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Court of Appeals
of the
State of New York

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

Plaintiff-Respondent,

– against –

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

Defendants,

CRANE CO.,

Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT CRANE CO.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(f), amicus curiae the Chamber of Commerce of the United States of America states that it is a non-profit membership organization, with no parent company and no publicly traded stock.

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QUESTION PRESENTED

In light of widely-recognized principles of fairness and social welfare and a host of traditional decision patterns in American tort law, is it not clear that a manufacturer is under no obligation, morally or legally, to warn of risks presented by products entirely designed, manufactured, distributed, and controlled by others?

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business organization representing 300,000 direct members and indirectly representing the interests of more than three million businesses of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber frequently participates as an amicus curiae in cases raising issues of concern to the Nation's business community, such as this one.

Appellant here asks this Court to upend well-settled tort and products liability law, a subject of great practical significance to the Chamber's members, and a subject of particular expertise of the co-author of this amicus brief, James A. Henderson, Jr., Professor Emeritus at the Cornell Law School. Over a fifty-year career, he has published numerous books and law review articles on the subjects of

tort and products liability law. He also served as Co-Reporter for the Restatement, Third, of Torts: Products Liability (1998) and, since 2008, he has served as Special Master to U.S. District Judge Alvin K. Hellerstein in the New York World Trade Center Disaster Litigation.

STATEMENT OF THE CASE

Amicus adopts Appellant's statement of the case, to the extent relevant to Amicus's arguments.

ARGUMENT

I. INTRODUCTION

The briefs of Appellant Crane Co. and their supporting Amici demonstrate convincingly that Crane Co.'s position is supported by precedent. Rather than repeat those arguments in this brief, Amicus will show that Crane Co. is also supported by widely-recognized normative principles of fairness and social welfare and is consistent with decisional patterns running broadly and deeply through American tort and products liability law. Because the substantive issue in this case concerns the possible adoption by this Court of Plaintiff's nontraditional approach to product manufacturers' duties to warn, considerations of policy are especially important. Amicus cites cases and Restatement provisions in what follows, but

only to show that its normative conclusions are consistent thematically with mainstream American jurisprudence.

II. PLAINTIFF'S OPEN-ENDED, RESCUE-BASED APPROACH REPRESENTS A DEPARTURE FROM MAINSTREAM PRODUCTS LIABILITY TRADITION

A. The Traditional, Mainstream Products Liability Rule Governing a Manufacturer's Duty to Warn, Set Forth in the Restatement of Products Liability, Consists of Three Functional Elements

The traditional rule governing a manufacturer's duty to warn consists of three functional elements: (1) the existence of product-related risks that, while not obvious to users, are knowable and foreseeable by the manufacturer;[1] (2) the existence of an opportunity for the manufacturer to warn product users and others who are in positions effectively to reduce or eliminate those risks;[2] and (3) the fact that the manufacturer designed, manufactured, or otherwise controlled the dangerous aspects of the product about which warnings are allegedly owed.[3] The

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[1] *See* Restatement, Third, of Torts: Products Liability § 2(c), cmt. *a* (1998) ("Most courts agree that, for the liability system to be fair and efficient, the balancing of risks and benefits in judging product . . . marketing must be done *in light of the knowledge of risks . . . reasonably available at the time of distribution*").

[2] *See id.* § 2(c), cmt. *i* ("Depending on the circumstances, Subsection (c) may require that warnings be given not only to purchasers, users, and consumers but also to others . . . *who will be in a position to reduce or avoid the risk of harm.*").

[3] *See id.* § 2(c) ("a product . . . is defective [for lack of warnings] . . . when the . . . *risks of harm posed by the product* could have been reduced or avoided by the provision of reasonable . . . warnings . . . and the omission of the . . . warnings renders *the product* not reasonably safe.").

first two elements—knowledge of the relevant risks and opportunities to act effectively on that knowledge—are characteristics that cost-avoiders of all stripes—including rescuers of strangers—must possess to be effective.[4] The third element performs an anchoring function, connecting the concept of effective cost-avoidance, which has many other tort applications, with the narrower subject of a manufacturer's duty to warn of dangerous products.[5] Under traditional American products liability jurisprudence, a manufacturer must see to it that the design and marketing of its products are nondefective.[6] This means that the manufacturer must see to it that its products, at least generically, are reasonably safe.[7] The requirement that the duty to warn must be anchored to the risks that the manufacturer's own product presents is the element that prevents the duty from

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[4] *See* Guido Calabresi, The Costs of Accidents 135 (1970) ("[Social welfare] would require allocation of accident costs to those acts or activities (or combination of them) which could avoid the accident costs most cheaply."). *See generally* Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 U.C.L.A. L. Rev. 1193, 1195 (1994) ("Product warnings . . . can be effective only when intended recipients [i.e., cost avoiders] are able to receive, comprehend, and act upon the information imparted.").

[5] *See supra* note 3. The italicized portion of § 2(c) in note 3 performs the anchoring function. A manufacturer owes a duty to warn of the risks generated by, and only by, *the manufacturer's own products*.

[6] This is true regarding design and warning claims, which are functionally equivalent to negligence claims. *See* Products Liability Restatement § 2, cmt. *a*.

[7] Section 2(c) of the Products Liability Restatement requires that failures to warn must render products "not reasonably safe." It is reasonable to conclude that a rational distributor's objective, given this prerequisite to liability, would be to warn adequately, thereby rendering the marketing reasonably safe.

expanding into the functional equivalent of a general duty to rescue strangers from risks that do not originate with the distributor's product.[8] Without the anchoring element, a kitchen knife manufacturer could be required to warn against the possibility that food prepared with the knife is spoiled, or that the kitchen floor might be slippery. Discussions that follow rely on further examples to explain why the third element of the traditional formulation of the duty to warn is a vital prerequisite of that duty, anchoring the concept of product warnings to principles of welfare, fairness, and common sense.

B. Plaintiff's Proposed Approach to Product Warnings Eliminates the Third Element of the Traditional Rule, Thereby Condoning Vaguely-Formulated, Open-Ended Responsibilities that Approach General Duties to Rescue

As indicated, the third element of the traditional rule governing failure to warn—that to owe a duty to warn the defendant must have designed, manufactured, distributed, or otherwise controlled the dangerous aspects of the product or other environmental agent that caused the plaintiff's harm—establishes

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[8] For a recent treatment of the duty to rescue, *see* James A. Henderson, Jr., et. al., *The Torts Process* 244-272 (8th ed. 2012). Section 37 of the Restatement, Third, of Torts: Liability for Physical and Emotional Harm (2010) rejects a general duty to rescue on the part of actors who have not created risks of harm to those requiring rescue, subject to specific exceptions not relevant in the instant case. Chief among the exceptions are the fact that the potential rescuer's conduct caused the other to require rescue and the existence of a preexisting relationship between the potential rescuer and the one requiring rescue. *See* Henderson, *supra*, at 244.

common-sense limits that prevent a product manufacturer's responsibility regarding warnings from approaching a wide-open duty to rescue. To try to support Crane Co.'s liability in this case, Plaintiff urges this Court to eliminate the anchoring element and transform the traditional liability rule into one of exceptional open-endedness.[9] Discussions that follow in Part III consider the welfare and fairness implications of Plaintiff's open-ended rescue-like approach. For now, it will be useful to describe the sorts of fact patterns that, although clearly rejected by the traditional rule, would arguably support liability under Plaintiff's more open-ended approach.

Before considering hypothetical fact patterns, it will assist understanding to eliminate several red herrings introduced by Plaintiff. First, when a manufacturer's product contains a defectively-designed component part that subsequently must be replaced with an identically-designed component part manufactured by another

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[9] This Court rejected such an attempt by the plaintiffs in *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001). For further discussion of the case, *see infra* note 63 and text accompanying. Although plaintiffs did not even allege that the defendants' guns were defective, plaintiffs claimed that defendants negligently marketed their guns, eventually leading to harm to victims of gun violence. The two elemental allegations, absent the third anchoring element, were: first, defendants' general knowledge that large numbers of their guns enter the illegal market and are used in crime; and second, defendants' ability to exercise control over the marketing and distribution of their guns. Referring to the potentially limitless liability that would follow from plaintiffs' approach, this Court rejected plaintiffs' attempt to ignore the anchoring element. *See infra* note 64 and accompanying text.

distributor and the defective aspect of the replacement component's design subsequently causes harm, the original manufacturer is properly held liable for the defective aspect because the original manufacturer created the design of the later-installed replacement part.[10] Plaintiff wrongly insists that this is an example of the original manufacturer being held liable for the later distributor's design defect.[11] In truth, it is an example of the original manufacturer being held *for its own design defect*. Thus, Plaintiff's insistence that the first manufacturer is being held for the second manufacturer's defective product, is flat out wrong. The earlier decision by this Court imposing design liability on the facts just stated[12] represents, instead, an application of this Court's traditional rule.

Plaintiff is equally in error when he asserts in his brief that the instant case involves synergism between Crane Co.'s valves and the asbestos-containing gaskets distributed by others and introduced by GM, the manager of the

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[10] Note that the original manufacturer did not *manufacture* the replacement door; but it *designed* the door, thereby supplying the anchoring element and justifying liability under the traditional rule.

[11] *See* Brief for Plaintiff-Respondent at 4: "*Sage* [the case described in the text] explicitly found that a manufacturer could be liable for injuries arising from a [design] defect associated with a replacement that it did not control, distribute or otherwise directly interact with." For Plaintiff's more extended discussion *see id.* at 45-49.

[12] *Sage v. Fairchild-Swearingen Corp.*, 70 N.Y.2d 579 (1987).

environment in which the valves functioned as components.[13] Synergism occurs when a combination of different products presents a total level of risk that is greater than the sum of the risks that each product presents separately from the other.[14] When synergism occurs, each of the contributing products is a concurrent cause of the plaintiff's harm.[15] However, in the instant case, it is indisputable that Crane Co.'s valves did not generate the heat that caused the asbestos in the other distributors' gaskets to become dangerously friable. GM's system did that, independently of Crane Co.'s valves. Although New York failure-to-warn jurisprudence recognizes synergism as a basis of liability,[16] the record in this case makes it indisputably clear that synergism between Crane Co.'s bare-metal valves and the asbestos-containing gaskets produced, distributed and controlled by others did not occur.[17]

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[13] *See* Brief for Plaintiff-Respondent at 49-55.

[14] *See generally* James A. Henderson, Jr., *Requiring Sellers of Safe Products to Rescue Users From Risks Presented by Other, More Dangerous Products*, 37 Sw. L. Rev. 595 (2008).

[15] *See, e.g., Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222, 225-226 (N.Y. 1992) (acknowledging that where the combination of one sound product with another sound product creates a dangerous situation, the manufacturers/distributors of both products have a duty to warn).

[16] *Id.*

[17] For factual support for this conclusion *see* Rely Brief for Appellant at 9-10.

Consider now the sorts of liability claims that Plaintiff's nontraditional, open-ended approach would generate. Regarding friable asbestos, the manufacturers and distributors of a limitless number of products used in proximity to asbestos-containing systems similar to GM's system in the instant case would presumably be required to warn a large number of downstream users and bystanders. Those exposed to liability would potentially include the distributors of all the components in such systems, including piping, pipe hangers, nuts, bolts, washers, clamps, gauges, and virtually limitless examples of otherwise nondefective products attached to or used in connection with other asbestos-containing products.[18] There is no principled basis for limiting application of Plaintiff's open-ended approach to asbestos. Thus, asbestos may be the product area where tort plaintiffs most need new industrial defendants to pay for their injuries;[19] but Plaintiff's expanded approach would apply to countless other products. For example, manufacturers of swimwear would presumably be required to warn of dangerous modes of water sports not otherwise obvious;[20] manufacturers of workplace apparel might well be required to warn of dangers in

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[18] For a real-life example of what could develop *see infra* notes 28-32 and text accompanying.

[19] Amicus does not mean to impugn Plaintiff's motives in this regard. Members of the plaintiffs' bar owe a duty to pursue every plausible possibility on behalf of their clients. But in considering questions of social policy, this Court must keep its eyes open to the realities. For a factual summary *see* Brief of Amici at 1-6.

[20] For variations on the swimwear hypothetical *see supra* note 14.

work environments including the nonobvious dangers presented by power equipment;[21] and distributors of matches and lighters would presumably be required to warn of the hidden risks of smoking.[22]

Is it an adequate response to these difficulties to insist that, while the claims would in most instances reach the jury, excessive liability would be avoided by instructing jurors to find for the defendant if they find that the relevant risks were not *reasonably* foreseeable? Such a response would miss the mark for several reasons. First, courts have held that when a product distributor is threatened with potentially limitless liability, it can be protected adequately only by a liability rule that affords protection in appropriate cases as a matter of law.[23] An open-ended approach to legal duty that sends claims to the jury on vague reasonableness instructions unfairly exposes actors to open-ended, potentially limitless liability. And second, such a vaguely formulated duty would force manufacturers to investigate expansively and to supply redundant, arguably useless warnings in many instances, thereby reducing rather than enhancing social welfare. It follows that if the duty to warn in the instant context is to avoid potentially limitless

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[21] For an example of such a warning actually proposed by a plaintiff *see* infra notes 25-28 and text accompanying.

[22] Manufacturers of ash trays would similarly owe such a duty to warn, as would manufacturers of coffee cups and saucers, which, under Plaintiff's proposed approach, would be foreseeable substitutes for ash trays.

[23] *See infra* notes 53-55 and accompanying text.

liability, it must do so by anchoring that duty to risks presented by the manufacturer's own products.

At this point, one might be tempted to criticize the author of this Amicus brief for having an overactive imagination. But if Plaintiff were to convince this Court to eliminate the limiting, anchoring third element of the traditional rule regarding manufacturers' duties to warn, these arguably absurd examples would be virtually certain to arise. That such an assessment is realistic is suggested by a Louisiana decision involving a hand-held electric drill, the hidden internal sparks of which triggered an explosion when used in a confined, gas-filled area.[24] The plaintiff argued that the manufacturer should have attached a warning of the risks of explosion on the drill itself. The manufacturer included such warning in the owner's manual, but did not attach it to the drill itself. The plaintiff's main difficulty was to show how an adequate warning could have been designed to reach remote users in the field. Perhaps believing that he would appear excessively result-oriented to suggest that the manufacturer should have warned only of explosions, the result that caused his harm, the plaintiff argued that a tag attached to the drill should have warned of at least ten important risks. These proposed warnings included:

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[24] *See Broussard v. Continental Oil Co.*, 433 So. 2d 354 (La. App. 1983), *cert. denied*, 440 So. 2d 726 (La. 1983).

> Don't abuse cord; Wear proper apparel; Don't use in damp areas; Use proper extension cords outdoors; Don't touch metal parts when drilling near any electrical wiring; Remove tightening key; Unplug to change bits; Use safety glasses; Avoid gaseous areas; Secure work.[25]

The verdict and judgment at trial were for the manufacturer. Affirming that outcome, the appellate court concluded "We are not impressed with plaintiff's [list of suggested warnings.]"[26] The court reasoned that limiting plaintiff's proposal to only ten warnings was essentially arbitrary; that even ten warnings would be confusing and would be more than users could deal with effectively; and that the suggested warning about the risk of explosion—"Avoid gaseous areas"—was too abbreviated and was thus inadequate.[27] The court concluded that, given these difficulties, the only alternative was to include an adequate warning in the owner's manual, which presumably the defendant had done. Amicus offers this Louisiana decision as a real-life illustration of the sorts of difficulties that courts would routinely confront if manufacturers were forced to respond to the open-ended failure-to-warn approach urged by Plaintiff in the instant case. The decision also suggests the sorts of expansive warnings—e.g., "wear proper apparel," "use proper extension cords outdoors"—that could be expected under Plaintiff's approach.

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[25] *See* 433 So. 2d at 358.

[26] *Id.*

[27] *Id.*

III. PLAINTIFF'S SUGGESTED DEPARTURE FROM TRADITION IS BOTH UNFAIR AND DETRIMENTAL TO SOCIAL WELFARE

A. Judicial Policy Analyses Are Necessary in Connection with Proposals for Change

Crane Co.'s briefs respectfully but correctly criticize the decision of the Appellate Division in this case for failing to mention, let alone review, the policy reasons supporting its rejection of the limits built into the traditional failure-to-warn rule.[28] In response, Plaintiff concedes that policy considerations should accompany proposals for change, but insists that the radically open-ended rule Plaintiff advocates represents tradition and therefore the court below, agreeing with tradition, was not required to consider underlying social policies.[29] Plaintiff is clearly wrong on at least two counts: First, Plaintiff, not Crane Co., is the party urging a nontraditional, unanchored duty to warn; and second, courts confronting disputes over existing law should address policy implications regardless of which side is seeking change. In the discussions that follow, Amicus addresses the important policy issues that Plaintiff's Brief dismisses as irrelevant.

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[28] *See* Appellant's Brief at 22-26.

[29] *See* Plaintiff's Brief at 106.

B. The Social Policy Objectives of American Tort and Products Liability Law: Two Major Perspectives Dominate

By nearly unanimous consent, American tort law serves two important policy objectives: increasing social welfare, or allocative efficiency, and achieving fairness, or corrective justice.[30] The first of these objectives is instrumental in nature; the threat of tort liability strengthens incentives for actors to invest optimally in precautions, thereby avoiding unnecessary accidents and achieving optimal levels of risky activities.[31] The second objective of tort is noninstrumental; courts seek to achieve fairness not as means to external welfare ends, but as internal ends in themselves.[32] Although some legal scholars insist that one or the other of these objectives must dominate,[33] New York decisions recognize both as

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[30] *See generally* Louis Kaplow & Steven Shavel, Fairness versus Welfare xvii (2002) (Innovations of fairness and justice are the norm in the legal academy.) *See also Hamilton v. Baretta U.S.A. Corp.*, *supra* note 9, 750 N.E.2d at 1061 ("[J]udicial resistance to the expansion of duty grows out of practical concerns both about *potentially limitless liability* and about *the unfairness of imposing liability for the acts of another*.").

[31] Regarding the objective of avoiding wasteful accidents, *see* James A. Henderson, Jr., The Torts Process 35-36 (8th ed. 2012); regarding the objective of achieving optimal levels of risky activities *see id.* at 473-474.

[32] *See* Kaplow & Shavell, *supra* note 30 at 38-45.

[33] For the view that corrective justice prevails whenever its principles conflict with principles of social welfare, *see* Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 U.C.L.A. L. Rev. 621 (2002). For the view that principles of social welfare prevail, *see generally* Kaplow & Shavell, *supra* note 30.

legitimate.[34] The discussions that follow make clear that neither social welfare nor fairness principles support Plaintiff's nontraditional, unanchored approach to a manufacturer's failure to warn.

C. Social Welfare Principles Support the Traditional Failure-to-Warn Rule Relied on by Crane Co. But They Do Not Support Plaintiff's Alternative, Open-Ended Approach

As indicated, whether or not a proposed liability rule will enhance public welfare is a primary consideration whenever courts decide whether to expand actors' responsibilities beyond traditional limits. Important considerations in gauging a warning-based liability rule's potential for deterring wasteful conduct are whether: (1) reasonable manufacturers would be able to determine the existence, nature, and seriousness of the risks to product users in the field;[35] (2) reasonable manufacturers could identify those at risk and could reasonably assume that users are unaware of the risks;[36] (3) reasonable manufacturers could reach remote users with adequate warnings and, upon receiving the warnings, users could act effectively to reduce or avoid those risks;[37] and (4) typically the risks are

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[34] *See supra* note 30 and text accompanying.

[35] *See* Restatement of Products Liability § 10(b)(1), relating to post-sale duties to warn. This provision, together with the three that follow, help courts to respond to motions regarding which claim should reach the jury. As Comment *a* makes clear, courts should carefully examine and assess the adequacy of plaintiff's proof.

[36] *See* Restatement of Products Liability § 10(b)(2).

[37] *Id.* § 10(b)(3).

sufficiently great to justify the significant burdens of providing such a warning.[38] Under the traditional rules governing manufacturers' duties to warn of the risks presented by their own products, all of these considerations are likely to support liability in appropriate cases. Thus, a reasonable manufacturer presumably would know the risks presented by its own product, and could at low cost identify the persons at risk. And a reasonable manufacturer could relatively easily gauge the need for, and likely effectiveness of, warnings about its own products. Because users to whom warnings would be given are typically purchasers of the manufacturer's own products, reaching such users at time of distribution would likely be feasible and presumably could be accomplished at relatively low cost. Moreover, on the assumption that product warnings in many cases are likely to generate significant savings in accident costs, reasonable warnings are likely to be worth making. Thus, on reasonable assumptions, principles of welfare-enhancement justify the traditional duty to warn of the risks created by a manufacturer's own products.

Now consider the likely welfare effects of the unanchored, rescue-like approach urged by Plaintiff. As discussed earlier, under Plaintiff's approach, a manufacturer of a well-designed and well-manufactured product such as bare metallic valves would owe a duty to warn, at potentially high cost, about a limitless

[38] *Id.* § 10(b)(4).

number of other dangerous products and environmental elements neither created by the manufacturer not within its physical control at any time. Even quite reasonable manufacturers could not be expected to discover or understand all such possibilities and it would be costly for them to educate themselves across such a broad spectrum of possibilities. Identifying down-the-line users and reaching them with meaningful warnings would also be problematic and costly.[39] Moreover, if the risks of asbestos-containing gaskets are presumed to be widely known, and gasket manufacturers and other peripheral players are already supplying warnings, it is questionable whether redundant warnings from valve manufacturers could do much good or deliver much in the way of marginable social benefits.

In sum, Plaintiff's open-ended approach to the duty to warn, based on naked foreseeability and opportunity,[40] would not enhance scarce resources but rather would waste them. One can understand how busy courts might be seduced by the siren call of a claim to warn of all foreseeable risks whatever their sources. After

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[39] Comment *i* to Products Liability Restatement § 10(b)(4) observes: "Compared with the costs of providing warnings attendant upon the original sale of a product, the costs of providing post-sale warnings are typically greater. In the post-sale context, identifying those who should receive a warning and communicating the warning to them can require large expenditures." Again, the instant case does not involve a claim of breach of post-sale duty to warn. But the logistical problems of trying to warn about another manufacturer's product are fairly closely analogous to the problems accompanying post-sale warnings. *See supra* notes 24-27.

[40] *See supra* notes 1 and 2 and text accompanying.

all, everyone knows that friable asbestos is dangerous, and asking valve manufacturers to warn users of other manufacturers' gaskets might possibly function as a reminder for someone down the line. However, as Plaintiff recognizes, the rule he advances is not, and in principle should not be, limited to asbestos-containing elements in the valves' broadly varying environments of use.[41] Because Plaintiff seeks to expand manufacturers' traditional duties to warn, it is incumbent on this Court to consider the socially wasteful effects, over time, likely to accompany Plaintiff's anchorless, open-ended approach. Simply stated, Plaintiff's proposal would not enhance welfare, but would diminish it.

D. Fairness Principles Support the Traditional Failure-to-Warn Rule Relied on by Crane Co. But They Do Not Support Plaintiff's Alternative Open-Ended Approach

Not only would Plaintiff's unanchored, open-ended approach likely be wasteful of scarce resources and thus detrimental to social welfare, it would also be unfair to product manufacturers to whom it applied. Even if this Court were inclined toward succumbing to the lure of the argument that holding manufacturers liable for failing to warn of risky products created and controlled by others might somehow help reduce harm to someone, this Court would have to confront the unfairness to manufacturers of doing so. Properly assessed, Plaintiff's approach condones using otherwise-faultless manufacturers of defect-free products that did

[41] *See* Brief for Plaintiff-Respondent at 101-103

not cause plaintiffs' harm as convenient vehicles with which to compensate the victims of other, faulty manufacturers' defectively-designed and marketed products.[42] The unfairness of such an arrangement resides not only in the fact that liability may be crushing but also that tort law would be imposing fault-based liability[43] on manufacturers who: (1) often cannot adequately comprehend what is being demanded of them—e.g., how broadly must they investigate to discover strangers who may require rescue?; (2) cannot obtain or verify the facts necessary to comply with those demands—e.g., which individuals fall into the categories of those requiring rescue?; and (3) are unable, in any event, adequately to conform to the demands imposed upon them—e.g., by what mechanical means are they to deliver the relevant risk information?[44]

Moreover, the unfairness of Plaintiff's proposed expansive approach has a significant and unfair wealth-transfer dimension. The manufacturers that initially bear the increased liability costs generated by Plaintiff's approach would, if the costs do not force them directly into bankruptcy, presumably pass on those costs to

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[42] This Court has recognized this application of the fairness norm. *See supra* note 30.

[43] Comment *a* to § 1 of the Products Liability Restatement makes clear that, in connection with design and failure-to-warn defects, the test for defect is essentially the same as the test for negligence.

[44] For a process analysis of why courts have rejected a general duty to rescue, labeling the norms aimed at avoiding these three shortcomings as comprehensibility, verifiability, and conformability, *see* James A. Henderson, Jr., *Process Constraints in Tort*, 67 Cornell L. Rev. 901 (1982).

their customers and shareholders. Given that the manufacturer's products are not defective in design and did not proactively cause anyone to suffer harm, the manufacturer's liability costs would constitute the equivalent of a no-fault excise tax imposed on innocent parties. And who would receive the benefits of this tax? Not simply the victims of the defective products—here, asbestos-containing gaskets—that caused the plaintiffs' harm, but also the shareholders and other customers of the at-fault corporations. In effect, then, Plaintiff's approach would constitute a no-fault tax on the innocent in order to subsidize the guilty. Amicus submits that such an arrangement would be unfair in the extreme.[45]

IV. NEARLY UNIVERSAL DECISION PATTERNS IN TORT INDICATE THAT PLAINTIFF'S UNANCHORED, RESCUE-BASED DUTY TO WARN REFLECTS BAD SOCIAL POLICY

A. The Patterns That Follow Reveal That Plaintiff's Approach Is Out of Step With Deep Rhythms in American Tort Law and Social Policy and Thus Constitute Strong Circumstantial Evidence That Plaintiff's Proposal Reflects Bad Social Policy

While the tort decisions examined below may not be controlling precedents, Amicus offers them as analogs to the open-ended duty-to-warn approach advanced by Plaintiff. That courts in New York and elsewhere have nearly unanimously rejected the approaches in these analogous cases suggests that Plaintiff's position

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[45] *See Hamilton v. Beretta U.S.A. Corp.*, quoted in note 61, *infra*: "[J]udicial resistance to the expansion of duty grows out of . . . the unfairness of imposing liability [on one actor] for the acts of another."

in the instant case deserves the same negative response. If there were only two or three such decisions, Amicus might hesitate to draw attention to them. But there are many more than that, as the following discussions will attest.

B. Traditional Examples, Drawn from Outside the Products Liability System, Place Workable Boundaries on Rules of Recovery and Duties of Care

The classic example of American courts refusing to recognize open-ended legal duties of care is their traditional rejection of a general duty to rescue strangers whom the defendant actor has not placed at risk.[46] To serve as fair and effective guides to behavior, rules imposing duties to take affirmative action must allow those actors to whom the duties are addressed to understand what is being asked of them, to verify the factual elements that trigger duties to act, and to conform to what the actors are being asked to do.[47] A *general* duty to rescue strangers would necessarily be vague and open-ended—e.g., one must rescue strangers whenever doing so will generate social welfare benefits that exceed the costs of rescue. Moreover, it would often be difficult to determine who needs warnings and how to get warnings to them. Such a legal standard would not satisfy the above-stated conditions for effectiveness and fairness and, not surprisingly, courts refuse to

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[46] *See supra* note 8, citing Restatement, Third, of Torts: Liability for Physical and Emotional Harm § 37 (2010).

[47] *See supra* note 44 and text accompanying.

impose such a duty.[48] However, courts do recognize more focused, formal exceptions to the general no-duty rule that avoid the difficulties of an open-ended general duty to rescue downstream strangers.[49]

Judicial denial of recovery for pure economic losses—sometimes referred to as pure *financial* losses—is another example of American courts' refusal to impose open-ended rules of recovery that are likely to lead to potentially unlimited liabilities.[50] A leading decision in admiralty,[51] involving an oil spill that disrupted shipping in a large, commercially busy harbor, explains why a general rule denying recovery for pure economic or financial losses is necessary:

> The number of persons suffering foreseeable financial harm in a typical accident is likely to be far greater than those who suffer traditional (recoverable) physical harm. The typical downtown auto accident, that harms a few persons physically . . . , may well cause financial harm (e.g., through delay) to a vast number of potential plaintiffs. . . . To use the notion of "foreseeability" . . . to separate the financially injured allowed to sue from [those] not allowed to sue would draw vast numbers of injured

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[48] *See supra* note 51 and text accompanying.

[49] *See* James A. Henderson, Jr. et. al., *The Torts Process* 244 (8th ed. 2012) (Two major exceptions are (1) the fact that defendant placed plaintiff in a position to require rescue and are (2) a preexisting relationship between defendant and plaintiff.). Observe that neither exception is available on the instant facts.

[50] *See 522 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc.*, 750 N.E.2d 1098 (N.Y. 2001) (emphasizing problem of potentially unlimited liability, the Court denied liability as a matter of law.).

[51] *See Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50 (1st Cir. 1985).

> persons within the class of potential plaintiffs in even the most simple accident cases.[52]

The court goes on to observe that "courts cannot weigh or apply [the relevant factors] case by case."[53] As a consequence, courts "have spoken of a general principle against liability for negligently caused financial harm, while creating many exceptions."[54] In doing so, it is necessary "to consider exceptions by class rather than case by case."[55] These same observations might be made regarding the approach to manufacturers' duties to warn advocated by Plaintiff in the instant case. Requiring a manufacturer to warn of a potentially large number of other products would be equally open-ended and impossible to manage on a case-by-case basis; such an approach could very well expose a manufacturer of nondefective valves to crushing liability for huge quantities of harm caused by asbestos contained in gaskets neither created nor controlled by the valve manufacturer.

Yet another example of American courts rejecting an open-ended, potentially limitless rule of recovery involves tortfeasors' exposures to liability for mental and emotional upset suffered by persons who are neither physically harmed

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[52] *Id.* at 54.

[53] *Id.* at 55.

[54] *Id.* at 56.

[55] *Id.*

nor placed at risk of such harm by the defendant's conduct. In a leading case decided by this Court, a dentist sought to recover, *inter alia*, for his emotional upset caused when anesthesia equipment rebuilt by defendant caused a patient to overdose and die in the dentist's arms.[56] Denying recovery against the machine rebuilder for the dentist's emotional upset as a matter of law, this Court observed that "even as to a [person such as the plaintiff dentist] to whom a duty is owed, such [emotional] injury is compensable only when [it is] a direct, rather than a consequential, result of the breach."[57] If the anesthesia machine had exposed the dentist to risk of physical injury, recovery for his upset from that exposure would be considered direct, and thus appropriate; but recovery is not warranted when the dentist's emotional upset flows from his witnessing harm to another, even a patient. This Court concluded:

> If the distinction thus drawn [as a matter of law] appears over-fine that is the inevitable result of the fact that the drawing of any line necessarily differentiates between close cases. But to extend the duty as plaintiff argues . . . would face Trial Judges and juries with a distinction extremely difficult to articulate or conceptualize . . . allowing recovery for emotional injury by the dentist but [not by] members of the patient's family [who did not witness the accident.][58]

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[56] *See Kennedy v. McKesson Co.*, 448 N.E.2d 1332 (N.Y. 1983).

[57] *Id.* at 1335.

[58] *Id.* at 1336.

The foregoing observations by this Court help to explain both the need for formal line-drawing in defining duties of care and rules of recovery, thereby supporting judicial rulings as matters of law, and the need to draw those lines fairly and sensibly. The traditional rule invoked by Crane Co. here not only draws boundaries that are manageable in litigation, but does so in a way that makes good sense—product manufacturers should, in fairness, be responsible for, but only for, the risks they create in the course of distributing products.

This Court voiced the same concerns more recently when it rejected as a matter of law a claim to recover the costs of medical monitoring incurred by a heavy smoker who, although not manifesting any physical injury, plausibly claimed to be at increased risk of lung cancer due to his smoking.[59] While this Court was willing to consider medical monitoring claims on behalf of plaintiffs who have already manifested physical injury, eliminating that boundary element would divert scarce resources to less deserving plaintiffs and would threaten limitless, crushing liability:

> [D]ispensing with the physical injury requirement could permit "tens of millions" of potential plaintiffs to recover monitoring costs, effectively flooding the courts while concomitantly depleting the purported tortfeasor's resources for those who have actually sustained damage. Moreover, it is speculative, at best, whether asymptomatic plaintiffs will ever contract a disease; allowing them to recover medical monitoring costs without first

[59] *See Caronia v. Philip Morris U.S.A., Inc.*, 5 N.E.3d 11 (N.Y. 2013).

> establishing physical injury would lead to the inequitable diversion of money away from those who have actually sustained an injury as a result of the exposure.[60]

In this case, the "inequitable diversion of money" under Plaintiff's unbounded proposal for change would consist of allowing users of one defective product that caused their injuries—the asbestos-containing gaskets—to be subsidized by the distributors of another product—Crane Co.'s valves—that were neither defective nor a cause of plaintiffs' injuries.[61]

American tort law contains many other examples of ways that our courts have imposed formal boundaries on rules of recovery and duties of care. This discussion will consider one more—a fairly recent decision by this Court denying a claim against a group of firearm manufacturers for adopting allegedly negligent patterns of marketing handguns so that too many guns end up in the hands of criminals and other untrustworthy users.[62] In much the same manner as does Plaintiff in the instant case, the plaintiffs in the handgun earlier case argued that foreseeability of risk coupled with opportunity to act supported a duty by defendants to market the handguns so as to avoid injuries to the plaintiffs' relatives. In dismissing plaintiffs' claims as a matter of law, this Court explained:

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[60] *Id.* at 18.

[61] *See supra* note 45 and text accompanying.

[62] *See supra* note 9, *Hamilton v. Beretta U.S.A. Corp.*

> Foreseeability, alone, does not define duty—it merely determines the scope of the duty once it is determined to exist. . . . The injured party must show that a defendant owed not merely a general duty to society but a specific duty to him or her. . . . That is required in order to avoid subjecting an actor "to limitless liability to an indeterminate class of persons. . . ." [citation omitted.] We have been cautious . . . in extending liability to defendants for their failure to control the conduct of others. . . . This judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another.[63]

No clearer statement could be found expressing the theme running through the decisions here being considered—that to enhance social welfare and achieve fairness, courts must place sensible boundaries on the duties owed in tort. When Plaintiff argues that a manufacturer should be responsible for failing to warn remote users about the risks presented by products and environmental elements that the manufacturer neither created nor in any way controlled, Plaintiff fails to recognize, let alone come to grips with, the considerations raised in the cases discussed above.

C. Traditional Examples, Drawn from Within the Products Liability System, That Place Workable Boundaries on Rules of Recovery and Duties of Care

As one might expect, the same pattern of judicial boundary-setting in tort law, described above, also runs through the American system of products liability. This section considers examples that, taken together, reveal this pattern clearly.

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[63] *Id.* at 1060.

Rather than relying exclusively on specific judicial decisions as examples, what follows also uses black-letter Sections and Official Comments from the Restatement, Third, of Torts: Products Liability (1998). None of the examples about to be discussed is directly applicable here. Moreover, the Restatement is not binding legal authority. However, the organization that sponsors Restatements—the American Law Institute—structures them to express rules and principles that represent majority positions and, where none such are available, that represent the best-reasoned positions among recognized alternatives.[64] Thus, the Restatement of Products Liability is an appropriate source of examples upon which to rely in an effort to identify a discernable pattern in recent American products liability decisions.

A troublesome issue that confronted the drafters of the Products Liability Restatement concerns the exposure to liability of manufacturers of nondefective component parts that are subsequently combined with components made by others to produce integrated end-products that, because of synergistic risk enhancement, are defective in design. American courts refuse to impose liability on manufacturers of nondefective components unless those manufacturers substantially participate in, and thus to a significant degree control, their

[64] *See generally* James A. Henderson, Jr. et. al., *The Torts Process* 10-11 (8th ed. 2012).

integration of the components into the finished products.[65] An Official Comment to the Restatement black-letter Section confirming this position observes that:

> Imposing liability would require the component seller to scrutinize another's product which the component seller has no role in developing. This would require the component seller to develop sufficient sophistication to review the decisions of the [presumably expert] business entity that is already charged with responsibility for the integrated product.[66]

Regarding a component manufacturer's duty to warn, another Official Comment observes:

> [W]hen a sophisticated buyer integrates a component into another product, the component seller owes no duty to warn either the immediate buyer or ultimate consumers of dangers arising because the component is unsuited for the special purpose to which the buyer puts it. To impose a duty to warn in such a circumstance would require that component sellers monitor the development of products and systems into which their components are to be integrated.[67]

The facts in the instant case do not call for application of the rules just described—Crane Co.'s valves did not contribute synergistically to cause the assembled end-product to be unacceptably dangerous. But the principles at play strongly suggest, by analogy, that this Court should reject Plaintiff's insistence that Crane Co. owed a duty to warn of risks entirely created by other defendants' products over which Crane Co. exerted no control.

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[65] *See* Restatement, Third, of Torts: Products Liability § 5 (1998).

[66] *Id.* cmt. *a*.

[67] *Id.* cmt. *b*.

Another difficult issue concerns a manufacturer's duty to warn about risks that become known only after the time of original distribution. That courts must recognize some version of a post-sale duty to warn is clear.[68] However, although such a duty would not, as it would in this case, involve warning of risks presented by other distributor's products, post-sale duties to warn must be bounded and limited lest they give rise to the sorts of open-ended, potentially crushing responsibilities that American courts are loathe to recognize. The solution that the drafters of the Products Liability Restatement adopted was to recognize a post-sale duty to warn "if a reasonable person . . . would provide such a warning"[69] and then to impose four specific preconditions limiting the circumstances in which a reasonable manufacturer would undertake to warn,[70] including the requirement that "the risk of harm is sufficiently great to justify the burden of providing a warning."[71] The first Official Comment to the operative Restatement Section includes observations that resonate with the major points in this brief:

> [A]n unbounded post-sale duty to warn would impose unacceptable burdens on product sellers. The costs of identifying and communicating with

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[68] Viewed as a form of rescue, here the post-sale duty to warn rests on the classic exception based on the rescuer's conduct having placed the plaintiff in a position to require rescue. In the instant case no similar basis for an exception exists because Crane Co.'s valves did not place the Plaintiff in need of rescue via warnings.

[69] *See* Restatement, Third, of Torts: Products Liability § 10(a) (1998).

[70] *Id.* § 10(b).

[71] *Id.* § 10(b)(4).

> product users years after sale are often daunting. Furthermore, [i]f every post-sale improvement in a product design were to give rise to a duty to warn users of continuing to use the existing design, the burden on product sellers would be unacceptably great. . . . In deciding whether a claim . . . should reach the trier of fact, the court must determine whether the requirements . . . are supported by proof. . . . In light of the serious potential for over-burdening sellers . . . the court should carefully examine the circumstances for and against imposing a duty . . . in a particular case.[72]

As with all of these examples, this case does not present the issue of post-sale warnings. But the structure of the relevant Restatement rule, together with the quoted portions from the Official Comments, argue strongly against Plaintiff's open-ended approach.

A final example deserves this Court's attention: the Restatement, Third's rejection of trademark licensors' legal responsibility to persons injured by defective products manufactured by others to which the licensor's logos are attached. An Official Comment to the relevant Restatement Section explains:

> [E]ven if purchasers of the product might assume that the trademark owner was the manufacturer, the licensor does not "sell or distribute . . . [the] product manufactured by another." . . .
>
> Trademark licensors are liable for harm caused by defective products distributed under the licensor's trademark [only] when they participate substantially in the design, manufacture, or distribution of the licensee's products.[73]

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[72] *See* note 65, Comment *a*.

[73] *See* Restatement, Third, of Torts: Products Liability § 14, cmt. *d*.

Once again, as with previous examples, the majority rule regarding trademark licensors refuses to allow tort plaintiffs to escape the formal requirement that defendants must have commercially distributed the defective products that proactively caused the plaintiff's harm. And once again, the only exception to the general rule is where the defendant manufacturer shares control over the production or distribution of the harm-causing product.

V. CONCLUSION

Plaintiff's unanchored, open-ended approach to failure-to-warn reflects bad social policy. By threatening otherwise innocent manufacturers with potentially crushing liability for failing to warn about the risks of other manufacturers' products, Plaintiff's approach would diminish social welfare and be unfair to the manufacturers and their shareholders and customers who are forced to bear such costs. Moreover, a number of analogous areas of tort law, from both outside and inside products liability, reveal an unmistakable tendency to avoid duties of care and rules of recovery that are likely to expose actors to such open-ended liability. Not surprisingly, as demonstrated in Crane Co.'s and Amici's briefs, a large majority of American courts, including this Court, embrace the traditional anchoring requirement that, to be liable for failure to warn, a manufacturer must have distributed the risky product that caused the plaintiff's harm. Notwithstanding Plaintiff's superficially complex brief exceeding 125 pages in

length, Plaintiff cannot escape the simple reality that the traditional anchoring element is absent in the instant case; Crane Co.'s products—bare metal valves installed in G.M.'s system—did not generate the asbestos-related risks that resulted in plaintiff's harm. Without an anchoring connection to Crane Co.'s valves, Plaintiff's position approaches imposition of a general duty to rescue strangers.

In sum, Plaintiff's suggested approach to failure-to-warn, if adopted by this Court, would stand out as a significant departure from basic themes in traditional tort and products liability law. One can certainly appreciate that this Court may be reluctant to criticize the holding of their respected colleagues in the Appellate Division. Even so, Amicus urges this Court to reverse the judgment below.

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