted).

In drawing that line, courts rely on the concepts of duty, foreseeability, and proximate cause. The duty to use care to avoid injury to others arises from the foreseeability of the risk created. *Di Ponzio v. Riordan*, 89 N.Y.2d 578, 583, 657 N.Y.S.2d 377, 679 N.E.2d 616 (1997). But foreseeability, standing alone, does not

determine whether a duty exists. *De Angelis v. Lutheran Med. Ctr.*, 58 N.Y.2d 1053, 1055, 462 N.Y.2d 626, 449 N.E.2d 406 (1983) ("In fixing the bounds of that duty, not only logic and science, but policy play an important role") (citations omitted).

Tort law has two general purposes for assigning liability to someone who causes harm. The first is compensation. Negligence law seeks to make whole those who have been injured by people who fail to live up to their legal responsibilities. *See Bocre Leasing Corp.*, 84 N.Y.2d at 690, 621 N.Y.S.2d 497, 645 N.E.2d 1195; *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 443, 835 N.Y.S.2d 534, 867 N.E.2d 385 (2007) (damages are designed to make the injured plaintiff "whole"). Second, tort law imposes liability so as to deter conduct that creates an unreasonable risk of injury to others. *Enright v. Eli Lilly & Co.*, 77 N.Y.2d 377, 386, 568 N.Y.S.2d 550, 570 N.E.2d 198, *cert. denied*, 502 U.S. 868 (1991). *See also* Michael S. Jacobs, *Toward a Process-Based Approach to Failure-to-Warn Law*, 71 N.C. L. Rev. 121, 180-81 (1992) ("To the extent that tort law seeks to deter personal injury, a doctrine that encourages manufacturers to spend their dollars and energy effectively to avoid product-related harms is far better suited to consumer interests than one which compensates some consumers generously after the fact, but which does little beforehand to reduce product risk for all consumers.").

Public policies favoring economic enterprise and innovation serve as an important limitation on tort liability. Every act has a potentially infinite number of

consequences, so that if a defendant were required to pay for every potential wrong resulting from an action, economic enterprise and innovation that benefits society could come to a standstill. *See Widera v. Ettco Wire and Cable Corp*., 204 A.D.2d 306, 307, 611 N.Y.S.2d 569 (1994), *leave to appeal denied*, 85 N.Y.2d 804 (1995) (declining to create employer liability for employee's unborn child's alleged exposure to toxins, brought home on the employee's clothes, because it would "expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs"). Particularly when an injury results from a confluence of events, courts are generally agreed that tort liability must be bounded. There is a point at which imposing liability has negative consequences; where there is a serious risk of discouraging worthwhile conduct. *See Enright*, 77 N.Y.2d at 388 (research and development of new prescription drugs would be dampened, and beneficial drugs withheld from the market, if drug companies owe a duty toward "generations not yet conceived").

As Justice Breyer explained, courts must take care to strike an effective balance, because "[s]maller damages would not sufficiently discourage firms from engaging in the harmful conduct, while larger damages would 'over-deter' by leading potential defendants to spend more to prevent the activity that causes the economic harm . . . than the cost of the harm itself." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 593 (1996) (Breyer, J., concurring). As this Court explained,

> [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. It is always tempting, especially when symmetry and sympathy would so seem to be best served, to impose new duties, and, concomitantly, liabilities, regardless of the economic and social burden.

De Angelis, 58 N.Y.S.2d at 1055. *See also Lauer v. City of New York*, 95 N.Y.2d 95-96, 104-105, 711 N.Y.S.2d 112, 733 N.E.2d 184 (2000) (courts should exercise caution in "enlarging the ambit of duty" out of concern for "far-reaching effects in future cases" particularly if the request for an expanded duty "rest[s] largely on the foreseeability of harm"); *Fox v. Marshall*, 88 A.D.3d 131, 139-40, 928 N.Y.S.2d 317 (2011) (public policy precludes holding that a doctor owes a duty to the general to properly diagnose and treat a patient).

Thus, to determine whether a duty exists, courts must balance several factors, "including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability." *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 586, 611 N.Y.S.2d 817, 634 N.E.2d 189 (1994). As to this last factor, courts consider the economics of establishing duty, including defendant's ability to pay damages; as well as the likelihood of opening the floodgates to both real and feigned claims, and the ability of the courts to cope with the new

litigation. *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 33, 407 N.Y.S.2d 874 (1978), *aff'd* 47 N.Y.2d 440 (1979) (declining to create a cause of action for "educational malpractice").

In sum, whenever a court is asked to determine whether a duty exists, in a new or novel set of circumstances, it must "consider the consequences of recognizing a novel cause of action and to strike the delicate balance between the competing policy considerations which arise whenever tort liability is sought to be extended beyond traditional bounds." *Albala v. City of New York*, 54 N.Y.2d 269, 274-75, 445 N.Y.S.2d 108, 429 N.E.2d 786 (1981); *see also Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439, 450, 5 N.E.3d 11 (2013) (refusing to create an equitable medical monitoring cause of action, in part to avoid "the potential for vast uncircumscribed liability") (citation omitted). And while limitation on the scope of a tort duty necessarily means that some plaintiffs will find themselves on the uncompensated side of the line, the courts' responsibility is to "afford[] a principled basis for reasonably apportioning liability." *532 Madison Ave. Gourmet Foods v. Finlandia Ctr.*, 96 N.Y.2d 280, 292, 727 N.Y.S.2d 49, 750 N.E.2d 1097 (2001).

B. Public Policy Supports a Rule That Only Manufacturers Who Place a Dangerous Product into the Stream of Commerce Have a Duty To Warn of the Dangers

In this case, the issue is whether or not Crane Co. had a duty to warn users of products it did not manufacture about the dangers inherent in the use of those other products. The theory adopted by the court below, holding that Crane does have such a duty, contains no logical stopping point (despite the lower court's suggestion otherwise). Under any theory by which a manufacturer of a safe product has a duty to warn of dangers inherent in the manufacture of other products, the potential liability is limitless. Saucepan manufacturers will have to warn of the dangers of grease fires. Jelly manufacturers will have to warn of the danger of peanut allergies. Manufacturers of champagne flutes would be required to warn their ultimate users that consuming alcohol can be dangerous, particularly when combined with the use of other products, such as automobiles. *See* Michael Drahos, *et al.*, *Danger Ahead: The Changing Face of Failure to Warn Claims*, 33 Trial Adv. Quarterly 28, 33 (2014) ("[M]anufacturers of lighters could be liable for harm caused by cigarettes and bullet manufacturers for injuries caused by an accidental gun discharge.").

Such duties would cause disproportionate economic impacts. Modern industrial society is full of potential hazards, and imposing severe costs on parties with only tenuous connections to the harm runs the risk of stifling important economic activity. *See* James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required To*

Rescue Users from Risks Presented by Other, More Dangerous Products, 37 Sw. U. L. Rev. 595, 616 (2008) (If a court holds that a seller of a safe product is strictly liable for injuries caused entirely by other, more dangerous, products, the users and consumers of the safe product "end up compensating (and thereby subsidizing) the users and consumers of the dangerous products, thereby generally discouraging use and consumption of relatively safe products and encouraging use and consumption of relatively dangerous ones.").

Policy considerations counsel against finding a duty in the circumstances present in this case. As Nobel Laureate Friedrich Hayek noted, overreaching liability rules "will normally raise the cost of production or, what amounts to the same thing, reduce over-all productivity." Friedrich A. Hayek, *The Constitution of Liberty* 224 (1960). A presumption against imposing liability is justified because the "over-all cost is almost always underestimated." *Id*. at 225. This underestimation is due to the fact that tort law, if taken to an extreme, has the potential of stifling entrepreneurial activity, driving away investors, and depriving society of jobs, as well as goods and services, that otherwise might have existed. Moreover, liability places the onus on the defendant who has no control to prevent the harm from occurring and offers the warning from a place where the user is neither expecting to see it nor likely to notice

it.[2] *See Rastelli*, 79 N.Y.2d 289, 582 N.Y.S.2d 373, 591 N.E.2d 222, 225-26 (refusing to hold tire manufacturer liable for defective multipiece rim it did not manufacture when manufacturer had no control over production of multipiece rim, had no role in placing rim in chain of distribution, and derived no benefit from its sale); *O'Neil*, 53 Cal. 4th at 363, 135 Cal. Rptr. 3d 288, 266 P.3d 987 ("It is also unfair to require manufacturers of nondefective products to shoulder a burden of liability when they derived no economic benefit from the sale of the products that injured the plaintiff."); *Simonetta*, 197 P.3d at 138 & n.8 (refusing to extend liability to manufacturers outside of chain of distribution when manufacturers lacked control over type of insulation Navy would choose and defendant derived no revenue from asbestos-containing products); *Braaten*, 198 P.3d at 498 (refusing to hold manufacturer liable because "[t]he law generally does not require a manufacturer to study and analyze the products of others and warn users of the risks of those products" (internal quotation marks removed).

[2] Courts that generously impose liability on manufacturers for failure to warn provide "an incentive to sellers to overwarn about product risks, which undermines the effectiveness of product warnings to the ultimate detriment of consumers." Mark Geistfeld, *Inadequate Product Warnings and Causation*, 30 U. Mich. J.L. Reform 309, 310 (1997). This incentive is heightened because "companies are penalized for underwarning but not for overwarning." W. Kip Viscusi, *Individual Rationality, Hazard Warnings, and the Foundations of Tort Law*, 48 Rutgers L. Rev. 625, 666 (1996). If the manufacturers put the warning on the pumps, valves, and turbines, the warning would be seen only after the insulation had been removed for servicing, which presumably would be too late to prevent exposure, requiring a warning that borders on the ridiculous: "If you can read this, you have been exposed to asbestos."

The concern for unseen costs is especially acute in a case like this, where the connection between the alleged wrong and the injury suffered is so distant. *See Pulka v. Edelman*, 40 N.Y.2d 781, 785, 390 N.Y.S.2d 393, 358 N.E.2d 1019 (1976) ("Although it is reasonable to require one person to be responsible for the negligent conduct of another in some instances, it is unreasonable to impose that duty where the realities of every day experience show us that, regardless of the measures taken, there is little expectation that the one made responsible could prevent the negligent conduct."); *Vergara v. Scripps Howard*, 261 A.D.2d 302, 304, 691 N.Y.S.2d 392, *leave to appeal denied*, 94 N.Y.2d 757 (1999) (manufacturer owed no duty to a worker injured while using a machine that had been altered after purchase because the injury was "too attenuated to support liability."); *McPherson v. New York City Hous. Auth.*, 228 A.D.2d 654, 655, 646 N.Y.S.2d 16 (1996) ("The causal connection between a criminal act in an essentially open-air, public area, and any negligence on the part of the defendant, is too attenuated, as a matter of law, to serve as a basis for the plaintiffs' recovery.") If the Court were to find liability in this case, it is difficult to imagine where such liability would stop.

This Court has been extremely reticent to establish new tort doctrines under such circumstances. *See In re New York City Asbestos Litig.*, 5 N.Y.3d 486, 498, 840 N.E.2d 115, 122, 806 N.Y.S.2d 146, 153 (2005) (refusing to find liability in case where wife was injured by laundering husband's asbestos-covered clothing because

"the 'specter of limitless liability' is banished only when the 'class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship'" and there was no relationship between the employer and the wife). Here, the Navy as the employer had a duty to warn its employees of the hazards of asbestos, and the manufacturers of the asbestos-containing insulation had a duty to warn the Navy, but there was no relationship between Dummitt and Crane that can justify imposing a duty on Crane to warn Dummitt of the dangers of asbestos-containing insulation that it did not manufacture, distribute, or install.

II

SPECIAL DUTIES DEVELOPED IN ASBESTOS LITIGATION IMPOSE SERIOUS ECONOMIC HARMS

Asbestos exposure has become one of the primary targets for abusive and exploitative mass tort litigation. New duties developed in asbestos cases are bound to bleed into other types of tort cases, affecting tort doctrine as a whole. Overly expansive tort litigation harms citizens of New York by deterring economic investment and job creation and curbing the availability of goods and services on the market—thus increasing the already-high cost of living. It is important to consider the ramifications of the expansion of liability sought by the Plaintiffs in this case in the context and history of asbestos litigation as a whole.

Asbestos litigation is widely recognized as the epicenter of a massive breakdown in American tort law. *See, e.g., Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 597-98 (1997) (describing the "asbestos-litigation crisis"). According to a 2005 report by the RAND Institute, $54 billion has already been spent on litigation over asbestos-related injuries, more than half of which has gone to "transaction costs," such as attorneys' fees. Stephen J. Carroll *et al.*, RAND Institute for Civil Justice, *Asbestos Litigation* 81 (2005). After 30 years, this litigation

> has spread well beyond the asbestos-related manufacturing and installation industries . . . to touch almost every form of economic activity that takes place in the United States. [The study] found that 75 out of a total of 83 different types of industries . . . included at least one firm that had been named as an asbestos litigation defendant.

Id. Because virtually all manufacturers of products containing asbestos are bankrupt, the plaintiffs' bar has sought out other defendants with peripheral connections to the asbestos industry. Symposium, *The Asbestos Litigation Tsumani–Will It Ever End?*, 9 J.L. Econ. & Pol'y 489 (2013) (panelist Mark A. Behrens describing 97 asbestos-related bankruptcies to date); Steven B. Hantler, *et al.*, *Is the "Crisis" in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1151-52 (2005) ("These 'peripheral defendants' have only an attenuated connection to asbestos, but are now named in asbestos litigation because of their 'deep pockets'; 'the net has spread . . . to companies far removed from the scene of any putative wrongdoing.'").

> [T]he absence of blameworthy solvent defendants does not justify the imposition of expanded theories of liability to those parties who could not prevent the harm. From both compensation and deterrence perspectives, the issue is not whether asbestos victims should receive compensation from some entity, but rather which entity can fairly be called upon to shoulder the financial burden.

Paul J. Riehle et al., *Products Liability for Third Party Replacement or Connected Parts: Changing Tides from the West*, 44 U.S.F. L. Rev. 33, 61 (2009).

Of course, some asbestos cases are justified on the merits. There is no doubt that industrial exposure to dangerous chemicals is properly the subject of tort law. The problem is when courts become willing to bend the rules of tort law in favor of plaintiffs and against "deep pockets" defendants, creating a special subset of asbestos litigation within, and contrary to, fundamental tort principles. James L. Stengel identifies two "fundamental phenomena" that combine to create the asbestos litigation crisis: "claimant elasticity," defined as "the essentially inexhaustible supply of claimants," and "defendant elasticity," defined as "the correspondingly unbounded source of defendants," which stem from "the inability of the asbestos litigation system to discriminate both between those with real asbestos-related injuries and those without, and between defendants who are in fact culpable and those more appropriately viewed as 'solvent bystanders.'" *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 233 (2006). Asbestos litigation creates genuine injustices when it assigns liability onto those parties that are wealthiest rather than parties that

genuinely deserve the blame. Changing the rules of tort liability to establish a duty based on ability to pay rather than actually placing harmful products into the stream of commerce transforms the system from one of justice to one that redistributes wealth on the basis of a jury's subjective feelings of compassion.

CONCLUSION

Allowed to stand, the ruling below imposes upon defendants the role of social insurer, which is not the function of tort law in this state. *Sanchez v. State of New York*, 99 N.Y.2d 247, 253, 754 N.Y.S.2d 621, 784 N.E.2d 675 (2002); *Eiseman v. State of New York*, 70 N.Y.2d 175, 191, 518 N.Y.S.2d 608, 511 N.E.2d 1128 (1987) (college had no duty to protect student from predation from another student, who had a criminal background and prior drug addiction, or to warn the general collegiate community about his past). Pennsylvania Supreme Court Justice Flaherty eloquently described the need for balancing the social benefits and burdens which result from an expansion of tort liability:

> As it is with everything, a *balance* must be struck – certain limits drawn. We are, in the end, dealing with money, and that money must come from somewhere – from someone: the public pays for the very most part by increased insurance premiums, taxation, prices paid for consumer goods, medical services, and in loss of jobs when the manufacturing industry is too adversely affected. A sound and viable tort system – generally what we now have – is a valuable incident of our free society, but we must protect it from excess lest it becomes unworkable and alas, we find it replaced with something far less desirable.

Mazzagatti v. Everingham by Everingham, 512 Pa. 266, 281, 516 A.2d 672, 680 (1986) (Flaherty, J., concurring). The expansion of duty sought by the plaintiffs in this case would lead New York tort law to excess, rendering an attenuated defendant liable to a distant plaintiff.

The decision below should be *reversed*.

DATED: December 8, 2014.

Respectfully submitted,

THEODORE HADZI-ANTICH
Counsel of Record

DEBORAH J. LA FETRA
Of Counsel

By /s/ Theodore Hadzi-Antich
THEODORE HADZI-ANTICH

Attorneys for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF SERVICE

I, Suzanne M. MacDonald, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On December 8, 2014, a true copy of a BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF CRANE CO. was placed in envelopes addressed to:

Jordan C. Fox
Belluck & Fox, LLP
546 Fifth Avenue, 4th Floor
New York, NY 10036-5000
Counsel for Respondent

Eric R. I. Cottle, Esq.
K & L Gates, LLP
599 Lexington Avenue
New York, NY 10022
Counsel for Appellant

Victor E. Schwartz, Esq.
Shook, Hardy & Bacon
1155 F Street, NW, Suite 200
Washington, DC 20004
Counsel for Amicus Curiae, Business Council of New York State

which envelope/envelopes, with postage thereon fully prepaid, was/were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 8th day of December, 2014, at Sacramento, California.

/s/ Suzanne M. MacDonald
SUZANNE M. MACDONALD