No. CA09-01505

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

DOUGLAS POKORNEY,

Plaintiff-Respondent,

-against-

FOSTER WHEELER ENERGY CORPORATION, ET AL.,

Defendant-Appellant.

AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN INSURANCE ASSOCIATION, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Amici file this brief to address the first point raised in Defendant-Appellant's brief:

1. Whether Defendant-Appellant, Foster Wheeler, owed a duty to warn Plaintiff, Douglas Pokorney, about the alleged hazards of products that Defendant-Appellant did not design, manufacture, specify, recommend, or install, and over which Defendant-Appellant did not exercise control.

Amici submit that, under controlling New York law, Defendant-Appellant did not owe such a duty to the Plaintiff. This position is also supported by the majority rule nationwide and considerations of sound public policy.

STATEMENT OF INTEREST

Amici are organizations that represent companies doing business in New York and their insurers. Accordingly, *amici* have a substantial interest in ensuring that New York's tort system is fair, follows traditional tort law rules, and reflects sound public policy. *Amici* will show that the trial court's decision to impose liability on Defendant-Appellant for harm caused by

asbestos-containing products made and applied by others is inconsistent with these principles, as well as controlling New York law, and should be reversed.

STATEMENT OF THE CASE

Amici adopt Defendant-Appellant's 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*, 37 Sw. U. L. Rev. 511, 511 (2008). 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 boilers, should be held liable for harms caused by asbestos-containing products, such as external insulation, made by others and attached post-sale, e.g., by the U.S. Navy. Ordinarily, manufacturers such as Defendant-Appellant 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 insulation liability concept Plaintiff-Respondent seeks 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 Plaintiff's theory.

In essence, Plaintiff-Respondent seeks 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, 37 Sw. U. L. Rev. 595, 602 (2008) (Cornell Law School Professor 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 Defendant-Appellant for harms caused by products they never made, sold, installed, or profited from.

Plaintiff-Respondent's 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; "[t]hat is required in order to avoid subjecting the actor 'to limitless liability.'" *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232, 727 N.Y.S.2d 7, 12, 750 N.E.2d 1055, 1060 (2001) (internal citation omitted). Where there is no legal duty – and there is no duty here under controlling New York law – then Plaintiff-Respondent's foreseeability theory is not even reached. *See, e.g., In re New York City Asbestos Litig.* (*Holdampf v. A.C.&S., Inc.*), 5 N.Y.3d 486, 493, 806 N.Y.S.2d 146,150, 840 N.E.2d 115, 119 (2005) (foreseeability "merely determines the scope of the duty once it is determined to exist."); *Hamilton*, 96 N.Y.2d at 232, 727 N.Y.S.2d at 12, 750 N.E.2d at 1060.

Similarly, a touchstone of strict products liability is that the defendant must have participated in the chain of distribution of a defective product. *See* Restatement (Second) of Torts § 402A (1965); Restatement Third, Torts: Products Liability §§ 1-2 (1997) [hereinafter Restatement Third]. 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 Plaintiff-Respondent's extreme and unsound invitation to expand liability law and create a broad new duty rule requiring manufacturers to warn about risks in products made by others. Plaintiff-Respondent's theory is contrary to controlling New York law and the majority rule nationwide. *See, e.g., Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 582 N.Y.S.2d 373, 591 N.E.2d 222 (1992); *Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008); *Braaten v. Saberhagen Holdings,* 198 P.3d 493 (Wash. 2008); *Taylor v. Elliott Turbomachinery Co., Inc.*, 171 Cal. App. 4th 564 (2009), *review denied* (Cal. June 10, 2009); Henderson, *supra.*

Furthermore, Plaintiff-Respondent's theory represents unsound public policy. The decision would worsen the asbestos litigation and invite a flood of new cases into New York. 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 this theory for insulation asbestos.

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 the 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 reversed.

ARGUMENT

I. UNDER NEW YORK LAW, DEFENDANT-APPELLANT OWED NO DUTY TO WARN PLAINTIFF ABOUT HAZARDS FROM OTHERS' PRODUCTS

Defendant-Appellant was not in the chain of distribution of the asbestos-containing products which allegedly caused Plaintiff-Respondent's harm. Accordingly, Defendant-Appellant owed no duty to Plaintiff-Respondent and cannot be held liable for failure to warn.

Under the law of negligence, it is well established that before a defendant may be liable to a plaintiff, it must be shown that the defendant owes a duty to the plaintiff. *See Pulka v. Edelman*, 40 N.Y.2d 781, 782, 390 N.Y.S.2d 393, 395, 358 N.E.2d 1019, 1022 (1976),

reargument denied, 41 N.Y.2d 901, 393 N.Y.S.2d 1028, 362 N.E.2d 640 (1977). The existence and scope of a duty of care, if any, is a question of law to be determined by the court. *See Palka v. Servicemaster Mgmt. Servs. Corp.*, 83 N.Y.2d 579, 584-85, 611 N.Y.S.2d 817, 820, 634 N.E.2d 189, 192 (1994). "A person may have a moral duty to prevent injury to another, but no legal duty." *Pulka*, 40 N.Y.2d at 786, 390 N.Y.S.2d at 397, 358 N.E.2d at 1022.

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." *DeAngelis v. Lutheran Med. Center*, 58 N.Y.2d 1053, 1055, 462 N.Y.S.2d 626, 627-28, 449 N.E.2d 406, 407-08 (1983). In fixing the point at which a legal duty attaches, courts must balance a variety of factors, "including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability." *Palka*, 83 N.Y.2d at 586, 611 N.Y.S.2d at 821, 634 N.E.2d at 193.

Lines are drawn to prevent the creation of "a new legal duty that would require the [defendant] to respond in damages, as an insurer, for [a] plaintiff's injuries." *D'Amico v. Christie*, 71 N.Y.2d 76, 86, 524 N.Y.S.2d 1, 5, 518 N.E.2d 896, 900 (1987), or that would result in "crushing exposure to liability," *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 402, 492 N.Y.S.2d 555, 557, 482 N.E.2d 34, 36 (1985).

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; namely (1) where the defendant substantially participated in the integration of its product into the design of another product, *see* Restatement Third § 5; *City of Cohoes v. Kestner Engineers, P.C.*, 226 A.D.2d 914,

917, 640 N.Y.S.2d 917, 917 (3d Dept. 1996) (liability may be imposed on a component part maker that is aware of or takes parts in the design and construction of an assembled unit); or (2) where two otherwise safe products combine to create a new, synergistic hazard. *See* Henderson, 37 Sw. U. L. Rev. at 599.

These bedrock tort principles are part of settled New York law as illustrated by the New York Court of Appeals' decision in *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 582 N.Y.S.2d 373, 591 N.E.2d 222 (1992). In *Rastelli*, 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 explained that "a plaintiff may recover in strict products liability or negligence when a manufacturer fails to provide adequate warnings regarding the use of *its* product." 79 N.Y.2d at 297, 582 N.Y.S.2d at 376, 591 N.E.2d at 225 (emphasis added). The court, 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." 79 N.Y.2d at 297-298, 582 N.Y.S.2d at 376-377, 591 N.E.2d 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." *Rastelli*, 79 N.Y.2d at 298, 582 N.Y.S.2d at 377, 591 N.E.2d at 226. "Nothing in the record suggests that Goodyear created the dangerous condition. . . ." *Id.*

Under *Rastelli*, Defendant-Appellant here "had no duty to warn about the use of its [product] with potentially dangerous [products] produced by another where [Defendant-Appellant] did not contribute to the alleged defect in a product, had no control over it, and did not produce it." *Id.*; *see also Kaloz v. Risco,* 120 Misc. 2d 586, 466 N.Y.S.2d 218 (N.Y. Sup. Ct. 1983) (pool manufacturer not liable for fall from defective ladder manufactured by another); *Tortoriello v. Bally Case, Inc.*, 200 A.D.2d 475, 606 N.Y.S.2d 625 (1st Dept. 1994) (walk-in freezer manufacturer not liable for slip and fall hazard in another's quarry floor tile); *Gifaldi v. Dumont Co., Inc.*, 172 A.D.2d 1025, 1025, 569 N.Y.S.2d 284, 284 (4th Dept. 1991) ("Absent specific allegations that [chemicals incorporated into allegedly defective polyurethane foam insulation] were defective or that the manufacturers knew that their products would be combined to form a dangerous or defective product, the defectiveness of the finished product cannot be imputed to the manufacturers of the components."). Furthermore, no synergistic hazard is involved here. The subject boiler may have been safe, but the external asbestos insulation applied to it was potentially hazardous. The hazard, therefore, 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 Defendant-Appellant.

Contrary to *Rastelli*, Plaintiff-Respondent has argued that a duty should be imposed on Defendant-Appellant because Plaintiff alleges it was foreseeable that asbestos-containing external thermal insulation would be affixed to Defendant-Appellant's boilers after they were sold to the Navy. The argument rests on an extremely weak foundation, in addition to being inconsistent with controlling New York law.

For example, the trial court drew support from two Washington State appellate court decisions which were subsequently overruled by the Washington Supreme Court, *Simonetta v.*

Viad Corp., 151 P.3d 1019 (Wash. Ct. App. 2007), *rev'd*, 197 P.3d 127 (Wash. 2008), and *Braaten v. Saberhagen Holdings,* 151 P.3d 1010 (Wash. Ct. App. 2007), *rev'd*, 198 P.3d 493 (Wash. 2008). (These cases are discussed in more detail in the next section of this brief).

The trial court also cited *Berkowitz v. A.C.&S., Inc.*, 288 A.D.2d 148, 733 N.Y.S.2d 410 (1st Dept. 2001), which is not controlling law in this Department or in New York, and did not hold that a duty existed. Rather, the First Department was asked to review summary judgment orders dismissing a pump maker, Worthington, from various asbestos cases. The court found that issues of fact existed with respect to whether plaintiffs were exposed to defendant's pumps. In a single paragraph devoid of any legal analysis or consideration of New York duty law cases, the court opined that it did not "necessarily appear that Worthington had no duty to warn concerning the danger of asbestos that it neither manufactured nor installed on its pumps." 288 A.D.2d at 149, 733 N.Y.S.2d at 412. *Berkowitz* should be given no weight by this Court. The Fourth Department's statement is little more than mere *dicta.* Even the Washington appellate court described *Berkowitz* as "unhelpful," *Simonetta,* 151 P.3d at 1026, because the opinion contains "almost no analysis." *Braaten,* 151 P.3d at 1015. Perhaps most importantly, *Berkowitz* fundamentally misstates New York law as set forth in *Rastelli* and the numerous other cases cited herein.

In addition, the trial court cited an unpublished Illinois federal court decision, *Sether v. Agco Corp.*, 2008 WL 1701172 (S.D. Ill. Mar. 28, 2008) (unpublished), which looked at whether a marine steam turbine manufacturer was entitled to invoke federal court jurisdiction pursuant to the so-called "federal officer" removal statute. As part of its claim of federal officer jurisdiction, defendant argued that it had supplied marine steam turbines to the Navy without thermal insulation material that was later installed by shipbuilders. The court said, "It is well settled, of

course, that a manufacturer of a product has a duty to provide those warnings or instructions that are necessary to make its product safe for its intended use," citing *Berkowitz. Id.* at *3.

The court, however, did not squarely address the duty issue in its unpublished opinion. Perhaps more importantly, while the *Sether* court's general statement about a manufacturer's duty to warn is legally correct in the abstract – i.e., manufacturers generally do have a duty to provide warnings necessary to make *their* products safe – the court make a critical error by blurring the distinction between defendant's turbine and the asbestos-containing thermal insulation products sold and affixed by others. "[T]he majority rule nationwide" is that "a 'manufacturer's duty to warn is restricted to warnings based on the characteristics of the manufacturer's own products'; '[t]he law generally does not require a manufacturer to study and analyze the products of others and warn users of the risks of those products.'" *Braaten,* 198 P.3d at 498 (internal citations omitted); *see also Rastelli, supra.*

The unpublished *Sether* opinion does not even appear to accurately state Illinois law. *See, e.g., Timm v. Indian Springs Recreation Assoc.*, 543 N.E.2d 538, 542 (Ill. App.) ("Liability will not be imposed upon a defendant who is not a part of the original producing and marketing chain."), *appeal denied*, 548 N.E.2d 1079 (Ill. 1989); *Torres v. Wilden Pump & Eng'g Co.*, 740 F. Supp. 1370, 1371 (N.D. Ill. 1009) (no liability where defendant did not make, design, or distribute machine that allegedly caused plaintiff's harm); *Niemann v McDonnell Douglas Corp.*, 721 F. Supp. 1019, 1030 (S.D. Ill. 1989) (airplane manufacturer had no duty to warn about replacement asbestos chafing strips it did not manufacture).

Plaintiff-Respondent also may rely on *Chicano v. General Electric Co.,* 2004 WL 2250990 (E.D. Pa. Oct. 5, 2004) (unpublished), another unpublished opinion which was based on a federal court's attempt to predict Pennsylvania's component manufacturer liability test. As

with *Berkowitz*, the Washington appellate court in *Simonetta* described *Chicano* as "unhelpful." *Simonetta,* 151 P.3d at 1026.

Furthermore, a review of the decisions cited in *Chicano* demonstrates that the cases cited by the court actually come to the *opposite* conclusion reached by the judge in that case and do not support the broad imposition of warnings-based liability for dangers in products made by others. *See Wenrick v. Schloemann-Siemag Aktiengesellschaft*, 564 A.2d 1244, 1248 (Pa. 1989) (manufacturer of an electrical control system had no duty to guard a switch in the system because the system was not defective and the danger arose from the placement of the system in the final product by another manufacturer; the court explained, "Anglo-American common law has for centuries accepted the fundamental premise that mere knowledge of a dangerous situation, even by one who has the ability to intervene, is not sufficient to create a duty to act," and concluded, "We are not prepared to accept such a radical restructuring of social obligations."); *Fleck v. KDI Sylvan Pools*, 981 F.2d 107, 118 (3d Cir. 1992) (stating it would be "unreasonable" to impose failure to warn 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,* 507 U.S. 1005 (1993); *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1309 (3d Cir. 1995) (recycling machine component part manufacturer was not liable for a failure to warn of the danger of another component which it neither manufactured nor assembled); *Jacobini v. V. & O. Press Co.*, 588 A.2d 476, 480 (Pa. 1991) (die set manufacturer not strictly liable for failure to warn end user of dangers associated with using die made by another in power press manufactured by a third party, and concluding that "[t]o recognize a potential for liability through such a chain of

responsibility would carry the component part manufacturer's liability to an unwarranted and unreasonable extreme.").

Finally, *Chicano* is incompatible with New York law because the court treated foreseeability of harm as synonymous with creating a triable issue of fact with regard to duty. That is not the law in New York.

As this Court knows, foreseeability of harm alone "does not define the existence of duty," *Eiseman v. New York*, 70 N.Y.2d 175, 187, 518 N.Y.S.2d 608, 613, 511 N.E.2d 1128, 1134 (1987), and "should not be confused with duty." *Pulka*, 40 N.Y.2d at 784, 390 N.Y.S.2d at 396, 358 N.E.2d at 1022. Foreseeability "merely determines the scope of the duty once it is determined to exist." *Holdampf*, 5 N.Y.3d at 493, 806 N.Y.S.2d at 150, 840 N.E.2d at 119; *see also McCarthy v. Sturm, Ruger and Co., Inc.*, 916 F. Supp. 366, 369 (S.D.N.Y. 1996) ("the issue of foreseeability is only relevant in determining the scope of a preexisting duty; it is not normally used to create a duty."), *aff'd sub nom. McCarthy v. Olin Corp.*, 119 F.3d 148, 157 (2d Cir. 1997) ("although it may have been foreseeable" to the defendant that its bullets could have been misused by the Long Island Railroad shooter, the defendant was "not legally liable for such misuse."); *Port Auth. of N.Y. & N.J. v. Arcadian Corp.*, 189 F.3d 305, 316 (3d Cir. 1999) (New York law imposed no duty on fertilizer makers to prevent misuse of their products by terrorists who bombed the World Trade Center in 1993, "even if the misuse of the product might be foreseeable.").

We also anticipate that Plaintiff-Respondent may argue that the novel duty theory sought here is supported by the Fourth Department's decision *Rogers v. Sears, Roebuck, and Co.*, 268 A.D.2d 245. 701 N.Y.S.2d 359 (4th Dept. 2000), but it is not. In *Rogers*, the court found that a manufacturer of an outdoor gas grill had a duty to warn decedent of the dangers of explosion and

fire presented by her storage and use of the grill on her semi-enclosed porch. The court said that, although the gas leak may have been caused by a defective propane tank made by another manufacturer, the gas grill manufacturer had a duty to warn of the dangers presented by such a defect "where its grill *could not be used without the tank*, and where its own warning to use the grill only outdoors was itself recognition of the danger of gas emission inherent in the use of the grill regardless of any defects." 268 A.D.2d at 246, 701 N.Y.S.2d at 359 (emphasis added). The product at issue here, a boiler, and the types of products involved in cases like this one (e.g., pumps and valves), are entirely different than the gas grill in *Rogers*, which could not operate without the gas tank that turned out to be defective. There is no requirement that boilers must have external asbestos thermal insulation in order to work; similarly, valve and pumps do not require asbestos-containing gaskets or packing to work, they only need some sort of fluid sealing device. Products such as boilers, pumps or valves may be utilized in a variety of applications where it was incumbent on the installer to choose the manner of installation and the type of insulation, if any. The *Rogers* analogy is a falsity.

In sum, the duty rule Plaintiff-Respondent seeks here is inconsistent with controlling New York law and should be rejected. *See Rastelli, supra*; *see also Munger v. Heider Mfg. Co.*, 90 A.D.2d 645, 645, 456 N.Y.S.2d 271, 271 (3d Dept. 1982) ("Plaintiff's contention that the corporate manufacturers of component parts of the machine had a duty to foresee that the assembler (Scott) might not post appropriate warnings of dangerous moving parts, and the fact that Scott posted no such warnings constituted a breach of that duty entitling plaintiff to a trial, while novel, is completely unpersuasive.").

II. RECENT OUT-OF-STATE CASES ON POINT HAVE REJECTED PLAINTIFF'S NOVEL DUTY THEORY

Courts in several recent out-of-state cases directly on point have flatly rejected the new duty rule Plaintiff-Respondent seeks here, including courts that are perceived to be favorable to plaintiffs. For example, in two companion cases, *Simonetta v. Viad Corp.,* 197 P.3d 127 (Wash. 2008), and *Braaten v. Saberhagen Holdings,* 198 P.3d 493 (Wash. 2008), 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.*, 2009 WL 2032332 (Wash. Ct. App. July 13, 2009) (following *Braaten* and *Simonetta* to dismiss claim against Caterpillar for asbestos insulation used with engines it manufactured) (attached at Appendix B).

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.").

Even more recently, in *Taylor v. Elliott Turbomachinery Co., Inc.*, 171 Cal. App. 4th 564 (2009) , *review denied* (Cal. June 10, 2009), a California Court of Appeal for the Bay Area found the Washington Supreme Court's reasoning in *Braaten* and *Simonetta* to be "convincing" and "sound," holding 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. *Id.* 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 Rutherford v. Owens-Illinois*, 16 Cal. 4th 953, 958 (1997) (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).

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 v. Superior Court*, 10 Cal. 4th 1185, 1188 (1995)). 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.*; *see also Cadlo v. Owens-Illinois, Inc.*, 125 Cal. App. 4th 513, 524 (2004) (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); *Lee v. Electric Motor Div.,* 169 Cal. App. 3d 375, 385 (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.*, 166 Cal. App. 3d 357, 362-63 (1985) ("To our knowledge, no reported decision has held a manufacturer liable for its failure to warn of risks of using its product, where it is shown that the immediate efficient cause of injury is a product manufactured by someone else."); *Blackwell v. Phelps Dodge Co.*, 157 Cal. App. 3d 372, 378 (1984) ("The product alleged to have been dangerous and hence defective, 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.*, 117 Cal. App. 3d 634, 638 (1981) ("To say that the absence of a warning [about defects] in other products makes the [defendant's product] defective is semantic nonsense.").

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.*, 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.

The duty rule sought by Plaintiff also was rejected this year by trial courts in Pennsylvania and Maine. In *Milich v. Anchor Packing Co.*, A.D. No. 08-10532 (Pa. Ct. Com. Pl. Butler County Mar. 16, 2009) (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.*, 2009 WL 1747857 (Me. Super. Ct. Cumberland County Apr. 24, 12009) (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.

The issue also was addressed in *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488 (6th Cir. 2005), 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,* 703 A.2d 1315 (Md. Ct. Spec. App.), *cert. denied,* 709 A.2d 139 (Md. 1998), *abrogated on other grounds, John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002), 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.*, 780 F.2d 1131 (4th Cir. 1986), 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.*, 21 Fed. Appx. 371, 381 (6th Cir. 2001) (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 Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 472 (11th Cir. 1993); *Wiler v. Firestone Tire & Rubber Co.*, 95 Cal. App. 3d 621, 629-30 (1979); *Spencer v. Ford Motor Co.,* 367 N.W.2d 393, 396 (Mich. App. 1985); *Acoba v. General Tire, Inc.*, 986 P.2d 288, 305 (Haw. 1999).

This Court should follow the sound reasoning articulated by the Washington Supreme Court in *Simonetta* and *Braaten* and the California appellate court in *Taylor*, among others, and hold that Defendant-Appellant is not liable for failure to warn regarding the danger of exposure to products made, sold, or installed by others.

III. OTHER AUTHORITY SUPPORTS DEFENDANT-APPELLANT

Numerous other decisions from around the country support a finding that Plaintiff-Respondent's warning-based claims fail as a matter of law. *See Mitchell v. Sky Climber, Inc.*, 487 N.E.2d 1374, 1376 (Mass. 1986) ("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."); *Shaw v. General Motors Corp.*, 727 P.2d 387, 390 (Colo. App. 1986) ("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*, 796 S.W.2d 225, 226 (Tex. App.-San Antonio 1990) (crane manufacturer had no duty to warn about rigging it did not manufacture, integrate into its crane, or place in the steam of commerce); *Sperry v. Bauermeister, Inc.*, 804 F. Supp. 1134, 1140 (E.D. Mo. 1992) (seller not liable for incorporation of its parts into system designed by another), *aff'd*, 4 F.3d 596 (8th Cir. 1993); *Fricke v. Owens-Corning Fiberglas Corp.*, 618 So. 2d 473, 475 (La. App. 1993) (manufacturer not liable for inadequate warning on product it neither made nor sold); *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 615-616 (Tex. 1996) (manufacturer not

liable for tire made by licensee); *Powell*, 166 Cal. App. 3d at 364 ("the manufacturer's duty is restricted to warnings based on the characteristics of its own product . . . the law does not require a manufacturer to study and analyze the products of others and to warn users of risks in those products."); *Toth v. Economy Forms Corp.*, 571 A.2d 420, 423 (Pa. Super. 1990) (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*, 593 A.2d 422 (Pa. 1991); *Exxon Shipping Co. v. Pacific Res., Inc.*, 789 F. Supp. 1521, 1526 (D. Haw. 1991) (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 recognized in New York, and as the Washington Supreme Court held in *Simonetta* and *Braaten,* and the California appellate court held in *Taylor,* 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.*, 530 N.W.2d 510 (Mich. App. 1995), *appeal denied*, 562 N.W.2d 198 (Mich. 1997), a Michigan appellate court held that dialysis machine manufacturers owed no duty to warn hospital employees of the risk of exposure to formaldehyde supplied by another company even though the dialysis machine manufacturers had recommended the use of formaldehyde to clean 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. A California court has held that, while a broom is commonly used to sweep up dust that might contain silica, the 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].

Other decisions are in accord. *See, e.g., Childress v. Gresen Mfg. Co.*, 888 F.2d 45, 49 (6th Cir. 1989) (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.*, 996 F. Supp. 1110, 1117 (N.D. Ala. 1997) ("[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.*, 844 F. Supp. 590, 595 (D. Haw. 1994) ("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*, 951 So. 2d 425, 439 (La. Ct. App.) (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*, 957 So. 2d 1289 (La. 2007).

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

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.").

In addition, the New York Court of Appeals has explained, "courts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree." *Holdampf*, 5 N.Y.3d at 493, 806 N.Y.S.2d at 150, 840 N.E.2d at 119 (quoting *Hamilton*, 96 N.Y.2d at 232, 727 N.Y.S.2d at 12, 750 N.E.2d at 1060). That policy would be significantly undermined by the broad new duty theory being promoted here by Plaintiff-Respondent; "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 Plaintiff-Respondent would require makers of products that might be used anywhere near asbestos insulation to warn about it.

Of course, the dramatic shift in tort law sought by Plaintiff-Respondent would likely be extended beyond asbestos cases. Presumably, Plaintiff-Respondent's third-party insulation 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.

Plaintiff-Respondent's *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. *Cf. Ayala v. V. & O. Press Co.*, 126 A.D.2d 229, 237, 512 N.Y.S.2d 704, 709 (2d Dept. 1987) (repairer could not be held liable for failure to warn of design defect in machine; "[t]o hold otherwise would be to expose to liability every contractor who, over a lifetime of a product, repairs it in even the slightest way, simply upon the premise that the contractor ought to have warned of a dangerous condition inherent in the product's design for which he was in no way responsible. We do not choose to expand the scope of products liability to such an unwarranted degree.").

"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*, 16 Brook. J.L. & Pol'y 589, 630 (2008) (urging courts to reject the duty Plaintiff-Respondent seeks 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*, 52 U. Cin. L. Rev. 38, 43 (1983) ("The extension of workplace warnings liability unguided by practical considerations has the unreasonable potential to impose absolute liability. . . .").

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.*, 391 F.3d 190, 200 (3d Cir. 2005). The United States Supreme Court in *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 597 (1997), described the litigation as a "crisis." *See also* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001); Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002). Through 2002, approximately 730,000 asbestos claims had been filed. *See* Stephen J. Carroll *et al.*, *Asbestos Litigation xxiv* (RAND Inst. for Civil Justice 2005) [hereinafter RAND Rep.]. At least 322,000 asbestos claims may be pending. *See* American Academy of Actuaries, *Current Issues in Asbestos Litigation* (Feb. 2006), *available at* http://www.actuary.org/pdf/casualty/asbestos_feb06.pdf.

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,* 12 J. Bankr. L. & Prac. 51 (2003).

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; *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. 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). 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 S. 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* RAND Rep. at 94. The new duty rule sought by Plaintiff-Respondent would exacerbate the litigation.

This Court should consider these implications, as concern about worsening the asbestos litigation was a factor in the New York Court of Appeals' decision to reject another novel asbestos duty rule in *Holdampf*, 5 N.Y.3d at 498, 806 N.Y.S.2d at 153, 840 N.E.2d at 122 (Port Authority, as employer and landowner, had no duty to protect employee's wife from exposure to asbestos dust); *see also In re Eighth Judicial Dist. Asbestos Litig.* (*Rindfleisch v. Alliedsignal, Inc.*), 12 Misc. 3d 936, 815 N.Y.S.2d 815 (N.Y. Sup. Ct. 2006) (defendant employer owed no duty to wife of employee).

Here, this Court should follow the spirit of New York Court of Appeals' decision in *Holdampf* – as well as the holdings of the Court of Appeals in *Rastelli* and *Hamilton* – and join the growing list of courts that are taking sound measures to improve the asbestos litigation environment, or at least prevent it from worsening. *See generally* Mark Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning*, 12 Conn. Ins. L.J. 477 (2006) (discussing how state courts and legislatures have acted to restore fairness and sound public policy to asbestos litigation); James A. Henderson, Jr., *Asbestos Litigation Madness:*

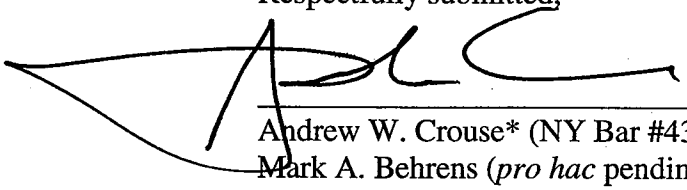
Have the States Turned a Corner?, Mealey's Tort Reform Update, Jan. 2006, at 12 ("A movement is afoot among state courts and legislatures that may prove to be the beginnings of a reversal in the disheartening trends of recent years, perhaps the turning of a corner in this hugely important and highly controversial area of tort litigation.").

Finally, it is important to note that while Plaintiff-Respondent no doubt seeks 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*, 17 Norton J. Bankr. L. & Prac. 257 (2008).

CONCLUSION

For these reasons, *amici curiae* ask this Court to reverse the trial court's decision and enter a judgment in favor of Defendant-Appellant.

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,* 37 Sw. U. L. Rev. 595 (2008)

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

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.*,[1] 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.[2] 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.[3] In a companion case, *Braaten v. Saberhagen Holdings*,[4] 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.[5] 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* manufacturers 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

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.[6] 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[7] 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*,[8] 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.[9] 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.[10] 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.[11]

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.[12] 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*.[13] But not all of these rescue-by-warning cases can be dismissed on the basis of the obviousness of the relevant risks.[14]

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

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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.[15]

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."[16] 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,[17] the swimsuit manufacturer may also owe a duty to warn about the risk of a caustic interaction between the swimsuit fabric and the chlorine.[18] 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.[19]

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.[20]

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.[21] 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.[22] 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.[23] 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.[24] 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.[25] 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.[26]

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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.[27] 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.[28] 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.[29] 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.[30] 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.[31] 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.[32] 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.[33] 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.[34] 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.[35] When courts insist that product sellers warn of the hidden risks of their own products, rescue does not come into play.[36] 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.[37] Not only are the check-

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.[38] 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.[39] But as a general rule, courts refuse to require banks to monitor checking account activities in a watchdog capacity.[40]

One interesting (and timely) exception to this reluctance to assign watchdog status to banks and other financial institutions is the United States Patriot Act,[41] aimed at helping to prevent terrorism activities after the September 11, 2001, attacks. The Patriot Act amends the Bank Secrecy Act,[42] requiring financial institutions to establish anti-money laundering programs in order to inhibit the financing of terrorism.[43] 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.[44] Clearly, the Patriot Act requires these financial institutions to perform watchdog functions in relation to their customers' activities.[45] 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

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.[46] 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.[47]

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.[48] Among the reasons given for this response are the absence of a preexisting personal relationship between the would-be rescuer and the victim;[49] the lack of custody or control of the rescuer over the victim;[50] the absence of any "just and sensible legal guidelines;"[51] and the virtual impossibility of defining a sensible starting or

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.[52] A minority of courts have allowed plaintiffs to succeed with failure-to-warn claims in these cases.[53] Among the minority decisions imposing liability for failure to warn of the risk of child abuse, some courts rely on child abuse reporting statutes.[54] 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.[55]

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.[56] 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.[57] 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.[58] 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.[59] 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.[60] And one Justice dissented on the ground that "[o]verwhelming policy considerations weigh against

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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."[61]

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.[62] Moreover, therapists will respond to such a duty by committing greater numbers of patients to civil confinement, thereby significantly increasing the relevant social costs.[63] Surprisingly, in light of the analysis in this article, a majority of courts that have addressed the issue have followed *Tarasoff*,[64] although several have narrowed the holding to reduce possible open-endedness.[65] 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.[66] Others reach opposite conclusions.[67] In recent years, several state legislatures have codified the holding, almost always narrowing the duty to make outcomes more predictable.[68] 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.[69]

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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.[70] When they supply component parts they may be strictly liable for defects;[71] but repairs, as such, constitute services.[72] 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.[73] 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.[74] 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.[75]

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.[76] 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;[77] but pharmacists are otherwise liable to their customers only if proven negligent.[78] 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.[79] 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.[80] 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.[81] And when pharmacists voluntarily undertake to warn customers of side effects of medications, or risks from drug interactions, they must do so reasonably.[82] 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.[83] The

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.[84] 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.[85] And requiring pharmacists to monitor prescriptions would greatly increase customer costs.[86]

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.[87] 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.[88]

(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.[89] 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.[90]

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,[91] 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.[92] 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.[93] If the component supplier substantially participates in the integration of the component into the design of the end-product, the supplier will be liable.[94] But not otherwise, even though the component combines with other components synergistically to create joint risks in the end-product.[95] 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.[96] But the general rule against watchdog responsibility for component parts manufacturers is solid.[97]

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.[98]

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

> To impose responsibility on the supplier of the compnent 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.[99]

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

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;[100] and even when the would-be rescuers are arguably in a position to render assistance by warning the victims;[101] 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.[102] 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.[103] 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.[104] It is easy for a plaintiff to assert that, if an

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.[105]

These heeding presumptions, which have been confusing and controversial,[106] 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?[107] 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?[108] Failure-to-warn doctrine allows defendants to raise these questions, but almost always leaves them for the triers of fact to decide.[109] It must be borne in mind that these difficulties inhere in the application of failure-to-warn doctrine in all contexts,[110] 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,[111] plaintiffs in these rescue-by-

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.[112] 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 indeterminancy with the serious questions regarding whether warnings really make a difference in people's behaviors,[113] 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.[114]

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.[115]

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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.[116] 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,[117] 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.[118] 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.[119] 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.[120] 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.[121] 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.[122] When the post-distribution, synergistic creation of risk results from purchaser/manufacturers subsequently combining components to

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.[123] This limitation on a component seller's liability appears consistent with the preceding policy analysis, from both efficiency and fairness perspectives.[124]

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.[125] 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.[126] Mindful of the admonitions of Part II about avoiding oversimplified, dismissive rules of decision,[127] 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.[128] At most, some of the proffered language might have been included in official comments.[129] 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.[130] Note also that the proposal covers both rescue by warning and rescue by design, a point raised earlier in this discussion.[131] 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.[132]

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.[133] Moreover, as explained earlier, the swimsuit and the swimming pool do not interact synergistically.[134] 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.[135] And the pumps and the asbestos do not interact synergistically to create "significantly greater" joint risks.[136]

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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.[137] 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.[138] 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.[139]

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.[140] 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.[141] 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.[142] 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.[143]

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

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,[144] but some of these cases are still under review.[145] 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.

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)

HOnly 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 Technologies, LLC; Foster-Wheeler Energy Corporation; Fraser's Boiler Service, Inc.; Goulds Pumps (IPG), Inc.; Ingersoll-Rand Company; Lockheed Shipbuilding Company; Metropolitan Life Insurance Company; Saberhagen Holdings, Inc.; Todd Shipyards Corp.; and Viacom, Inc., Successor by Merger to CBS Corporation, f/k/a Westinghouse Electric Corporation, Respondents.

No. 60271-3-I.

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 decision in this case.[FN1] There, we affirmed the trial court's summary dismissal of the claims against defendants 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 manufactured. Thereafter, the supreme court granted Caterpillar's petition for review and remanded this case to this court for reconsideration in light of its decisions in *Braaten v. Saberhagen Holdings*[FN2] and *Simonetta v. Viad Corporation.*[FN3] Accordingly, we have reconsidered our original decision and now affirm the judgment 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 discussion is limited only to the question of the duty of Caterpillar.

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 manufactured evaporators, which were machines used on naval ships.[FN4] The evaporators Joseph Simonetta serviced were encased in asbestos insulation and Simonetta had to remove the insulation in order to repair the equipment and reinsulated it when he was finished.[FN5] The manufacturer did not supply the insulation.[FN6]

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.[FN7]

FN7.*Id.* at 363.

In *Braaten,* the defendants manufactured pumps and valves used on naval ships.[FN8]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.[FN9] The navy also applied asbestos-containing insulation to the valves and pumps after they were installed on the ships.[FN10]In his work as a pipefitter, Braaten had to both remove and reapply asbestos insulation from pumps and valves on naval ships.[FN11]

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.[FN12]Following *Simonetta,* the court held that the defendants had no duty to warn under common law products liability or negligence theories.[FN13]

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 packing 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."[FN14]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."[FN15]

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.[FN16]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.[FN17]Further, "[i]t makes no difference whether the manufacturer knew its products would be used in conjunction with asbestos insulation."[FN18]

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.	:	

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 maters that may be decided without fact-finding." 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.[FN1] 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.,* LINSC-CV-04-57, at 7 (Me. Super. Ct., Lin. Cty., Apr. 2, 2007) (Gorman, J.).[FN2] 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 longstanding 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.[FN3] 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.[FN4]

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.,* SAG-SC-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 boilers 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 Wheel- er.

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),[FN5] 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 of 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 inadequate 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 forseeability 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. Saberhagen Holdings,* 198 P.3d 493, 498-99 (Wash. 2008) (collecting cases supporting "the majority rule nationwide").[FN6]

> 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,[FN7] 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.[FN8] *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 forseeability 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.[FN9]

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

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing *Amici Curiae* Brief in Support of Defendant-Appellant upon counsel by depositing a copy in a first-class postage-prepaid envelope into a depository under the exclusive care and custody of the United States Postal Service this 19th day of August, 2009, addressed as follows:

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