COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

MIDDLESEX, SS:		**NO. 2012-P-0329**
ELLEN N. WHITING, individually and as Executrix of the Estate of Willis R. Whiting, Jr., ***Plaintiff-Appellant,***	:	**On Appeal from a Judgment of the Middlesex County Superior Court**
V.	:	
CBS CORPORATION AND CRANE CO., ***Defendants-Appellees.***	:	

AMICI CURIAE BRIEF OF MASSACHUSETTS CHAMBER OF COMMERCE, INC., COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AMERICAN INSURANCE ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, AND NFIB SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANTS-APPELLEES

Ryan K. Farnsworth, BBO #670603
(COUNSEL OF RECORD)
Mark A. Behrens (*pro hac vice*)
SHOOK, HARDY & BACON L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 783-8400
Fax: (202) 783-4211
rfarnsworth@shb.com
mbehrens@shb.com

Counsel for Amici Curiae

Of Counsel

Robin S. Conrad (*pro hac vice*)
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
Tel: ((202) 463-5337
Fax: (202) 463-5346
rconrad@uschamber.com

Of Counsel for the Chamber of Commerce of the United States of America

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QUESTION PRESENTED

Amici[1] support the Superior Court's grant of summary judgment in favor of Defendants-Appellees, and file this brief to address one issue under review:

> Whether an equipment manufacturer may be held liable for harms allegedly caused by (1) asbestos-containing replacement parts (gaskets or packing) manufactured or sold by third parties or (2) asbestos-containing external thermal insulation manufactured and sold by third parties and attached post-sale by the Navy.

The Superior Court held that Defendants-Appellees, makers of valves and turbines installed aboard a naval combat ship (the *USS Guadalcanal*), owed no duty to warn Plaintiff of the hazards in asbestos-containing products made or sold by third parties and used in conjunction with Defendants-Appellees' products. We agree with that decision.

INTEREST OF *AMICI CURIAE*

Amici are organizations that represent companies doing business in Massachusetts and their insurers. *Amici* have a substantial interest in ensuring that Massachusetts' tort system is fair, follows

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[1] None of the parties or their counsel, or anyone other than the *amici*, their members, or their counsel, authored this brief in whole or in part or made a monetary contribution intended to fund the brief's preparation or submission.

traditional tort law rules, and reflects sound public policy. Because the Superior Court's decision is consistent with these principles, follows Massachusetts law, and reflects the clear majority rule nationwide, the grant of summary judgment in favor of Defendants-Appellees should be affirmed.

STATEMENT OF THE CASE AND FACTS

Amici adopt Defendants-Appellees' Statement of the Case and Facts relating to the question presented.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Asbestos litigation is the "longest-running mass tort" in U.S. history. Helen Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 511 (2008). Since the litigation emerged nearly four decades ago, lawyers who bring asbestos cases have perpetuated the litigation by seeking out new defendants or raising new theories of liability. *See* Mark Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 501 (2009); Peter Geier, *Asbestos Litigation Moves On With World War II Shipyard Cases 'Dying Off', Plaintiff Attorneys Dig Deeper to Find New Strategies*, 130:5 Recorder (San Francisco) 12 (Jan. 9, 2006), *at* 2006 WLNR 25577320.

An emerging theory being promoted here and by some plaintiffs' counsel is that makers of products used in naval propulsion systems, such as pumps, valves, and turbines, should be held liable for harms allegedly caused by asbestos-containing replacement parts (*e.g.*, gaskets or packing) manufactured or sold by third parties or by asbestos-containing external thermal insulation manufactured or sold by third parties and attached post-sale by the Navy.

Ordinarily, manufacturers are named in asbestos cases with respect to asbestos that was contained in their *own* products, not to hold them liable for *others'* products. This is an important point. The focus here is on products made by third parties, not on the products made or sold by Defendants-Appellees.

Plaintiff's theory is so extreme that almost no plaintiff raised it until recently. The lack of older case law on point, after nearly forty years of litigation and many hundreds of thousands of filings,[2]

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[2] Through 2002, approximately 730,000 asbestos claims had been filed. *See* Stephen J. Carroll *et al.*, *Asbestos Litigation* xxiv (RAND Corp. 2005). Countless more claims have been filed in the last decade.

by itself, speaks volumes about the exotic nature of Plaintiff's theory.

The driving force behind the theory, two appellate decisions from Washington State, is now gone, rejected by the Washington Supreme Court in *Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008), and *Braaten v. Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008). Plaintiffs' lawyers then tried to raise the theory in California, where it was rejected by numerous appellate courts,[3] and then *unanimously* rejected by the California Supreme Court in *O'Neil v. Crane Co.*, 266 P.3d 987 (Cal. 2012). Since *Simonetta*,

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[3] *See Taylor v. Elliott Turbomachinery Co., Inc.*, 171 Cal. App. 4th 564 (Cal. App. 1st Dist. 2009); *Hall v. Warren Pumps, LLC*, 2010 WL 528489 (Cal. App. 2d Dist. Div. 2 Feb. 16, 2010), *review granted* (Cal. May 12, 2010), *review dismissed, cause remanded* (Feb 29, 2012); *Merrill v. Leslie Controls, Inc.*, 179 Cal. App. 4th 262 (Cal. App. 2d Dist. Div. 3 2009), *review granted and opinion superseded*, 224 P.3d 919 (Cal. 2010), *review dismissed, cause remanded* (Feb 29, 2012); *Walton v. The William Powell Co.*, 183 Cal. App. 4th 1470 (Cal. App. 2d Dist. Div. 4), *review granted and opinion superseded*, 232 P.3d 1201 (Cal. 2010), *review dismissed, cause remanded* (Feb. 29, 2012); *Woodard v. Crane Co.*, 2011 WL 3759923 (Cal. App. 2d Dist. Div. 4 Aug. 25, 2011), *review granted* (Cal. Nov. 16, 2011), *review dismissed, cause remanded* (Feb. 29, 2012); *see also Petros v. 3M Co.*, 2009 WL 6390885 (Cal. Super. Ct. Alameda County Sept. 30, 2009).

Braaten, and *O'Neil*, many other courts have rejected the theory Plaintiff is shopping here. *See infra.*

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

Plaintiff essentially seeks to impose "rescuer liability" on Defendants-Appellees for failure to warn about asbestos-related hazards in products made or sold by others. *See* James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 Sw. U. L. Rev. 595 (2008) (Professor Henderson is the Frank B. Ingersoll Professor of Law at Cornell Law School and was Co-Reporter for the Restatement Third, Torts: Products Liability).

What is suddenly driving Plaintiff's theory? The answer is found in a statement by former plaintiffs' attorney Richard Scruggs. He candidly 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 5 (Mar. 1, 2002) (quoting Mr. Scruggs). As this Court is aware, most of the primary historical asbestos defendants (*i.e.*, those companies that manufactured asbestos products) have been forced into bankruptcy, and the Navy enjoys sovereign immunity. As a substitute, Plaintiff seeks to impose liability on Defendants-Appellees for harms caused by products they never made, sold, installed, or profited from.

Plaintiff's justification for this radical expansion of liability is "foreseeability." As every first-year law student knows, however, foreseeability can be a *Palsgraf*-like slippery slope that has no end. Courts must draw a reasonable line, and that line has been in place for the entire history of asbestos litigation and going back in time through the common law.

This Court should reject Plaintiff's invitation to create a broad new duty rule that is contrary to both Massachusetts law and the clear majority rule nationwide.

Furthermore, Plaintiff's theory represents unsound public policy. The decision would worsen the asbestos litigation and invite a flood of new cases into Massachusetts, particularly since Plaintiff's theory has been soundly rejected elsewhere.

Hundreds of companies made products that arguably were used in the vicinity of some asbestos insulation, which in earlier years was ubiquitous in industry and buildings. Many of these companies may have never manufactured a product containing asbestos (*e.g.*, manufacturers of steel pipe and pipe hangers; makers of nuts, bolts, washers, wire, and other fasteners of pipe systems; makers of any equipment attached to and using the pipe system; and paint manufacturers), but they could nonetheless be held liable under Plaintiff's theory.

Civil defendants in other types of cases would also be adversely affected, as the broad new duty rule sought here presumably would not be limited to asbestos litigation but could require manufacturers to warn about all conceivable dangers relating to hazards in others' products that might be used in conjunction with or near their own. For example, makers of bread or jam would be required to warn of peanut allergies,

as a peanut butter and jelly sandwich is a foreseeable use of their products. Valve and pump manufacturers, as well as door or drywall manufacturers, could be held liable for failure to warn about the dangers of lead paint made by others and applied to their products post-sale. As this Court can appreciate, the only limit on such an expansive legal requirement would be the imagination of creative plaintiffs' lawyers.

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

For these reasons, the Superior Court's decision to grant summary judgment in favor of Defendants-Appellees should be affirmed.

ARGUMENT

I. DEFENDANTS-APPELLEES CANNOT BE HELD LIABLE IN NEGLIGENCE BECAUSE THEY OWED NO DUTY TO PLAINTIFF-APPELLANT

In negligence, it is well established that before a defendant may be liable to a plaintiff there must first be a legal duty owed by the defendant to the plaintiff and a breach of that duty proximately

resulting in the injury. Whether a defendant has a duty of care to the plaintiff in the circumstances is a question of law for the Court, and is determined "by reference to existing social values and customs and appropriate social policy." *Cremins v. Clancy,* 415 Mass. 289, 292 (1993).[4] Contrary to Plaintiff's suggestion, foreseeability alone is insufficient to create a tort law duty.[5] Here, social values, customs, and appropriate social policy all support a finding that no duty was owed by Defendants-Appellees.

First, Massachusetts, like other states, limits the duty to warn in negligence cases to those in the chain of distribution of the hazardous product. For example, in *Mitchell v. Sky Climber, Inc.*, 396 Mass. 629 (1986), a negligence action against a seller of a

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[4] *See also Yakubowicz v. Paramount Pictures Corp.,* 404 Mass. 624, 629 (1989) ("In determining whether the law ought to provide that a duty of care is owed by one person to another, we look to existing social values and customs, and to appropriate social policy."); *Schofield v. Merrill,* 386 Mass. 244, 247 (1982) (a duty "finds its source in existing social values and customs.").

[5] As the California Supreme Court explained, "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which the foresight alone provides a socially and judicially acceptable limit on recovery of damages for injury." *Thing v. La Chusa,* 771 P.2d 814, 830 (Cal. 1989).

lift motor used in movable scaffolding equipment, the Supreme Judicial Court held, "A manufacturer of a product has a duty to warn foreseeable users of dangers in the use of *that product* of which he knows or should have known." *Id.* at 631 (emphasis added). The Court added, "We have never held a manufacturer liable . . . for failure to warn of risks created solely in the use or misuse of the product of *another manufacturer.*" *Id.* (emphasis added).

Similarly, in *Garcia v. Kusan, Inc.*, 39 Mass. App. Ct. 322 (1995), citing *Mitchell*, this Court held, "In the absence of special circumstances, [plaintiff] may not recover for instructions and representations concerning the use of other manufacturers' equipment and may only recover if he can establish that some item traced to a specific defendant caused his injury." *Id.* at 329. In *Carrier v. Riddell, Inc.*, 721 F.2d 867 (1st Cir. 1983), the First Circuit said, "we have researched Massachusetts law and can find no case imposing liability upon a manufacturer (for failure to warn) in favor of one who uses the product of a *different* manufacturer." *Id.* at 869 (emphasis in original). The court added, "there are various Massachusetts 'warning cases,' the language of which

suggests a duty of care runs to those who buy or use the product itself, not a different maker's product." *Id.*[6]

Plaintiff suggests *Mitchell*'s holding was limited to instances involving *unforeseeable* harms. *See Mitchell*, 396 Mass. at 631 (stating that a manufacturer has "no duty . . . to set forth . . . a warning of a possible risk created solely by an act of another that would not be associated with a foreseeable use or misuse of the manufacturer's own product.") At most, *Mitchell* "left unanswered the question whether a manufacturer owes a duty to warn if the potential danger, though created solely by a third party, *is* associated with a foreseeable use of the

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[6] *See also Mathers v. Midland-Ross Corp.*, 403 Mass. 688, 691 (1989) ("A plaintiff who sues a particular manufacturer for product liability generally must be able to prove that the item which it is claimed caused the injury can be traced to that specific manufacturer."); *Cipollone v. Yale Indus. Prods., Inc.*, 202 F.3d 376, 379 (1st Cir. 2000) (under Massachusetts law, "the manufacturer of a component part is liable only if the defect existed in the manufacturer's component itself."); *Feitas v. Emhart Corp., U.S.M.*, 715 F. Supp. 1149, 1153 (D. Mass. 1989) ("Because plaintiff failed to produce any evidence that defendant designed, manufactured or sold any of the components of the rubber mill which contributed to plaintiff's injury, defendant's motion for summary judgment is allowed.").

manufacturer's product." *Morin v. AutoZone Northeast, Inc.*, 79 Mass. App. Ct. 39, 51 (2011), *review denied*, 460 Mass. 1104 (2011).

Plaintiff's interpretation of *Mitchell* is too narrow. It ignores other Massachusetts authority and runs counter to the majority rule nationwide. *See, e.g., Simonetta,* 197 P.3d at 133 (explaining that the Restatement (Second) of Torts § 388 and cases from around the country limit the duty to warn to those in the chain of distribution of the hazardous product); *Stark v. Armstrong World Indus., Inc.*, 21 Fed. Appx. 371, 2001 WL 1216977, at *8 (6th Cir. 2001) ("This form of guilt by association has no support in the law of products liability.").

In fact, in cases just like this one, courts have cited *Mitchell* for the proposition that no liability can be imposed on a manufacturer for harms caused by a third party's asbestos-containing product.[7]

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[7] *See Dombrowski v. Alfa Laval, Inc.*, 2010 WL 4168848 (Mass. Super. Middlesex County July 1, 2010) ("Massachusetts courts 'have never held a manufacturer liable . . . for failure to warn of risks created solely in the use or misuse of the product of another manufacturer'") (quoting *Mitchell*); *In re Asbestos Litig. (Anita Cosner)*, 2012 WL 1694442, at *1 (Del. Super. Ct. New Castle County May 14, 2012) ("Massachusetts courts 'have never held a manufacturer
(Footnote continued on next page)

Furthermore, there are sound social policy reasons not to extend liability to remote defendants such as Defendants-Appellees for products made or sold by third parties. As this Court recently explained:

> Considerations against the imposition of a duty to warn about replacement parts include (1) the original manufacturer's lack of preventive control over the design and marketing of the later component; (2) its lack of any economic benefit from the sale of the replacement component; (3) the perishability of warnings in manuals during the span between the original sale and the later or remote owner's acquisition of the product; and (4) the greater suitability in these circumstances of a duty to warn by the component manufacturer by reason of its control, benefit, and clear accountability.

Morin, 79 Mass. App. Ct. at 51 n.10.

Other courts have identified several additional social policy factors that support a finding of no duty in the circumstances presented here. These include the fact that "the connection between

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liable . . . for failure to warn of risks created solely in the use or misuse of the product of another manufacturer'" because a finding of such a duty "would exceed all reasonable limits.") (citations omitted); *Braaten v. Saberhagen Holdings,* 198 P.3d 493, 499 (Wash. 2008) (citing *Mitchell*); *Ottinger v. American Standard, Inc.*, 2007 WL 7306556 (Pa. Com. Pl. Philadelphia County Sept. 11, 2007) (citing *Mitchell*, among other cases, for the "legal principle that a party does not have a duty to warn generally about the risks of products manufactured by another. . . .").

[Defendants-Appellees'] conduct and [Plaintiff's] injury is remote." *Taylor v. Elliott Turbomachinery Co., Inc.*, 171 Cal. App. 4th 564, 594 (Cal. App. 1st Dist. 2009).

Second, "[l]ittle moral blame can be attached to the conduct for which [Plaintiff] seeks to impose liability" (i.e., the failure to warn of dangerous propensities in other manufacturers' products). *Id.* at 595. As 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 J. 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), *at* http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf.

Third, imposing liability in situations such as this appeal would not serve the policy of preventing future harm. Asbestos litigation today arises from exposures that took place long ago. Imposing a duty to warn on Defendants-Appellees would do nothing to prevent the type of injury alleged by Plaintiff. "Such exposures have already taken place, and in light of the heavily regulated nature of asbestos today,[8] it is most unlikely that holding [Defendants-Appellees] liable for failing to warn of the danger posed by other manufacturers' products will do anything to

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[8] 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 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." *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 310 (E. & S.D.N.Y. 2002); *see also* Occupational Safety & Health Admin., *Regulatory History of Asbestos*, *at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=PREAMBLES&p_id=784.

prevent future asbestos-related injuries." *Taylor*, 171 Cal. App. 4th at 595.

Fourth, as described in more detail later, imposing a duty in these circumstances would impose significant burdens on manufacturers generally. Manufacturers could incur liability not only for their own products, but also for every hazardous product with which their product might foreseeably be used. The broad new duty rule sought by Plaintiff presumably would not be limited to asbestos cases, causing potentially limitless liability for any number of potential defendants in countless situations.

Fifth, because it may often be difficult for a manufacturer to know what kind of other products will be used or combined with its own product, defendants might well face the dilemma of trying to insure against unknowable risks and hazards.

Finally, "there can be little doubt" that [Defendants-Appellees'] conduct in selling critical components to the Navy "was of high social utility." *Taylor*, 171 Cal. App. 4th at 596; *see also Hall*, 2010 WL 528489, at *8 (noting "high social utility" of equipment "used to power Navy vessels and run factories").

II. DEFENDANTS-APPELLEES CANNOT BE HELD LIABLE UNDER WARRANTY LAW FOR HARMS CAUSED BY OTHERS

Liability under the implied warranty of merchantability in Massachusetts is "congruent in nearly all respects with the principles expressed in Restatement (Second) of Torts § 402A (1965)." *Haglund v. Philip Morris Inc.*, 446 Mass. 741, 746 (2006); *Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1, 22 (1998) (same); *see also Cigna Ins. Co. v. Oy Saunatec, Ltd.*, 241 F.3d 1, 15 (1st Cir. 2001) ("Actions under Massachusetts law for breach of the implied warranty of merchantability are the functional equivalent of strict liability in other jurisdictions."). "[T]he Legislature has imposed duties on merchants as a matter of social policy, and has expressed its intent that this warranty should establish liability as comprehensive as that to be found in other jurisdictions that have adopted the tort of strict product liability." *Commonwealth v. Johnson Insulation,* 425 Mass. 620, 653 (1997), quoting *Back v. Wickes Corp.,* 375 Mass. 633, 639-40 (1978). The Restatement (Second) of Torts § 402A "takes the position that the seller of 'any product in a defective condition unreasonably dangerous to the user

or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer[.]'" *Johnson*, 425 Mass. at 654, quoting Restatement (Second) of Torts § 402A (1965); *see also* Restatement Third, Torts: Products Liability § 1 (1997).

The need for a tie between a plaintiff's injury and a defective product put into the stream of commerce by the defendant is stated throughout Massachusetts case law. *See Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 354 (1983) ("Recognizing that *the seller is in the best position to ensure product safety*, the law of strict liability imposes on the seller a duty to prevent the release of "any product in a defective condition unreasonably dangerous to the user or consumer," *into the stream of commerce*.") (emphasis added), quoting Restatement (Second) of Torts § 402A(1) (1965); *Mattoon v. City of Pittsfield*, 56 Mass. App. Ct. 124, 140 (2002) (explaining that § 402A "defines the strict liability of a seller for physical harm to a user or consumer of the *seller's product*.") (emphasis added), *review denied*, 438 Mass. 1108 (2003); *Wolfe v. Ford Motor Co.*, 6 Mass. App. Ct. 346, 349 (1978) ("The duty of

the manufacturer to warn of the dangers in the use of *his product* is well established. . . .") (emphasis added).[9]

Here, however, Defendants-Appellees were not in the chain of distribution of the asbestos-containing products that allegedly caused Plaintiff's harm; therefore, they should not be held liable for harms caused by those products. Liability should not be imposed on an entity that does not manufacture or market the allegedly defective product that caused a plaintiff's injury. *See Soule v. General Motors Corp.*, 882 P.2d 298, 8 Cal. 4th 548, 568 n.5 (Cal. 1994) ("we have consistently held that manufacturers are not insurers of their products; they are liable in tort only when 'defects' in their products cause injury.").

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

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[9] *See also Lou ex rel. Chen v. Otis Elevator Co.*, 2004 WL 504697, at *4 (Mass. Super. Feb. 13, 2004) (noting with respect to a defective product the interest of Massachusetts "in holding accountable a United States company doing business in Massachusetts if it is found to be responsible for *putting that product into the stream of commerce.*") (emphasis added).