

Civil Number **B208275**

**IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO**

ALFRED C. HALL and BERTIE G. HALL,

*Plaintiffs and Appellants,*

v.

WARREN PUMPS, LLC, et al.,

*Defendants and Respondents.*

Los Angeles County Superior Court Case Number BC373038  
The Honorable Terry Green, Judge Presiding

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**AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC.,  
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,  
NATIONAL ASSOCIATION OF MANUFACTURERS,  
ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES,  
AMERICAN INSURANCE ASSOCIATION,  
AMERICAN PETROLEUM INSTITUTE,  
AND AMERICAN CHEMISTRY COUNCIL  
IN SUPPORT OF DEFENDANTS-RESPONDENTS**

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*Amici curiae* Coalition for Litigation Justice, Inc., Chamber of Commerce of the United States of America, National Association of Manufacturers, Association of California Insurance Companies, American Insurance Association, American Petroleum Institute, and American Chemistry Council file this brief to urge this Court to affirm the decision of the trial court granting judgment in favor of Defendants-Respondents.

**QUESTION PRESENTED**

Whether, under California law, a product manufacturer may be held liable for harms allegedly caused by asbestos-containing external or replacement parts made, supplied, or installed by others and affixed post-manufacture.

## **STATEMENT OF INTEREST**

*Amici* are organizations that represent companies doing business in California and their insurers. Accordingly, *amici* have a substantial interest in ensuring that California's tort system is fair, follows traditional tort law rules, and reflects sound public policy. *Amici* will show that the trial court's decision to reject Plaintiffs-Appellants' invitation to hold Defendants-Respondents liable for harm caused by *other manufacturers'* asbestos-containing products is consistent with these principles, as well as California law, and should be affirmed.

## **STATEMENT OF THE CASE**

*Amici* adopt Defendants-Respondents' Statement of the Case.

## **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* (2008) 37 Sw. U. L. Rev. 511, 511. Since the litigation emerged over three decades ago, lawyers who bring asbestos cases have perpetuated the litigation by seeking out new defendants or raising new theories of liability.

An emerging theory being promoted by some plaintiffs' counsel is that makers of nondefective products such as pumps or valves should be held liable for harms allegedly caused by asbestos-containing products, such as external thermal insulation, gaskets, or packing, made by others and attached post-sale, e.g., by the U.S. Navy. Ordinarily, manufacturers such as Defendants-Respondents are named in asbestos cases only with

respect to asbestos that was contained in their *own* products – not to hold them accountable for asbestos-containing products made by others and affixed to or used around their products post-sale. Indeed, the third-party liability concept Plaintiffs-Appellants seek to impose here is so extreme that almost no plaintiff during the thirty-plus years of asbestos litigation has had the audacity even to raise this argument until very recently. The lack of case law on point after so many years of litigation and after many hundreds of thousands of filings, by itself, speaks volumes about the exotic nature and recent vintage of Plaintiffs’ theory.

In essence, Plaintiffs-Appellants seek to impose rescuer liability on defendants to warn about asbestos-related hazards in products made or installed 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* (2008) 37 Sw. U. L. Rev. 595, 602 (Frank B. Ingersoll Professor at Cornell Law School and Co-Reporter for the Restatement Third, Torts: Products Liability: “Every student of American tort law knows that American courts will not impose a legal duty to rescue another merely because the would-be rescuer knows that the other requires help that the rescuer is in a position to render.”) (attached at Appendix A) [hereinafter Henderson]. It is easy to see what is suddenly driving this novel theory: most major manufacturers of asbestos-containing products have filed bankruptcy and the Navy enjoys sovereign immunity. As a substitute, plaintiffs seek to impose liability on solvent manufacturers like Defendants-

Respondents for harms caused by products they never made, sold, installed, or profited from.

Plaintiffs-Appellants' justification for this radical expansion of asbestos 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.

In negligence, a plaintiff must establish the existence of a duty owed directly to the injured person. Duty questions involve policy-laden judgments in which a line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit. Courts make duty determinations by balancing several factors. *See Rowland v. Christian* (1968) 69 Cal. 2d 108, 113. Under California law – and contrary to Plaintiffs-Appellants' theory – "foreseeability is not coterminous with duty." *Sakiyama v. AMF Bowling Centers, Inc.* (2d Dist. 2003) 110 Cal. App. 4th 398, 407, *reh'g denied* (Aug. 6, 2003), *review denied* (Cal. Sept. 24, 2003); *Thing v. La Chusa* (1989) 48 Cal. 3d 644, 656, 659 (rejecting a "reasonable foreseeability" test for assessing duty because "foreseeability, like light, travels indefinitely in a vacuum" and because of "the importance of avoiding the limitless exposure to liability that the pure foreseeability test of 'duty' would create.") (internal citations omitted). The *Rowland* factors do not support a duty owed here, as the First District Court of Appeal recently held in a virtually

identical case, *Taylor v. Elliott Turbomachinery Co., Inc.* (1st Dist. 2009) 171 Cal. App. 4th 564, 596, *review denied* (Cal. June 10, 2009).

Similarly, a touchstone of strict products liability is that the defendant must have participated in the chain of distribution of a defective product. *See Kasel v. Remington Arms Co., Inc.* (2d Dist. 1972) 24 Cal. App. 3d 711, 725. Manufacturers have historically been responsible for products over which they retain some measure of control and responsibility. They are not responsible for the products of others that might have been used in the vicinity of their own product, even if that use was “foreseeable.”

This Court should reject Plaintiffs’ extreme and unsound invitation to dramatically expand liability law and create a broad new duty rule requiring manufacturers to warn about risks in products made by others. Plaintiffs’ theory is contrary to California law and the majority rule nationwide. *See, e.g., Taylor*, 171 Cal. App. 4th at 571; *Simonetta v. Viad Corp.* (Wash. 2008) 197 P.3d 127; *Braaten v. Saberhagen Holdings* (Wash. 2008) 198 P.3d 493; *Lindstrom v. A-C Prod. Liab. Trust* (6th Cir. 2005) 424 F.3d 488; *Henderson, supra*.

Furthermore, Plaintiffs’ theory represents unsound public policy. It would worsen the asbestos litigation and invite a flood of new cases into California. 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 Plaintiffs' theory.

Civil defendants in other types of cases would also be adversely impacted, 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 bread. 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 this type of expansive duty requirement would be the imagination of creative plaintiffs' lawyers.

Consumer safety also 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 judgment below should be affirmed.



## ARGUMENT

### **I. DEFENDANT OWED NO DUTY TO WARN PLAINTIFF ABOUT HAZARDS FROM OTHERS' PRODUCTS**

Defendants-Respondents owed no duty to Plaintiffs-Appellants and were not in the chain of distribution of the asbestos-containing products which allegedly caused Plaintiffs' harm. Consequently, no liability can be imposed here.

In negligence, it is well established that before a defendant may be liable to a plaintiff, it must be shown that the defendant owed a duty to the plaintiff. The existence and scope of a duty of care, if any, is a question of law to be determined by the court. Duty questions involve policy-laden judgments. "A person may have a moral duty to prevent injury to another, but no legal duty." *Pulka v. Edelman* (N.Y. 1976) 358 N.E.2d 1019, 1022, *reargument denied* (1977) 362 N.E.2d 640.

Here, the Court must determine whether it is fair and reasonable to hold a manufacturer of a nondefective product liable for asbestos-related hazards in *other manufacturers'* products. To make this determination, the Court must balance a variety of factors, including: (1) the foreseeability of harm to the injured party; (2) the degree of certainty he or she suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant and the consequences to the community of imposing a duty of care with resulting liability for breach; (7) and the availability, cost, and prevalence of insurance for the risk involved. *Rowland*, 69 Cal. 2d at 113.

Contrary to Plaintiffs-Appellants' theory, "foreseeability alone is not sufficient to create an independent tort duty." *Erlich v. Menezes* (1999) 21 Cal. 4th 543, 552; *see also Coldwell Banker Residential Brokerage Co. v. Superior Court* (4th Dist. 2004) 117 Cal. App. 4th 158, 167 ("the mere existence of foreseeability of harm . . . is, for public policy reasons, not sufficient to impose liability."). In fact, California courts "may find that no duty exists, despite foreseeability of harm, because of other [*Rowland*] factors." *Sakiyama* 110 Cal. App. 4th at 407.<sup>1</sup> There are sound reasons for not allowing liability to be imposed solely based upon foreseeability of harm. As the Supreme Court of California explained in *Thing v. La Chusa*, "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 [an] injury." *Thing*, 48 Cal. 3d at 668. Here, as the First District Court of Appeal held in *Taylor*, 171 Cal. App. 4th at 596, the *Rowland* factors do not support a finding of a duty owed by the Defendant-Appellant.

With respect to Plaintiffs' strict liability claim, it must be shown that Defendants-Respondents participated in the chain of distribution of a defective product. *See Peterson v. Superior Court* (1995) 10 Cal. 4th 1185, 1188; *see also* Restatement (Second) of Torts § 402A (1965); Restatement Third, Torts: Products Liability §§ 1-2 (1997) [hereinafter

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<sup>1</sup> *See also Elden v. Sheldon* (1988) 46 Cal. 3d 267, 274 (the determination of duty "recognizes that policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk."); *Burgess v. Superior Court* (4<sup>th</sup> Dist. 1992) 2 Cal. 4th 1064, 1072 (duty "depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability.")

Restatement Third]. Thus, there is no basis to hold Defendants-Respondents strictly liable for Plaintiff's harm.

In a nutshell, whether couched in terms of negligence or strict liability, manufacturers are not liable for harms caused by others' products except in limited situations not present here: (1) where the defendant substantially participated in the integration of its product into the design of another product, *see DeLeon v. Commercial Mfg. & Supply Co.* (5th Dist. 1983) 148 Cal. App. 3d 336; Restatement Third § 5; or (2) where two otherwise safe products combine to create a new, synergistic hazard. *See Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzer Co.* (2d Dist. 2004) 129 Cal. App. 4th 577; Henderson, 37 Sw. U. L. Rev. at 599.

These bedrock tort principles are part of settled California law as recently addressed by the First District Court of Appeal in *Taylor v. Elliott Turbomachinery Co., Inc.* (1st Dist. 2009) 171 Cal. App. 4th 564, *review denied* (Cal. June 10, 2009). The First District, following the Washington Supreme Court's recent rulings in *Simonetta v. Viad Corp.* (Wash. 2008) 197 P.3d 127, and *Braaten v. Saberhagen Holdings* (Wash. 2008) 198 P.3d 493, held that makers of products supplied to the Navy for use in a ship's propulsion system had no duty to warn of the dangers inherent in asbestos-containing products supplied by other manufacturers. *Taylor*, 171 Cal. App. 4th at 591. The court explained that the law "restricts the duty to warn to entities in the chain of distribution of the defective product" and that liability may not attach "unless the manufacturer's product itself causes or creates the risk of harm" or the manufacturer "substantially

participate[s] in the integration of [its] components into the final product.” *Id.* at 575; *see also Peterson*, 10 Cal. 4th at 1188 (“manufacturers, retailers, and others *in the marketing chain* of a product are strictly liable in tort for personal injuries caused by a defective product.”) (emphasis added); *Daly v. General Motors Corp.* (1978) 20 Cal. 3d 725, 739 (the basis for imposing strict liability on a particular defendant is that “he has marketed or distributed a defective product.”).

The court in *Taylor* concluded that, because defendants “were simply ‘not part of the manufacturing or marketing enterprise of the allegedly defective product[s] that caused the injury in question,’” they could not be held liable for failure to warn. 171 Cal. App. 4th at 577 (quoting *Peterson*, 10 Cal. 4th at 1188). The court wisely observed the basis for the bright-line rule that ties liability to the injury-producing product: “manufacturers cannot be expected to determine the relative dangers of various products they do not produce or sell and certainly do not have a chance to inspect or evaluate.” 171 Cal. App. 4th at 576. “This legal distinction acknowledges that overextending the level of responsibility could potentially lead to commercial as well as legal nightmares in product distribution.” *Id.*

Next, the *Taylor* court applied the component supplier doctrine as yet another basis to reject plaintiffs’ claims. 171 Cal. App. 4th at 584; *see also* Restatement Third § 5; *id.* at Comment *a* (1997) (“As a general rule, component sellers should not be liable when the component itself is not defective.”). The *Taylor* court explained two policy considerations which support this rule:

First, requiring suppliers of component parts to ensure the safety of their materials as used in other entities' finished products "would require suppliers to 'retain an expert in the client's field of business to determine whether the client intends to develop a safe product.'" Suppliers of "products that have multiple industrial uses" should not be forced "to retain experts in a huge variety of areas in order to determine the possible risks associated with each potential use." A second, related rationale is that "finished product manufacturers know exactly what they intend to do with a component or raw material and therefore are in a better position to guarantee that the component or raw material is suitable for their particular applications."

171 Cal. App. 4th at 584 (internal citations omitted).

Finally, the court held that defendants could not be held liable under a negligence theory for harms caused by products made or sold by others. The court explained, "If Mr. Taylor's injuries may be ascribed to morally blameworthy conduct, it is the conduct of the manufacturers and suppliers of the asbestos-containing materials he actually encountered, who were in the best position to investigate and warn of the dangers posed by their products." *Id.* at 595; *cf. Lineaweaver v. Plant Insulation Co.* (1st Dist. 1995) 31 Cal. App. 4th 1409, 1418 (1995) ("it serves no justice to fashion rules which allow responsible parties to escape liability while demanding others to compensate a loss they did not create."). Recently, *Taylor* was cited with approval by a Los Angeles trial court. *See Calif. Judge Vacates Verdict Against Crane, Cites Taylor*, HarrisMartin's Columns—Raising the Bar in Asbestos Litigation, Aug. 4, 2009.

In addition to the First District's decision in *Taylor*, there is other well-established California precedent holding that manufacturers cannot be liable for failure to warn about the hazards of subsequently affixed asbestos-containing parts made, supplied, or installed

by others. See *Cadlo v. Owens-Illinois, Inc.* (1st Dist. 2004) 125 Cal. App. 4th 513, 524 (no liability where there was no evidence that defendant “played any role in the design, manufacture, distribution, or marketing” of the products that allegedly caused plaintiff’s harm); cf. *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal. 4th 953, 958 (a plaintiff in an asbestos case “must, in accordance with traditional tort principles, demonstrate . . . that a product or products *supplied by the defendant*, to which he became exposed” causes injury) (emphasis added).

In analogous situations, California courts have held that the manufacturer of one product has no duty to warn of alleged hazards in another’s product. For example, in *Zambrana v. Standard Oil Co. of California* (2d Dist. 1972) 26 Cal. App. 3d 209, plaintiff was injured when his car was struck by a Ford automobile that went out of control from a sudden loss of tire pressure. The Ford vehicle’s tires were originally equipped with rubber valve stems and metal extensions. The Ford vehicle’s owner later purchased a new set of Firestone tires with brass stems and directed the Firestone dealer to affix the Ford metal extensions to the brass stems. Plaintiff contended that the combination of a metal valve stem with a metal extension was dangerously defective, even though neither the valve nor the extension itself was defective. The court affirmed judgment in favor of Firestone, concluding: “Firestone was neither a ‘designer’ nor ‘manufacturer’ of the combination of parts which is said to be defective.” *Id.* at 217; see also *Wiler v. Firestone Tire & Rubber Co.* (3d Dist. 1979) 95 Cal. App. 3d 621, 629-30

(tire maker not liable for defective valve stem manufactured and affixed to the tire by automobile company).

Numerous other California decisions are in agreement. See *Lee v. Electric Motor Div.* (2d Dist. 1985) 169 Cal. App. 3d 375, 385, *review denied* (Cal. Aug. 29, 1985) (“We have found no case in which a component part manufacturer who had no role in designing the finished product and who supplied a nondefective component part, was held liable for the defective design of the finished product.”); *Powell v. Standard Brands Paint Co.* (3d Dist. 1985) 166 Cal. App. 3d 357, 362-63 (“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.* (1984) 157 Cal. App. 3d 372, 378 (“The product alleged to have been dangerous and hence defective, for lack of warnings and instructions 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...”); *Garman v. Magic Chef, Inc.* (2d Dist. 1981) 117 Cal. App. 3d 634, 638 (“To say that the absence of a warning [about defects] in other products makes the [defendant’s product] defective is semantic nonsense.”); *McGoldrick v. Porter-Cable Tools* (2d Dist. 1973) 34 Cal. App. 3d 885, 888 (power saw stand manufacturer not liable for defective saw housing made by another and affixed to the stand).

Likewise, a California trial court has held that, while a broom is commonly used to sweep up dust that might contain silica, a broom manufacturer is not required to warn of the hazards of silica exposure. See Thomas W. Tardy, III & Laura A. Frase, *Liability of Equipment Manufacturers for Products of Another: Is Relief in Sight?*, HarrisMartin's Columns—Raising the Bar in Asbestos Litigation, May 2007, at 6 [hereinafter Tardy & Frase].

Consistent with these decisions, a federal court applying California law rejected failure to warn claims by airlines passengers who sued commercial airlines and aircraft manufacturer Boeing, alleging that prolonged and cramped seating on aircraft created a risk of developing a condition known as deep vein thrombosis. In *In re Deep Vein Thrombosis* (N.D. Cal. 2005) 356 F. Supp. 2d 1055, 1068, the court said it could “find no case law that supports the idea that a manufacturer, after selling a completed product to a purchaser, remains under a duty to warn the purchaser of potentially defective additional pieces of equipment that the purchaser may or may not use to complement the product bought from the manufacturer.”

Plaintiffs-Appellants, on the other hand, rely on authorities that “are distinguishable.” *Taylor*, 171 Cal. App. 4th at 586. For instance, in two of the principal California authorities relied upon by Plaintiffs-Appellants, *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzer Co.* (2d Dist. 2004) 129 Cal. App. 4th 577, and *Wright v. Stang Mfg. Co.* (2d Dist. 1997) 54 Cal. App. 4th 1218, *review denied* (Cal. Aug. 13, 1997), “a



defect in the defendant manufacturer's product itself caused or created the risk of harm." *Taylor*, 171 Cal. App. 4th at 586.

The court in *Tellez-Cordova* held that a manufacturer of power grinding tools had a duty to warn about the release of respirable dust caused by the interaction of the defendant's power grinders with abrasive wheels or discs made by another. The court observed that the defendant's grinding tools created the dust and that the other manufacturer's disks would not have been dangerous without the effect of the defendant's tools. *See Tellez-Cordova*, 129 Cal. App. 4th at 585. In contrast, no synergistic hazard is involved here. The subject pumps and valves may have been safe, but the asbestos supplied by others was potentially hazardous. The subject hazard did not arise from two safe products being used in tandem; rather, it arose solely from the asbestos products made by someone other than the Defendants-Respondents.

*Wright* involved a plaintiff injured when a deck gun on a fire truck broke loose and failed under the intense pressure generated by the deck gun and the inadequate capacity of the riser pipe attached to the deck gun. *See Wright*, 54 Cal. App. 4th at 1224-26. As the Washington Supreme Court explained as one reason for distinguishing *Wright* from a case virtually identical to this one, the defendant's product (like here) "functioned as intended, whereas an entire assembly in *Wright* failed under water pressure. *Simonetta*, 197 P.3d at 137. The First District in *Taylor* agreed, stating: "In short, in *Wright*, the unexpected, immediate cause of injury was not, as in this case, a toxic agent contained in another manufacturer's product, but was either a design defect in Stang's

product itself or a misuse of Stang's product, which Stang was in the best position to anticipate." *Taylor*, 171 Cal. App. 4th at 589.

Plaintiffs-Appellants also rely on another California case that has no application here, *DeLeon v. Commercial Mfg. & Supply Co.* (5th Dist. 1983) 148 Cal. App. 3d 336. *DeLeon* held that a manufacturer which "participate[s] in the design of . . . custom-made equipment for a particular location in a processing line" must ensure that the placement of the product does not create a hazard. *See DeLeon*, 148 Cal. App. 3d at 347. The holding has no bearing on this case. "There is nothing in *DeLeon* that suggests that a manufacturer may be liable for failing to warn of the dangerous qualities of another manufacturer's product." *Taylor*, 171 Cal. App. 4th at 589-590.

This Court should follow the sound reasoning articulated by the First District Court of Appeal in *Taylor* and hold that Defendants-Respondents are not liable for asbestos-related risks posed by others' products.

## **II. RECENT OUT-OF-STATE CASES ON POINT HAVE REJECTED PLAINTIFFS' NOVEL DUTY THEORY**

The First District's decision in *Taylor* is not only consistent with settled California law, it is also "strongly supported by other persuasive out-of-state authorities that are very closely on point." *Taylor*, 171 Cal. App. 4th at 592; *see also* Henderson, *supra*.

For example, in two companion cases, *Simonetta v. Viad Corp.* (Wash. 2008) 197 P.3d 127, and *Braaten v. Saberhagen Holdings* (Wash. 2008) 198 P.3d 493, an en banc panel of the Washington Supreme Court voted 6–3 to overturn an appellate court and held that manufacturers have no duty to warn about asbestos-related hazards in products

made by others. *See also Anderson v. Asbestos Corp., Ltd.* (Wash. Ct. App. July 13, 2009) 2009 WL 2032332 (following *Braaten* and *Simonetta* to dismiss claim against Caterpillar for asbestos insulation used with engines it manufactured) (attached at Appendix B). Among other authorities, the Washington Supreme Court cited several California cases as support for its holdings: *Powell v. Standard Brands Paint Co.* (3d Dist. 1985) 166 Cal. App. 3d 357, *Blackwell v. Phelps Dodge Co.* (1984) 157 Cal. App. 3d 372, and *Garman v. Magic Chef, Inc.* (2d Dist. 1981) 117 Cal. App. 3d 634.

In *Simonetta*, the court held that the manufacturer of an asbestos-free evaporator had no duty to warn of danger posed by asbestos insulation that it did not manufacture, sell, or supply, even though the evaporator was built with the knowledge that insulation was required for proper operation. 197 P.3d at 138. The court also held that the manufacturer of the asbestos-free evaporator could not be held strictly liable for failure to warn of the hazard posed by the asbestos product because the evaporated manufacturer was not involved in the manufacture or marketing of the asbestos insulation used in conjunction with its product. *See id.*

The Washington Supreme Court in *Simonetta* began its opinion by discussing the black letter rule set forth in the Restatement (Second) of Torts § 388 (1965): “One who supplies directly or through a third person a chattel for another to use is subject to liability . . . if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that [users] . . . will realize its dangerous condition, and (c) fails to exercise reasonable care to

inform them of its dangerous condition or of the facts which make it likely to be dangerous.” *Id.* at 131. The court then stated that a “careful review of case law interpreting failure to warn cases under § 388” – from both Washington and nationwide – did not support a finding of liability against the maker of the asbestos-free evaporator. *Id.* at 132. In the many cases read and cited by the court, “the claims for § 388 failure to warn were posited only against parties in the chain of distribution of the product.” *Id.* at 132. The court said there was “little to no support” in Washington law “for extending the duty to warn to another manufacturer’s product, and also said that “[c]ase law from other jurisdictions similarly limits the duty to warn in negligence cases to those in the chain of distribution of the 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 under § 388.” *Id.* at 134.

Next, the *Simonetta* court addressed plaintiff’s strict liability claim as embodied in the Restatement (Second) of Torts § 402A (1965). The court explained that strict liability is based on the rationale that imposition of liability is justified on “the defendant who, by manufacturing, selling, or marketing a product, is in the best position to know of the dangerous aspects of the product and to translate that knowledge into a cost of production against which liability insurance can be obtained.” *Id.* at 134. In contrast, the defendant, a maker of an asbestos-free evaporator, was not in the chain of distribution of the asbestos insulation. Therefore, the court held, the defendant could not be held strictly liable for failure to warn. *See id.*

The court also rejected plaintiff's attempts to position the case in the line of decisions dealing with synergistic hazards. *See id.* at 137. The court correctly appreciated that the *Simonetta* case did not involve two safe products being used in tandem; rather, it arose solely from the asbestos insulation made by someone other than the defendant.

In *Braaten*, the Washington Supreme Court rejected common law negligence and strict liability failure to warn claims against pump and valve manufacturers for harm caused by plaintiff's exposure to asbestos-containing replacement packing and replacement gaskets and asbestos-containing insulation made by others. 198 P.3d at 501. The court again held that liability for warning-based claims is limited to those in the chain of distribution of the hazardous product, and that liability could not be imposed on a defendant outside of that chain, even if "the manufacturer knew its products would be used in conjunction with asbestos insulation." *Id.* at 498 (citing *Simonetta*, 197 P.3d at 136). The court noted that its "decision in *Simonetta* is in accord with the majority rule nationwide." *Id.*

Next, the court considered whether defendants were required to warn of the danger of exposure to asbestos in replacement packing or replacement gaskets in products which the defendants may have originally sold with asbestos-containing packets or gaskets. The defendants did not dispute that they could be liable for failure to warn of the danger of asbestos exposure from gaskets or packing originally contained in their products; the focus of the court was on replacement gaskets and packing made by others after the

original equipment was removed. Once again, the court found the law to be straightforward and easy to apply. The court said, “The general rule under the common law is, as explained in *Simonetta*, that a manufacturer does not have an obligation to warn of the dangers of another’s product. 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 this general rule.” *Id.* at 501. The court also said that “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.*; see also *Simonetta*, 197 P.3d at 136 (“[F]oreseeability has no bearing on the question of adequacy of warnings in these circumstances.”).

The duty rule sought by Plaintiffs-Appellants was also rejected this year by trial courts in Pennsylvania and Maine. In *Milich v. Anchor Packing Co.* (Pa. Ct. Com. Pl. Butler County Mar. 16, 2009) A.D. No. 08-10532 (attached at Appendix C), a Pennsylvania trial court held, “to the extent that Plaintiff may have been exposed to replacement packing supplied by a third party, there is no authority that Crane can be held liable for such exposure as a matter of law. To the contrary, the authority relied upon by Crane in its Motion for Summary Judgment indicates that Crane is not subject to such liability.” *Id.* at 9.

In the Maine case, *Rumery v. Garlock Sealing Technologies, Inc.* (Me. Super. Ct. Cumberland County Apr. 24, 2009) 2009 WL 1747857 (attached at Appendix D), the court explained, “Maine case law has not imposed upon a manufacturer a duty to warn

about the dangerous propensities of other manufacturer's [sic] products." *Id.* at 5. The court added, "it was not the Defendant's product, but the dangers inherent in the asbestos-containing packing and gaskets, a product the Defendant did not manufacture or supply, that proximately caused the Plaintiff's alleged damages. As there is no strict liability for a failure to warn solely of the hazards inherent in another product, the foreseeability argument regarding the adequacy of warnings is not pertinent." *Id.* at 6.

In addition, the issue was addressed in *Lindstrom v. A-C Product Liability Trust* (6th Cir. 2005) 424 F.3d 488, where a plaintiff with alleged asbestos-related mesothelioma sued several manufacturers of products used in conjunction with other manufacturers' asbestos products. The central issue in *Lindstrom* was causation as it related to component parts, rather than the existence of a duty. The court found no causation, concluding that a manufacturer cannot be held responsible for asbestos contained in another product. *Id.* at 496. For example, the *Lindstrom* court affirmed summary judgment for pump manufacturer CoffinTurbo, which did not manufacture or supply the asbestos products used to insulate its pumps. The court found that Coffin Turbo could not be held responsible for the asbestos contained in another product, though the asbestos was attached to a Coffin Turbo product. *Id.* It was those asbestos products, not Coffin Turbo's pumps, that caused injury.

Similarly, in *Ford Motor Co. v. Wood* (Md. Ct. Spec. App.) 703 A.2d 1315, *cert. denied*, (Md. 1998) 709 A.2d 139, *abrogated on other grounds, John Crane, Inc. v. Scribner* (Md. 2002) 800 A.2d 727, plaintiffs alleged asbestos exposure from replacement

parts in older Ford vehicles. Unable to identify the maker of the replacement parts, plaintiffs sued Ford claiming that “regardless of who manufactured the replacement parts, there was sufficient evidence from which a jury could infer that Ford had a duty to warn of the dangers involved in replacing the brakes and clutches on its vehicles.” *Id.* at 1130. The Maryland appellate court, citing *Baughman v. General Motors Corp.* (4th Cir. 1986) 780 F.2d 1131, with approval, held that “a vehicle manufacturer [is liable only for defective components] incorporated...into its finished product.” *Id.* at 1331. The court was “unwilling to hold that a vehicle manufacturer has a duty to warn of dangers of a product that it did not manufacture, market, or sell, or otherwise place into the stream of commerce.” *Id.* at 1332; *see also Stark v. Armstrong World Indus., Inc.* (6<sup>th</sup> Cir. 2001) 21 Fed. Appx. 371, 381 (unpublished) (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,” because “[t]his form of guilt by association has no support in the law of products liability.”).

In *Baughman*, the federal appellate decision cited by the Maryland court in *Wood*, the court refused to hold an automobile manufacturer liable for a mechanic’s injuries when a tire mounted on a replacement wheel exploded. 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 Fourth Circuit rejected this argument:



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); *see also Wiler*, 95 Cal. App. 3d at 629-30; *Reynolds v. Bridgestone/Firestone, Inc.* (11<sup>th</sup> Cir. 1993) 989 F.2d 465, 472; *Spencer v. Ford Motor Co.* (Mich. App. 1985) 367 N.W.2d 393, 396; *Acoba v. General Tire, Inc.* (Haw. 1999) 986 P.2d 288, 305.

This Court should follow the sound reasoning articulated by the First District Court of Appeal in *Taylor*, and the Washington Supreme Court in *Simonetta* and *Braaten*, among others, and hold that Defendants-Respondents are not liable for failure to warn regarding the danger of exposure to products made, sold, or installed by others.

### **III. OTHER AUTHORITY SUPPORTS DEFENDANTS-RESPONDENTS**

Numerous other decisions from around the country support a finding that Plaintiffs-Appellants' claims fail as a matter of law. For example, in *Rastelli v. Goodyear Tire & Rubber Co.* (N.Y. 1992) 591 N.E.2d 222, a much-cited case, plaintiff's decedent was killed while inflating a truck tire, manufactured by Goodyear, when a multipiece tire rim made by a different company separated explosively. Plaintiff's decedent claimed, among other things, that Goodyear had a duty to warn against its nondefective tire being used with allegedly defective multipiece tire rims made by others. The New York Court of Appeals, the state's highest 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.” *Id.* at 225 (emphasis added). The court, however, “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.” *Id.* at 225-226. The court also noted that no “synergistic hazard” was involved, explaining, “This is not a case where the combination of one sound product with another sound product creates a dangerous condition about which the manufacturer of each product has a duty to warn.” *Id.* at 226. “Nothing in the record suggests that Goodyear created the dangerous condition. . . .” *Id.* *Rastelli* supports a finding that no duty is owed here.

Numerous other decisions are in agreement. *See, e.g., Mitchell v. Sky Climber, Inc.* (Mass. 1986) 487 N.E.2d 1374, 1376 (“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.”); *Fleck v. KDI Sylvan Pools* (3d Cir. 1992) 981 F.2d 107, 118 (it would be “unreasonable” to impose liability on a manufacturer of a “safe pool” for injuries sustained as a result of a lack of depth warnings on a replacement pool liner made by another manufacturer), *cert. denied sub nom. Doughboy Recreational, Inc., Div. of Hoffinger Indus., Inc. v. Fleck* (1993) 507 U.S. 1005; *Shaw v. General Motors Corp.* (Colo. App. 1986) 727 P.2d 387, 390 (“The burden of guarding against the injury suffered here should appropriately be placed upon the entity that designed the final product, arranged for the acquisition of all the component parts, and directed their

assembly.”); *Walton v. Harnischfeger* (Tex. App.-San Antonio 1990) 796 S.W.2d 225, 226 (crane manufacturer had no duty to warn about rigging it did not manufacture, integrate into its crane, or place in the stream of commerce); *Sperry v. Bauermeister, Inc.* (E.D. Mo. 1992) 804 F. Supp. 1134, 1140 (seller not liable for incorporation of its parts into system designed by another), *aff'd*, (8<sup>th</sup> Cir. 1993) 4 F.3d 596; *Fricke v. Owens-Corning Fiberglas Corp.* (La. App. 1993) 618 So. 2d 473, 475 (manufacturer not liable for inadequate warning on product it neither made nor sold); *Firestone Steel Prods. Co. v. Barajas* (Tex. 1996) 927 S.W.2d 608, 615-616 (manufacturer not liable for tire made by licensee); *Toth v. Economy Forms Corp.* (Pa. Super. 1990) 571 A.2d 420, 423 (Pennsylvania does not “impose liability on the supplier of metal forming equipment to warn of dangers inherent in wood planking it did not supply.”), *appeal denied*, (Pa. 1991) 593 A.2d 422; *Exxon Shipping Co. v. Pacific Res., Inc.* (D. Haw. 1991) 789 F. Supp. 1521, 1526 (chain manufacturer not liable for defectively designed replacement chain made by another even though the replacement part was “identical, in terms of make and manufacture, to the original equipment”).

In addition, as the California appellate court held in *Taylor*, and as the Washington Supreme Court held in *Simonetta* and *Braaten*, foreseeability of harm does not trigger a responsibility to warn about harms posed by others’ products. For instance, in *Brown v. Drake-Willock Int’l, Ltd.* (Mich. App. 1995) 530 N.W.2d 510, *appeal denied*, (Mich. 1997) 562 N.W.2d 198, 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 the 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.

Other decisions are in accord. *See, e.g., Childress v. Gresen Mfg. Co.* (6<sup>th</sup> Cir. 1989) 888 F.2d 45, 49 (Mich. law) (component maker’s knowledge of the design of the final product was insufficient to impose liability); *In re Silicone Gel Breast Implants Prods. Liab. Litig.* (N.D. Ala. 1997) 996 F. Supp. 1110, 1117 (“[t]he issue is not whether GE was aware of the use to be put by [breast] implant manufacturers of its [silicone gel] – clearly it knew this - . . . such awareness is irrelevant to the imposition of liability.”); *Kealoha v. E.I. Du Pont de Nemours & Co.* (D. Haw. 1994) 844 F. Supp. 590, 595 (“The alleged foreseeability of the risk of the finished product is irrelevant to determining the liability of the component part manufacturer because imposing such a duty would force the supplier to retain an expert in every finished product manufacturer’s line of business and second-guess the finished product manufacturer.”); *Palermo v. Port of New Orleans* (La. Ct. App.) 951 So. 2d 425, 439 (shipping dock board had no duty to protect dock workers from raw asbestos shipped by other companies; “[w]hether the Dock Board knew generally that asbestos was being shipped through the port is *irrelevant to this inquiry*; absent a defect in its premises . . . the pertinent fact is that the Dock Board had no custody or control of the asbestos-containing cargo or of the loading, unloading or ship repair operations.”) (emphasis added), *writ denied*, (La. 2007) 957 So. 2d 1289.

Here, no defect is alleged in the product sold by Defendants-Respondents. Any harm which occurred arose from hazards in products made or sold by others. No liability should attach to Defendants-Respondents.

**IV. IMPOSITION OF A DUTY REQUIREMENT  
WOULD REPRESENT UNSOUND PUBLIC POLICY**

Public policy dictates that manufacturers be held liable for defects in their *own* products, or in the use of their *own* products – not those of others. To place a duty to warn on a defendant for harms caused by others’ products, or the use of others’ products, is contrary to longstanding tort law principles that: (1) economic loss should ultimately be borne by the one who caused it, and (2) the manufacturer of a particular product is in the best position to warn about risks associated with it. *See, e.g.*, Restatement Third § 5 Cmt. *a.* (“If the component is not itself defective, it would be unjust and inefficient to impose liability solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective.”).

“[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.)* (N.Y. 2005) 840 N.E.2d 115, 119 (quoting *Hamilton v. Beretta U.S.A. Corp.* (N.Y. 2001) 750 N.E.2d 1055). That policy would be significantly undermined by the broad new duty theory being promoted here by Plaintiffs-Appellants; “an expansion of the liability for failure to warn under these circumstances becomes untenable and unmanageable.” Tardy & Frase, *supra*, at 6; *see also Taylor*, 171 Cal. App. 4th at 595-596 (“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.”).

In the real world of product design and usage, virtually every product is connected in some manner with many others in ways that may be anticipated, if courts are 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. . . .” 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. 7 (Defense Research Inst. Toxic Torts & Env’tl L. Comm. Winter 2005) [hereinafter Petereit].

“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.” Tardy & Frase, *supra*, at 6. “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 7. Packaging companies might be held liable for hazards regarding contents made by others. The Court no doubt appreciates there are many other examples.

We will not belabor this exercise further because similar scenarios could be developed for virtually any product. If a manufacturer’s duty were defined by

foreseeable uses of *other* products, the chain of warnings and liability would be so endless, so unpredictable, and so speculative as to be worthless. No rational manufacturer could operate under such a system. Manufacturers also cannot be expected to have R&D 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. Now, however, this Court is faced with an attempt to create just such a liability system. The proposition advanced by Plaintiffs-Appellants would require makers of products that might have been used anywhere near asbestos to warn about it.

Of course, the dramatic shift in tort law sought by Plaintiffs-Appellants would likely be extended beyond asbestos cases. Presumably, Plaintiffs' third-party liability theory would be product-neutral and applied as a principle of law across all types of cases. *All* manufacturers would somehow be required to anticipate *all* possible products that could be used in conjunction with their own; research the potential harms associated with those products (generally in entirely different fields of expertise); and develop some system for placing multiple and possibly inconsistent warnings on their products to deal with every such scenario.

Plaintiffs-Appellants' *foreseeability* theory is thus extremely broad, with no limiting factor except foreseeability, which itself is limited only by the imagination of the manufacturer (or, perhaps more pertinent here, only by the creativity of attorneys asserting liability long after the product was used or sold). Product liability law has never extended this far.

“Consumer safety also could be undermined by the potential for over-warning (the “Boy Who Cried Wolf” problem) and through conflicting information on different components and finished products.” 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* (2008) 16 Brook. J.L. & Pol’y 589, 630 (urging courts to reject the duty Plaintiffs-Appellants seek here); *see also* Restatement Third § 5 Cmt. a.; Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory* (1983) 52 U. Cin. L. Rev. 38, 43 (“The extension of workplace warnings liability unguided by practical considerations has the unreasonable potential to impose absolute liability. . .”).

**V. IMPOSITION OF A DUTY REQUIREMENT WOULD EXACERBATE THE ASBESTOS LITIGATION**

“For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits.” *In re Combustion Eng’g, Inc.* (3d Cir. 2005) 391 F.3d 190, 200. The United States Supreme Court in *Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 597, described the litigation as a “crisis.”

So far, the litigation has forced over eighty-five employers into bankruptcy, *see* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29, and has had devastating impacts on defendant companies’ employees, retirees, shareholders, and surrounding communities. *See* Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms* (2003) 12 J. Bankr. L. & Prac. 51.



As a result of these bankruptcies, “the net has 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, *abstract available at* 2001 WLNR 1993314.<sup>2</sup> One plaintiffs’ attorney has described the 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).<sup>3</sup> Over 8,500 defendants have been named, *see* Deborah R. Hensler, *California Asbestos Litigation—The Big Picture*, HarrisMartin’s Columns—Raising the Bar in Asbestos Litigation, Aug. 2004, at 5, up from 300 defendants in 1982, *see* James Kakalik et al., *Variation in Asbestos Litigation Compensation and Expenses* 5 (RAND Inst. for Civil Justice 1984). Nontraditional defendants now account for more than half of asbestos expenditures. *See* Stephen J. Carroll et al., *Asbestos Litigation* 94 (RAND Inst. for Civil Justice 2005).

California has not escaped these problems. *See* Alan Calnan & Byron G. Stier, *Perspectives on Asbestos Litigation: Overview and Preview* (2008) 37 Sw. U. L. Rev. 459, 462 (“[T]here is a sense locally among the bar that Southern California may be in the midst of a surge.”); Patrick M. Hanlon & Anne Smetak, *Asbestos Changes* (2007)

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<sup>2</sup> *See also* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1, *abstract available at* 2000 WLNR 2042486; Richard B. Schmitt, *Burning Issue: How Plaintiffs’ Lawyers Have Turned Asbestos into a Court Perennial*, Wall St. J., Mar. 5, 2001, at A1.

<sup>3</sup> *See also* Steven B. Hantler et al., *Is the Crisis in the Civil Justice System Real or Imagined?* (2005) 38 Loy. L.A. L. Rev. 1121, 1151-52 (discussing spread of asbestos litigation to “peripheral defendants”).

62 N.Y.U. Ann. Surv. Am. L. 525, 599 (“[P]laintiffs’ firms are steering cases to California, partly to the San Francisco-Oakland area, which is traditionally a tough venue for defendants, but also to Los Angeles, which was an important asbestos venue in the 1980s but is only recently seeing an upsurge in asbestos cases.”); Steven D. Wasserman et al., *Asbestos Litigation in California: Can it Change for the Better?* (2007) 34 Pepp. L. Rev. 883, 885 (“With plaintiff firms from Texas and elsewhere opening offices in California, there is no doubt that even more asbestos cases are on their way to the state.”); Emily Bryson York, *More Asbestos Cases Heading to Courthouses Across Region*, 28:9 L.A. Bus. J. 8 (Feb. 27, 2006), at 2006 WLNR 4514441; Cortney Fielding, *Plaintiffs’ Lawyers Turn to L.A. Courts for Asbestos Litigation*, Daily J., Feb. 27, 2009, at 1.

Judges in California have acknowledged the ever-increasing burden placed on the judicial system by the state’s asbestos docket. For example, San Francisco Superior Court Judge James McBride has said that the length of asbestos trials causes hardship for jurors, leaving many citizens unable to serve and forcing the courts to “use jurors at an absolutely abominable rate.” *Judicial Forum on Asbestos*, HB Litigation Conferences, New York City, June 3, 2009 (quoting Judge McBride), available at <http://litigationconferences.com/?p=6669>. Judge McBride said that the rate at which asbestos litigation depletes potential jurors from the overall pool could lead the jury system to “collapse” if the economy worsens significantly; these impacts would be most likely to occur in areas, such as Los Angeles County, which tend to have lower response rates on summonses. *See also Judges Roundtable: Where Is California Asbestos Litigation Heading?*,

HarrisMartin's Columns—Raising the Bar in Asbestos Litigation, July 2004, at 3 (San Francisco Superior Court Judge Ernest Goldsmith stating that asbestos cases take up twenty-five percent of the court's docket); Dominica C. Anderson & Kathryn L. Martin, *The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis* (2004) 45 Santa Clara L. Rev. 1, 2 (“The sheer number of cases pending at any given time results in a virtually unmanageable asbestos docket.”).

The broad new duty rule sought by Plaintiffs-Appellants would worsen the litigation and fuel claims against defendants, such as Defendants-Respondents. Claimants are already drawn to California courts because of the belief that the state's asbestos litigation rules will give them an advantage. See Victor E. Schwartz et al., *Litigation Tourism Hurts Californians*, 21:20 Mealey's Litig. Rep.: Asbestos 41 (Nov. 15, 2006) (stating that, in a 2006 sample of 1,047 California asbestos plaintiffs for whom address information was available, an astonishing *thirty percent* had addresses outside California); Steven D. Wasserman & Sunny S. Shapiro, *State's Courts Overburdened With Asbestos Suits*, *The Recorder*, July 24, 2009, at 5-6. If Plaintiffs prevail here, the decision will reinforce this perception and signal to plaintiffs throughout the country that they should file in California because they can obtain judgments based on a novel theory that has been rejected elsewhere.

The increase in new filings which could be expected to flow into California courts would further strain the state's judicial system. As this Court knows, the state's court

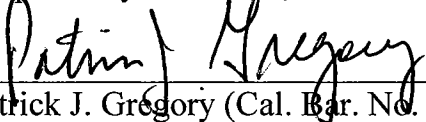
system is facing serious challenges due to the unprecedented statewide fiscal crisis. The Judicial Council has ordered ALL California courts to close the third Wednesday of each month, starting September 16, 2009 and running through the fiscal year, which ends June 30, 2010. See Judicial Council of California, *Judicial Council Approves Reallocation of \$159 Million to Support Trial Courts*, July 30, 2009, at <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR40-09.PDF>. The Los Angeles Superior Court chose to observe a furlough day a month earlier, on August 19, 2009. See Los Angeles Superior Court, *Los Angeles Superior Court Scheduled Furlough Day, August 19, 2009*, at <http://www.lasuperiorcourt.org/courtnews/Uploads/14200972493111FURLOUGHDAYINFORMATION7-22-09.htm>. As the enabling statute for these extreme actions explains: “The Legislature finds and declares that the current fiscal crisis, one of the most serious and dire ever to affect the state, threatens the continued operations of the judicial branch.” Cal. Govt. Code § 68106(a).

Finally, it is important to note that while Plaintiffs-Appellants no doubt seek to impose liability on a solvent manufacturer as a substitute for proper entities that are now bankrupt, trusts have been established to pay claims involving those companies’ products. In fact, one study concluded: “For the first time ever, trust recoveries may fully compensate asbestos victims.” See Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 Mealey’s Asbestos Bankr. Rep. 1 (Nov. 2006); see generally William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts* (2008) 17 Norton J. Bankr. L. & Prac. 257.

## CONCLUSION

For these reasons, *amici curiae* ask this Court to affirm the decision of the trial court granting judgment in favor of Defendants-Respondents.

Respectfully submitted,

  
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## **APPENDIX A**

James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required  
to Rescue Users from Risks Presented by Other, More Dangerous Products*  
(2008) 37 Sw. U. L. Rev. 595

# SELLERS OF SAFE PRODUCTS SHOULD NOT BE REQUIRED TO RESCUE USERS FROM RISKS PRESENTED BY OTHER, MORE DANGEROUS PRODUCTS

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James A. Henderson, Jr.\*

## I. INTRODUCTION

What is a nice topic like this doing in a symposium on asbestos litigation? Well, it happens that products liability claims seeking to extend duties to rescue have occurred most recently in connection with asbestos claims. In that vexing context, an en banc panel of the Washington Supreme Court very recently overturned an appellate court and rejected component maker liability for failure to warn of asbestos-related hazards in products made by others. In *Simonetta v. Viad Corp.*,<sup>1</sup> the court held that a manufacturer may not be held liable for failure to warn of the dangers of asbestos exposure resulting from the post-sale application of insulation made by another.<sup>2</sup> The court said that the defendant evaporator manufacturer was only responsible for the “chain of distribution” of its product, and that the addition of asbestos-containing insulation manufactured by another company constituted a separate chain of distribution.<sup>3</sup> In a companion case, *Braaten v. Saberhagen Holdings*,<sup>4</sup> the court rejected failure to warn claims against pump and valve manufacturers relating to replacement packing and replacement gaskets made by others. Earlier, the United States Court of Appeals for the Sixth Circuit reached a

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1. 2008 WL 5175068 (Wash. Dec. 11, 2008).
2. *See id.* at \*5, 10.
3. *Id.* at \*10.
4. 2008 WL 5175083 (Wash. Dec. 11, 2008).



similar conclusion.<sup>5</sup> Thus, although the title of this article frames the problem in general terms and the analysis admits of wider application, its roots are in asbestos litigation. Consistent with the Washington Supreme Court's decisions, this article argues that imposing liability on distributors merely because their products are subsequently used with asbestos-containing products made by others would clearly go too far. Moreover, the debate surrounding the issue is sometimes unnecessarily confusing.

To begin to straighten things out, Part II explains exactly what the problem is, and what it is not. Part II arranges the topic conceptually so that the rest of the article can explain how courts should be handling these product-interaction, rescue-by-warning claims. Part III then demonstrates that courts in a wide variety of contexts courts have traditionally refused to require one group of actors to perform "watchdog" functions over the risky conduct of a second group in order to rescue victims of the second group from harm. These traditional lines of decision strongly suggest that courts should show similar restraint in connection with failure-to-warn claims in products liability. Part IV develops the policy reasons why expanded duties to rescue via warnings are inappropriate in the products liability cases of interest here. Assigning watchdog responsibilities to the sellers of safe, nondefective products will achieve neither the instrumental objective of efficiency nor the noninstrumental objective of doing justice between the parties. Part IV then proposes a no-duty rule with which to sort out these product-interaction claims. The article concludes that, while it is understandably tempting for courts to try accomplish rescue to give asbestos plaintiffs new financial resources on which to draw, courts must resist the temptation in this instance.

## II. WHAT THE PROBLEM IS—AND WHAT IT IS NOT

A simple hypothetical illustrates the factual situations of interest here. Suppose that *M* manufactures swimsuits and that *M* knows that wearers of its suits will swim in a variety of swimming pools, both above-ground and in-ground. Assume further that some of the risks generally associated with swimming pool usage are neither obvious nor generally known to swimmers—for example, the risks of attempting head-first dives into shallow, above-ground pools—and that *M* does not mention these risks in

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5. See *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005) (Ohio law). The central issue in *Lindstrom* was causation as it related to component parts rather than the existence of a duty. The court found no causation, concluding that a manufacturer cannot be held responsible for asbestos contained in another product. See *id.* at 496.

marketing its swimsuits.<sup>6</sup> Assume finally that *V*, wearing one of *M*'s suits, attempts a shallow dive into an above-ground pool, manufactured by *P*, and suffers spinal cord injury. Does *V* have a viable claim<sup>7</sup> against *M*, the swimsuit manufacturer, for failing to warn *V* of the risks of shallow dives? *P*, the pool manufacturer, may be liable to *V*,<sup>8</sup> but is *M*? One's first reaction to this hypothetical may be that it is academically unrealistic—that no court in its right mind would consider holding *M* liable on these assumed facts. But courts recently have, in fact, been presented with failure-to-warn claims of this sort. As observed at the outset, these new cases do not involve swimsuits made by *M*, but nondefective pumps and valves, and *P*'s products are not above-ground pools, but asbestos gaskets and insulation materials applied internally and externally to *M*'s pumps and valves upon their post-sale installation.<sup>9</sup> More will be said about these actual cases subsequently; the point here is that the swimsuit hypothetical cannot be dismissed summarily as being academic.

Even if variations on the swimsuit claim may actually arise in litigation, they may be likely to strike many observers as manifestly weak on the merits. If this assessment is accurate, wherein, exactly, does the weakness lie? The inquiry here is not whether, after thorough analysis, this initial assessment of weakness is borne out. Later discussions in this article, based on precedents and public policy, argue that it is. Rather, the objective for the moment is to test the adequacy of attempts to deal with the swimsuit claim dismissively. Something about the swimsuit claim is clearly strange. But may the strangeness be captured in a simple turn of phrase? For example, one might attempt to dismiss such a claim on the ground that there is nothing wrong with the swimsuit—that there is no evidence that the swimsuit was defective in any way. But this response overlooks the legal basis of *V*'s claim—if the swimsuit lacks a required warning about diving in shallow water, it is defective for that reason. Technically, the assertion of nondefectiveness simply begs the question of *M*'s failure to warn, the very basis of *V*'s claim.

Another dismissive response might be that the swimsuit did not actually or proximately cause *V*'s broken neck—the swimsuit did not induce *V* to attempt the shallow dive. Once again, however, this response

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6. The reader may balk at the idea that the risks of diving into shallow water are neither obvious nor generally known, but a number of courts have held otherwise. See, e.g., *Corbin v. Coleco Indus., Inc.*, 748 F.2d 411, 420 (7th Cir. 1984).

7. By "viable claim" I mean one that survives a defendant's motion for summary judgment. See, e.g., *id.*

8. See, e.g., *Klen v. Asahi Pool Inc.*, 643 N.E.2d 1360, 1363 (Ill. App. Ct. 1994), *appeal denied, sub nom. Klen v. Doughboy Recreational, Inc.*, 649 N.E.2d 417 (Ill. 1995).

9. See *Braaten*, 2008 WL 5175083; *Simonetta*, 2008 WL 5175068.

overlooks the fact that the swimsuit was presumably a necessary, but-for condition of *V*'s going swimming in the first place—even if the suit did not induce *V* to dive, it made it possible for him to do so—and is therefore a but-for cause-in-fact of *V*'s accident.<sup>10</sup> And if *M* failed to warn about the risks of diving, that failure could be found by a jury to be a proximate cause of *V*'s injuries.<sup>11</sup>

Yet another response might be that no warning need be given because the risks of diving in shallow water are obvious. But this response ignores the explicit assumption of non-obviousness at the outset—a minority of courts have held pool manufacturers liable for failing to warn swimmers of the risks of diving into shallow above-ground pools.<sup>12</sup> To be sure, some swimsuit-type claims can be dismissed on the ground that the relevant risk is obvious—suppose that *V*'s claim were that *M* failed to warn about the risk of drowning in a pool full of water. The general risk of drowning is obvious enough that it need not be warned about, either by *M* or by *P*.<sup>13</sup> But not all of these rescue-by-warning cases can be dismissed on the basis of the obviousness of the relevant risks.<sup>14</sup>

Regarding most of these dismissive responses to the failure-to-warn claim presented in the swimsuit hypothetical, their inadequacies reside in their failure to take sufficient account of the foundational premise of *V*'s claim—that *M* owes *V* a duty to warn about the risks of shallow diving. Only by attacking the premise of *M*'s duty to warn may *M* disentangle itself from the doctrinal web of “defect combined with causation” revealed in this discussion. Responding that the risks are obvious may attack the duty

10. Most courts apply variations of the test, “but for the defendant having acted at all, would the plaintiff nevertheless have suffered the same harm?” See JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 105 (7th ed. 2007). If the answer is “No,” the defendant’s conduct is a but-for cause-in-fact of plaintiff’s harm. Presumably *V* would not have been swimming in the first place without the swimsuit. *Id.*

11. See JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 405-06 (6th ed. 2008).

12. See, e.g., *Corbin v. Coleco Indus., Inc.*, 748 F.2d 411, 420-21 (7th Cir. 1984) (reversing summary judgment in favor of pool manufacturer and allowing jury to consider whether a warning would have deterred plaintiff from diving); *Klen v. Asahi Pool Inc.*, 643 N.E.2d 1360, 1369-70 (Ill. App. Ct. 1994), *appeal denied, sub nom. Klen v. Doughboy Recreational, Inc.*, 649 N.E.2d 417 (Ill. 1995) (affirming the trial court’s ruling that it was for jury to decide whether danger of diving into above-ground pool was open and obvious to 14-year-old); *Jonathan v. Kvaal*, 403 N.W.2d 256, 258 (Minn. Ct. App. 1987) (reversing summary judgment in favor of pool manufacturer). But see *Glittenberg v. Doughboy Recreational Indus.*, 491 N.W.2d 208 (Mich. 1992) (summary judgment for defendants affirmed), *reh’g denied, sub nom. Horan v. Coleco Indus.*, 495 N.W.2d 388 (Mich. 1992).

13. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. j (1998). Section 2 also offers Illustration 12, in which a ladder manufacturer need not warn of the risks of setting up a ladder in front of an unlocked door. *Id.*

14. See, e.g., *Klen*, 649 N.E.2d at 1369-70.

premise, but it falls short because it does not defeat *M*'s duty in every case.<sup>15</sup>

Of all of the other ways of couching a no-duty response, the most commonly encountered is "A manufacturer owes no duty to warn about the risks presented by another manufacturer's product."<sup>16</sup> On the face of it, this assertion is powerful. Not only does it reject the strange, instinctively questionable notion that a swimsuit manufacturer might owe a duty to warn of the risks presented by a swimsuit wearer's diving into a shallow, above-ground pool; but it also refers directly to, and attempts to negate, the more general proposition that one manufacturer should perform a watchdog function to rescue its product users from risks created by other products. Upon further reflection, however, the problem with this often-encountered assertion is that it proves too much. Thus, in order to fulfill its duty to warn about the risks presented by its own product, a manufacturer may legitimately be required to warn about the risks to which another product contributes when its own product and the other product are combined interactively in use. In the swimsuit hypothetical, for example, suppose the fabric out of which the swimsuit is made reacts caustically and harmfully when the pool water contains an abnormally high concentration of chlorine? Even if the pool manufacturer or the chlorine manufacturer must warn about the risks of high-chlorine-content pool water,<sup>17</sup> the swimsuit manufacturer may also owe a duty to warn about the risk of a caustic interaction between the swimsuit fabric and the chlorine.<sup>18</sup> Although such a warning could be said to be a warning "about the risks presented by another manufacturer's product"—i.e., the pool and the chlorine—the non-obvious risks presented by the swimsuit fabric may be sufficient to require a warning from the swimsuit manufacturer.<sup>19</sup>

This last-described, "caustic interaction" variation on the swimsuit hypothetical involves non-obvious risks presented by a synergistic combination of two different products—the swimsuit and the above-ground

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15. *See id.*

16. *See, e.g.,* John W. Petereit, *The Duty Problem with Liability Claims Against One Manufacturer for Failing to Warn About Another Manufacturer's Product*, TOXIC TORTS & ENVTL. L. COMMITTEE NEWSLETTER (DRI, Chicago, Ill.), Winter 2005, at 5-9.

17. One question would be whether the risks of high chlorine-content water are obvious to reasonable persons. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. j (1998). The other would be whether the pool manufacturer, rather than simply the chlorine distributor, owes a duty to warn. This article addresses the latter issue.

18. *See, e.g.,* *Vail v. KMart Corp.*, 25 A.D.3d 549, 551 (N.Y. App. Div. 2006) (stating that clothing manufacturer could have duty to warn of especially flammable garment fabric); *Bigham v. J.C. Penney Co.*, 268 N.W.2d 892, 895-96 (Minn. 1978) (affirming manufacturer liability for garments' "melt and cling" characteristics).

19. *See Vail*, 25 A.D.3d at 551.

pool—giving rise to a legitimate duty to warn on the part of both manufacturers.<sup>20</sup>

Faced with such synergistic product interactions, some courts have selected one manufacturer to bear the entire responsibility to provide a warning, based on circumstances that render warnings by the other manufacturer relatively more difficult and ineffectual.<sup>21</sup> But even there, the manufacturer required to warn may be said to be warning, to some extent, “about the risks presented by another manufacturer’s product.” By contrast, in the original swimsuit hypothetical involving the shallow dive, no synergism is present. The swimsuit itself does not interact synergistically with the shallowness of the swimming pool to increase the risk of a dangerous dive.<sup>22</sup> Nor, in the asbestos cases alluded to earlier, does a pump interact synergistically with the asbestos that a purchaser adds internally or externally after sale.<sup>23</sup> Thus, the earlier-noted strangeness of imposing a duty on the swimsuit or the pump manufacturer to warn about the risks of diving or covering the pump with asbestos derives from the fact that the only connection between the swimsuit and the pump, on the one hand, and the injury to the plaintiff, on the other, was a but-for, condition-precedent connection. In that instance, the swimsuit and the pump manufacturer are being asked to warn about the risks presented *entirely* (nonsynergistically) by another manufacturer’s product.

It follows that in deciding when a manufacturer should warn about another manufacturer’s product, a line must be drawn between those situations in which two (or more) products interact synergistically to create joint risks greater in magnitude than the sum of the risks measured separately, and those in which they do not. Later discussions in Part IV consider more precisely how, and why, such a line must be drawn. Those discussions necessarily touch upon how courts should deal with the concept of duty. For now, two conclusions follow from what has been said so far. First, simple, dismissive explanations, such as a manufacturer never being required to warn about other manufacturers’ products, will not suffice; a

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20. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. j (1998); *supra* notes 13, 17 and accompanying text.

21. See, e.g., *Gonzalez v. Volvo of Am. Corp.*, 752 F.2d 295, 301 (7th Cir. 1985) (holding that automobile manufacturer did not have a duty to warn of mis-match between bumper and bumper hitch, but hitch lessor owed duty to warn user-lessee); *Persons v. Salomon N. Am., Inc.*, 265 Cal. Rptr. 773, 779 (Cal. Ct. App. 1990) (holding that ski binding manufacturer owed no duty to warn of mis-match between binding and ski boot, but ski rental agency owed duty to warn skier).

22. The swimsuit may be a necessary, but-for condition to the swimmers attempting such a dive, see *supra* note 10 and accompanying text, but once in place, the swimsuit does not increase the risk of the swimmer making such an attempt.

23. See *Braaten*, 2008 WL 5175083, at \*3.

duty may be imposed when two different products interact synergistically to create joint risks. And second, when courts cross the line and impose failure-to-warn liability on one manufacturer for the risks presented entirely and nonsynergistically by the products of another manufacturer, the former 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.<sup>24</sup> These cases do not involve "pure rescue" because the watchdog manufacturer's product is a but-for cause-in-fact of the tort plaintiff's being put at risk, but they clearly involve "rescue" in a meaningful sense of the term.<sup>25</sup> Part III, which follows immediately, describes a number of analogous contexts in which courts have refused to impose such a watchdog status on defendants, strongly suggesting, in the aggregate, that doing so in this products liability context would likewise be inappropriate.

### III. COURTS HAVE TRADITIONALLY REFUSED TO REQUIRE ACTORS TO PERFORM WATCHDOG FUNCTIONS IN ORDER TO RESCUE VICTIMS FROM RISKS CREATED AND CONTROLLED BY OTHERS

Each example about to be considered does not necessarily and independently justify the denial of plaintiffs' failure-to-warn claims in the swimsuit/diving and pump/asbestos cases of primary interest here. Instead, the objective is to show a consistent pattern of decisions, supported by recurring policy considerations, that point strongly in that direction. At the very least, plaintiffs in the cases being considered in this article bear a heavy burden of showing that allowing them to recover will promote the objectives of fairness and efficiency believed to underlie the tort system.<sup>26</sup>

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24. See, e.g., *S. Agency Co. v. Hampton Bank of St. Louis*, 452 S.W.2d 100, 105 (Mo. 1970).

25. So-called "pure rescue" occurs when the rescuer has had no part whatever in causing the need for rescue, and the one needing rescue is a total stranger. Were courts to impose a duty to engage in pure rescue, it would be referred to as a "general duty to rescue." See HENDERSON ET AL., *supra* note 10, at 230. In the cases of interest here, technically the defendants are causes-in-fact of the plaintiffs' need to be rescued. See *supra* note 10 and accompanying text. But the causal links here are more attenuated than in the cases in which courts have traditionally imposed a duty to rescue. See *infra* note 32 and accompanying text. For more on the essence of rescue see *infra* note 36 and accompanying text.

26. For a summary of the policies underlying tort see HENDERSON, ET AL., *supra* note 10, at 34-37.

A. *Examples From Outside the Products Liability System*

1. The Traditional Judicial Bias Against a General Duty to Rescue

Every student of American tort law knows that American courts will not impose a legal duty to rescue another merely because the would-be rescuer knows that the other requires help that the rescuer is in a position to render.<sup>27</sup> Under this rule, the mere fact that a swimsuit manufacturer is in a position to warn about diving does not justify imposing a legal duty to do so.<sup>28</sup> Of course, this “no general duty to rescue” rule is subject to a number of exceptions, which may seem so numerous as to swallow the rule.<sup>29</sup> Because one of these exceptions applies when an actor knows that her conduct (whether or not tortious) has helped to place another in the position of requiring rescue, technically the claims of primary interest in this article are not “pure rescue” claims.<sup>30</sup> Thus, the swimsuit manufacturer in the earlier hypothetical knows that its product has in fact contributed, albeit passively and non-tortiously, to placing the swimmer in a position where he may be injured while attempting a shallow dive. Likewise, the pump manufacturer knows that it has created a predicate for the post-sale application of dangerous, asbestos-containing fire retardants.<sup>31</sup> But the leading cases establishing the cause-in-fact exception to the no-duty-to-rescue rule are distinguishable from the swimsuit and pump cases in ways that would justify courts in rejecting duty-to-rescue arguments in the latter circumstances.<sup>32</sup> Thus, while the general rule against imposing a duty to rescue does not, by itself, warrant denying the claims in these cases, neither does the exception based on actual causation require courts to recognize those claims.

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27. See RESTATEMENT (SECOND) OF TORTS § 314 (1965); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM, § 37 (Proposed Final Draft No. 1, 2005).

28. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM, § 37 (Proposed Final Draft No. 1, 2005).

29. See *id.* §§ 38-44.

30. See HENDERSON ET AL., *supra* note 10, at 34-37. A leading case on the cause-in-fact exception is *Tubbs v. Argus*, 225 N.E.2d 841 (Ind. Ct. App. 1967).

31. See *Simonetta*, 2008 WL 5175068, at \*2.

32. In *Tubbs v. Argus*, the defendant was the driver of an automobile who crashed the vehicle and injured the plaintiff, a passenger, placing her in need of rescue. 225 N.E.2d at 841. Because of Indiana's guest law, the defendant was not liable in tort for causing the plaintiff's initial injuries. *Id.* at 842. But the appellate court reversed a demurrer below on the plaintiff's claim that the defendant breached his duty to rescue after the accident. *Id.* at 843. Compared with those facts, the cases of interest here involve more attenuated causal links between the defendant's sale of a nondefective product and the plaintiff's need to be rescued from a more dangerous, defective product. See, e.g., *Simonetta*, 2008 WL 5175068, at \* 3-4.

For present purposes the main relevance of the strong judicial tradition against imposing legal duties to rescue, then, resides in the policy reasons supporting the general no-duty rule. From an instrumental efficiency perspective, courts and commentators doubt that such a rule would encourage rescue, and fear that it might actually discourage it.<sup>33</sup> And from the non-instrumental fairness perspective, courts and commentators feel that imposing an objective standard of reasonableness in judging would-be rescuers' conduct would unfairly punish those who are subjectively incapable of responding to such a duty.<sup>34</sup> Moreover, the unavoidable vagueness of such a standard would lead to arbitrary, emotion-driven outcomes at trial that would undermine shared notions of fair play.<sup>35</sup> When courts insist that product sellers warn of the hidden risks of their own products, rescue does not come into play.<sup>36</sup> But in the cases of interest here, when a court asks a manufacturer to warn about risks created entirely and nonsynergistically by other, more dangerous products, rescue is clearly involved and the traditional bias against requiring rescue strongly suggests that such a duty to warn should not be imposed.

## 2. The Traditional Refusal of Courts to Require Banks to Act as Watchdogs Regarding Their Customers' Financial Transactions

When a fiduciary establishes a trust account in a bank and thereafter writes checks to himself individually in the course of embezzling trust assets, does the bank owe the beneficiaries a duty to warn them of what the fiduciary appears to be doing? Most courts that have considered the question have refused to impose such a duty.<sup>37</sup> Not only are the check-

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33. See, e.g., *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 354-62 (Cal. 1976) (Mosk, J., concurring and dissenting); *infra* notes 61-63 and accompanying text; see also William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 94 (1978).

34. See James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 935 (1982).

35. *Id.* at 912.

36. One could, of course, speak of all tort duties in terms of rescue. A person driving recklessly fast could be said to owe a duty to rescue others from the risks of his driving by slowing down to a reasonable speed. But such a driver is held for misfeasance, not nonfeasance. In essence, rescue involves a duty to act to prevent harm that is threatened entirely from external circumstances, including the conduct of others.

37. See, e.g., *Matter of Knox*, 64 N.Y.2d 434, 438 (N.Y. 1985) ("A bank is not in the normal course required to conduct an investigation to protect funds from possible misappropriation by a fiduciary . . ."); *Helig Trust & Beneficiaries v. First Interstate Bank of Wash.*, 969 P.2d 1082, 1085 (Wash. Ct. App. Div. 2d 1998) (holding that without actual knowledge of trustee's breach of fiduciary duty, bank had no duty to notify beneficiaries of trustee's withdrawals).



writing actions of the fiduciary almost always ambiguous—there may be innocent explanations for such admittedly questionable transactions—but also the costs of imposing open-ended watchdog responsibilities on banks are likely to be great.<sup>38</sup> In the end, such a duty to warn based on ambiguous appearances of impropriety would translate into insurers' liability for fiduciary self-dealing, which banks would simply treat as a cost of doing business and pass on to all of their customers. Of course, if a bank becomes more actively involved in assisting a fiduciary in committing a breach of trust, exposure to liability may be appropriate.<sup>39</sup> But as a general rule, courts refuse to require banks to monitor checking account activities in a watchdog capacity.<sup>40</sup>

One interesting (and timely) exception to this reluctance to assign watchdog status to banks and other financial institutions is the United States Patriot Act,<sup>41</sup> aimed at helping to prevent terrorism activities after the September 11, 2001, attacks. The Patriot Act amends the Bank Secrecy Act,<sup>42</sup> requiring financial institutions to establish anti-money laundering programs in order to inhibit the financing of terrorism.<sup>43</sup> Under 2003 amendments to regulations promulgated under the Bank Secrecy Act, financial institutions are required to report to a designated federal officer or agency any and all suspicious transactions that appear to involve money laundering or the financing of terrorist activity.<sup>44</sup> Clearly, the Patriot Act requires these financial institutions to perform watchdog functions in relation to their customers' activities.<sup>45</sup> Does this suggest that the traditional reluctance to assign such responsibilities is undergoing a significant sea change that might call for a reassessment of the thesis that American law is biased against turning banks into watchdogs? Three important considerations suggest that no such broad-scale change is underway. First, the Bank Secrecy Act regulations and related customs in the relevant industries define the concept of suspicious activities with

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38. See, e.g., *Helig Trust*, 969 P.2d at 1084.

39. See, e.g., *S. Agency Co. v. Hampton Bank of St. Louis*, 452 S.W.2d 100, 105 (Mo. 1970) (“[A]ctual notice of misappropriation or conduct amounting to bad faith on the part of the bank must be shown in order . . . to recover.”).

40. See *id.*

41. H.R. 3162, 107 Cong., 1st Sess. (Oct. 24, 2001).

42. Pub. L. 91-508, codified as amended at 12 U.S.C. §1829b, 12 U.S.C. §§1951-1959, and 31 U.S.C. §§5311-5314; 5316-5332.

43. Cheryl R. Lee, *Constitutional Cash: Are Banks Guilty of Racial Profiling in Implementing the United States Patriot Act?*, 11 MICH. J. RACE & L. 557 (2006).

44. 31 C.F.R. Part 103, 68 Fed. Reg. 65392 et seq. (Nov. 20, 2003).

45. See Maureen A. Young, *New Developments and Compliance Issues in a Security Conscious World*, 866 PLI/Pat 347 (2006).

relative specificity.<sup>46</sup> Second, the extraordinary background circumstances—helping in the fight against international terrorism—suggest that the approach under the Patriot Act will not be transported to other, more pedestrian financial contexts. And finally, notwithstanding the strong national-security justifications supporting the Patriot Act, the suspicious-activity reporting under the Act has proven to be costly and controversial.<sup>47</sup>

### 3. The Traditional Refusal of Courts to Require Defendants to Warn Others of the Proclivities of Relatives and Close Associates to Engage in Sexually Abusive Behavior

When a wife knows that her husband has, in the past, shown a predilection to molest children sexually, and she knows that he will find himself in circumstances that provide him the opportunity to repeat such abusive behavior, does the wife owe a legal duty to warn the children thereby placed at risk, or the children's parents? Because the facts are emotionally charged and the case for rescue is ostensibly compelling, such a circumstance provides a good test of the hypothesis that courts are generally biased against compelling actors to perform watchdog functions. Consistent with a strong no-duty-to-rescue tradition, most courts in such cases refuse to recognize a duty to warn.<sup>48</sup> Among the reasons given for this response are the absence of a preexisting personal relationship between the would-be rescuer and the victim;<sup>49</sup> the lack of custody or control of the rescuer over the victim;<sup>50</sup> the absence of any "just and sensible legal guidelines;"<sup>51</sup> and the virtual impossibility of defining a sensible starting or

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46. 31 C.F.R. § 103.17 (setting a threshold on transactions involving at least \$5,000); 31 C.F.R. § 103.17(a)(2) (requiring reporting if a specified financial institution knows, suspects, or has reason to suspect that a transaction is one of four classes of transactions enumerated in the regulations).

47. See, e.g., Christopher J. Zinski, *Patriotism, Secrecy and the Long Arm of the Law*, 124 *BANKING L.J.* 457 (2007) (arguing that criminals know how to avoid detection); Maureen A. Young, *New Developments and Compliance Issues in a Security Conscious World*, 866 *PLI/Pat* 347 (2006) (describing litany of problems); Cheryl R. Lee, *supra* note 43, at 557 (noting that financial returns on SARs have been meager).

48. See, e.g., *Eric J. v. Betty M.*, 90 Cal. Rptr. 2d 549 (Cal. Ct. App. 2000) (ruling that, where parolee molested girlfriend's eight-year-old son, parolee's family owed no duty to warn girlfriend of parolee's felony conviction for child molestation); *D.W. v. Bliss*, 112 P.3d 232, 242 (Kan. 2005) (holding wife not liable for failing to warn 15-year-old boy of her husband's prior sexual activities with men in her home); *Meyer v. Lindala*, 675 N.W.2d 635, 641 (Minn. Ct. App. 2004) (holding that religious congregation in which both plaintiffs and their sexual abuser were members owed no duty to warn based on knowledge of prior sexual offenses perpetrated by abuser).

49. See *Meyer*, 675 N.W.2d at 641.

50. See *Bliss*, 112 P.3d at 242.

51. See *Gritzner v. Michael R.*, 611 N.W.2d 906, 915 (Wis. 2000).

stopping point for such liability.<sup>52</sup> A minority of courts have allowed plaintiffs to succeed with failure-to-warn claims in these cases.<sup>53</sup> Among the minority decisions imposing liability for failure to warn of the risk of child abuse, some courts rely on child abuse reporting statutes.<sup>54</sup> For example, a decision for the plaintiffs by the Supreme Court of New Jersey relies on the fact that its statute applies to "any person 'having reasonable cause to believe'" that a child has been subject to abuse.<sup>55</sup>

#### 4. One Controversial Exception to the General Rule: The *Tarasoff* Decision in California

More than thirty years ago the Supreme Court of California imposed liability on a psychologist for failing to warn a young woman that a patient had confided his intentions to the therapist to kill the woman.<sup>56</sup> The majority of the court reasoned that, although the therapist and the victim were strangers, the relationship between the therapist and his patient gave rise to a duty to warn the victim and her parents of her imminent peril.<sup>57</sup> Based on the traditional criteria developed in the child abuse cases in the preceding section, the court should have denied the plaintiff's claims against the psychologist, who had no preexisting relationship with the victim, did not cause the victim's predicament, and did not control his patient's behavior.<sup>58</sup> It appears that the defendant's status as a professional, combined with the unique opportunity to warn presented by the facts, led a majority of the court to base a duty to warn merely on the opportunity to do so, in direct conflict with the Restatement of Torts, Second.<sup>59</sup> One Justice concurred in the result only to the extent that it rested on the circumstance that the defendant therapist had actually predicted that his patient would kill the victim; the concurrence insisted that no duty to use reasonable care in reaching that assessment should be imposed.<sup>60</sup> And one Justice dissented on the ground that "[o]verwhelming policy considerations weigh against

52. See *Kelli T-G. v. Charland*, 542 N.W.2d 175, 178 (Wis. Ct. App. 1995).

53. See, e.g., *Doe v. Franklin*, 930 S.W.2d 921 (Tex. App. — El Paso 1996) (grandmother liable when grandfather abused granddaughter).

54. See *J.S. & M.S. v. R.T.H.*, 714 A.2d 924, 931 (N.J. 1998).

55. *Id.*

56. *Tarasoff v. Regents of Univ. of Calif.*, 551 P.2d 334 (Cal. 1976).

57. See *id.* at 343-44. The Restatement view is reflected in Restatement (Second) of Torts, § 314.

58. See *supra* note 48.

59. This is the author's assessment of the holding. See RESTATEMENT (SECOND) OF TORTS § 314.

60. See *Tarasoff*, P.2d at 353-54, (Mosk, J., concurring and dissenting).

imposing a duty on psychotherapists to warn a potential victim against harm."<sup>61</sup>

The policy reasons offered by the dissenting Justice in *Tarasoff* are relevant to this general discussion of the duty to rescue. According to the dissent, threatening therapists with liability for failing to warn will not serve to increase public safety; those in need of therapy will not seek it so readily, nor will therapy be as effective as it otherwise might.<sup>62</sup> Moreover, therapists will respond to such a duty by committing greater numbers of patients to civil confinement, thereby significantly increasing the relevant social costs.<sup>63</sup> Surprisingly, in light of the analysis in this article, a majority of courts that have addressed the issue have followed *Tarasoff*,<sup>64</sup> although several have narrowed the holding to reduce possible open-endedness.<sup>65</sup> Has the duty imposed by *Tarasoff* and its progeny had the adverse effects that the dissenting Justice predicted? Some writers insist that *Tarasoff* has generated negative effects.<sup>66</sup> Others reach opposite conclusions.<sup>67</sup> In recent years, several state legislatures have codified the holding, almost always narrowing the duty to make outcomes more predictable.<sup>68</sup> On any fair assessment, *Tarasoff* has proven to be controversial, and does not appear to have spawned similar duties in areas other than psychotherapy. The decision is useful in the context of this article mainly because it reveals how non-traditional extensions of duties to rescue by warning are likely to stir up controversy when, on rare occasions, they are made. And the dissent in *Tarasoff* provides an eloquent essay on how and why extending duties to rescue may prove to be wasteful, ineffectual, and downright counterproductive.<sup>69</sup>

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61. See *id.* 355 (Clark, J., dissenting).

62. See *id.* 359-60 (Clark, J., dissenting).

63. See *id.* 361-62 (Clark, J., dissenting).

64. See, e.g., *Shuster v. Altenberg*, 424 N.W.2d 159 (Wis. 1988); *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 673 N.E.2d 1311, 1320-22 (Ohio 1997). But see *Nasser v. Parker*, 455 S.E.2d 502 (Va. 1995). See also Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97, 98-100 (1994).

65. See, e.g., *Thompson v. Alameda County*, 614 P.2d 728, 738 (Cal. 1980) (stating that duty to warn is triggered only when a therapist is aware of specific threats to specific victims).

66. See, e.g., Alan A. Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358 (1976); Toni Pryor Wise, Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff*, 31 STAN. L. REV. 165, 166 (1978).

67. See, e.g., David B. Wexler, *Victimology and Mental Health: An Agenda*, 66 VA. L. REV. 681, 683-84 (1980); Daniel J. Givelber et al., *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443 (1984).

68. See, e.g., N.J. STAT. ANN. § 2A:62A-16(b) (West 2000).

69. See *Tarasoff*, 551 P.2d at 354 (Clark, J., dissenting).

*B. Examples From Within the Products Liability System*

1. The Traditional Rule That Repairers Need Not Warn of Other Risks Presented by the Products They Repair

The general rule is that product repairers provide services, for which they are liable only when proven negligent.<sup>70</sup> When they supply component parts they may be strictly liable for defects;<sup>71</sup> but repairs, as such, constitute services.<sup>72</sup> Consequently, the issue here is not one of strict liability versus negligence, but whether a repairer's duty of care includes the duty to warn product owners and users about non-obvious risks, not relating to the repair, which the repairer discovers during his work.<sup>73</sup> Even though it might be argued that such a duty is owed, given that the repairer often has a preexisting (and perhaps an on-going) relationship with the product owner or user who hires him, courts have refused to impose a general duty to warn on repairers in such circumstances.<sup>74</sup> The main reasons advanced by the courts for such refusals are the open-endedness and vagueness of the responsibilities to inspect and report that a duty to warn would place on repairers, and the substantial financial costs that such a duty would generate, both in searching for defects and insuring against what would in fact amount to strict liability, that customers of repairers would ultimately be forced to bear.<sup>75</sup>

2. The Traditional Rule That Pharmacists Need Not Warn of Risks Presented by the Prescription Products They Dispense

What makes this traditional limit on the duty to warn unusual is that it applies to commercial entities that are clearly in the business of selling products, and that frequently have ongoing relationships with their customers.<sup>76</sup> The general rule is that pharmacists are strictly liable for harm caused by manufacturing defects in the prescription products they dispense,

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70. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 19 cmt. f (1998).

71. *Id.*

72. *Id.*

73. See *Seo v. All-Makes Overhead Doors*, 119 Cal. Rptr. 2d 160 (Cal. Ct. App. 2002).

74. *Id.* at 162 (finding no duty on part of repairer to correct or warn of defects on other portions of remote-controlled gate); *Ayala v. V. & O. Press Co.*, 126 A.D.2d 229 (N.Y. App. Div. 1987) (no duty to warn of design defect in machine being repaired).

75. See *Seo*, 119 Cal. Rptr. 2d at 168.

76. See *id.*; RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6 (1998).

to the same extent as are commercial retailers of nonprescription products;<sup>77</sup> but pharmacists are otherwise liable to their customers only if proven negligent.<sup>78</sup> Courts conceptualize the latter portion of this traditional approach by asserting that pharmacists primarily provide a service in regard to prescription products, but courts do not explain how that assertion is consistent with imposing strict liability for harm caused by manufacturing defects in such products. In any event, the issue of primary importance here is whether a pharmacist's duty of care includes a duty to warn customers of the non-obvious risks presented by prescription products. Clearly pharmacists must exercise reasonable care to fill prescriptions correctly and to pass on any warnings to customers supplied by manufacturers.<sup>79</sup> But do they owe a duty to use care to protect patients against misprescription in the sense that the wrong drug or device has been prescribed for a particular customer, or that two or more drugs will prove dangerous if taken together by the same customer? Must a pharmacist exercise reasonable care to alert customers that they may have developed a dependence on prescription drugs that may lead to addiction over time?

The traditional response to these questions is "No"—pharmacists do not owe their customers a duty to serve as watchdogs over the decisions of physicians regarding which drugs and medical devices to prescribe to which patients; they are not liable for injuries so long as prescriptions are accurately filled.<sup>80</sup> This general rule is subject to sensible exceptions. Thus, courts have held that pharmacists owe a duty to be alert for obvious errors on the face of the prescription.<sup>81</sup> And when pharmacists voluntarily undertake to warn customers of side effects of medications, or risks from drug interactions, they must do so reasonably.<sup>82</sup> Moreover, if a pharmacist has specific factual information about a particular customer that would cause a reasonable person to realize that the customer is at greater than normal risk, a court may recognize a duty to warn that customer.<sup>83</sup> The

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77. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6(e)(1) (1998).

78. *Id.* § 6(e)(2).

79. *Id.* § 6 cmt. h, illus. 4.

80. See, e.g., *Morgan v. Wal-Mart Stores, Inc.*, 30 S.W.3d 455, 461-66 (Tex. App. 2000); *Johnson v. Walgreen Co.*, 675 So. 2d 1036, 1037 (Fla. Dist. Ct. App. 1996).

81. See, e.g., *McKee v. Am. Home Prod. Corp.*, 782 P.2d 1045, 1055 (Wash. 1989); *Horner v. Spalitto*, 1 S.W.3d 519, 521-23 (Mo. Ct. App. 1999) (prescription called for three times the normal dosage).

82. See, e.g., *Cottam v. CVS Pharmacy*, 764 N.E.2d 814, 821-22 (Mass. 2002) (pharmacy voluntarily distributed list of potential side effects; duty to warn customers that list was not exhaustive); *Baker v. Arbor Drugs, Inc.*, 544 N.W.2d 727, 731 (Mich. Ct. App. 1996) (pharmacy advertising that it had established a drug-interaction database to protect customers), *appeal denied*, 588 N.W.2d 725 (Mich. 1997).

83. See, e.g., *Happel v. Wal-Mart Stores, Inc.*, 766 N.E.2d 1118, 1124-25 (Ill. 2002)

major reason that courts give for adhering to the basic rule of no duty to warn is that courts do not wish to force pharmacists to second-guess the judgments of prescribing physicians, or to interfere with the physician-patient relationship.<sup>84</sup> At a deeper level, undoubtedly, the reasons are similar to those already observed in other legal contexts: imposing a duty to monitor and warn would not add very much to customer safety, given the reliance of patients on their physicians, and might actually increase risk.<sup>85</sup> And requiring pharmacists to monitor prescriptions would greatly increase customer costs.<sup>86</sup>

### 3. The Traditional Rule That Trademark Licensors Need Not Police Their Trademarks Nor Protect Purchasers From the Risks Presented by the Products to Which Their Trademarks Are Attached

When the owner of a well-known trademark licenses its logo to be attached to a product it has neither manufactured nor distributed and over which it exerts no control, does it owe a duty to police the trademark in order to protect purchasers from non-obvious risks presented by the product? Even though the logo may be a major reason why many persons purchase the product; and even though product purchasers may assume that the trademark licensor has distributed, or at least vouches for, the product; the traditional rule is that the trademark licensor who does not participate in the manufacture or distribution of the product owes no duty to rescue the purchasers by warning them of hidden, non-obvious risks, whether or not the licensor knows that the risks exist and are significant.<sup>87</sup> By contrast, when trademark licensors do participate in the distribution of the products to which their trademarks attach, they are liable as sellers for any shortcomings in the manufacture, design and marketing of the products.<sup>88</sup>

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(pharmacy knew of customer's allergies and of risks that drug posed for her); *Lasley v. Shrake's Country Club Pharmacy, Inc.*, 880 P.2d 1129, 1130 (Ariz. Ct. App. 1994) (failure to warn customer of risk of dependency over 30-year period of taking drug).

84. *See, e.g., McKee*, 782 P.2d at 1051 ("Requiring the pharmacist to warn of potential risks associated with a drug would interject the pharmacist into the physician-patient relationship and interfere with ongoing treatment.").

85. *See, e.g., Ramirez v. Richardson-Merrell, Inc.*, 628 F. Supp. 85, 88 (E.D. Pa. 1986) ("Interference in the patient-physician relationship can only do more harm than good.").

86. *See, e.g., McKee*, 782 P.2d at 1055 (requiring pharmacists to supply customers with all package insert material would impose "the economic and logistic burden of copying the inserts as well as developing a storage, filing and retrieval system to ensure the current insert is dispensed with the proper drug.").

87. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 14 cmt. d (1998).

88. *Id.*; *see, e.g., Torres v. Goodyear Tire & Rubber Co., Inc.*, 786 P.2d 939, 946-47 (Ariz.

These rules governing trademark licensor liability conform to the patterns reflected in previously considered examples of courts refusing to require commercial actors to perform watchdog (or, in this context, policing) functions.<sup>89</sup> When the trademark licensor lacks control over the distribution of the product, the questionable gains in safety from imposing a duty on the licensor are presumably outweighed by the costs of doing so.<sup>90</sup>

4. The Traditional Rule That Component Part Manufacturers Need Not Monitor Use of Their Components by Subsequent Manufacturers who Combine Those Components With Others to Produce Dangerous End-Products

When the manufacturer of a nondefective component part supplies the part to another manufacturer who combines it with other components to produce a defectively dangerous end-product, is the component part supplier liable to those who are harmed by the defective design of the end-product? Parallel to their treatment of trademark licensors,<sup>91</sup> courts generally refuse to impose responsibility on component part suppliers to monitor the end-uses of their components and to rescue, via warnings, those exposed to risks created by the integration of those components into dangerous end-products.<sup>92</sup> This no-duty rule applies even though the component part directly and synergistically contributes to the risks of injury presented by the end-product, and whether or not the component part manufacturer knows or should know that its component part is contributing to those risks.<sup>93</sup> If the component supplier substantially participates in the integration of the component into the design of the end-product, the supplier will be liable.<sup>94</sup> But not otherwise, even though the component combines with other components synergistically to create joint risks in the end-product.<sup>95</sup> Whether an exception to this no-duty rule should be made for unusual circumstances, as when a component supplier knows that its purchaser (the manufacturer of the integrated end-product) lacks expertise

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1990).

89. See *supra* Part III.A.

90. See *supra* notes 28, 36, 46-48 and accompanying text.

91. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 14 cmt. d (1998).

92. See *id.* § 5 cmt. a (1998); *Mitchell v. Sky Climber Inc.*, 487 N.E.2d 1374, 1376 (Mass. 1986).

93. See, e.g., *Zaza v. Marquess & Nell, Inc.*, 675 A.2d 620, 632-33 (N.J. 1996).

94. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 5(b) (1998).

95. See *Zaza*, 675 A.2d at 629-30.



and knowledge of the relevant risks, is unclear.<sup>96</sup> But the general rule against watchdog responsibility for component parts manufacturers is solid.<sup>97</sup>

The rationales most often advanced for this no-duty rule should by now be familiar to the reader. The Restatement, Third, of Torts: Products Liability expresses them this way:

As a general rule, component sellers should not be liable when the component itself is not defective as defined in this Chapter. If the component is not itself defective, it would be unjust and inefficient to impose liability solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective. Imposing liability would require the component seller to scrutinize another's product which the component seller has no role in developing. This would require the component seller to develop sufficient sophistication to review the decisions of the business entity that is already charged with responsibility for the integrated product.<sup>98</sup>

The U.S. Court of Appeals for the Eighth Circuit explains:

To impose responsibility on the supplier of the component part in the context of the larger defectively designed machine system would simply extend liability too far. This would mean that suppliers would be required to hire machine design experts to scrutinize machine systems that the supplier had no role in developing. Suppliers would be forced to provide modifications and attach warnings on machines that they never designed nor manufactured. Mere suppliers cannot be expected to guarantee the safety of other manufacturers' machinery.<sup>99</sup>

### C. *Some General Observations*

The preceding descriptions of traditional caselaw, drawn non-exhaustively from both outside and inside the products liability system, demonstrate quite clearly that courts generally refuse to require actors to perform watchdog functions in order to rescue would-be victims from risks created and controlled by others. Even when the would-be rescuers' conduct is linked causally to placing the would-be victims in need of

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96. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 5 cmt. b (1998).

97. See HENDERSON & TWERSKI, *supra* note 11, at 537 ("The rule set forth in § 5 is firmly established in American law.").

98. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 5 cmt. a (1998).

99. See *Crossfield v. Quality Control Equip. Co.*, 1 F.3d 701, 704 (8th Cir. 1993).

rescue;<sup>100</sup> and even when the would-be rescuers are arguably in a position to render assistance by warning the victims;<sup>101</sup> courts have refused to compel such rescue-by-warning efforts because the courts have perceived that such an imposition would be both unfair and ineffective.<sup>102</sup> In connection with the cases of interest in this article—variations on the earlier swimsuit hypothetical in which victims seek to hold the sellers of safe products liable for failing to warn of the risks presented entirely by other, more dangerous products—the preceding descriptions of traditional caselaw strongly support judicial rejection of such claims. Part IV, which follows directly, provides a policy analysis of why courts should reject these rescue-by-warning claims.

#### IV. REQUIRING SELLERS OF SAFE PRODUCTS TO RESCUE USERS OF DANGEROUS PRODUCTS CONSTITUTES BAD PUBLIC POLICY

##### A. *Relying on Failure to Warn As the Doctrinal Vehicle for Accomplishing Rescue Is Unfortunate*

Although the reported decisions that prompt this article involve failure to warn of risks of asbestos exposure, some of the rescues of which this article speaks could be accomplished by product design modifications. Thus, the pumps and valves to which asbestos products are applied post-distribution might conceivably be redesigned to discourage such post-sale applications of asbestos, or to reduce the risks they create.<sup>103</sup> But clearly, redesigning swimsuits to discourage diving into shallow above-ground pools would not be feasible. It is, therefore, not surprising that plaintiffs in the rescue case of interest here rely on claims of failure to warn. The very ease with which these rescue-by-warning claims may be formulated belies how inherently problematic they really are. The author of this article has elsewhere described failure-to-warn doctrine as an empty shell of rhetoric that does not give courts adequate basis on which to distinguish spurious claims from valid ones.<sup>104</sup> It is easy for a plaintiff to assert that, if an

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100. See RESTATEMENT (SECOND) OF TORTS § 314 (1965).

101. See *supra* note 27 and accompanying text.

102. See *supra* note 34 and accompanying text.

103. For example, the product surfaces might be designed to make application of asbestos more difficult, or to somehow contain the asbestos particles before they become air-borne. The author assumes these possibilities are far-fetched.

104. See James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265 (1990).

inherently safe pump or valve had carried warnings about the risks of asbestos that may be attached by purchasers post-sale, the plaintiff would have heeded the warnings and avoided exposure. Evidence of the wishful thinking behind such an assertion is to be found in the fact that many jurisdictions deem it necessary to supply plaintiffs with "heeding presumptions" in order to render such claims facially plausible.<sup>105</sup>

These heeding presumptions, which have been confusing and controversial,<sup>106</sup> lie near the heart of the difficulties with failure-to-warn doctrine in the present context. To return to the swimsuit hypothetical, is it realistic to presume that a swimsuit manufacturer could somehow reach its purchaser/users with a warning against diving that would overcome the other considerations—including daredevil impulses—that would lead an individual to dive head first into shallow water?<sup>107</sup> Or that placing warnings on pumps and valves would somehow convince an entire industry to refuse to use insulating materials that had been traditionally used, were relatively cheap and readily available, and that had proven very effective as fire retardants?<sup>108</sup> Failure-to-warn doctrine allows defendants to raise these questions, but almost always leaves them for the triers of fact to decide.<sup>109</sup> It must be borne in mind that these difficulties inhere in the application of failure-to-warn doctrine in all contexts,<sup>110</sup> not just in the one of primary interest here. But when these difficulties are placed side-by-side with the historical reality that courts in many different contexts have refused to impose watchdog responsibilities on commercial actors to rescue victims from risks created and controlled by others,<sup>111</sup> plaintiffs in these rescue-by-

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105. See HENDERSON & TWERSKI, *supra* note 11, at 391-400.

106. See, e.g., Karen L. Bohmholdt, Note, *The Heeding Presumption and Its Application: Distinguishing No Warning from Inadequate Warning*, 37 LOY. L.A. L. REV. 461, 461-62 (2003); Richard C. Heinke, *The Heeding Presumption in Failure to Warn Cases: Opening Pandora's Box?*, 30 SETON HALL L. REV. 174, 174-75 (1999); Hildy Bowbeer & David S. Killoran, *Liriano v. Hobart Corp.: Obvious Dangers, The Duty to Warn of Safer Alternatives, and the Heeding Presumption*, 65 BROOK. L. REV. 717, 717-18 (1999).

107. The author's problems with this rhetorical question are set forth in HENDERSON & TWERSKI, *supra* note 11, at 402-03.

108. The plaintiff might be better off arguing that, if the warnings had been given, he would have quite a well paying job rather than continue to expose himself to the marginally increased risks of pump-related asbestos in an environment already contaminated with asbestos from other sources. Such a hypothesis strikes the author as so fantastically unrealistic that what must be happening is that the plaintiff is, in actual fact, seeking strict, fault-free enterprise liability. *Cf. infra* notes 114-19, and accompanying text.

109. See Henderson & Twerski, *supra* note 104, at 306. ("[T]he plaintiff's prima facie case [of causation] is too easy to establish [and] the tools available to defendants to rebut it are almost nonexistent.")

110. See *supra* Part III.

111. See *supra* Part III.

warning cases of the swimsuit and pump/valve variety should bear a heavy burden of showing that sound public policies support the outcomes they seek. The following section reveals that quite the opposite is true.

*B. Legitimate Public Policy Objectives Would Not Be Served by Imposing These Duties to Rescue*

Requiring sellers of safe products to rescue users of other, more dangerous products would not serve to achieve the policy goals of allocative efficiency or fundamental fairness.<sup>112</sup> Regarding the instrumental objective of promoting the efficient allocation of resources, such a requirement in the form of a duty to warn of risks entirely created and controlled by other manufacturers would be too open-ended and vague to serve as a meaningful guide to a seller's conduct. In the swimsuit hypothetical, for example, would the swimsuit manufacturer also be required to warn of the risks of running around a wet and slippery pool deck? Or swimming at a beach that might be subject to deadly undertows? Or sharks? Should the swimsuit manufacturer be required to warn of the risks of swimming on a full stomach? Or while drunk? And regarding sellers of pumps and valves, should they also warn of the dangers of installing the pumps in unseaworthy vessels? Or in vessels that may become contaminated with contagious disease? These are not far-fetched possibilities, were courts to recognize a duty to warn of risks that originate from, and are controlled entirely by, sources other than the defendant seller of the inherently safe product. Combining this indeterminacy with the serious questions regarding whether warnings really make a difference in people's behaviors,<sup>113</sup> what emerges is a regime of de facto enterprise liability, in which failure-to-warn is a means by which to shift costs from one enterprise to another in order to achieve social objectives having no necessary connection with modifying user behavior.<sup>114</sup>

The author of this article has argued elsewhere that enterprise liability on a grand scale is unworkable and inefficient, even when the risks that result in injury can be traced to the enterprise being held strictly liable.<sup>115</sup>

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112. See *supra* note 18.

113. See *supra* notes 107-08 and accompanying text.

114. If one assumes that warnings in these settings do not actually reduce accident costs significantly, and that plaintiffs almost always reach triers of fact with failure-to-warn claims, see *supra* note 109, then the defendants' liability amounts to strict enterprise liability based on the fact of distributing products that contribute in attenuated, cause-in-fact ways, see *supra* notes 10, 32, to causing plaintiffs to be harmed.

115. See James A. Henderson, Jr., *Why Negligence Dominates Tort*, 50 UCLA L. REV. 377

In much more constrained forms, enterprise liability may be justifiable as a means of making sure that enterprises that create risks bear their fair share of the social costs that those risks generate.<sup>116</sup> But in the present context, when a court holds the seller of a safe product strictly liable for the harm caused entirely by more dangerous products, the relevant social costs are not allocated to the appropriate enterprise. Users and consumers of the safe product under such a regime end up compensating (and thereby subsidizing) the users and consumers of the dangerous products, thereby generally discouraging use and consumption of relatively safe products and encouraging use and consumption of relatively dangerous ones. The end result is that extending failure-to-warn doctrine to effect the rescue of users and consumers of dangerous products will not promote efficiency, but rather the opposite. Unless they have some other instrumental objective in mind, such as providing asbestos victims with a source of funding regardless of how unprincipled the means of doing so,<sup>117</sup> courts should not think seriously about extending these duties to warn in the name of promoting allocative efficiency.

Even if extending these duties to warn will not promote allocative efficiency—indeed, will probably prove wasteful—what of the non-instrumental goal of achieving fairness and justice between the parties? The author of this article has elsewhere identified three fairness values that products liability may be seen to promote: (1) compensating victims of defective products for the disappointment of their reasonable expectations; (2) requiring those who deliberately appropriate the well-being of others to make their victims whole; and (3) shifting the social costs of risky activities from the innocent victims of those activities to those who directly benefit from them.<sup>118</sup> Taken together, promoting these values helps to achieve corrective justice. The unifying principle is that those whose self-promoting activities cause harm to others should compensate their victims in order to make them whole and set things right. How do these principles of corrective justice inform an assessment of the proposed extension of failure-to-warn doctrine to require sellers of safe products to rescue victims of other, more dangerous products? Upon reflection, they argue against imposing such liability. As both the swimsuit and the pump/valves

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(2002).

116. See James A. Henderson, Jr., *Echoes of Enterprise Liability in Product Design and Marketing Litigation*, 87 CORNELL L. REV. 958 (2002).

117. It should be remembered that the decisions that prompted this article, which is deliberately couched in more general terms, are asbestos cases. See *supra* note 7.

118. See James A. Henderson, Jr., *Coping With the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 935-38 (1981).

examples make clear, the sellers of the relatively safe products have not deliberately or actively caused harm to the victims, nor have they unjustly enriched themselves (or their customer bases) at the victims' expense.<sup>119</sup> Indeed, given the roles of the defendants as non-rescuers in these examples, it is difficult to conceptualize these cases in corrective-justice terms. It follows that the only policy justification for imposing this kind of duty to rescue must be instrumental—even if the sellers of the safe products do not ethically deserve to be held liable, threatening them with liability will cause them effectively to rescue victims from injury. On this view, the defendant product sellers must be seen instrumentally as a means of achieving efficiency. But this brings the analysis full circle—imposing what amounts to strict liability in these cases will not promote efficiency. Once this efficiency rationale is revealed as a false promise, hope for a public policy justification for extending the duty to rescue by warning vanishes.

To this point the policy discussion has focused on what might be termed “nearly pure” rescue claims, where the safe product does not combine synergistically with the more dangerous product to produce joint risks.<sup>120</sup> When such synergism does occur, the policy arguments supporting liability are much stronger. From an instrumental standpoint, a failure-to-warn regime based on synergistic interaction is more workable because the synergism identifies the risks to be warned about, significantly reducing the open-endedness of the duty to warn that courts would encounter in the absence of synergism.<sup>121</sup> And from a fairness perspective, it is easier when synergism occurs to say that the relatively safe product, itself (apart from any failure to warn), is significantly contributing to causing the victim's injuries.<sup>122</sup> When the post-distribution, synergistic creation of risk results from purchaser/manufacturers subsequently combining components to

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119. These are the essential difficulties of making out an ethical case for imposing a “nearly pure” duty to rescue. The defendant is liable for something it did *not* do, not something it *did* do. For ethical arguments supporting a duty to rescue on non-instrumental grounds, see Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980); Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1 (1993). For arguments against a duty to rescue, see Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

120. For a discussion of “pure” and “nearly pure” rescue, see *supra* note 25.

121. Earlier discussions have rehearsed the virtually limitless range of risks about which a swimsuit or a pump manufacturer might be required to warn in the absence of any requirement of synergism. See *supra* text following note 112. The earlier example of the swimsuit disintegrating caustically in high-chlorine-content pool water, see *supra* text preceding note 17, makes this clear. The required warning in that instance would focus on the effects of chlorine, not a limitless number of other risks.

122. In the example of the caustic interaction of the swimsuit and the chlorine, the swimsuit is an active participant in causing the dangerous synergism.

produce an integrated end-product, traditionally courts hold the component seller liable for end-product defects only if it substantially participates in the combining of the components.<sup>123</sup> This limitation on a component seller's liability appears consistent with the preceding policy analysis, from both efficiency and fairness perspectives.<sup>124</sup>

*C. Working Out a No-Duty Rule to Cover These Rescue-by-Warning Claims*

This section assumes that strong lines of precedent and careful considerations of public policy support judicial rejection of claims requiring sellers of relatively safe products to rescue users and consumers from risks presented entirely by other, more dangerous products.<sup>125</sup> It remains to work out a sufficiently clear no-duty rule that will allow courts to dispose of such claims as a matter of law.<sup>126</sup> Mindful of the admonitions of Part II about avoiding oversimplified, dismissive rules of decision,<sup>127</sup> the author offers the following first effort at formulating an appropriate no-duty rule: a commercial product seller owes no duty to design or warn against the risks presented by other products with which the seller's product interacts after sale or distribution unless either (1) the seller participates actively and substantially in causing the interaction to occur, or (2) the post-sale interaction synergistically creates joint risks that are significantly greater than the sum of the risks that the product and the other products would present independently. If either or both of the exceptions apply, the rules generally governing negligence and product defectiveness determine liability.

This approach is not offered as a proposed revision of the Restatement of Products Liability, on which the author served as Co-Reporter.<sup>128</sup> At most, some of the proffered language might have been included in official comments.<sup>129</sup> It will be noted that the proposal might be phrased,

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123. See *supra* notes 92-95 and accompanying text.

124. Substantial participation in the integration of the components implies control by the component seller, which supports instrumental objectives. And the participation makes the component part supplier an active contributor to the risk, strengthening noninstrumental arguments based on corrective justice.

125. See *supra* Parts II, III.B.

126. In general, no-duty rules should provide clear guidelines based on considerations other than the policy objectives, themselves. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM, § 7 cmt. a (Proposed Final Draft 2005).

127. See *supra* text preceding and accompanying notes 10-15.

128. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998).

129. Perhaps it might have been to § 2(c), dealing with the basic subject of failure to warn, *id.*

alternatively, in "product defectiveness" language, leaving courts to fit it into the conceptual framework of their products liability law.<sup>130</sup> Note also that the proposal covers both rescue by warning and rescue by design, a point raised earlier in this discussion.<sup>131</sup> The most important aspect of this proposed no-duty rule is that the vast majority of products liability claims will come within one or both of the two exceptions—the cases that the no-duty rule covers will presumably be few in number, perhaps limited to asbestos claims depending on whether other courts decide to follow the recent decisions of the Washington Supreme Court.<sup>132</sup>

Perhaps the most efficient way to understand what the proposed rule would accomplish is to walk through some illustrative cases to see how they would come out. For example, how would a court respond to the swimsuit hypothetical considered at various junctures in this analysis? Clearly, the proposed no-duty rule would require judgment as a matter of law for the swimsuit manufacturer. Although swimsuit distributors promote swimming generally, they do not promote diving into shallow water, the dangerous interaction in that case; even if swimsuit manufacturers know that such conduct occurs, they do not actively participate in causing it to occur.<sup>133</sup> Moreover, as explained earlier, the swimsuit and the swimming pool do not interact synergistically.<sup>134</sup> The same outcome would result in the pump/asbestos cases. Pump manufacturers may know that asbestos will be applied post-sale within and without their products, but this analysis assumes that the manufacturers do not actively participate in causing that to occur.<sup>135</sup> And the pumps and the asbestos do not interact synergistically to create "significantly greater" joint risks.<sup>136</sup>

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§ 2(c), or § 5, dealing with component parts that get combined to create integrated end-products, *id.* § 5. The author would have preferred the first alternative, since these cases do not fit easily into the component parts paradigm.

130. The Restatement (Third) of Torts sections dealing with time-of-sale failure to warn rely on defectiveness rather than distributor's negligence. But the reasonableness-based tests for liability for design and marketing defects are functionally equivalent to negligence. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. a (1998) (The provisions governing design and warning defects "achieve the same general objectives as does liability predicated on negligence.").

131. See *supra* note 103 and accompanying text.

132. See *Braaten*, 2008 WL 5175083; *Simonetta*, 2008 WL 5175068.

133. See *supra* note 119 and accompanying text.

134. See *supra* note 22 and accompanying text.

135. See *supra* text accompanying note 119.

136. See *supra* text following note 22. There, the text speaks of asbestos applied to the outside of the pumps. What of asbestos-containing gaskets installed post-sale inside the pumps? On the assumption that the asbestos becomes dangerous only when disturbed during servicing, the defendant can argue persuasively that any small degree of synergism between the pumps and the



What about the majority of products liability claims that do (and should) fall within the exceptions—the claims that the proposed no-duty rule should not bar? The earlier hypothetical involving the swimsuit that interacts dangerously with high-chlorine-content pool water is easy—the products interact synergistically under the second exception and plaintiff is free to invoke design and warning principles in seeking recovery.<sup>137</sup> What about a claim that the manufacturer of an automobile should warn users about driving while intoxicated? One's first reaction may be that the proposed no-duty rule bars the claim because it is similar to the claim in the swimsuit/diving and pump/asbestos cases. Upon reflection, that reaction will be seen to be in error. Drunkenness and automobile driving are poster children for dangerous synergistic interaction; the combination of the two product-related activities creates joint risks that are "significantly greater" than the sum of the risks that the activities present independently. If the reader nevertheless believes that such a failure-to-warn claim is weak, it is probably because the risks of drunk driving are well-known and plainly obvious, and no duty to warn exists for that reason.<sup>138</sup> But observe that even obvious risks may require modifications in product design—although courts and other regulators have not required automobile manufacturers to design their products to reduce the frequency of drunk driving, it is at least conceivable that they might.<sup>139</sup>

How does the proposed no-duty rule interface with the problem of determining a component part manufacturer's responsibility for dangerously designed end-products? It will be recalled from an earlier discussion that sellers of non-defective components are liable for the dangerous designs of integrated end-products only when the sellers substantially participate in the integrative design process.<sup>140</sup> However, even if a component seller does not actively participate in integrating its product into the end-design, its component may nevertheless combine synergistically with the other components, falling within the second exception to the proposed no-duty rule. But then the separate no-duty rule governing non-participating component suppliers kicks in, and the component seller would be off the liability hook as a matter of law. Thus, courts should first apply the proposed no-duty rule and, if a defendant seller

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gaskets does not create joint risks that are significantly greater than if the asbestos had been applied externally to the pumps.

137. See *supra* note 18 and accompanying text.

138. See *supra* note 13 and accompanying text.

139. See *supra* text accompanying notes 103, 131. On the subject of anti-drunk-driving devices in automobiles, see JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 550 (4th ed. 2000).

140. See *supra* notes 92-95 and accompanying text.

comes within an exception, move to the further question of whether another no-duty rule applies to warrant judgment for defendant as a matter of law.

## V. CONCLUSION

A manufacturer's duty to provide reasonable warnings and to adopt reasonably safe designs ordinarily does not involve rescue.<sup>141</sup> Thus, when a defectively designed or marketed product interacts synergistically with products manufactured by others, the commercial distributor of the defective product is liable for misfeasance, not nonfeasance. In these routine situations, the manufacturer is being held liable for harm its unreasonably dangerous product actively causes, not for harm that the manufacturer has failed to prevent. By contrast, the cases of interest in this article, wherein the sellers of nondefective products are required to warn or design against risks that are entirely generated by unsafe products with which their products happen to interact non-synergistically, do involve rescue in a very real sense.<sup>142</sup> In these cases, the seller of the safe product is held for nonfeasance, not misfeasance—for failing to rescue users of its inherently safe products from risks that its products did not actively contribute to creating.<sup>143</sup>

This article has considered two concrete examples of product-interaction, rescue-by-warning products liability claims: one purely hypothetical—a swimsuit manufacturer's alleged duty to warn swimsuit users against the risks of diving into shallow, above-ground swimming pools; and one quite real—a pump manufacturer's alleged duty to warn its users of the risks presented entirely by asbestos products added to its pumps only after purchase and installation. The preceding analysis demonstrates that imposing liability on either the swimsuit manufacturer or the pump manufacturer runs counter to a strong bias in traditional American liability law against requiring one group of actors to function as watchdogs to prevent another group of actors from wrongfully causing harm. And this analysis shows that imposing liability of this sort constitutes bad public policy. In response to these difficulties, this article proposes a no-duty rule that will enable courts to sort out these product-interaction, rescue-by-warning claims, one that would properly dispose of the swimsuit/diving and the pump/asbestos claims for defendants as a matter of law while allowing more sensible product-interaction claims to reach triers of fact. Simply

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141. See *supra* note 36 and accompanying text.

142. See *supra* text following note 36.

143. See *supra* note 36 and accompanying text.

stated, the proposed rule recognizes product-interaction claims when either the seller actively and substantially participates in causing the product interaction to occur, or the product interaction synergistically creates significant joint risks of harm.

To date, courts have not allowed plaintiffs to proceed with product-interaction, rescue-by-warning claims,<sup>144</sup> but some of these cases are still under review.<sup>145</sup> If future courts choose to impose liability in these situations and these holdings catch on and spread, courts may eventually be involved in an unprecedented, unfortunate expansion of the duty to rescue. This author predicts that such an expansion will not occur. Most judges will understand what their predecessors have always understood—that hanging liability on such a slender thread does not promote the efficient allocation of resources, nor does it achieve justice among the parties involved.

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144. See *Braaten v. Saberhagen Holdings*, 2008 WL 5175083 (Wash. Dec. 11, 2008); *Simonetta v. Viad Corp.*, 2008 WL 5175068 (Wash. Dec. 11, 2008); cf. *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005) (Ohio law).

145. See *Taylor v. A.W. Chesterton*, Nos. A116816 and A117648 (Cal. App. 1st Div.); *Merrill v. Leslie Controls, Inc.*, No. B200006 (Cal. App. 2d Div.).

**APPENDIX B**

*Anderson v. Asbestos Corp., Ltd.*, 2009 WL 2032332  
(Wash. Ct. App. July 13, 2009)

**H**Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA  
 2.06.040

Court of Appeals of Washington,  
 Division 1.

Ruby J. ANDERSON, for herself and as Personal  
 Representative of the Estate of Decedent, Kenneth L.  
 Anderson, Appellant,

v.

ASBESTOS CORP., Ltd.; Caterpillar, Inc.; Crown  
 Cork & Seal Company, Inc.; Garlock Sealing Tech-  
 nologies, LLC; Foster-Wheeler Energy Corporation;  
 Fraser's Boiler Service, Inc.; Goulds Pumps (IPG),  
 Inc.; Ingersoll-Rand Company; Lockheed Shipbuild-  
 ing Company; Metropolitan Life Insurance Com-  
 pany; Saberhagen Holdings, Inc.; Todd Shipyards  
 Corp.; and Viacom, Inc., Successor by Merger to  
 CBS Corporation, f/k/a Westinghouse Electric Cor-  
 poration, Respondents.

No. 60271-3-1.

July 13, 2009.

Appeal from King County Superior Court; Honorable  
John P. Erlick, J.  
William Joel Rutzick, Schroeter Goldmark & Bender,  
 Seattle, WA, for Appellant.

John Alan Knox, William Kastner & Gibbs, PLLC,  
Walter Eugene Barton, Attorney at Law, Robert  
Hopkins Madden, Attorney at Law, Seattle, WA, for  
 Respondent.

UNPUBLISHED

COX, J.

\*1 On August 11, 2008, we filed our original deci-  
 sion in this case.<sup>FN1</sup> There, we affirmed the trial  
 court's summary dismissal of the claims against de-  
 fendants Lockheed Shipbuilding Company and Todd  
 Shipyards Corporation. But we reversed its order in  
 limine at trial excluding the theory of the case that

Caterpillar, Inc. had a duty to warn of the dangers of  
 using asbestos insulation with the engines it manufac-  
 tured. Thereafter, the supreme court granted Caterpil-  
 lar's petition for review and remanded this case to this  
 court for reconsideration in light of its decisions in  
Braaten v. Saberhagen Holdings<sup>FN2</sup> and Simonetta v.  
Viad Corporation.<sup>FN3</sup> Accordingly, we have reconsid-  
 ered our original decision and now affirm the judg-  
 ment on the defense verdict at trial. We discussed the  
 background of this case in our original decision and  
 will not repeat that discussion here. We do not read  
 the supreme court's grant of Caterpillar's petition for  
 review as affecting our ruling in favor of summary  
 dismissal of Todd and Lockheed. Thus, our discus-  
 sion is limited only to the question of the duty of Cat-  
 erpillar.

FN1. Anderson v. Asbestos Corp., noted at  
 146 Wn.App. 1030 (2008).

FN2. 165 Wn.2d 373, 198 P.3d 493 (2008).

FN3. 165 Wn.2d 341, 197 P.3d 127 (2008).

#### DUTY TO WARN

Anderson claims the trial court incorrectly excluded  
 any evidence regarding his theory that Caterpillar had  
 a duty to warn about asbestos insulation used with  
 engines it manufactured. Based on the supreme  
 court's recent decisions, we disagree.

Both *Braaten* and *Simonetta* discuss the duty to warn  
 in asbestos cases. In *Simonetta*, the defendant manu-  
 factured evaporators, which were machines used on  
 naval ships.<sup>FN4</sup> The evaporators Joseph Simonetta  
 serviced were encased in asbestos insulation and Si-  
 monetta had to remove the insulation in order to re-  
 pair the equipment and reinsulated it when he was  
 finished.<sup>FN5</sup> The manufacturer did not supply the insu-  
 lation.<sup>FN6</sup>

FN4. Simonetta, 165 Wn.2d at 346.

FN5. *Id.*

FN6.Id.

The supreme court held that a manufacturer may not be held liable in common law products liability or negligence for failure to warn of the dangers of asbestos exposure resulting from another manufacturer's insulation applied to its products after sale of the products to the navy.<sup>FN7</sup>

FN7.Id. at 363.

In *Braaten*, the defendants manufactured pumps and valves used on naval ships.<sup>FN8</sup> Some of the manufacturers' products originally contained packing and gaskets with asbestos in them, but the packing and gaskets were manufactured by third parties and installed in the defendants' products.<sup>FN9</sup> The navy also applied asbestos-containing insulation to the valves and pumps after they were installed on the ships.<sup>FN10</sup> In his work as a pipefitter, Braaten had to both remove and reapply asbestos insulation from pumps and valves on naval ships.<sup>FN11</sup>

FN8. Braaten, 165 Wn.2d at 379.

FN9. Id. at 380.

FN10. Id. at 379.

FN11. Id. at 381.

The first issue in *Braaten* was whether the defendants had a duty to warn of the danger of exposure during maintenance of their products to asbestos in insulation that the navy would foreseeably apply to their equipment.<sup>FN12</sup> Following *Simonetta*, the court held that the defendants had no duty to warn under common law products liability or negligence theories.<sup>FN13</sup>

FN12.Id. at 380.

FN13.Id. at 380, 398.

\*2 The remaining issue in *Braaten* was whether the defendant-manufacturers had a duty to warn of the danger of exposure to asbestos in replacement pack-

ing and gaskets that the defendants did not manufacture, sell, or otherwise supply. The court held "that the general rule that there is no duty under common law products liability or negligence principles to warn of the danger of exposure to asbestos in other manufacturers' products applies with regard to replacement packing and gaskets."<sup>FN14</sup> The court noted, "[t]he defendants did not sell or supply the replacement packing or gaskets or otherwise place them in the stream of commerce, did not specify asbestos-containing packing and gaskets for use with their valves and pumps, and other types of materials could have been used."<sup>FN15</sup>

FN14.Id. at 380.

FN15.Id.

Here, evidence showed that Caterpillar manufactured engines used on ships on which Anderson worked. Anderson sought to pursue the theory that Caterpillar had a duty to warn about asbestos "which [Caterpillar] did not supply but which it was aware would be used in connection with" its engines.<sup>FN16</sup> But under the supreme court's recent decisions, there is no duty under common law products liability or negligence principles to warn of the danger of exposure to asbestos in other manufacturers' products.<sup>FN17</sup> Further, "[i]t makes no difference whether the manufacturer knew its products would be used in conjunction with asbestos insulation."<sup>FN18</sup>

FN16. Brief of Appellant at 1.

FN17. Simonetta, 165 Wn.2d at 354, 363; Braaten, 165 Wn.2d at 398.

FN18. Braaten, 165 Wn.2d at 385 (citing Simonetta, 165 Wn.2d at 358).

Here, the trial court decided that Caterpillar had no duty to warn about asbestos insulation used with the engines it manufactured. Accordingly, its ruling on the motion in limine was correct under *Simonetta* and *Braaten*. Thus, the defense verdict should stand.

We now affirm the judgment in favor of Caterpillar.

WE CONCUR: LAU and APPELWICK, JJ.

Wash.App. Div. 1,2009.  
Anderson v. Asbestos Corp.  
Not Reported in P.3d, 2009 WL 2032332  
(Wash.App. Div. 1)

END OF DOCUMENT

**APPENDIX C**

*Milich v. Anchor Packing Co.*, A.D. No. 08-10532  
(Pa. Ct. Com. Pl. Butler County Mar. 16, 2009)



IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

WALTER MILICH, an individual,	:	CIVIL DIVISION-ASBESTOS
	:	
Plaintiff,	:	A.D. No. 08-10532
	:	
vs.	:	
	:	
ANCHOR PACKING COMPANY, et al.,	:	
	:	
Defendants.	:	

PROthonotary's  
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*Shelton*  
 PROthonotary

Attorney for Plaintiff: Carrie L. Furlan  
 Attorney for Crane Co.: Eric R. I. Cottle/David Shelton

Horan, J. March 16, 2009

**MEMORANDUM OPINION AND ORDER OF COURT**

Presently before the Court for consideration is the Motion for Summary Judgment of Crane Co. For the reasons set forth below, said Motion is GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced this action by filing a Complaint alleging that he developed mesothelioma as the result of exposure to asbestos-containing products manufactured, supplied, distributed or utilized by the above-captioned

Defendants, including valves manufactured and/or supplied by Defendant Crane.

Mr. Milich's deposition was conducted over the course of four days. Mr. Milich's testimony establishes that he was employed by Mine Safety Appliance ("MSA") at its Evans City, Pennsylvania facility from 1952 until 1987. He testified that he worked as a lead engineer in the Testing Facility. In this position, Mr. Milich worked with liquid metals projects and performed small scale experiments. From 1953 to 1956, he worked on a large liquid metals test unit called the "Missy Project" or "Missy System." He recalled that Crane valves were used in connection with liquid metals projects. Mr. Milich further testified that "[m]aybe on one or two occasions" he observed workers repacking the stems of Crane valves. (Deposition of Walter Milich, 5/1/08, 24 and 60). He stated that he never performed "hands-on" work with the Crane valves and did not know if the valve contained asbestos. (Deposition of Milich, 5/1/08, 50 and 59). He further testified that the valve packing was moist and "wasn't

brittle." Mr. Milich did not know if the packing was original to the valve. (Deposition of Milich, 5/1/08, 58-59).

Defendant Crane has filed a Motion for Summary Judgment, which is presently before the Court. Therein, Crane argues that the record in this case contains no evidence that Plaintiff worked in proximity of Crane asbestos-containing valves and/or packing on a regular and frequent basis during his tenure at MSA.

#### LEGAL STANDARD

Rule 1035.2 of the Pennsylvania Rules of Civil Procedure provides that a party may move for summary judgment "whenever there is no genuine issue of material fact as to a necessary element of the cause of action . . . ." Pa.R.C.P. 1035.2(1) Rule 1035.2(2) further provides that a party may move for summary judgment when "an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." Pa.R.C.P. 1035.2(2). Once a motion for summary

judgment is made, the non-moving party may not simply rest upon the mere allegations or denials in his pleadings, but is required to set forth specific facts showing that there is a genuine issue for trial. Pa.R.C.P. 1035.3. That is, once the motion for summary judgment has been properly supported, the burden then shifts to the non-movant to disclose evidence that is the "basis for his or her argument resisting summary judgment." *Samarin v. GAF Corp.*, 571 A.2d 398, 402 (Pa.Super. 1989). In *Samarin*, the Superior Court clarified the legal standard governing a motion for summary judgment:

In passing upon a motion for summary judgment the court must examine the record in the light most favorable to the nonmoving party . . . . It is not part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried . . . . Any doubt must be resolved against the moving party . . . .

*Id.* at 401-402. (citations omitted).

The legal standard for summary judgment based upon a lack of product identification in an asbestos-related exposure case was established in the landmark decision of *Eckenrod v. GAF Corp.*, 544 A.2d 50 (Pa.Super. 1988), *allocator denied*, 533 A.2d 968 (Pa. 1988). The *Eckenrod* court held that:

In order for liability to attach in a products liability action, plaintiff must establish that the injuries were caused by a product of the particular manufacturer or supplier. *Berkebile vs. Brantley Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975). Additionally, in order for a plaintiff to defeat a motion for summary judgment, a plaintiff must present evidence to show that he inhaled asbestos fibers shed by the specific manufacturer's product. *Wible vs. Keene Corp.*, No. 86-4451 Slip Op. (E.D. Pa. August 19, 1987) [available on WESTLAW, 1987 W.L. 15833]; *Anastasi vs. Pacor, Inc.*, No. 6251 (C.P. Phila. Co. March 8, 1983); *aff'd* 349 Pa.Super. 610, 503 A.2d 44 (1985). Therefore a plaintiff must establish more than the presence of asbestos in the workplace; he must prove that he worked in the vicinity of the product's use. *Pongrac vs. Consolidated Rail Corp.*, 632 F.Supp. 126 (E.D.Pa. 1985).

*Id.* at 52. The *Eckenrod* court concluded by succinctly stating that "[w]hether a plaintiff could successfully . . . defeat a motion for summary judgment by showing circumstantial evidence depends upon the frequency of the use of the product and the regularity of plaintiff's employment in proximity thereto." *Eckenrod*, 544 A.2d at 53, (citation omitted).

In *Gregg v. V-J Auto Parts, Inc.* 943 A.2d 216 (Pa. 2007), the Supreme Court of Pennsylvania refined the summary judgment standard established in *Eckenrod*. There, the Supreme Court held that it is appropriate for courts at the summary judgment

stage to assess a plaintiff's evidence of exposure to a defendant's asbestos-containing product, whether direct or circumstantial, to determine whether the evidence meets the frequency, regularity, and proximity requirements developed in *Eckenrod* and its progeny. *Id.* at 226-227. The *Gregg* Court further noted that the trial court's role at the summary judgment stage is to assess a plaintiff's quantum of evidence. The court further held that summary judgment is proper where there is only evidence of a "de minimus" exposure to a defendant's product. *Id.* at 226. The Supreme Court in *Gregg* observed that:

In summary, we believe that it is appropriate for courts, at the summary judgment stage, to make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff's/decedent's asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury.

*Id.* at 227.

The *Gregg* court also generally observed that plaintiffs commonly proffer expert opinions that any exposure to asbestos, "no matter how minimal," is a substantial

contributing factor to an asbestos-related disease. The court held that "such generalized opinions do not suffice to create a jury question in a case where the exposure to the defendant's product is *de minimus* . . . ." *Id.* at 226-227.

#### LEGAL ANALYSIS

In opposition to Crane's Motion for Summary Judgment, Plaintiff submitted, among other documents, the depositions of Plaintiff, the affidavit and deposition transcript of co-worker Jack Bicehouse, and Crane's answers to written discovery. As summarized above, Plaintiff's testimony establishes that he did not perform any hands-on work with Crane valves, but rather merely saw other workers repacking the valve stems on perhaps one or two occasions at most.

The affidavit and deposition testimony of Jack Bicehouse does not establish Plaintiff's frequent and/or regular exposure to an asbestos-containing product manufactured or supplied by Crane. Mr. Bicehouse worked at MSA during the relevant time period as an engineering aide. According to Mr.

Bicehouse's affidavit testimony, he and Mr. Milich worked on the Missy System and were "exposed to various asbestos-containing products," including Crane valves. Notwithstanding this generalized affidavit testimony, Mr. Bicehouse could not explain at his deposition why he associated Crane with valves, nor could he describe the valves or recall any characteristics thereof. Moreover, Mr. Bicehouse did not have any recollection of observing any persons working on Crane valves in Plaintiff's presence. (Deposition of Jack Bicehouse, 90-91). Further, Mr. Bicehouse's testimony does not indicate that the valve packing was original to the valve.

Plaintiff also relies on Crane's written discovery responses in this case and in an unrelated case. Therein, Crane generally indicates that it incorporated asbestos-containing packing into its valves and that it sold replacement packing to its valve customers. However, there is no indication whatsoever that Crane supplied such packing to MSA and that Plaintiff was exposed to such packing.

It should also be noted that Plaintiff has not presented competent evidence that Crane specified the use of asbestos



packing in its valves and/or specified that replacement packing must be asbestos-containing. Furthermore, to the extent that Plaintiff may have been exposed to replacement packing supplied by a third party, there is no authority that Crane can be held liable for such exposure as a matter of law. To the contrary, the authority relied upon by Crane in support of its Motion for Summary Judgment indicates that Crane is not subject to such liability. See *Toth v. Economy Forms Corp.*, 571 A.2d 420 (Pa.Super 1989) (scaffolding manufacturer not liable for defective planking that it did not manufacture or supply, but which was subsequently affixed to its product by a third party).

Finally, Plaintiff relies upon the generalized testimony of certain experts in opposition to Crane's Motion for Summary Judgment. These experts generally opine that each and every exposure, "however brief or trivial," contributes to asbestos-related diseases. (See e.g.; Affidavit of David Laman, M.D.; Exhibit 3 of Plaintiff's Consolidated Response to All Defendants' Motions for Summary Judgment). Under the *Gregg* decision, however, these generalized opinions are insufficient

to create an issue of fact where exposure is *de minimus*. 943  
A.2d at 226-227.

Under Pennsylvania law, exposure must be "of such a nature as to raise a reasonable inference that [the plaintiff] inhaled asbestos fibers" from the product. See *Andalaro v. Armstrong World Industries, Inc.* 799 A.2d 71, 86 (Pa.Super. 2002) (citations omitted). Plaintiff must also produce evidence that he worked on a regular and frequent basis in the vicinity of a product manufactured or supplied by Crane. See *Wilson v. A.P. Green Industries*, 807 A.2d 922 (Pa.Super. 2002) (applying the *Eckenrod* principles to a mesothelioma claim).

In the case at bar, Plaintiff has failed to set forth specific facts that demonstrate that there is a genuine issue of fact relative to his inhalation of asbestos dust shed from valves or packing specifically manufactured or sold by Crane. Although there is evidence that Crane valves were present at MSA, Plaintiff has not identified evidence that he regularly and frequently worked with or around any Crane asbestos-containing product. As a result, Plaintiff has failed to satisfy the standard set forth in *Eckenrod* and its progeny

relative to successful opposition to a motion for summary judgment predicated on lack of product identification. Accordingly, the Defendant's Motion for Summary Judgment is GRANTED.

Accordingly, We Enter the Following:

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

WALTER MILICH, an individual, : CIVIL DIVISION-ASBESTOS  
Plaintiff, : A.D. No. 08-10532  
vs. :  
ANCHOR PACKING COMPANY, et al., :  
Defendants. :

ORDER OF COURT

AND NOW, March 16, 2009, it is hereby ORDERED that  
the Motion for Summary Judgment of Crane Co. is GRANTED.

BY THE COURT,

  
Marilyn J. Horan  
Judge

**APPENDIX D**

*Rumery v. Garlock Sealing Technologies, Inc.*, 2009 WL 1747857  
(Me. Super. Ct. Cumberland County Apr. 24, 12009)

Superior Court of Maine.  
Cumberland County  
Carolyn RUMERY, individually and as personal representative of the Estate of Donald Rumery, Plaintiff,  
v.  
GARLOCK SEALING TECHNOLOGIES, INC., et al., Defendants.  
No. 05-CV-599.  
April 24, 2009.

Decision and Order (Foster Wheeler)

In this action, Plaintiff seeks to recover for damages allegedly resulting from the death of Donald Rumery, due to his exposure to asbestos during the course of his employment with Central Maine Power Company. Plaintiff alleges that as the result of exposure to products manufactured or supplied by Defendant Foster Wheeler Energy Corp., a/k/a, Foster Wheeler Energy, Inc. (Foster Wheeler), the decedent contracted asbestos-related illnesses, which ultimately resulted in his death. This matter is before the Court on Defendant Foster Wheeler's motion for summary judgment.

I. Summary Judgment Standard of Review

M.R. Civ. P. 56(c) provides that summary judgment is warranted if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ... show that there is no genuine issue as to any material fact ... and that [the] moving party is entitled to a judgment as a matter of law.” M.R. Civ. P. 56(c). For purposes of summary judgment, a “material fact is one having the potential to affect the outcome of the suit.” Burdzel v. Sobus, 2000 ME 84, ¶ 6, 750 A.2d 573, 575. “A genuine issue of material fact exists when there is sufficient evidence to require a fact-finder to choose between competing versions of the truth at trial.” Lever v. Acadia Hosp. Corp., 2004 ME 35, ¶ 2, 845 A.2d 1178, 1179. If ambiguities in the facts exist, they must be resolved in favor of the non-moving party. Beaulieu v. Aube Corp., 2002 ME 79, 2,796 A.2d 683,685.

To avoid summary judgment, a plaintiff must establish a *prima facie* case for each element of the cause of action. See Barnes v. Zappia, 658 A.2d 1086, 1089 (Me. 1995). In Arrow Fastener Co. v. Wrabacon, Inc., 2007 ME 34, 917 A.2d 123, the Law Court observed:

[A]lthough summary judgment is no longer an extreme remedy, it is not a substitute for trial. It is, at base, “simply a procedural device for obtaining judicial resolution of those matters that may be decided without factfinding.” If facts material to the resolution of the matter have been properly placed in dispute, summary judgment based on those facts is not available except in those instances where the facts properly proffered would be flatly insufficient to support a judgment in favor of the nonmoving party as a matter of law.

Id. ¶ 18, 917 A.2d at 127 (citations omitted) (quoting Curtis v. Porter, 2001 ME 158, ¶ 7, 784 A.2d 18, 21-22).

The opposing party to a summary judgment motion is given the benefit of any inferences which might be reasonably drawn from the evidence. See Porter, 2001 ME 158, 9,784 A.2d at 22. However, neither party can rely on unsubstantiated denials, but “must identify specific facts derived from the pleadings, depositions, answers to interrogatories, admissions and affidavits to demonstrate either the existence or absence of an issue of fact.” Kenny v. Dep’t of Human Servs., 1999 ME 158, ¶ 3, 740 A.2d 560, 562 (quoting Vinick v. Comm’r of Internal Revenue, 110F.3d 168,

171 (1st Cir. 1997)).

## II. Causation Standard

In this case, Plaintiff asserts claims of negligence and strict liability. For Plaintiff to prevail, Plaintiff must demonstrate, among other elements, that Defendant's conduct caused the damages for which Plaintiff seeks to recover. In Maine, to prove causation, a plaintiff must prove that the defendant's conduct "is a *substantial factor* in bringing about the harm." *Spickler v. York*, 566 A.2d 1385, 1390 (Me. 1989); see also *Wing v. Morse*, 300 A.2d 491, 495-96 (Me. 1973). On Defendant's motion for summary judgment, the question is, therefore, whether a material issue of fact remains for trial as to Plaintiff's allegation that Defendant's conduct or product caused Plaintiff's damages.

As asbestos litigation has evolved both nationally and within Maine, the level of proof necessary to establish the requisite relationship between the plaintiff's injuries and the defendant's product has been the subject of much debate. A majority of jurisdictions have adopted the standard articulated by the court in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), where the court construed the "substantial factor" test of the Restatement (Second) of Torts.<sup>[FN1]</sup> In *Lohrmann*, the court announced and applied the "frequency, regularity and proximity test," which requires a plaintiff to "prove more than a casual or minimum contact with the product" that contains asbestos. *Id.* at 1162. Rather, under *Lohrmann*, a plaintiff must present "evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Id.* at 1162-63. *Lohrmann* suggests that the Court engage in a quantitative analysis of a party's exposure to asbestos in order to determine whether, as a matter of law, the party can prevail.

FN1. The Restatement (Second) of Torts is consistent with the causation standard in Maine. Section 431 provides in pertinent part that "[t]he actor's negligent conduct is a legal cause of harm to another if ... his conduct is a substantial factor in bringing about the harm." RESTATEMENT (SECOND) OF TORTS § 431.

Although the Maine Law Court has not addressed the issue, at least one Justice of the Maine Superior Court has expressly rejected the *Lohrmann* standard. Justice Ellen Gorman rejected the *Lohrmann* standard "[b]ecause it is entirely the jury's function to determine if the conduct of the defendant was a substantial factor in causing the plaintiff's injury and because it is not appropriate for the court to determine whether a plaintiff has proven that a defendant's product proximately caused the harm." *Campbell v. H.B. Smith Co.*, LINS-CV-04-57, at 7 (Me. Super. Ct., Lin. Cty., Apr. 2, 2007) (Gorman, J.).<sup>[FN2]</sup> In rejecting the *Lohrmann* standard, Justice Gorman wrote that to establish a *prima facie* case, a plaintiff must demonstrate:

FN2. Justice Gorman also rejected the *Lohrmann* standard for similar reasons in *Boyden v. Tri-State Packing Supply*, CUMSC-CV-04-452 (Me. Super. Ct., Cum. Cty., Feb. 28, 2007) and *Buck v. Eastern Refractories, Co.*, OXFSC-CV-04-15 (Me. Super. Ct., Oxf. Cty., July 23, 2007).

(1) "medical causation" - that the plaintiff's exposure to the defendant's product was a substantial factor in causing the plaintiff's injury and (2) product nexus - that the defendant's asbestos-containing product was *at the site where the plaintiff worked or was present, and that the plaintiff was in proximity to that product at the time it was being used ...* a plaintiff must prove not only that the asbestos products were used at the worksite, but that the employee inhaled the asbestos from the defendant's product.

*Campbell*, at 7 (citing 63 AM. JUR. 2D *Products Liability* § 70 (2001)).

Insofar as under *Lohrmann* a plaintiff must prove exposure to asbestos over a sustained period of time, while under

the standard applied by Justice Gorman a plaintiff must only demonstrate that plaintiff was in proximity to the product at the time that it was being used, the *Lohrmann* standard imposes a higher threshold for claimants. The Court's decision as to the applicable standard cannot, however, be controlled by the standard's degree of difficulty. Instead, the standard must be consistent with basic principles of causation. In this regard, the Court agrees with the essence of Justice Gorman's conclusion-to require a quantitative assessment of a plaintiff's exposure to asbestos, as contemplated by *Lohrmann*, would usurp the fact finder's province. Whether a defendant's conduct caused a particular injury is at its core a question of fact. See *Tolliver v. Dep't of Transp.*, 2008 ME 83, ¶ 42, 948 A.2d 1223, 1236; *Houde v. Millett*, 2001 ME 183, ¶ 11, 787 A.2d 757, 759. The Court perceives of no basis in law to deviate from this long-standing legal principle. The Court, therefore, concludes that in order to avoid summary judgment, in addition to producing evidence of medical causation, a plaintiff must establish the product nexus through competent evidence. In particular, a plaintiff must demonstrate that: (1) the defendant's product was at the plaintiff's work place, (2) the defendant's product at the plaintiff's work place contained asbestos, and (3) the plaintiff had personal contact with asbestos from the defendant's product.<sup>[FN3]</sup> If a plaintiff produces such evidence, which can be either direct or circumstantial, the question of whether the defendant's product was a "substantial factor" in causing the plaintiff's damages is for the jury.<sup>[FN4]</sup>

FN3. The Court recognizes that in many of the asbestos-related cases, the plaintiff asserts the claim, at least in part, on behalf of the estate of a person who was allegedly exposed to asbestos. In those cases, the plaintiff would be required to demonstrate that defendant's asbestos-containing product was present at the decedent's work place, and that the decedent had contact with the product.

FN4. The Court notes that the causation standard applied by Justice Gorman in *Campbell, Boyden, and Buck* may not be entirely equivalent with that employed in *Bessey v. Eastern Refractories, Inc.*, SAGSC-CV-99-001, 99-020, 99-035, 99-041, 99-050, and 00-001 (Me. Sup. Ct., Sag. Cty., Feb. 19, 2002) (Bradford, J.), an earlier case in which the Superior Court addressed the issue. While *Bessey* also rejected the *Lohrmann* standard and utilized the "medical causation/product nexus" framework described in 63 AM. JUR. 2D *Products Liability* § 70, *Bessey* arguably imposes a different factual burden to establish causation at the summary judgment stage. Without affirmatively adopting either the "*Bessey* Standard" or the standard articulated by Justice Gorman in *Campbell, Boyden, and Buck*, the Court will analyze the causation issue in a manner consistent with established causation principles set forth by the Law Court. See, e.g., *Spickler*, 566 A.2d at 1390; *Morse*, 300 A.2d at 495-96.

### III. Discussion

In support of her contention that Defendant Foster Wheeler is legally responsible for the decedent's illness and death, Plaintiff relies on the testimony of several former employees of Central Maine Power Company, the decedent's employer, as well as information contained in various documents. For purposes of this motion, Plaintiff has established that: (1) the decedent worked at Central Maine Power Company's Wyman Station, (2) Defendant Foster Wheeler manufactured three of the boilers that were located at the Wyman Station during the time of the decedent's employment, (3) asbestos-containing material, including insulation, block, and joint compound, was used on component parts of the boilers, (4) the decedent started the boilers on occasion and was present when maintenance was performed on the boilers, and (5) dust from the asbestos-containing material was generated when maintenance was performed on the boilers.

To avoid summary judgment, Plaintiff must produce evidence from which a reasonable fact finder could conclude that the decedent had contact with an asbestos-containing product manufactured by Defendant Foster Wheeler. For summary judgment purposes, given the number of boilers at the Wyman Station that Defendant Foster Wheeler manufactured, and given that the decedent worked in and around the boilers on occasion, Plaintiff has established that the decedent had contact with the product of Defendant Foster Wheeler, and that the product contained asbestos-containing material. However, there is no evidence upon which a fact finder could rely to conclude that the boil-



ers contained asbestos material when they left Defendant Foster Wheeler's control. The issue is thus whether Defendant Foster Wheeler can be legally responsible for the asbestos-containing material that was incorporated in the boilers after the boilers left the control of Defendant Foster Wheeler.

Plaintiff maintains that she need not prove that the boilers contained asbestos when the boilers left the control of Defendant Foster Wheeler. Under Maine law, Plaintiff must prove that Defendant Foster Wheeler's product "[was] expected to and [did] reach the user or consumer without significant change in the condition in which it is sold." 14 M.R.S. § 221. In *Marois v. Paper Converting Mach. Co.*, 539 A.2d 621, 624 (Me. 1988), the Law Court, when defining the scope of Maine's strict liability statute, concluded that "... even if a substantive change is made in a product, the manufacturer will not be relieved of liability unless the change was an unforeseen and intervening proximate cause of the injury." Plaintiff argues that she has at least generated an issue of fact as to causation because the addition of asbestos material to the boilers was a foreseeable event. More specifically, Plaintiff maintains that Defendant Foster Wheeler was aware that insulation must be added to the boilers and, under *Marois*, Defendant Foster Wheeler is not relieved of liability.

Plaintiff's argument essentially concedes that Defendant Foster Wheeler's product (i.e., the boilers) did not contain asbestos when it left the Defendant's control. Plaintiff maintains that she need not prove that the Defendant's product contained asbestos when the product left the control of the Defendant. Instead, Plaintiff claims that, under 14 M.R.S. § 221 (2008),<sup>[FN5]</sup> a manufacturer or supplier is liable for asbestos-containing components that were foreseeably used in conjunction with their products, even though the manufacturer or supplier had not manufactured or supplied the asbestos-containing components that actually caused the injuries.

FN5. The strict liability statute provides in its entirety: "One who sells any goods or products 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 a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods, or to his property, if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without significant change in the condition in which it is sold. This section applies although the seller has exercised all possible care in the preparation and sale of his product and the user or consumer has not bought the product from or entered into any contractual relation with the seller." 14 M.R.S. § 221.

Strict liability pursuant to 14 M.R.S. § 221 may arise under any of three different theories: (1) a defect in the manufacture of a product; (2) a defect in the design of a product; or (3) a failure of the manufacturer to adequately warn with respect to danger in the use of a product. See *Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 537 n.3 (Me. 1986); *Walker v. General Elec. Co.*, 968 F.2d 116, 119 (1st Cir. 1992). The basis for imposing strict liability on a particular defendant is that "the product must be in some respect defective." *Bernier*, 516 A.2d at 537.

Where, as here, there is no evidence that the defendant's product contained asbestos at the time of its manufacture and otherwise functioned as designed, Plaintiff cannot contend that the defendant's products were defective in design or manufacture. Instead, Plaintiff's theory of liability must be premised upon a failure to warn. See *Lorfano v. Dura Stone Steps, Inc.*, 569 A.2d 195, 196 (Me. 1990) (explaining that under section 221, even where a product is faultlessly made, it may be deemed "defective" if it is "unreasonably dangerous to place the product in the hands of a user without a suitable warning and the product is supplied without such warning"). Essentially, Plaintiff claims that because the use of asbestos-containing packing and gaskets in conjunction with Defendant's product was foreseeable, liability for the failure to warn of the dangers of asbestos should attach. The Court disagrees.

A product liability action for failure to warn requires a three-part analysis: (1) whether the defendant held a duty to warn the plaintiff; (2) whether the actual warning on the product, if any, was inadequate; and (3) whether the inade-

quate warning proximately caused the plaintiff's injury. *Pottle v. Up-Right, Inc.*, 628 A.2d 672, 675 (Me. 1993). "A duty to warn arises when the manufacturer knew or should have known of a danger sufficiently serious to require a warning." *Id.*; see also *Bernier*, 516 A.2d at 540 ("A manufacturer has a responsibility to inform users and consumers of dangers about which he either knows or should know at the time the product is sold."). Such an articulation of the duty to warn would, at first, seem to indicate that any foreseeable use of asbestos in conjunction with a defendant's products would be a fundamental issue in determining a defendant's duty to warn. Importantly, however, the issue of knowledge or foreseeability relates to whether a manufacturer or supplier knew of the dangers of its own product at the time of distribution. Although the Law Court does not appear to have addressed this issue directly, the Law Court has described a manufacturer's liability for failure to warn in terms of the manufacturer's responsibility to alert consumers of defects inherent in the manufacturer's own products. See, e.g., *Bernier*, 516 A.2d at 537 (discussing whether "a manufacturer's actual or constructive knowledge of his product's danger" is relevant) (emphasis added); *Pottle*, 628 A.2d at 674-75 ("Strict products liability attaches to a manufacturer when by ... the failure to provide adequate warnings about its hazards, a product is sold in a condition unreasonably dangerous to the user.") (emphasis added). To date, Maine case law has not imposed upon a manufacturer a duty to warn about the dangerous propensities of other manufacturer's products. Moreover, the Court is not aware that the Law Court has deviated from the majority rule that "a manufacturer's duty to warn is restricted to warnings based on the characteristics of the manufacturer's own products." See *Braaten v. Sabenhagen Holdings*, 198 P.3d 493, 498-99 (Wash. 2008) (collecting cases supporting "the majority rule nationwide").<sup>[FN6]</sup>

FN6. See also *Taylor v. Elliott Turbomachinery Co.*, 171 Cal. App. 4th 564, 580-84 (Cal. Ct. App. 2009) (reviewing of some of the relevant policy considerations supporting the majority rule).

Recent extra-jurisdictional authority is particularly analogous to the present case. In *Braaten* and a companion case from the Washington Supreme Court, *Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008), which addressed the duty to warn under the RESTATEMENT (SECOND) OF TORTS § 402A,<sup>[FN7]</sup> the court held that liability will not arise if the failure to warn of the danger of asbestos exposure arises from asbestos-containing insulation applied to a defendant's product which the defendant did not manufacture or distribute.<sup>[FN8]</sup> See *Braaten*, 198 P.3d at 498; *Simonetta*, 197 P.3d at 138; see also *Taylor v. Elliott Turbomachinery Co.*, 171 Cal. App. 4th 564, 591-92 (Cal. Ct. App. 2009) (finding *Braaten* and *Simonetta* to be "convincing support" for court's determination of same issue); *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 495 (6th Cir. 2005) (manufacturer could "not be held responsible for material 'attached or connected' to its product on a claim of manufacturing defect"). Similarly, in this case, it was not the Defendant's product, but the dangers inherent in the asbestos-containing packing and gaskets, a product the Defendant did not manufacture or supply, that proximately caused the Plaintiff's alleged damages. As there is no strict liability for a failure to warn solely of the hazards inherent in another product, the foreseeability argument regarding the adequacy of warnings is not pertinent. In sum, although not controlling authority, the Court agrees with the reasoning articulated in *Braaten* and *Simonetta*: the Defendant is not liable for the injury-causing materials supplied by third parties used in conjunction with the Defendant's products.<sup>[FN9]</sup>

FN7. "The Legislature formulated section 221 directly from section 402A of the Restatement (Second) of Torts (1965)." *Bernier*, 516 A.2d at 537-38. When interpreting 14 M.R.S. § 221, the Law Court has customarily looked to the Restatement, including its commentary. See, e.g., *Bernier*, 516 A.2d at 538 ("Since section 221 and its legislative history does not have anything to say ... the commentary to section 402A is an appropriate place to begin our analysis.")

FN8. The court in *Braaten* and *Simonetta* also found that the Defendant-manufacturers were not strictly liable for a failure to warn because they were not part of the chain of distribution of the injury-causing products (i.e., the asbestos-containing packing and gaskets). *Braaten*, 198 P.3d at 497; *Simonetta*, 197 P.3d at 136; see also *Taylor*, 171 Cal. App. 4th at 577-78 (same).

FN9. Plaintiff argues that a “manufacturer will not be relieved of liability unless the change was an unforeseen and intervening proximate cause of the injury.” Marois v. Paper Converting Mach. Co., 539 A.2d 621, 624 (Me. 1988). Whether the application of asbestos to the defendant's product was unforeseen or a substantial alteration, however, addresses the issue of proximate cause. *See id.* at 623 (“The proximate cause issue in the case at bar arises from the modification of this machine after it left the Defendant's control.”). Because, as discussed, the Defendant has no duty to warn, the Court does not reach this issue.

#### IV. Conclusion

Based on the foregoing analysis, the Court denies the Motion for Summary Judgment of Defendant Foster Wheeler.

The entry is:

The Defendant's motion for summary judgment is GRANTED. Judgment is entered in favor of Defendant on all counts.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Dated: 4/24/09

<<signature>>

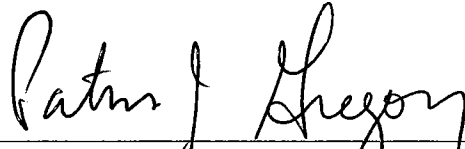
Justice, Maine Superior Court

Rumery v. Garlock Sealing Technologies, Inc.  
2009 WL 1747857 (Me.Super. ) (Trial Order )

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**CERTIFICATE OF WORD COUNT**

Pursuant to Rule 14(c)(1) of the California Rules of Court, the undersigned hereby certifies that this Brief contains 8,973 words, exclusive of captions, tables, and this certification.



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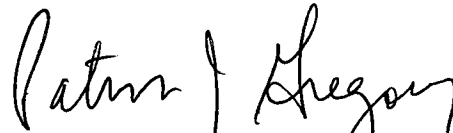
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Dated: September 3, 2009



I also sent an original and four copies of the foregoing by overnight mail to:

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