New York Court of Appeals

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

IN THE MATTER OF NEW YORK CITY ASBESTOS LITIGATION

DORIS KAY DUMMITT, Individually and as Executrix of the Estate of RONALD DUMMITT, deceased,

Respondent,

– against –

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

Defendants,

CRANE CO.,

Appellant.

BRIEF OF BUSINESS COUNCIL OF NEW YORK STATE, MANUFACTURERS ALLIANCE OF NEW YORK STATE, LAWSUIT REFORM ALLIANCE OF NEW YORK, 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, AMERICAN INSURANCE ASSOCIATION, NORTHEAST RETAIL LUMBER ASSOCIATION, AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF APPELLANT CRANE CO.

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DISCLOSURE STATEMENT

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

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QUESTION PRESENTED

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

INTEREST OF *AMICI CURIAE*

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

STATEMENT OF THE CASE

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

INTRODUCTION AND SUMMARY OF ARGUMENT

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

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

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

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

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

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

thermal insulation defendants and towards peripheral and new defendants associated with the manufacturing and distribution of alternative asbestos-containing products such as gaskets, pumps, automotive friction products, and residential construction products." Marc C. Scarcella *et al.*, *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts And Changes in Exposure Allegations From 1991-2010*, 27:19 Mealey's Litig. Rep.: Asbestos 1, 1 (Nov. 7, 2012).[4] One plaintiffs' attorney described the asbestos litigation as an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 19 (Mar. 1, 2002) (quoting Mr. Scruggs).[5]

Most recently, this trend was described in a significant ruling that is achieving nationwide notoriety. *See In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 96 (W.D.N.C. Bankr. 2014) (in bankruptcy hearing to estimate gasket and packing manufacturer Garlock Sealing Technologies, LLC's liability for present and future mesothelioma claims, the court explained: "Beginning in early 2000s,

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

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

the remaining large thermal insulation defendants filed bankruptcy cases and were no longer participants in the tort system. As the focus of plaintiffs' attention turned more to Garlock as a remaining solvent defendant, evidence of plaintiffs' exposure to other asbestos products often disappeared. Certain plaintiffs' law firms used this control over the evidence to drive up the settlements demanded of Garlock.").

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

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

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

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

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

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

Plaintiffs' lawyers justify the radical expansion of liability they seek based on *foreseeability*. But, as every first-year law student knows, foreseeability can be a *Palsgraf*-like slippery slope. Courts must draw a line limiting tort liability in order to avoid the unending slippery slope that a foreseeability standard would inevitably create.[9] That line is logically drawn at the point where a plaintiff is harmed by a product that was neither made nor sold by the defendant.[10]

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

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

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

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. Consumer safety could be undermined by the potential for over-warning and through conflicting information that may be provided by manufacturers of different components and by makers of finished products.

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

ARGUMENT

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

Over twenty years ago, in *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 591 N.E.2d 222, 582 N.Y.S.2d 373 (1992), this Court defined the circumstances under which the manufacturer or seller of a product that itself caused no injury can be held liable for another's injury-causing defective product when the two products are used together. Under the *Rastelli* doctrine, in a combined use scenario, a manufacturer can only be held liable for a harm caused

by an injurious defective product made or sold by a third-party when the manufacturer: (1) controlled the production of the injury-producing product, (2) derived a benefit from the sale of the injury-producing product, or (3) placed the injury-producing product in the stream of commerce. 79 N.Y.2d at 298, 591 N.E.2d at 226, 582 N.Y.S.2d at 377.

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

the first manufacturer produces a sound product which is compatible for use with a defective product of another manufacturer." 79 N.Y.2d at 297-298, 582 N.Y.S.2d at 376-377, 591 N.E.2d at 225-226.[11]

The *Rastelli* doctrine reflects traditional principles of tort law[12] and is firmly established in New York outside of the asbestos context. *See, e.g., Cleary v Reliance Fuel Oil Assoc., Inc.*, 17 A.D.3d 503, 505, 793 N.Y.S.2d 468 (2d Dep't 2005) (affirming dismissal of claims against manufacturer of water heater where device inserted into heater that controlled temperature of water was manufactured

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[11] *See also Hansen v Honda Motor Co., Ltd.*, 104 A.D.2d 850, 851, 480 N.Y.S.2d 244, 246 (2d Dep't 1984) ("Although a manufacturer is under a duty to design and manufacture a product which is safe at the time of sale, it is not responsible for injuries caused by subsequent modifications by another however foreseeable such modifications may have been to the manufacturer.").

[12] Product liability law generally provides that any entity *which participates in the chain of distribution* of a product is liable for harms caused by *a defect* in *that product*, whether negligently or nonnegligently caused. *See* Restatement (Second) of Torts § 402A (1965); Restatement Third, Torts: Products Liability § 1 (1998). As a comment to § 402A explains:

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

Restatement (Second) of Torts § 402A cmt. *c* (emphasis added); *see also* Restatement (Second) of Torts § 402A cmt. *f* (1965) (noting that § 402A applies to "any person engaged in the business of selling" product causing harm); Restatement (Third) of Torts: Prods. Liab. § 1 (1998) ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.").

and supplied by others). A manufacturer's knowledge that its product may be used in conjunction with a third-party's product does not turn the manufacturer into an insurer for harms caused by the other's product. *See, e.g., Tortoriello v Bally Case, Inc.,* 200 A.D.2d 475, 477, 606 N.Y.S.2d 625 (1st Dep't 1994) (dismissing claims against kitchen manufacturer for slip-and-fall injury to plaintiff caused by accumulation of ice on quarry tile floor the defendant did not "manufacture, deliver or install" even though the manufacturer's literature showed quarry tile as one of three available floor materials for walk-in freezers); *Kaloz by Kaloz v. Risco*, 120 Misc.2d 586, 588, 466 N.Y.S.2d 218, 220-21 (N.Y. Sup. Ct. Orange Cnty. 1983) (pool manufacturer not subject to liability for injury caused by allegedly defective ladder it did not manufacture, control or maintain; failure-to-warn theory cannot be "stretched to require a warning as to a conjunctive product manufactured by another even though such other product may be a *sine qua non* to the use of the first").[13]

Rastelli was applied in a New York asbestos case decided by the Fourth Department. *See Matter of Eighth Jud. Dist. Asbestos Litig.* (*Drabczyk v. Fisher*

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

Controls Int'l), 92 A.D.3d 1259, 1260, 938 N.Y.S.2d 715, 716 (4th Dep't), *lv. denied*, 969 N.E.2d 222 (N.Y. 2012). Federal courts interpreting New York law in asbestos cases have also found *Rastelli* to be in harmony with the clear majority rule nationwide, and have refused to impose legal responsibility upon a manufacturer for an allegedly injurious product that the manufacture did not manufacture, sell, or otherwise place in the stream or commerce.[14]

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

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

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

allegedly injurious material and situations in which the allegedly injurious material was one that *could* be, but did not need to be, used with the defendant's equipment.[16] In the end, the panel was unable to determine which combined-use scenario prevailed so the case was permitted to proceed to the fact-finding stage (during which the matter settled).

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

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[16] *Berkowitz* draws this distinction by distinguishing the First Department's opinion in *Rogers v. Sears, Roebuck & Co.*, 268 A.D.2d 245, 701 N.Y.S.2d 359 (1st Dep't 2000), with *Rastelli*. In *Rogers*, the manufacturer of a gas barbeque grill was held to be potentially responsible for a defective propane tank valve, because the gas grill could not be used without the propane tank. Conversely, in *Rastelli*, no liability was imposed because the defendant's tire could be used with or without multipiece rims. Thus, the "rule," if any, coming out of *Berkowitz* is that a product manufacturer is legally responsible in a combined-use scenario only when the combined use was *necessary* to the operation of the defendant's product. *See, e.g., Tortoriello,* 200 A.D.2d at 477.

[17] *See, e.g., Sawyer v. A.C. & S., Inc.*, 32 Misc.3d 1237(A), 938 N.Y.S.2d 230 (Table), 2011 WL 3764074, at *2 (N.Y. Sup. Ct. New York Cnty. June 24, 2011), *motion to vacate denied*, 2011 WL 11707702 (N.Y. Sup. Ct. New York Cnty. Sept. 6, 2011); *Defazio v. A.W. Chesterton*, 32 Misc.3d 1235(A), 938 N.Y.S.2d 226 (Table), 2011 WL 3667717 (N.Y. Sup. Ct. New York Cnty. Aug. 12, 2011); *see also In re Eighth Jud. Dist. Asbestos Litig. (Suttner v. Crane Co.)*, 115 A.D.3d 1218, 1218, 982 N.Y.S.2d 421, 421 (4th Dep't), *reargument denied*, 118 A.D.3d 1369, 987 N.Y.S.2d 590 (4th Dep't 2014).

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

In December 2011, in *Surre v. Foster Wheeler L.L.C.*, 831 F. Supp. 2d 797, 801 (S.D.N.Y. 2011), a New York City federal court concluded that the "foreseeability" analysis that had permeated numerous NYCAL decisions was flawed under New York law.[19] After surveying a broad spectrum of New York decisions, the court held that, under New York law, a manufacturer of equipment that did not require the use of asbestos to function is not responsible for asbestos materials made and sold by others that were used with that equipment - even if the use of asbestos was foreseeable - unless the equipment manufacturer had control over the production of the asbestos-containing material or otherwise placed the asbestos-containing material to which the plaintiff was exposed into the stream of commerce.[20]

In February 2014, in *Kiefer v. Crane Co.*,[21] another New York City federal court judge agreed that the *Rastelli* doctrine continues to be a correct statement of New York law:

> Under New York law, it is clear that one manufacturer cannot be held liable for the products of another. That is Judge Chin's

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19 *Id.* at 802 (citing *Tortoriello*). Judge Denny Chin of the U.S. Court of Appeals for the Second Circuit, sitting by designation on the district court, reconciled his conclusion with both *Rastelli* and *Berkowitz*.

20 *Id.* at 801.

21 No. 12-7613 (S.D.N.Y. Feb. 3, 2014) (Forrest, J.) (order granting summary judgment to Cleaver Brooks Co., Inc. and Crane Co. for reasons set forth in telephonic conference and decision) (discussed in *Federal Judge: Crane Co. Not Liable For Replacement Parts Under New York Law*, 29:2 Mealey's Litig. Rep. Asbestos 6 (Feb. 19, 2014)).

> decision in the *Surre v. Foster Wheeler* case [citation omitted]. That is true even if it is known that the asbestos-containing product would be used in conjunction with the defendant manufacturer's own product unless it was necessary that only the particular product could be used or there was involvement in the selection of the asbestos-containing product. Neither of these facts are present here.[22]

The judge in *Kiefer* agreed "with the *Surre* case that under the prevailing case law the correct rationale is that the stream of commerce test applies, not the foreseeability test, thereby requiring the grant of summary judgment.[23]

The Court should use this case to reaffirm its *Rastelli* "stream of commerce" precedent and confirm that New York law is in harmony with the clear majority rule nationwide in cases asserting that a manufacturer has a duty to warn about asbestos-containing products sold by third-parties and used near or in conjunction with the manufacturer's product.[24]

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22 *Kiefer v. Crane Co.*, No. 12-7613, trans. at 12 (S.D.N.Y. Feb. 3, 2014) (telephonic conference and decision) (attached as Addendum in Brief for Appellant Crane Co.).

23 *Id.* at 14.

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

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

Since *Rastelli* was issued, scores of courts across the United States, including the highest courts of two major states and numerous appellate courts, have applied the *Rastelli* "stream of commerce" doctrine to provide the "majority rule nationwide."[25] The courts have held a manufacturer of a product is not legally responsible for allegedly injurious asbestos-containing materials made and sold by third-parties, simply because it was foreseeable that those products would be used near or in conjunction with the manufacturer's equipment post-sale. *See Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 800 (E.D. Pa. 2012) ("products-liability theories rely on the principle that a party in the chain of distribution of a harm-

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[25] *Braaten v. Saberhagen Holdings,* 198 P.3d 493, 498 (Wash. 2008); *see also Dalton v. 3M Co.*, 2013 WL 4886658, at *10 (D. Del. Sept. 12, 2013) ("The majority of courts embrace the principles of the bare metal defense and refuse to impose liability upon manufacturers for the dangers associated with asbestos-containing products manufactured and distributed by other entities."), *report and recommendation adopted*, 2013 WL 5486813 (D. Del. Oct. 1, 2013); *In re Asbestos Litig. (Arland Olson),* 2011 WL 322674, at *2 (Del. Super. Ct. New Castle Cnty. Jan. 18, 2011) (following "the persuasive weight of decisions from other jurisdictions declining to impose a duty" where the defendant failed to warn or protect against hazards arising from a product it did not manufacture, distribute, or sell, "even if the defendant's product incorporated component parts that posed similar risks and would require replacement."); *Morgan v. Bill Vann Co., Inc.,* 969 F. Supp. 2d 1358, 1366-67 (S.D. Ala. 2013) (stating "the prevailing majority rule in other jurisdictions is to recognize the 'bare metal defense' (under which a pump manufacturer...cannot be liable for a third party's asbestos materials used with its products, where the pump manufacturer was not in the chain of distribution of such asbestos-containing materials)" and that "the trend in other jurisdictions favors adoption of that defense for sound and even compelling policy reasons...."); Mark A. Behrens & Margaret Horn, *Liability for Asbestos-Containing Connected or Replacement Parts Made by Third Parties: Courts Are Properly Rejecting this Form of Guilt by Association,* 37 Am. J. Trial Advoc. 489 499 (2014).

causing product should be liable because that party is in the best position to absorb the costs of liability into the cost of production."); *Faddish v. Buffalo Pumps*, 881 F. Supp. 2d 1361, 1374 (S.D. Fla. 2012) ("Because defendants were not in the chain of distribution of the dangerous asbestos-containing products causing injury to Mr. Faddish, they cannot be charged with a duty to warn under negligence or strict liability theory.").

In cases virtually identical to this one, courts have almost uniformly rejected asbestos third-party duty to warn claims, including many courts perceived to be favorable to plaintiffs. These courts include the Supreme Courts of California[26] and Washington,[27] appellate courts in Georgia,[28] Maryland,[29] Massachusetts,[30]

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

[27] *See Simonetta v. Viad Corp.*, 197 P.3d 127, 138 (Wash. 2008); *Braaten v. Saberhagen Holdings,* 198 P.3d 493, 504 (Wash. 2008); *see also Yankee v. APV N. Am., Inc.*, 262 P.3d 515, 520-21 (Wash. Ct. App. 2011); *Wangen v. A.W. Chesterton Co.*, 163 Wash. App. 1004, 2011 WL

New Jersey (on causation grounds),[31] and Pennsylvania;[32] and state trial courts in Connecticut,[33] Delaware (applying the law of Delaware and numerous other

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3443962, at *7 (Wash. Ct. App. Aug. 8, 2011); *Anderson v. Asbestos Corp.*, 151 Wash. App. 1005, 2009 WL 2032332, at *2 (Wash. Ct. App. July 13, 2009).

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

[29] *See May v. Air & Liquid Sys. Corp.*, 2014 WL 4958163, *1 (Md. Ct. Spec. App. Oct. 3, 2014); *Ford Motor Co. v. Wood,* 703 A.2d 1315, 1331 (Md. Ct. Spec. App.), *cert. denied*, 709 A.2d 139 (Md. 1998), *abrogated on other grounds, John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002); *see also In re Asbestos Litig. (Thomas Milstead),* 2012 WL 1996533, at *2 (Del. Super. Ct. New Castle Cnty. June 1, 2012) (applying Maryland law).

[30] *See Whiting v. CBS Corp.*, 2013 WL 530860, at *1, 982 N.E.2d 1224 (Table) (Mass. Ct. App. 2013); *Dombrowski v. Alfa Laval, Inc.*, 2010 WL 4168848, at *1 (Mass. Super. Middlesex Cnty. July 1, 2010) (quoting *Mitchell v. Sky Climber, Inc.*, 487 N.E.2d 1374, 1376 (Mass. 1986)); *see also In re Asbestos Litig. (Anita Cosner),* 2012 WL 1694442, at *1 (Del. Super. Ct. New Castle Cnty. May 14, 2012) (applying Mass. law) (citing *Dombrowski*).

[31] *See Hughes v. A.W. Chesterton Co.*, 89 A.3d 179, 190 (N.J. Super. A.D. 2014); *see also Robinson v. Air & Liquid Sys. Corp.*, 2014 WL 3673030, at *1 (D.N.J. July 23, 2014).

[32] *See Schaffner v. Aesys Tech., LLC,* 2010 WL 605275, at *6 (Pa. Super. Jan. 21, 2010); *see also Montoney v. Cleaver-Brooks, Inc.*, 2012 WL 359523 (Pa. Com. Pl. Phila. Cnty. Jan. 5, 2012); *Kolar v. Buffalo Pumps, Inc.*, 15 Pa. D. & C. 5th 38, 45-46 (Pa. Com. Pl. Phila. Cnty. Aug. 2, 2010); *Ottinger v. Am. Standard, Inc.*, 2007 WL 7306556 (Pa. Com. Pl. Phila. Cnty. Sept. 11, 2007); *cf. Eckenrod v. GAF Corp.*, 544 A.2d 50, 52 (Pa. Super.) ("a plaintiff must present evidence to show that he inhaled asbestos fibers shed by the specific manufacturer's product."), *appeal denied*, 553 A.2d 969 (Pa. 1988). An older decision to the contrary, *Chicano v. Gen. Elec. Co.,* 2004 WL 2250990, at *9 (E.D. Pa. Oct. 5, 2004), cited in *In re Asbestos Prods. Liab. Litig. (No. VI) (Hoffeditz v. Am. Gen. LLC)*, 2011 WL 5881008, at *1 (E.D. Pa. July 29, 2011), and *Urian v. Ford Motor Co.*, 2010 WL 3005539, at *2 (Del. Super. Ct. New Castle Cnty. July 30, 2010), misapplies Pennsylvania law as stated in *Schaffner.*

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

states),[34] Maine,[35] Minnesota,[36] Ohio,[37] and Texas.[38] Federal courts applying

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

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

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

[37] *See Alexander v. A.W. Chesterton Co.*, No. 12-776463, slip op. at 4 (Ohio Ct. Com. Pl. Cuyahoga Cnty. Mar. 7, 2014); *Roberts v. Adience, Inc.*, No. 04-523152, slip op. at 4 (Ohio Ct. Com. Pl. Cuyahoga Cnty. Mar. 7, 2014).

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

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

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

[40] *See Olds v. 3M Co.*, 2013 WL 5675509, at *1 (C.D. Cal. Oct. 16, 2013); *McNaughton v. Gen. Elec. Co.*, 2012 WL 5395008, at *1 (E.D. Pa. Aug. 9, 2012); *Floyd v. Air & Liquid Sys. Corp.*, 2012 WL 975359 (E.D. Pa. Feb. 8, 2012).

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

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

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

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

[45] *See Stark v. Armstrong World Indus., Inc.*, 21 F. App'x 371, 381 (6th Cir. 2001); *Lindstrom v. A-C Prods. Liab. Trust*, 424 F.3d 488, 496, 497 (6th Cir. 2005); *In re Asbestos Prods. Liab. Litig (No. VI)* (*Sweeney v. Saberhagen Holdings, Inc.*), 2011 WL 346822, at *7 (E.D. Pa. Jan. 13, 2011), *report and recommendation adopted*, 2011 WL 359696 (E.D. Pa. Feb. 3, 2011); *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 801 (E.D. Pa. 2012); *Floyd v. Air & Liquid Sys. Corp.*, 2012 WL 975615 (E.D. Pa. Feb. 8, 2012); *Abbay v. Armstrong Int'l, Inc.*, 2012 WL 975837, at *1 (E.D. Pa. Feb. 29, 2012); *Lyautey v. Alfa Laval, Inc.*, 2012 WL 2877377, at *1 (E.D. Pa. Mar. 20, 2012); *Miller v. A.W. Chesterton Co.*, 2012 WL 2914180, at *1 (E.D. Pa. May 14, 2012); *Serini v. A.W. Chesterton Co.*, 2012 2914188 (E.D. Pa. May 14, 2012); *Cardarg v. Aerojet Gen. Corp.*, 2012 WL 3536243, at *1 (E.D. Pa. July 27, 2012); *Campbell v. A.W. Chesterton*, 2012 WL 5392873,*1 (E.D. Pa. Oct. 16, 2012); *Various Plaintiffs v. Various Defendants*, 856 F. Supp. 2d 703, 709 (E.D. Pa. 2012); *Crews v. Air & Liquid Sys. Corp.*, 2014 WL 639685, at *5 (N.D.N.Y. Feb. 18, 2014); *Vedros v. Northrop Grumman Shipbuilding, Inc.*, 2014 WL 1093678, at *3 (E.D. La. Mar. 14, 2014); *Cabasug v. Crane Co.*, 989 F. Supp. 2d 1027, 1041 (D. Haw. 2013); *In re Asbestos Litig. (Wesley K. Davis)*, 2011 WL 2462569, at *5 (Del. Super. Ct. New Castle Cnty. June 7, 2011); *In re Asbestos Litig. (Harold and Shirley Howton)*, 2012 WL 1409011, at *6 (Del. Super. Ct. New Castle Cnty. Apr. 2, 2012), *appeal refused sub nom. Crane Co. v. Howton*, 44 A.3d 921 (Del. Super. Ct. New Castle Cnty. 2012). For cases permitting liability where the defendant manufactured a product that, by necessity, contained asbestos components, where the asbestos-containing material was essential to the proper functioning of the defendant's product, and where the asbestos-containing material would necessarily be replaced by other asbestos-containing material, *see Estate of Quirin v. Lorillard Tobacco Co.*, 2014 WL 585090, at *8 (N.D. Ill. Feb. 14, 2014); *Salisbury v. Asbestos Corp., Ltd.*, 2014 WL 345214 (E.D. Pa. Jan. 29, 2014).

The Supreme Court of California's unanimous decision in *O'Neil v. Crane Co.*, 266 P.3d 987 (Cal. 2012), is perhaps the most significant of the decisions on the subject. The court held, "a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products." *Id.* at 991.[46] The case involved a former sailor who died from mesothelioma that he claimed was caused by exposure to asbestos in the engine and boiler rooms of a World War II-era naval ship in the late 1960s. The sailor's family sued two companies that sold valves and pumps to the Navy at least twenty years before he worked on the ship. There, like here, it was "undisputed that defendants never manufactured or sold any of the asbestos-containing materials to which plaintiffs' decedent was exposed." *Id.* at 991. Instead, the decedent's asbestos exposures came from "external insulation and internal gaskets and packing, all of which were made by third parties and added to the pumps and valves post-sale." *Id.*

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

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

The California Supreme Court said that "the reach of strict liability is not limitless" and does not extend to harm "from entirely distinct products that the consumer can be expected to use with, or in, the defendant's nondefective product." *Id.* at 995. The court said, "It is fundamental that the imposition of liability requires a showing that the plaintiff's injuries were caused by an act of the defendant or an instrumentality under the defendant's control." *Id.* at 996.[47]

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[47] In a footnote, the court said that "[a] stronger argument for liability might be made in the case of a product that *required* the use of a defective part in order to operate" or "if the product manufacturer specified or required the use of a defective replacement part. . . ." *Id.* at 996 n.6. In *O'Neil*, the defendants' products did not require asbestos gaskets or packing to function, but even if they did, the court said, "the policy rationales against imposing liability on a manufacturer for a defective part it did not produce or supply would remain." *Id.*; *see also McNaughton v. Gen. Elec. Co.*, 2012 WL 5395008, at *1 (E.D. Pa. Aug. 9, 2012) ("Plaintiff's reliance upon footnote 6

"[T]he foreseeability of harm, standing alone, is not a sufficient basis for imposing strict liability on the manufacturer of a nondefective product, or one whose arguably defective product does not actually cause harm." *Id.* at 1005.

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

The Supreme Court of California also held that defendants had no duty in negligence to warn about the hazards of asbestos dust released from surrounding products that was a foreseeable consequence of maintenance work on defendants' pumps and valves. The court said, "[W]e have never held that a manufacturer's duty to warn extends to hazards arising exclusively from *other* manufacturers' products." *Id.* at 997. The court found support in a line of California appellate

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of *O'Neil* to establish Defendant's liability fails because, as this Court has noted previously, footnote 6 is merely dicta and does not reflect California law.") (citing *Floyd v. Air & Liquid Sys. Corp.*, 2012 WL 975684, at *1 (E.D. Pa. Feb. 9, 2012) ("footnote 6 of *O'Neil* is dictum.")).

cases "that hold[] instead that the duty to warn is limited to risks arising from the manufacturer's own product." *Id.* The court found further support in non-asbestos decisions from other jurisdictions, citing this Court's decision in *Rastelli v. Goodyear Tire & Rubber Co.,* 591 N.E.2d 222 (N.Y. 1992); the Fourth Circuit's decision in *Baughman v. General Motors Corp.*, 780 F.2d 1131 (4th Cir. 1986); a California Court of Appeal decision in a prior asbestos case, *Taylor v. Elliott Turbomachinery Co., Inc.*, 90 Cal. Rptr. 3d 414 (Ct. App. 2009); and several out-of-state asbestos cases. *See O'Neil*, 266 P.3d at 1000-05. The Supreme Court of California in *O'Neil* concluded that "expansion of the duty of care as urged [by plaintiffs] would impose an obligation to compensate on those whose products caused the plaintiffs no harm. To do so would exceed the boundaries established over decades of product liability law." *Id.* at 1007.

Prior to the *O'Neil* decision, the Washington Supreme Court was the first court of last resort to hold that a manufacturer is not liable for a third-party's asbestos-containing products when the manufacturer is not part of the chain of distribution of that product. In *Simonetta v. Viad Corp.,* 197 P.3d 127 (Wash. 2008), the court held that the successor corporation to the manufacturer of an evaporator used to desalinize water on a ship had no duty to warn a former naval machinist of the danger posed by externally applied asbestos insulation sold by a third-party. The court reviewed Washington case law interpreting failure to warn

cases under the Restatement (Second) of Torts § 388 (1965) and found that there was "little to no support . . . for extending the duty to warn to another manufacturer's product." *Id.* at 132-33. The court further noted that the "[c]ase law from other jurisdictions similarly limits the duty to warn in negligence cases to those in the chain of distribution of a hazardous product." *Id.* at 133. The court concluded that because the defendant "did not manufacture, sell, or supply the asbestos insulation . . . as a matter of law it had no duty to warn." *Id.* at 134.

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

In *Braaten v. Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008), the Washington Supreme Court extended the *Simonetta* holding to reject failure to warn claims against pump and valve manufacturers for harm caused by asbestos-containing replacement packing and replacement gaskets made by third-parties.

The court began its opinion by rejecting plaintiff's liability theories with respect to externally applied third-party asbestos insulation. With respect to plaintiff's strict liability claim, the court said, "We held in *Simonetta* that a manufacturer is not liable for failure to warn of the danger of exposure to asbestos in insulation applied to its products if it did not manufacture the insulation and was not in the chain of distribution of the insulation." *Id.* at 498 (citing *Simonetta*, 197 P.3d at 136). The court noted that its decision in *Simonetta* was "in accord with *the majority rule nationwide*: a 'manufacturer's duty to warn is restricted to warnings based on the characteristics of the manufacturer's own products.'" *Id.* (citation omitted) (emphasis added). For similar reasons, the court dismissed plaintiff's negligence claim. The court explained that, "'Because 'the duty to warn is limited to those in the chain of distribution of the hazardous product,' the defendants here had no duty to warn of the danger of exposure to asbestos in the insulation applied to their products." *Id.* at 501 (quoting *Simonetta*, 197 P.3d at 133).

The court then rejected liability theories relating to plaintiff's exposure to asbestos in replacement packing or gaskets. As the court had explained in *Simonettta*, a manufacturer does not have an obligation to warn of the dangers of another manufacturer's product. Accordingly, the court in *Braaten* held, "The defendant-manufacturers are not in the chain of distribution of asbestos-containing packing and gaskets that replaced the original packing and gaskets and thus fall

within the general rule." *Id.* at 500. "Moreover, whether the manufacturers knew replacement parts would or might contain asbestos makes no difference because such knowledge does not matter, as we held in *Simonetta*." *Id.* (citing *Simonetta*, 197 P.3d at 136).

Finally, the court rejected plaintiff's negligence claim relating to the replacement packing and gaskets. "As in the case of the asbestos-containing insulation," the court said, "the general rule is that there is no duty to warn of the dangers of another manufacturer's product, the breach of which is actionable in negligence." *Id.* at 504. Because the defendant pump and valve companies were not in the chain of distribution of the replacement gaskets and packing they "had no duty to warn of the danger of exposure to asbestos in packing and gaskets, the breach of which would be actionable negligence." *Id.*

An earlier influential opinion was issued by the Sixth Circuit in *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488 (6th Cir. 2005), the leading admiralty case on the subject. In *Lindstrom*, the court confirmed that a manufacturer is not liable for asbestos-containing components and replacement parts it did not manufacture or distribute. Lindstrom was a merchant seaman who worked in the engine rooms of various ships and developed mesothelioma as an alleged result of maintenance work on pumps and valves. Lindstrom claimed that he was exposed to asbestos while replacing gaskets on pumps manufactured by Coffin Turbo Pump,

Inc. But, the replacement gaskets were not manufactured by Coffin Turbo. The Sixth Circuit affirmed summary judgment, stating "Coffin Turbo cannot be held responsible for the asbestos contained in another product." *Id.* at 496. Lindstrom also alleged exposure to asbestos packing that was attached to pumps manufactured by Ingersoll Rand Co. Ingersoll Rand, however, did not manufacture the asbestos packing. The court held "that Ingersoll Rand [could] not be held responsible for asbestos-containing material [attached to Ingersoll Rand's] products post-manufacture. *Id.* at 497.[48]

More recently, in *Schaffner v. Aesys Technologies, LLC,* 2010 WL 605275 (Pa. Super. Jan. 21, 2010), a Pennsylvania appellate court held that "a manufacturer cannot be held liable for a product it neither manufactured nor supplied." *Id.* at *6 (citing *Toth v. Econ. Forms Corp.*, 571 A.2d 420, 423 (Pa. Super. Ct. 1990), *appeal denied*, 593 A.2d 422 (Pa. 1991)). The court noted that its holding was "consistent with the majority rule nationwide that an equipment manufacturer can not [sic] be held liable for a product it neither manufactured nor supplied." *Id.* at *5.

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[48] *See also Stark v. Armstrong World Indus., Inc.*, 21 F. App'x 371, 381 (6th Cir. 2001) (rejecting claim that turbine and boiler manufacturers should be held liable because their equipment "is integrated into the machinery of the vessel, much of which uses and may release asbestos," and stating that "[t]his form of guilt by association has no support in the law of products liability."); *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791 (E.D. Pa. 2012) (surveying cases and rejecting duty to warn for asbestos products made or sold by a third-party).

Most recently, in October 2014, a Maryland appellate court in *May v. Air & Liquid Sys. Corp.*, 2014 WL 4958163 (Md. Ct. Spec. App. Oct. 3, 2014), reaffirmed an earlier decision, *Ford Motor Co. v. Wood,* 703 A.2d 1315 (Md. Ct. Spec. App.), *cert. denied*, 709 A.2d 139 (Md. 1998), *abrogated on other grounds, John Crane, Inc. v. Scribner* 800 A.2d 727 (Md. 2002), which held that a vehicle manufacturer could not be held liable for failure to warn of the alleged dangers of asbestos-containing replacement parts that the company "did not manufacture, market, or sell, or otherwise place into the stream of commerce." *Id.* at 1332. Based on *Wood* "and, in accordance with a number of out-of-state cases that have followed in its wake," the court in *May* held that "manufacturers of steam pumps in Navy ships cannot be held liable for failing to warn of the dangers of asbestos-containing replacement parts (gaskets and packing) that they neither manufactured nor placed into the stream of commerce." 2014 WL 4958163 at *1. The court noted that other courts have "flatly rejected the argument that a pump manufacturer had a duty to warn of the hazards of asbestos-containing replacement parts because it was 'foreseeable' that those parts would be incorporated into the defendants' pumps." *Id.* at *7. "In the face of that considerable body of law that rejects their argument based on foreseeability," the plaintiffs cited the First Department's decision in *Berkowitz*. The Maryland appellate court, however, "f[ound] *Berkowitz* thoroughly unpersuasive and decline[d] to follow it." *Id.*

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

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

> Manufacturers of equipment derive no financial benefit from the sale of replacement or affixed parts manufactured by others, nor do they have the financial leverage to influence the design of those parts. As the replacement and affixed parts manufacturers have their own motives for the design and manufacture of their products, the equipment manufacturers are not a necessary factor in bringing the replacement or affixed products to market. Thus, in requiring companies that played no more than a relatively small or attenuated "role in exposing workers to asbestos to bear substantial costs of compensating for asbestos injuries not only raises fundamental

> questions of fairness but undercuts the deterrence objectives of the tort system."

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

And, as explained by the California Court of Appeal in *Taylor v. Elliott Turbomachinery Co., Inc.*, 90 Cal. Rptr. 3d 414 (Ct. App. 2009), imposing liability on a defendant for asbestos-containing connected or replacement parts made by third-parties would not serve the policy of preventing future harm.[49] The court said:

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

Id. at 439.[50]

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

[50] In 1972, the federal Occupational Safety and Health Administration ("OSHA") first issued permanent standards regulating occupational exposure to asbestos. *See* 29 C.F.R. § 1910.1001. "The 1972 OSHA regulations established standards for exposure to asbestos dust and mandated methods of compliance with the exposure requirements, including monitoring

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

For years, courts in non-asbestos cases have refused to impose liability on manufacturers of products that are used in conjunction with harm-causing products made by others. These cases support a finding that Plaintiff's claim fails as a matter of law.

For example, in *Brown v. Drake-Willock International, Ltd.*, 530 N.W.2d 510 (Mich. App. 1995), *appeal denied*, 562 N.W.2d 198 (Mich. 1997), a Michigan appellate court held that dialysis machine manufacturers owed no duty to warn hospital employees of the risk of exposure to formaldehyde supplied by another company even though the dialysis machine manufacturers had recommended the use of formaldehyde to clean their machines. The court 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.

Additional cases have held that an airplane manufacturer was not liable to passengers for circulatory problems caused by seats made by a third-party and installed post-sale, *see In re Deep Vein Thrombosis*, 356 F. Supp. 2d 1055, 1068

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work sites, compelling medical examinations, and, for the first time, labeling products with warnings." *Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276, 280 (4th Cir. 1993). After 1972, OSHA's asbestos regulations "became increasingly stringent over time" and most uses of asbestos ceased in the United States. *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 310 (E. & S.D.N.Y. 2002).

(N.D. Cal. 2005); a gasoline pump manufacturer had no duty to warn of the dangers of misuse of gasoline and gasoline containers made by third-parties, *see Donnelly v. Kerr-McGee Refining Corp.*, 1992 WL 208016, at *5 (W.D. Okla. Apr. 13, 1992), *aff'd*, 993 F.2d 1551, 1993 WL 176605, at *3 (10th Cir. May 21, 1993); a stove manufacturer had no duty to warn that a lighted stove might ignite gas leaking from some other place, *see Garman v. Magic Chef, Inc.*, 173 Cal. Rptr. 20, 22 (Ct. App. 1981);[51] a manufacturer of electrically powered lift motors used in conjunction with scaffolding equipment had no duty to warn of risks created by scaffolding made by others, *see Mitchell v. Sky Climber, Inc.*, 487 N.E.2d 1374, 1376 (Mass. 1986); a manufacturer of a truck cab and chassis was not liable when a dump bed and hoist made by a third-party were added post-sale without a back-up alarm and resulted in an injury, *see Shaw v. Gen. Motors Corp.*, 727 P.2d 387, 390 (Colo. App. 1986); a crane manufacturer had no duty to warn about rigging it did not manufacture, integrate into its crane, or place in the stream of commerce, *see Walton v. Harnischfeger*, 796 S.W.2d 225, 226 (Tex. App. 1990); a hydraulic

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

valve manufacturer was not liable for a defective log splitter used in conjunction with its product, *see Childress v. Gresen Mfg. Co.*, 888 F.2d 45, 46, 49 (6th Cir. 1989); a manufacturer of a paint sprayer was not liable when a solvent sold by a third-party and used to clean the sprayer ignited and burned a user, *see Dreyer v. Exel Indus., S.A.*, 326 F. App'x 353, 358 (6th Cir. 2009); a metal forming equipment manufacturer was not liable for a defective wood planking used in conjunction with its product, *see Toth v. Econ. Forms Corp.*, 571 A.2d 420, 423 (Pa. Super. Ct. 1990), *appeal denied*, 593 A.2d 422 (Pa. 1991); a manufacturer and seller of paint had no duty to warn users that dried paint should not be removed by the use of gasoline near an open flame, *see Johnson v. Jones-Blair Paint Co.*, 607 S.W.2d 305, 306 (Tex. App. 1980); a power saw stand manufacturer was not liable for an injury caused by a defective saw housing made by another and affixed to the stand, *see McGoldrick v. Porter-Cable Tools*, 110 Cal. Rptr. 481, 482 (Ct. App. 1973); a manufacturer of a garbage packer mounted on a truck chassis made by another company was not liable for a defect in the chassis, *see Sanders v. Ingram Equip., Inc.*, 531 So. 2d 879, 880 (Ala. 1988); a recycling machine component manufacturer was not liable for a malfunction in a different component made by another company, *see Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298, 1309 (3d Cir. 1995).

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

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

Id. at 1132-33 (emphasis added).[52]

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

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

In *Exxon Shipping Co. v. Pacific Resources, Inc.*, 789 F. Supp. 1521 (D. Haw. 1991), a manufacturer of a chain used to moor a large ship was not liable for an accident stemming from a defectively designed replacement chain made by another company even though the replacement was "identical, in terms of make and manufacture, to the original equipment." *Id.* at 1526. The court discussed the various justifications for holding manufacturers and sellers strictly liable for defects in their products and concluded that "a position in the chain of title is a critical link for the imposition of liability." *Id.* at 1527.[53]

IV. IMPOSITION OF LIABILITY ON A MANUFACTURER FOR AN ASBESTOS PRODUCT MADE OR SOLD BY A THIRD PARTY 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.)*, 85

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

N.Y.3d 486, 493, 840 N.E.2d 115, 119, 806 N.Y.S.2d 146, 150 (2005) (quoting *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232, 750 N.E.2d 1055, 1060, 727 N.Y.S.2d 7, 12 (2001)). That policy would be significantly undermined by holding a manufacturer liable for products made or sold by third-parties.[54]

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

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

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

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

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

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

well as door or drywall manufacturers, could be held liable for failure to warn about the dangers of lead paint made by others and applied to their products post-sale. "Can't you just see a smoker with lung cancer suing manufacturers of matches and lighters for failing to warn that smoking cigarettes is dangerous to their health?" Petereit, *supra*, at 4.[55]

A Maryland appellate court has said that if such a duty rule were the law,

> [a] power saw maker must warn of the risks of asbestos exposure (because a power saw could foreseeably be used to cut into asbestos-containing insulation); manufacturers of paint brushes must caution against the hazards of breathing mineral spirits (because mineral spirits are commonly used to clean paint brushes); orange juice producers must warn of the dangers of alcohol intoxication (because orange juice is often mixed with vodka).

Joseph W. Hovermill *et al.*, *Targeting of Manufacturers*, 47 No. 10 DRI For Def. 52, 54 (Oct. 2005) (quoting *Smith v. Lead Indus. Ass'n, Inc.*, No. 2368, at 15 (Md. Ct. Spec. App. 2002), *vacated on other grounds*, 871 A.2d 545 (Md. 2005)).[56]

Perhaps the only limit on such an expansive legal requirement would be the imagination of creative plaintiffs' lawyers. Indeed, if a manufacturer's duty were

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55 *See also Cullen v. Indus. Holdings Corp.*, 2002 WL 31630885, at *7 (Cal. Ct. App. Nov. 21, 2002) (stating that "[a]s but one example, [the defendant] points out that makers of cigarette lighters, matches and other products associated with cigarette smoking would thereby become liable for smoking-related injuries").

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

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

Additionally, consumer safety could be undermined by the potential for over-warning and through conflicting information on different components and finished products. *See* David C. Landin *et al., Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Public Policy in Asbestos Litigation*, 16 Brook. J.L. & Pol'y 589, 630 (2008).[57] As the California Supreme Court said in *O'Neil,* "To warn of all potential dangers would warn of

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[57] *See also* Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory,* 52 U. Cin. L. Rev. 38, 43 (1983) ("The extension of workplace warnings liability unguided by practical considerations has the unreasonable potential to impose absolute liability. . . ."). "Further, '[i]f business [entities] believe that tort outcomes have little to do with their own behavior, then there is no reason for them to shape their behavior so as to minimize tort exposure.'" Riehle *et al.*, 44 U.S.F. L. Rev at 61-62 (quoting Carroll *et al.*, *supra*, at 129).

nothing." *O'Neil*, 266 P.3d at 1006 (citation omitted).[58]

V. IMPOSING LIABILITY ON A MANUFACTURER FOR A THIRD-PARTY'S ASBESTOS PRODUCT WOULD WORSEN THE ASBESTOS LITIGATION AND IS UNNECESSARY BECAUSE TRUSTS EXIST TO PAY FOR HARMS CAUSED BY EXPOSURE TO ASBESTOS FROM BANKRUPT COMPANIES

"For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005). So far, "roughly 100 companies have entered bankruptcy to address their asbestos liabilities,"[59] leading to devastating impacts on employees, retirees, shareholders, and surrounding communities.[60]

Imposition of liability for asbestos-related injuries to defendants outside the chain of distribution of those products would worsen the asbestos litigation and lead to a flood of claims against solvent manufacturers for asbestos products made by third-parties. This is especially problematic because the influx of asbestos claims shows no signs of abating. A 2014 review of asbestos-related liabilities reported to the Securities and Exchange Commission by more than 150 publicly

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

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

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

traded companies showed that "[s]ince 2007, filings have been fairly stable" and "continued at this level in 2013." Mary Elizabeth C. Stern & Lucy P. Allen, *Snapshot of Recent Trends in Asbestos Litigation: 2014 Update* 7 (NERA Economic Consulting May 22, 2014); *see also* Jenni Biggs *et al.*, *A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated* 1 (Towers Watson June 2013) (mesothelioma claim filings have "remained near peak levels since 2000."). "Typical projections based on epidemiology studies assume that mesothelioma claims arising from occupational exposure to asbestos will continue for the next 35 to 50 years." Biggs *et al.*, *supra*, at 5; *see also* Best's Special Report, *Asbestos Losses Persist; A.M. Best Raises Industry's Loss Estimate to $85 Billion* 1 (A.M. Best Co., Inc. Dec. 10, 2012) ("it is clear that the asbestos problem will persist for many years to come."). Industry analysts predict that approximately 28,000 mesothelioma claims will be filed. Biggs *et al.*, *supra*, at 1.

New York could expect substantially more asbestos filings. One reason is that, as explained, other courts have almost uniformly rejected third-party duty to warn claims. A liability-creating decision by this Court would make New York an extreme outlier. Such a ruling would magnify other recent changes in the NYCAL that have tilted the balance to heavily favor plaintiffs. These changes include recent NYCAL trial court rulings that (1) end the nearly twenty-year practice of

deferring punitive damages,[61] and (2) are being interpreted by plaintiffs' counsel to erode an important NYCAL Case Management Order provision that compels the filing of asbestos bankruptcy trust claim forms before trial to promote honesty in litigation and allow defendants to obtain setoffs.[62] Additionally, the First Department in this action approved an approach to consolidation of cases at trial that could be viewed as so permissive and deferential that it borders on standardless. *See In re New York City Asbestos Litig.*, 990 N.Y.S.2d 174 (1st Dep't 2014) (finding consolidation appropriate in two unrelated cases simply because the plaintiffs were exposed to asbestos in a workplace (though not the same workplace) and were represented by the same counsel). Empirical evidence shows that smaller consolidations such as those in New York City artificially inflate settlements and are unfair because they make settlements "more likely," even if there are meritorious defenses, because the risk of going to the trial is

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

62 In *In re New York City Asbestos Litig.*, 37 Misc. 3d 1232(A), 966 N.Y.S.2d 347, 2012 WL 6554893, at *9 (N.Y. Sup. Ct. N.Y. Cnty. Nov. 15, 2012), the court said: "The CMO requires Plaintiffs to file their *intended* claims with the various bankruptcy trusts within certain time limitations, not claims they may or may not *anticipate* filing." Plaintiffs' lawyers have interpreted this statement to permit the filing of bankruptcy trust claims to be delayed until after trial or settlement, contrary to the spirit of the CMO. *See* ABA TIPS Section Task Force on Asbestos Litigation and the Bankruptcy Trusts, June 6, 2013, Hrg. Trans. at 114-115 (testimony of Joseph W. Belluck, Esq.) ("[Judge Heitler] put in what is in effect an intent standard into the disclosure.... So in New York, even though claims against bankruptcy trusts may be probable, I can predict that they are going to be filed, I am not under any requirement to file them. I only have to file the claims that my client intends to file before the trial.").

"extremely large" for defendants. Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. Legal Stud. 365, 384 (June 2006). "[P]laintiffs' probability of winning at trial increases by 15 percentage points when they have small consolidated trials rather than individual trials...." *Id.* at 385; *see also* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 574 (2007) (even small scale consolidations such as in New York City "significantly improve outcomes for plaintiffs.").

Furthermore, the unpredictability that would be created by the imposition of liability for third-parties' products would make it harder for New York businesses to grow and create jobs. Commentators have observed with respect to asbestos litigation:

> The uncertainty of how remaining claims may be resolved, how many more may ultimately be filed, what companies may be targeted, and at what cost, casts a pall over the finances of thousands and possibly tens of thousands of American businesses. The cost of this unbridled litigation diverts capital from productive purposes, cutting investment and jobs. Uncertainty about how future claims may impact their finances has made it more difficult for affected companies to raise capital and attract new investment, driving stock prices down and borrowing costs up.

George Scott Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. Tex. L. Rev. 981, 998 (2003).

Finally, it is important to note that trusts have been established to pay claims involving exposures to asbestos products made by bankrupt entities. Today, many

of the companies that filed for bankruptcy protection due, in part, to asbestos litigation "have emerged from the 524(g) bankruptcy process leaving in their place dozens of trusts funded with tens of billions in assets to pay claims." Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12:11 Mealey's Asbestos Bankr. Rep. 33, 33-34 (June 2013) (emphasis added).

In fact, over sixty trusts have been established to collectively form a *$36.8 billion* privately-funded asbestos personal injury compensation system that operates parallel to, but wholly independent of, the civil tort system. *See* U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 3 (Sept. 2011).[63] One study has concluded that "[f]or 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).[64]

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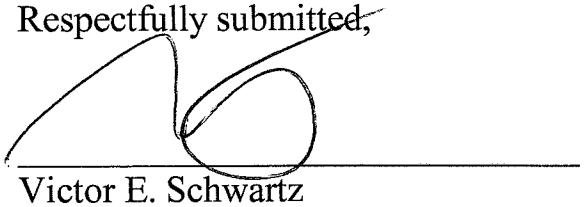
[63] *See also* Lloyd Dixon *et al.*, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (Rand Corp. 2010); Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* 2 (Rand Corp. 2011).

[64] It has been estimated that mesothelioma plaintiffs in Oakland, California 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 18 (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). In a recent bankruptcy proceeding involving gasket and packing manufacturer Garlock Sealing Technologies, LLC, a typical mesothelioma plaintiff's total recovery was estimated to be $1-1.5 million, "including an average of $560,000 in tort recoveries and about $600,000 from 22 trusts." *In re Garlock Sealing Techs.*, 504 B.R. at 96.

CONCLUSION

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

Respectfully submitted,



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Dated: October 8, 2014

IN THE NEW YORK COURT OF APPEALS

Docket No. APL-2014-00209

IN THE MATTER OF NEW YORK CITY ASBESTOS LITIGATION DORIS KAY DUMMITT, Individually and as Executrix of the Estate of RONALD DUMMITT, deceased, *Respondent,* *– against –* A.W. CHESTERTON, *et al.*, *Defendants,* CRANE CO., *Appellant.*	New York County Clerk's Index No. 190196-2010 **AFFIDAVIT OF SERVICE**

WASHINGTON, DISTRICT OF COLUMBIA) ss:

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

That deponent is an attorney duly admitted to practice before the Courts of the State of New York, that he is not a party to this action, he is over the age of eighteen years and resides in Virginia, and that on October 8, 2014, as counsel of record for *amici* the Business Council of New York State *et al.* in the above-captioned matter, he served three copies of the attached *AMICI CURIAE* BRIEF OF THE BUSINESS COUNCIL OF NEW YORK STATE *ET AL.* IN SUPPORT OF APPELLANT CRANE CO. on the following attorneys for the parties by depositing a true copy of the same enclosed in an overnight Federal Express depository under the exclusive care and custody of Federal Express in Washington, DC:

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Sworn to before me on the 8th day of October, 2014:

Notary Public

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

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