No. 06-CV-952

In the

District of Columbia Court of Appeals

MILDRED DEBNAM, Individually and
as Personal Representative of the Estate of PLUMMER DEBNAM,

Plaintiff-Appellant,

v.

CRANE CO.,

Defendant-Appellee.

On Appeal from the Superior Court of the District of Columbia,
Civil Division No. 2005 CA 004626 A (Hon. Frederick H. Weisberg, Judge)

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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Appellant Mildred Debnam hereby replies to the brief of Appellee Crane Co. ("Crane").

ARGUMENT

A. The Indemnification Provision of Paragraph 6 Does Not Define the Scope of Crane's Assumption of National's Warranty Liability

Crane focuses on the short-term indemnification provision of Paragraph 6 to bolster its position that Paragraph 17 referred only to Crane's future liability for warranty repairs or replacements.[1] Crane's emphasis on Paragraph 6, however, is misplaced because that provision does not define the scope of Crane's assumption of National's warranty liability under Paragraph 17.

Paragraph 6 of the 1959 Agreement provides, in relevant part, as follows:

> 6. National warrants and represents, and all such representations and warranties shall be true at the time of and shall survive the closing for a period of twelve months thereafter, that:
>
> * * *
>
> (g) *Except as otherwise provided herein*, [National] will indemnify and hold Crane harmless from any and all of [National's] liabilities of whatsoever kind or nature.[2]

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[1] Crane Br. at 18.

[2] JA at 132 (emphasis added).

Based on this provision, Crane asserts that it "expressly declined to undertake any liabilities of [National.]"[3] This overstatement leaves a fundamental misimpression of the framework created by Paragraphs 6 and 17.

First, the opening clause of Paragraph 6 states that National's obligation to indemnify Crane for National's liabilities survived closing only for twelve months. More importantly, Paragraph 17 expressly provides for Crane's assumption of all of National's *warranty* liabilities, a clear *exception otherwise provided* to the general rule under Paragraph 6 that Crane did not assume National's liabilities.

B. Paragraph 17 Expressly Contemplates Crane's Assumption of National's Liability for Nonstandard Warranty Claims

In its brief, Crane relies heavily on the trial court's statement that "reasonable persons in the position of the contracting parties could not have understood that Crane was agreeing to assume liability to third parties, who were not in privity with National", and Paragraph 17 "contemplate[d] only *standard* warranty claims for defective products that had to be *repaired or replaced*."[4] Crane's reliance, however, is misplaced because the trial court's statement was erroneous.

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[3] Crane Br. at 18.

[4] Crane Br. at 17-18.

Reasonable persons in the position of the contracting parties could have understood that Crane was assuming liability for *all* warranty claims on National products, including nonstandard warranty claims. In fact, the express terms of Paragraph 17 demonstrate that Crane and National *did* contemplate Crane's assumption of National's liability for nonstandard warranty claims.

To induce Crane to assume *all* of National's warranty liability, rather than merely National's liability for standard warranty repairs, National warranted and represented in Paragraph 17 that it did not "anticipate any prospective *abnormal* or *extraordinary* warranty claims, other than warranty claims *in the ordinary course of business*."[5]

If Crane was only to assume National's liability for standard warranty repairs, then National's representation that it was unaware of prospective nonstandard warranty claims was meaningless and inoperative. If, however, Crane was to assume *all* of National's warranty liability, including liability for nonstandard warranty claims, then National's representation was significant.

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[5] JA at 137 (emphasis added).

The trial court and Crane completely ignore National's representation that it was unaware of any prospective nonstandard warranty claims. This language unambiguously signifies the parties' understanding: Crane would assume *all* of National's warranty liability, including liability for nonstandard warranty claims.

C. Crane Ignores the Plain Meaning of the Term "All" in Paragraph 17

Crane upbraids Mrs. Debnam for asking this Court to focus on one word in Paragraph 17: all.[6] The word "all" ("all obligations of every kind whatsoever"), however, leaves only one possible interpretation of Crane's assumption of National's warranty obligations. Simply put, all means all. *See Sander v. Alexander Richardson Investments*, 334 F.3d 712, 716 (8th Cir. 2003) ("In short, 'all' means all" - interpreting exculpatory clause in marine contract) (citing *Knott v. McDonald's Corp.*, 147 F.3d 1065, 1067 (9th Cir. 1988) (enforcing clause in which franchise seller assigned "all [their] right, title and interest" to the buyer, including cause of action for breach of franchise agreement)).

[6] Crane Br. at 19.

Crane maintains that in this case, all means substantially less than all, arguing that Paragraph 17, read as a whole, focuses on the "repair of broken equipment."[7]

Mrs. Debnam does not dispute that Crane became responsible for the repair or replacement of broken equipment when it assumed *all* of National's warranty liability. But nothing in Paragraph 17 or elsewhere inexorably limits Crane's assumption to liability for warranty claims for the "repair of broken equipment."[8] Moreover, Crane cannot direct this Court to the sentence, clause or word that ties Paragraph 17 to the "repair of broken equipment." These words simply do not appear. Instead, responsibility for warranty repairs is but one of the liabilities Crane assumed when it inherited *all* of National's warranty obligations.

Where, as here, parties to a contract elect to employ broad, sweeping language, it is incumbent upon them to state any limitations thereto. *See Princemont v. Constr. Corp. v. Baltimore & Ohio R.R. Co.*, 131 A.2d 877, 878 (D.C. 1957) ("[T]he presumption is that if the parties had intended some limitation of the all-embracing language, they would have expressed such

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[7] Crane Br. at 20.

[8] Crane Br. at 21-25.

limitation."). Crane could have limited its assumption of warranty liability to claims for repairs, but it did not.

D. The New York Choice-of-Law Provision Does Not Absolve Crane from Liability for Warranty Claims by Persons Lacking Privity with National

In its brief, Crane asserts that based on the New York choice-of-law provision in Paragraph 29, Crane could not have assumed liability for warranty claims by persons lacking privity with National.[9] According to Crane, the parties did not intend for Crane to assume such liability because New York law, which governs the Agreement, did not recognize this type of warranty claim at the time of the Agreement. Crane's reasoning, however, has been rejected by other courts, including the Second Circuit applying New York law, and should be rejected here.

In *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10 (2nd Cir. 1993), the Second Circuit faced a similar situation in the context of liability under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA"). In 1973, Olin contracted to sell all of its aluminum business to Conalco. Under the asset purchase contract, Conalco agreed to indemnify Olin for all post-transfer liabilities associated with Olin's aluminum operation at the so-called Hannibal site. *Id.* at 12-13.

[9] Crane Br. at 21-23.

In 1986, Conalco and Olin were held jointly and severally liable under CERCLA for the substantial costs of environmental cleanup at the Hannibal site. Olin sued for a declaratory judgment that Conalco was contractually obligated to indemnify Olin for any costs associated with the CERCLA liability. Conalco counterclaimed for contribution from Olin for a portion of the cleanup costs. *Id.* at 13.

The Second Circuit applied New York law to interpret the asset purchase contract, specifically to determine the scope of Conalco's obligations under the indemnification clause. The central issue facing the Court was that Congress only enacted CERCLA years after the parties entered the asset purchase agreement.[10]

Conalco argued that in drafting their agreement, the parties only contemplated liabilities arising under then-existing law. Thus, Conalco could not have assumed Olin's then-unimaginable CERCLA liability. The Second Circuit agreed that the parties drafted their agreement with the then-existing law

[10] The Second Circuit stated the issue as follows: "The primary question we address in this appeal is whether the Agreements at issue, which predate the enactment of CERCLA and which make no mention of environmental liability, allocate to Conalco, the buyer, the subsequently created CERCLA obligation to clean up the Hannibal site, which Conalco claims was contaminated by Olin, the seller." *Olin Corp.*, 5 F.3d at 14

in mind, but still found that Conalco had assumed Olin's CERCLA liability.

After emphasizing Conalco's contractual obligation to indemnify Olin for "*all liabilities*" associated with the Hannibal site, the Court explained as follows:

> Notwithstanding the fact that CERCLA did not exist at the time these contracts were executed, we hold that as to the Hannibal site, these contractual provisions are sufficiently broad to encompass CERCLA liability. The language evidences the parties' clear and unmistakable intent that Conalco indemnify Olin for *all liability* related to the Hannibal site, *even future unknown liabilities*.
>
> * * *
>
> Conalco contends that CERCLA, which imposes strict liability and casts a broad liability net, was a *previously unimaginable scheme*. The District Court's decision forces Conalco, an apparently innocent purchaser of land, to assume a liability that *did not exist* at the time of contract for conditions that it did not create. . . . As to the Hannibal site, Olin contracted to release itself from *all liability* arising from its previous ownership of its aluminum business. Clearly the inclusion of the broadly worded contractual provisions affected the selling price Olin received. This was a contract between two large, sophisticated companies who hammered out an agreement and expected to be able to rely on its terms.
>
> * * *
>
> We agree with Olin that this language is broad enough to require Conalco to indemnify Olin for CERCLA liability.

Id. at 15-16 (emphasis added) (internal quotations omitted).

Crane's argument in this Court mirrors Conalco's failed argument before the Second Circuit: We could not have assumed liability for National's warranties to Mr. Debnam because New York law did not recognize such liability at the time of the 1959 or 1961 Agreements. The Second Circuit held that under New York contract law, the broad phraseology used by Olin and Conalco included future unknown liabilities, even liabilities arising under a previously unimaginable scheme. In Paragraph 17, Crane and National used the same operative term — "all."

Other courts, reaching the same conclusion as the Second Circuit, have recognized that parties can expressly exclude inchoate or unrecognized claims from the contractual assumption of liabilities. *See e.g.*, *Ramos v. Collins & Aikman Group, Inc.*, 977 F.Supp. 537, 540 (D.Mass. 1997) ("The Assumption of Liabilities Agreement provided for the assumption of all of the [seller's] liabilities. Because there was no express exception, [the buyer] assumed inchoate or contingent product liability claims[.]"). Crane could have negotiated for the exclusion of inchoate warranty liability from its assumption in Paragraph 17, but Crane did not.

Crane is now stuck with the undeniably broad language the parties chose. Accordingly, Crane assumed liability from National for Mr. Debnam's claim under the broad phraseology of Paragraph 17 regardless of whether New York law recognized such

a claim at the time of the contract. Thus, the New York choice-of-law law provision does not absolve Crane from liability for warranty claims brought by persons lacking privity with National.

Additionally, Crane stepped into National's shoes for purposes of all of its warranty "obligations." The key question then is what were the National's warranty obligations when the parties signed the 1959 and 1961 Agreements?

As discussed in Mrs. Debnam's opening brief, as of 1959, in five states a boiler mechanic injured by a National boiler in the manner of Plummer Debnam could recover in warranty even absent privity.[11] By the close of 1961, the ranks of such states had swelled to fourteen.[12] Moreover, each decision was applied retrospectively – warranty liability in the absence of privity applied to the universe of products sold *before* the decision was announced.

It is therefore of no moment that the District of Columbia waited until 1962 to reject privity. *See Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919 (D.C. 1962). The decision applied to the National boilers delivered to Thomas Elementary

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[11] *See* Appellant Br. at 8-9.

[12] *See* Appellant Br. At 8-9. Notably, Crane does not defend the trial court's assertion that Plaintiff's warranty claims "were virtually unknown in the law in 1959, absent privity of contract." JA at 644.

in 1948 to which Mr. Debnam was first exposed in 1964 and the resulting warranty claims asserted by Mrs. Debnam here.

E. New York Courts Applied Warranty Liability Absent Privity between 1959 and 1961

Assuming *arguendo* that Paragraph 17 did not unambiguously shift National's inchoate warranty liability to Crane, the meaning of Paragraph 17 is ambiguous and the trial court should have admitted extrinsic evidence of the Paragraph 17's meaning, including the Abrams affidavit.

By 1959, application of the privity doctrine in implied warranty cases had become unsettled in New York.[13] Various jurisdictions outside of New York had altogether abandoned the requirement as antiquated. Contemporary jurists and scholars routinely discussed this trend.

In published opinions, various New York trial courts held that privity was not required, while others held that it was.[14] In *Parish*, 13 Misc.2d at 36, the trial judge observed in 1958:

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[13] Crane cleaves to the notion that New York did not eliminate the privity requirement in warranty cases until 1973, relying on *Codling v. Paglia*, 32 N.Y.2d 330, 345 N.Y.S.2d 461 (1973). But *Codling* stands for the extension of a manufacturer's liability absent privity to *nonusers* of a product in a warranty action. In 1963, New York rejected the privity requirement for warranty claims asserted by any *contemplated user* of a product. *Goldberg v. Kollsman*, 12 N.Y.2d 432, 437, 191 N.E.2d 81, 83 (1963).

[14] Some of the pre-1959 New York cases that discarded privity in implied warranty cases include *Greenberg v. Bernice Foods*, 12 Misc.2d 883, 888, 178 N.Y.S.2d 407 (N.Y. App. 1958) ("[T]he judicial 'assault on the citadel of privity' has been going on a

> Since the *Waldorf*, *Lardaro* and *Welch* cases [], a state of confusion presently exists. It is hoped that, because the privity problem is of vital concern, the higher courts will clarify the legal atmosphere clouding the subject. As Lord Mansfield said: 'Lawyers and litigants are entitled to know where they stand as to what their rights are and what the law is.'

While many of these cases arose in connection with the sale of food, the broader discussion addressed abandonment of privity in all warranty cases and recognized the trend toward this result.

More importantly, by 1961, under New York's choice of law rules,[15] the absence of privity proved nonfatal to some plaintiffs' suits based on manufacturers' implied warranties. *See e.g.*, *Hinton v. Republic Aviation Corp.*, 180 F.Supp. 31 (S.D.N.Y. 1959)(under New York conflict of law rules, California law applies allowing wrongful death action against airplane

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long time[.]"); *Parish v. Great Atlantic Pacific Tea Co.*, 13 Misc.2d 33, 64-65, 177 N.Y.S.2d 7 (N.Y. Mun. 1958) ("The archaic notion that privity is essential to recovery in a breach of warranty action is cardinal error. It requires the acceptance of the artificial and the shutting of our eyes to the realities of life."); C*onklin v. Hotel Waldorf Astoria*, 5 Misc. 2d 496, 161 N.Y.S.2d 205 (N.Y. City Ct. 1957); *Lardaro v. MBS Cigar Corp.*, 10 Misc.2d 873, 177 N.Y.S.2d 6 (N.Y. Mun. 1957); *Welch v. Schiebelhuth*, 11 Misc. 2d 312, 316, 169 N.Y.S.2d 309 (Sup. Ct. 1957) ("Our own state has chipped away, eroded and streamlined the privity rule *and its demise*, without elegy, is in view." emphasis original)).

[15] "New York law includes, of course, New York's choice of law rules." *Commercial Union Ins. Co. v. Porter Hayden Co.*, 698 A.2d 1167, 1207, 116 Md.App. 605, 687 (1997).

manufacturer based upon breach of implied warranty without privity); *Siegel v. Braniff Airways*, 204 F.Supp. 861 (S.D.N.Y. 1960) (same, applying Texas law); *Conlon v. Republic Aviation Corp.*, 204 F.Supp. 865 (S.D.N.Y. 1960) (same, applying Michigan law to personal injury action); *Middleton v. United Aircraft,* Corp., 204 F.Supp. 856, 860 (S.D.N.Y. 1960) ("In view of the modern trend, as previously discussed, an action based on the breach of an implied warranty should not be dismissed because of the lack of privity between the plaintiff and the defendant.").

In these cases, New York choice of law rules mandated the application of warranty law from jurisdictions that had abandoned privity. National had sold its boilers throughout the United States, including in many states that had abandoned privity in warranty claims.

Thus, the notion that by 1959 or 1961 Crane could not have understood that it was agreeing to assume liability to third parties without privity is wrong. Crane and National were sophisticated manufacturer-distributors who sold their products nationally. As such, each entity bore possible exposure for claims stemming from defective products sold virtually anywhere. Third-party users of National's products were not bound by the 1959 or 1961 Agreements' choice of New York law.

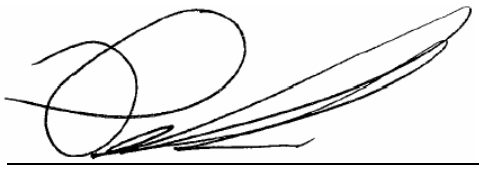
As shown above, New York courts were no strangers to warranty claims absent privity during the period from 1959 to

1961. At a minimum, the shifting law promoted an environment of ambiguity on this topic, and the trial court should have admitted extrinsic evidence as to the meaning of Paragraph 17, including the Abrams affidavit.

CONCLUSION

For the foregoing reasons, and those asserted in her opening brief, Mrs. Debnam asks that the Court reverse the trial court's grant of summary judgment.

Respectfully submitted,



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January 12, 2007