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November 8, 2007

VIA HAND DELIVERY

James C. Chute, Clerk
Maine Supreme Judicial Court
142 Federal Street
P. O. Box 368
Portland, Maine 04112-0368

RE: ***Brown v. Crown Equipment Corp.,*** **Law Court Docket No. FED-07-521**

Dear Jim:

Enclosed for filing with the Court in the above-referenced matter, please find (1) my Notice of Appearance; (2) 10 copies of the Brief of Amici Curiae International Association of Defense Council and Chamber of Commerce of the United States of America in Support of Appellant Crown Equipment Corp.; and (3) pursuant to Rule 9(e)(1), letters constituting the written consent of the parties to the filing of this brief.

Thank you for your assistance.

Sincerely,

Jonathan G. Mermin

Enclosures

cc: Terrence D. Garmey, Esq.
Robert Stier, Esq.

1277305.1

STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Court Docket No. FED-07-521

CLAIRE BROWN,

Appellee/Cross-Appellant,

v.

CROWN EQUIPMENT CORPORATION,

Appellant/Cross-Appellee.

NOTICE OF APPEARANCE

NOW COMES Jonathan G. Mermin, Esq., and enters his appearance on behalf of Amici Curiae International Association of Defense Counsel and Chamber of Commerce of the United States of America.

DATED at Portland, Maine this 8th day of November, 2007.

Jonathan G. Mermin, Esq.
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November 6, 2007

VIA FACSIMILE AND OVERNIGHT DELIVERY

Terrence D. Garmey
Smith Elliot Smith & Garney, P.A.
7 Custom Houst St., 5th Floor
Portland ME 04112-0442

Re: Brown v. Crown Equipment Corp., No. FED-07-521

Dear Mr. Garmey:

I represent the International Association of Defense Counsel and the Chamber of Commerce of the United States of America, which intend to file an amicus curiae brief in support of appellant Crown Equipment Corporation in the above-referenced case. Pursuant to Maine Rule of Appellate Procedure 9(e)(1), I am writing to confirm consent to the filing of the brief. If you consent, please so indicate below and return the original signed letter to Daniel Rapaport, Esq. in the enclosed pre-paid envelope.

Thank you for your consideration.

Sincerely,

NOV - 8 2007

Jonathan S. Franklin

Counsel for Amici Curiae

I consent.

Counsel for Appellee Claire Brown

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November 6, 2007

VIA FACSIMILE AND OVERNIGHT DELIVERY

Robert H. Stier, Jr.
Pierce Atwood LLP
One Monument Square
Portland ME 04101

Re: Brown v. Crown Equipment Corp., No. FED-07-521

Dear Mr. Stier:

I represent the International Association of Defense Counsel and the Chamber of Commerce of the United States of America, which intend to file an amicus curiae brief in support of appellant Crown Equipment Corporation in the above-referenced case. Pursuant to Maine Rule of Appellate Procedure 9(e)(1), I am writing to confirm consent to the filing of the brief. If you consent, please so indicate below and return the original signed letter to Daniel Rapaport, Esq. in the enclosed pre-paid envelope.

Thank you for your consideration.

Sincerely,

Jonathan S. Franklin

Counsel for Amici Curiae

I consent.

Counsel for Appellant Crown Equipment Corp.

No. FED-07-521

IN THE

State of Maine
Supreme Judicial Court

Sitting as the Law Court

CLAIRE BROWN,

Appellee/Cross-Appellant,

v.

CROWN EQUIPMENT CORPORATION,

Appellant/Cross-Appellee.

On Certified Questions from the United States Court of Appeal for the First Circuit

BRIEF FOR AMICI CURIAE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT CROWN EQUIPMENT CORP.

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November 8, 2007

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IN THE

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BRIEF FOR AMICI CURIAE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT CROWN EQUIPMENT CORP.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae International Association of Defense Counsel ("IADC") and Chamber of Commerce of the United States of America (the "Chamber") respectfully submit this brief in support of appellant Crown Equipment Corporation ("Crown") and a determination that Maine law imposes no post-sale

duty upon manufacturers to warn remote users regarding a product that was non-defective at the time of its sale.[1]

The International Association of Defense Counsel is an association of corporate and insurance attorneys whose practice is concentrated on the defense of civil lawsuits, including products liability lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and the continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable only for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

The Chamber of Commerce of the United States of America is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size, in every industry sector, and from every geographical region of the country. One of the principal functions of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business

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1 Pursuant to Me. R. App. P. 9(e)(1), amici state that this brief is filed with the written consent of the parties. This brief does not address the second question certified by the First Circuit.

community. The Chamber routinely files amicus briefs in cases, like this one, involving the scope of product liability laws.

Amici are particularly interested in this case, because an affirmative answer to the First Circuit's certified question would represent an extraordinary expansion of a manufacturer's duty to warn. The jury in this case expressly found that the product in question was not defective when made and first sold. Nevertheless, and contrary to the prevailing law throughout the nation, the jury was instructed that it could impose (and then it did impose) a duty on a manufacturer to warn even remote purchasers about products that were not defective when first sold, including warnings about new safety technology developed after the original sale. Under the formulation of law adopted by the federal Magistrate Judge in this case, whether a manufacturer has such a post-sale duty to warn remote customers depends on an undefined "reasonableness" test to be imposed by individual juries acting with hindsight. Amici have therefore filed this brief to apprise the Court of the harm to commerce and safety innovation if it were to determine that Maine law imposes a broad duty to warn remote customers regarding products that were not defective when made and first sold.

INTRODUCTION

The first question certified to this Court asks whether Maine law imposes upon manufacturers a post-sale duty to warn customers regarding a

product that was not defective when made and, if so, whether that duty can extend to remote purchasers. Amici submit that Maine law currently imposes no such duty and this Court should not create one. Consistent with the overwhelming weight of authority throughout the nation, a post-sale duty to warn should be limited to products that were defective when first sold. And under no circumstances should a post-sale duty to warn about non-defective products be extended to remote purchasers of used equipment subject only to an amorphous "reasonableness" standard. Establishing such an expansive legal obligation would undermine its very goal, because it would discourage manufacturers from investigating and redressing safety concerns that arise post-sale for fear that such actions would subject the manufacturer to extremely costly, and potentially impossible to discharge, post-sale duties to warn.

ARGUMENT

I. THE COURT SHOULD NOT CREATE A POST-SALE DUTY TO WARN REGARDING PRODUCTS THAT WERE NOT DEFECTIVE AT THE TIME OF INITIAL MANUFACTURE OR SALE.

For thirty-four years, Maine law has limited a manufacturer's duty to warn to instances where there was a defect at the time a product was distributed. 14 Me. Rev. Stat. Ann. § 221 (2007). This Court has repeatedly acknowledged that limit. See, e.g., Lorfano v. Dura Stone Steps, Inc., 569 A.2d 195, 197 (Me. 1990) (duty to warn imposed under § 221 is applicable to only those dangers

existing at the time a product is sold); Bernier v. Raymark Indus., Inc., 516 A.2d 534, 540 (Me. 1986) (liability limited to what manufacturer knew "at the time of distribution"). Nevertheless, this Court is being invited to disregard that limit and impose an expansive duty to warn that is unbounded by statutory or even common sense jurisprudential limits. This Court should reject that invitation. Instead, where, as here, a manufacturer's duty to warn has been traditionally limited by statute, this Court should exercise restraint and decline to create an expanded duty. Gafner v. Down E. Cmty. Hosp., 1999 Me. 130, ¶¶ 40-44, 735 A.2d 969, 979-80 (Me. 1999); Durepo v. Fishman, 533 A.2d 264, 265 (Me. 1987) (judicial expansion of tort law improper because a "judicial decree is no substitute for the exhaustive gathering of socio-economic facts and the public debate . . . that would occur before the Maine Legislature"). Accordingly, this Court should answer the first certified question in the negative and hold that Maine law imposes no post-sale duty to warn about products that were not defective when sold.

Judicial recognition of any post-sale duty warn on the part of a manufacturer, even with regard to defects existing at the time of first sale, "is relatively new." Restatement of Torts (Third): Products Liability § 10, cmt. a. (1998). In some jurisdictions, there remains no such duty at all. See, e.g., Birchler v. Gehl Co., 88 F.3d 518, 521 (7th Cir. 1996) ("The well established and generally accepted law in Illinois is that manufacturers do not have a continuing duty to

warn"); Boatmen's Trust Co. v. St. Paul Fire & Marine Ins. Co., 995 F. Supp. 956, 962 (E.D. Ark. 1998) ("[T]he Court finds that the plaintiffs have no cause of action under Arkansas law involving any post-sale duty to warn."). Many courts, however, recognize a limited post-sale duty to warn regarding products that contain latent defects at the time of initial manufacture or sale.[2] Importantly, however, where the duty is recognized it has almost always been limited to instances in which the product was defective or unreasonably dangerous at the time it left the hands of the manufacturer or seller—generally, the time of sale.[3] Indeed,

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2 See, e.g., Romero v. Int'l Harvester Co., 979 F.2d 1444 (10th Cir. 1992); Noel v. United Aircraft Corp., 342 F.2d 232 (3d Cir. 1964); Nishida v. E.I. Du Pont De Nemours & Co., 245 F.2d 768 (5th Cir. 1957); Wilson v. United States Elevator Corp., 193 Ariz. 251, 972 P.2d 235 (Ariz. Ct. App. 1998); Collins v. Hyster Co., 174 Ill. App. 3d 972, 529 N.E.2d 303 (Ill. App. Ct. 1988); Patton v. Hutchinson Wil-Rich Mfg. Co., 253 Kan. 741, 861 P.2d 1299 (Kan. 1993); Comstock v. General Motors Corp., 358 Mich. 163, 99 N.W.2d 627 (Mich. 1959); Ward v. Morehead City Sea Food Co., 171 N.C. 33, 87 S.E. 958 (N.C. 1916); Burns v. Pennsylvania Rubber & Supply Co., 117 Ohio App. 12, 189 N.E.2d 645 (Ohio Ct. App. 1961); Walton v. Avco Corp., 530 Pa. 568, 610 A.2d 454 (Pa. 1992).

3 See, e.g., Romero, 979 F.2d at 1452 ("Colorado only imposes a duty to protect users of products which had a design defect or hazard or were unreasonably dangerous under standards existing at the time of manufacture"); Wilson, 193 Ariz. at 253-57; 972 P.2d at 237-41 (no post-sale duty to warn when plaintiff does not allege flaw in product's design or manufacture); Patton, 253 Kan. at 759, 861 P.2d at 1313 ("We recognize a manufacturer's post sale duty to warn . . . when a defect, which originated at the time the product was manufactured, . . . is discovered to present a life threatening hazard") (emphasis added); see also Austin v. Will-Burt Co., 361 F.3d 862, 870 (5th Cir. 2004); (post-sale duty to warn only when defects existed at time of sale); Gregory v. Cincinnati, Inc., 450 Mich. 1, 17, 538 N.W.2d

even where courts have described the post-sale duty to warn in broader terms, see Cover v. Cohen, 61 N.Y.2d 261, 274-75, 461 N.E.2d 864, 871 (N.Y. 1984); Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401, 409 (N.D. 1994), an examination of the facts of those cases reveals that the defect or danger at issue existed at the time of manufacture. See Cover, 61 N.Y.2d at 268, 461 N.E.2d at 867 (jury determined throttle spring was defective at time of manufacture); Crowston, 521 N.W.2d at 405, 409-10 (plaintiff alleged that tire/wheel assembly was defective and dangerous at time of manufacture).

The reasoning for limiting any post-sale duty to warn of defects existing at the time of manufacture or initial sale is sound. As one court has explained, the recognition of a seller's "continuing duty to warn" describes only

> the obligation imposed where a manufacturer or seller, believing that it has sold a non-defective product, subsequently learns that its product was, in fact, defective when placed in the stream of commerce. In these circumstances, saying that there is a "continuing duty to warn" is, of course, a tacit recognition that the duty existed in the first instance. Such an obligation is not at all synonymous however with the claim . . . that where a product is free from all defects when sold, the seller, nevertheless, has a duty to monitor changes in technology

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325, 331-32 (Mich. 1995) (under Michigan law, "the only postmanufacture duty imposed on a manufacturer has been the duty to warn when the defect existed at the point of manufacture"); Kozlowski v. John E. Smith's Sons Co., 87 Wis. 2d 882, 899, 275 N.W.2d 915, 923(Wis. 1979) (recognizing duty to warn where plaintiff alleged that product lacked sufficient warnings at time of sale).

> and notions of safety and, either periodically or otherwise, notify its purchasers thereof. For where, as here, no initial duty to warn exists, none can be said to "continue."

Lynch v. McStome & Lincoln Plaza Assocs., 378 Pa. Super. 430, 441, 548 A.2d 1276, 1281 (Pa. Super. Ct. 1988) (emphasis added; citation omitted). Accord, Wilson, 193 Ariz. at 256-577, 972 P.2d at 240-41.

This case exemplifies the need to adhere to this well-established limitation. The jury answered "No" to the question "Was the lift truck at issue in this case in a defective and unreasonably dangerous condition when [Crown] first sold it in January 1990 and, if so, was that condition a legal cause of the death of Thomas Brown." First Cir. App. 230. The jury further answered "No" to the question "Was [Crown] negligent in its design of the lift truck as of January 1990 and, if so, was that negligence a legal cause of the death of Thomas Brown." First Cir. App. 231. Thus, as the case comes before this Court it is undisputed that the lift truck was not defective or unreasonably dangerous when first sold to its initial purchaser.

Nevertheless, based on language contained in a comment to the Restatement of Torts (Third): Products Liability § 10, the jury was instructed that it could also find liability—regardless of its decision on these initial questions—if Crown was "negligent in failing to warn, subsequent to its initial sale of the lift truck at issue in this case, of a horizontal intrusion hazard associated with the

operation of that lift truck." First Cir. App. 231. This liability, the jury was instructed, could take into account "available modifications to the lift truck that, if made, would have prevented Mr. Brown's accident and death." First Cir. App. 220. The jury accordingly answered "Yes" to the question "Was [Crown] negligent in failing, after the lift truck's original sale in January 1990, to adequately warn foreseeable users of the lift truck about the hazard known as 'horizontal intrusion' and, if so, was that negligence a legal cause of the death of Thomas Brown." First Cir. App. 231. Thus, the jury imposed liability upon Crown for failing to warn about the risk of horizontal intrusion even though it had concluded that risk did not render the lift truck unreasonably dangerous when sold. In other words, the jury imposed upon Crown a duty to warn about an allegedly hazardous condition that was either non-existent at the time of sale or did not render the truck defective when first sold.

Although the jury was not asked to explain its result any further, its apparent rationale was that Crown had a legal duty to inform remote purchasers about newly developed technology (the backrest extension) that might have made an already reasonably safe product even safer. Amici are concerned that imposing such a duty to "warn" about every new safety improvement will have the opposite of its intended result. Manufacturers are continually investing in new safety technology in order to improve upon the existing state of the art, even though the

existing technology is itself not unreasonably dangerous. If the result in this case is upheld, however, manufacturers will have incentives not to invest in new safety technologies lest an individual jury conclude (as this one did) that the existence of that new technology triggers a duty to warn any user—even remote purchasers of used equipment—that an already safe product might be made even safer.

The warnings necessary to comply with such a duty would often be expensive, since a manufacturer will have to seek out possibly thousands or millions of remote purchasers and would receive no remuneration for its efforts. But in addition, the specter of liability for a single missed warning (here, more than $1,500,000 for a single accident) will necessarily lead a prudent company to think twice before investing in new safety technology that might carry with it a new post-sale duty to warn purchasers of older models. That is precisely why the overwhelming majority of courts have held that there is no such duty to warn about products that are not defective when sold, or to repair or recall such products. See, e.g., Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 548, 462 S.E.2d 321, 331 (S.C. Ct. App. 1995) (observing that most jurisdictions reject any post-sale duty to warn of later developed safety devices); Gregory, 450 Mich. at 29, 538 N.W.2d at 337 ("[I]mposing a duty to update technology would place an unreasonable burden on manufacturers. It would discourage manufacturers from developing new designs if this could form the bases for suits or result in costly repair and recall

campaigns.").[4] The harm from this disincentive to innovation will be felt by all consumers and the economy in general.

Moreover, the inherently amorphous scope of the new duty to warn as set forth in the Restatement of Torts (Third): Products Liability § 10 is further reason to reject it. Here, the language of the Restatement was used to support a jury instruction that Crown could be found liable for failing to warn a remote purchaser if the risk of harm is "substantial;" if a purchaser could "reasonably be assumed to be unaware of the risk;" if Crown could have "effectively communicated a warning;" and if the risk was "sufficiently great" to justify imposing the duty to warn. First Cir. App. 222. But this amorphous standard is really no standard at all. A manufacturer cannot rationally determine in advance

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4 Even the tiny minority of courts that have recognized a post-sale duty to warn with regard to products not defective when made or first sold have generally limited that duty to "special" cases, such as where an extremely small number of products were sold. Although amici do not advocate that standardless approach, it should be noted that courts considering post-sale duty to warn claims involving forklifts (the common name for lift trucks) have not considered them "special" products warranting the imposition of an open-ended post-sale duty to warn. See, e.g., Engle v. BT Indus. AB, 1999 Pa. Dist. & Cty. Dec. LEXIS 170, *7-8 (Pa. Common Pleas Ct. 1999) (no post-sale duty to warn when forklift not defective, and forklift cannot be defective due to lack of post-sale warnings); Anderson v. Nissan Motor Co., 139 F.3d 599, 602 (8th Cir. 1998) (affirming dismissal of post-sale failure to warn claim); Habecker v. Clark Equip. Co., 797 F. Supp. 381, 395 (M.D. Pa. 1992) (no post-sale duty to warn because forklift was common product likely to get "swept away in the currents of commerce"), aff'd, 36 F.3d 278 (3d Cir. 1994).

whether a given jury will "reasonably assume" a purchaser to be unaware of a risk, will find that a warning could have been "effectively communicated" to that purchaser, or will find that a risk was both "substantial" and "sufficiently great" to justify a warning. See Charles H. Mollenberg, Jr., Post-Sale Duty to Warn: An Uncertain Future, 10 Kan. J.L. & Pub. Pol'y 94, 95-99 (2000) (because unbounded post-sale duty to warn makes every case a jury determination regarding adequacy of the warning in light of what is currently known about the product, ex ante compliance would be nearly impossible given that reasonableness varies from jury to jury).

As a result, manufacturers would have to assume that every unwarned purchaser and remote purchaser is a potential source of liability and will err on the side of not voluntarily creating that duty by investing in new safety technology. An amorphous post-sale duty to warn also means that a product seller or manufacturer cannot, in advance, determine the cost of providing the warning or spread it out across consumers. See id. at 96; Victor Schwartz, The Post-Sale Duty To Warn: Two Unfortunate Forks In the Road to A Reasonable Doctrine, 58 N.Y.U. L. Rev. 892, 895-96 (1983) (contrasting costs of point-of-sale warnings with those of post-sale warnings). Consequently, one of the traditional reasons for placing a new burden on manufacturers and sellers—that they can spread the cost evenly among consumers—evaporates.

Because strict liability standards already impose liability for products that are defective and unreasonably dangerous when first sold, manufacturers have additional incentives both to correct those conditions and to warn about them. Whether a post-sale duty to warn exists in such circumstances is therefore often of little moment, since such a duty would largely be consonant with strict liability. Cf. Moulton v. Rival Co., 116 F.3d 22, 26 (1st Cir. 1997) ("We do not reach the issue of whether the Maine Law Court would recognize a negligence-based post-sale duty to warn because the jury verdict is adequately supported on a strict liability claim and the damages are the same."). But where, as here, a product is not defective when sold, imposing an open-ended negligence-based duty to warn about new safety technology will have the perverse result of creating disincentives to continue improving that technology.

In the federal proceedings, the Magistrate Judge assumed Maine tort law would impose a post-sale duty to warn consistent with a comment to Section 10 of the Restatement (Third) of Torts: Products Liability. But the Restatement is supposed to be just that—a restatement of the law. It is not a statute or a freestanding source of new rights not already recognized in the law. See, e.g., Douglas R. Richmond, Expanding Products Liability: Manufacturers' Post-Sale Duties to Warn, Retrofit and Recall, 36 Idaho L. Rev. 7, 11 (1999). With respect to Section 10, which was not added until the Third Restatement in 1997, the

drafters overstepped their bounds in indicating—contrary to the overwhelming weight of judicial authority—that a post-sale duty to warn can extend to products that were not defective when first made or sold. Thus, several courts have expressly and properly rejected the analysis of Section 10.[5]

Even the Restatement recognizes that post-sale duties to retrofit or recall are primarily the subject of legislative action, not tort law. See Restatement (Third) of Torts: Products Liability § 11 (tort liability can exist only when manufacturer fails to recall when directed to do so by government, or manufacturer unreasonably undertakes voluntary recall). The same should be true with post-sale duties to warn regarding non-defective products, which operate as de facto recall requirements. In numerous states, these duties have been addressed by legislatures, which are far better able than are courts to weigh the competing costs and benefits. Sometimes the legislature will confirm the settled common law rule. See, e.g., Miss. Code Ann. § 11-1-63(c) (i) (West 1993) (manufacturer liable only for failing to warn about dangers it knew or should have known when product left its control). A few have gone further. See Iowa Code Ann. § 668.12.2 (West 1987); La. Rev. Stat. Ann. § 9:2800.57.C (1991); N.C. Gen. Stat. § 99b-5(a)(2)

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5 See DeSantis v. Frick, Co., 1999 Pa. Super. 329, 745 A.2d 624, 631 (Pa. Super. Ct. 1999); Modelski v. Navistar Int'l Transp. Corp., 302 Ill. App. 3d 879, 888, 707 N.E.2d 239, 246 (Ill. Ct. App. 1999); Irion v. Sun Lighting, Inc., 2004 Tenn. App. LEXIS 210 (Tenn. Ct. App. 2004).

(1995); Ohio Rev. Code Ann. 2307.76(A)(2)(b), (B), (C) (1995); Wash. Rev. Code 7.72.030(1)(c) (1992). But as this Court has recognized, it is in the legislative arena, not the jury room, where this issue should be debated and resolved. See, e.g., Durepo, 533 A.2d at 265. Under circumstances such as these, it should not be the task of this Court, or any court for that matter, to create a new expansive post-sale duty to warn remote purchasers where the Maine Legislature has not seen fit to do so.

Accordingly, because the jury found that the lift truck in question was not defective when first sold, and because there is no recognized post-sale duty to warn regarding such non-defective products, this Court should answer the first certified question in the negative.

II. AT A MINIMUM, ANY POST-SALE DUTY TO WARN REGARDING PRODUCTS THAT WERE NOT DEFECTIVE WHEN FIRST MADE OR SOLD SHOULD NOT EXTEND TO REMOTE PURCHASERS.

As explained above, the Court should not create a new post-sale duty to warn regarding products that were not defective when first made and sold. That should be the end of the inquiry. But even if the Court were to determine that there is or could be such a duty, in no event should that duty extend beyond initial customers to remote purchasers such as Mr. Brown's employer.

Section 10 of the Restatement does not clearly distinguish between original and remote purchasers as the proper recipients of a post-sale warning.

Like its broad description of a post-sale duty to warn without regard to when the defect or danger arises, Section 10 describes the recipient of a post-sale duty to warn in vague terms of reasonableness. See Restatement of Torts (Third) § 10, cmt. g. ("For a post-sale duty to warn to arise, the seller must reasonably be able to communicate the warning to those identified as appropriate recipients . . . . As the group to whom warnings might be provided increase in size, costs of communicating warnings may increase and their effectiveness may decrease.").

Despite such broad language, however, the few cases to squarely consider the issue have generally held that the manufacturer's post-sale duty to warn applies only to the original purchaser. See Lewis v. Ariens Co., 434 Mass. 643, 649, 751 N.E.2d. 862, 867 (Mass. 2001) (no requirement for manufacturer or seller to warn the owner of a product "who has purchased it at least second-hand"); Dixon v. Jacobsen Mfg. Co., 270 N.J. Super. 569, 637 A.2d 915 (N.J. App. Div. 1994); cf. Crowston, 521 N.W.2d at 408 (declining to impose a duty on manufacturer to trace all current owners of its products when product was mass produced and widely distributed).

In no event should this Court accept Section 10's virtually unbounded description of the class of purchasers to whom the alleged post-sale duty can be owed. If the duty extends to anyone to whom a manufacturer can "reasonably communicate" a warning, as a random jury might determine, then there are no

effective limitations at all. A manufacturer cannot identify that class of purchasers in advance and will therefore have to undertake the laborious process of tracking down and communicating with potentially thousands, if not millions, of remote purchasers. As explained above, it is more likely that a manufacturer will seek ways to avoid such warnings altogether by not even trying to develop new safety upgrades to existing models that are already reasonably safe. The comment to the Restatement itself recognizes that "the seller's inability to identify those for whom warnings would be useful may properly prevent a post-sale duty to warn from arising." Restatement (Third) of Torts: Products Liability § 10, cmt. e. But the drafters provide no effective way for a manufacturer to determine in advance when the difficulty of providing post-sale warnings becomes so great as to eliminate the duty.

By far the better approach (and the one dictated by law) would be to limit any post-sale duty to warn to products that were defective when first made or sold, which would essentially conform the duty to existing strict liability standards. Such initial purchasers are the only class of users a manufacturer can readily identify. Even if the law imposed a post-sale duty to warn about non-defective products, a manufacturer could at least expect that initial purchasers would identify themselves. In this case, for example, Crown maintained a list of initial customers, and voluntarily provided information to them about available product

enhancements. But if a post-sale duty were extended beyond those initial purchasers, a manufacturer would have to undertake the expensive, laborious, and often impossible task of identifying and tracking remote purchasers of used equipment, lest a jury conclude in hindsight that its efforts were unreasonable. Although the appellee here might argue that the task was not onerous with respect to Mr. Brown's employer, which had contacted Crown for a different purpose, that argument misses the point. The question is whether Maine law will impose a vague duty to notify all remote purchasers with whom a manufacturer can "reasonably communicate." If such an open-ended duty is created, it would impose unjustified burdens on manufacturers regardless of the facts of any individual case. That is why the Supreme Judicial Court of Massachusetts has held that post-sale duties to warn, if they exist at all, do not extend to someone who purchased a product "at least second hand" years after a product was sold. Lewis v. Ariens, 434 Mass. at 649, 751 N.E.2d at 867.

Without this limitation, the burden placed upon the product manufacturer or seller to warn increases exponentially. See Michael L. Matula, Manufacturer's Post-Sale Duties in the 1990s, 32 Tort & Ins. L.J. 87, 92 (1996). While the cost of point-of-sale warnings can be low, post-sale warnings would typically require significant labor resources to identify and track down current product owners. See Frank E. Kulbaksi III, Statutes of Repose and the Post-Sale

Duty to Warn: Time for a New Interpretation, 32 Conn. L. Rev. 1027, 1038 (2000). Moreover, "even if all current users could be located, the actual dissemination of notice of a newly discovered latent danger could also be unduly burdensome, financially and otherwise." Id. Furthermore, the cost of post-sale warnings will have to be shouldered by the manufacturer alone because the price of already sold products cannot be adjusted to reflect the additional cost. Id. Because of the difficulty in tracing remote purchasers, there might even be a rise in preventable injuries due to overwarning at the time of sale. See, e.g., Richmond, 36 Idaho L. Rev. at 19; Andre v. Union Tank Car Co., 213 N.J. Super. 51, 67, 516 A.2d 277 (Law Div. 1985) ("To warn of all potential dangers would warn of nothing."). Such "[o]verwarning causes consumers and users to discount or ignore valid warnings, which, in turn, leads to higher accident costs." Richmond, 36 Idaho L. Rev. at 19.

In sum, in the event the Court concludes that there is or could be a duty to warn about products that were not defective when first made or sold, that duty should be limited to initial purchasers.

CONCLUSION

For the foregoing reasons, and those set forth in Crown's brief, this Court should determine that Maine law imposes no post-sale duty upon manufacturers to warn remote users regarding a product that was non-defective at

the time of its sale. Consequently, the first certified question should be answered in the negative.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2007, two copies of the foregoing Brief for Amici Curiae International Association of Defense Counsel and the Chamber of Commerce of the United States were served by First Class Mail on:

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