ASBESTOS LITIGATION: THE "ENDLESS SEARCH FOR A SOLVENT BYSTANDER"

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I. INTRODUCTION

The title of this article quotes an observation by former plaintiffs' lawyer Richard "Dickie" Scruggs,[1] who earned millions of dollars in asbestos cases then became a billionaire after spearheading the state attorneys general litigation against the tobacco industry in the 1990s.[2] Several years later, Mr. Scruggs pled guilty to attempting to bribe a Mississippi judge in fee dispute related to the settlement of Hurricane Katrina insurance cases.[3] Nevertheless, he was candid and honest when he described the asbestos litigation as an "endless search for a solvent bystander."[4]

Originally, and for many years, asbestos litigation typically pitted a dusty trade worker "against the asbestos miners,

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[1] Richard Scruggs & Victor Schwartz, *Medical Monitoring and Asbestos Litigation – A Discussion with Richard Scruggs and Victor Schwartz*, 1-7:21 MEALEY'S ASBESTOS BANKR. REP. 5 (Feb. 2002) (quoting Mr. Scruggs describing the asbestos litigation as an "endless search for a solvent bystander.").

[2] *See* CURTIS WILKIE, THE FALL OF THE HOUSE OF ZEUS: THE RISE AND RUIN OF AMERICA'S MOST POWERFUL TRIAL LAWYER IX (2010); ALAN LANGE & TOM DAWSON, KINGS OF TORT 14-15 (2009).

[3] *See Court Orders Mississippi Lawyer Scruggs to Kentucky Federal Prison*, INSURANCEJOURNAL.COM, *available at* http://www.insurance journal.com/news/southeast/2008/07/25/92200.htm?prin.

[4] *See* Scruggs & Schwartz, *supra* note 1, at 5.

manufacturers, suppliers, and processors who supplied the asbestos or asbestos products that were used or were present at the claimant's work site or other exposure location."[5] Much of this work involved asbestos products that were friable (i.e., could be crumbled easily when dry) and contained long, rigid amphibole fibers, rather than the more common, but far less toxic, chrysotile form of fiber.[6] The occupations most closely associated with asbestos exposure and disease included "shipbuilders and Navy personnel working around heavy amphibole asbestos exposures on World War II ships; insulators blowing large clouds of free amphibole or mixed fibers; and asbestos factory workers exposed to 'snowstorms' of raw asbestos."[7]

Most of the primary historical asbestos defendants, including virtually all manufacturers of asbestos-containing insulation products, eventually sought bankruptcy court protection, resulting in a wave of bankruptcies between 2000 and 2002.[8] Following the

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[5] JAMES S. KAKALIK ET AL., COSTS OF ASBESTOS LITIGATION 3 (1983), *available at* http://www.rand.org/content/dam/rand/pubs/reports/2006/R3042.pdf.

[6] *See, e.g.*, *In re* Asbestos Litig., 911 A.2d 1176, 1181 (Del. Super. Ct. 2006) ("[I]t is generally accepted in the scientific community and among government regulators that amphibole fibers are more carcinogenic than serpentine (chrysotile) fibers."); Bartel v. John Crane, Inc., 316 F. Supp. 2d 603, 605 (N.D. Ohio 2004) ("While there is debate in the medical community over whether chrysotile asbestos is carcinogenic, it is generally accepted that it takes a far greater exposure to chrysotile fibers than to amphibole fibers to cause mesothelioma."), *aff'd sub nom.* Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488 (6th Cir. 2005).

[7] Mark Behrens, Esq., Testimony Before the Task Force on Asbestos Litigation and Bankruptcy Trusts of the American Bar Association's Tort Trial and Insurance Practice Section (June 6, 2013), *available at* http://www.americanbar.org/groups/tort_trial_insurance_practice/asbestos_task_force.html; *see also* JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES vi-vii (1984), *available at* http://www.rand.org/content/dam/rand/pubs/reports/2006/R3132.pdf ("For the sample claims closed by all or nearly all defendants in the 32 months we studied . . . . [t]hree worker classifications accounted for the vast majority of asbestos-related litigation: shipyard workers (37 percent of all closed claims); asbestos-related factory workers (35 percent); and insulation workers (21 percent).").

[8] *See* Mark D. Plevin et al., *Where Are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 11:1 MEALEY'S ASBESTOS BANKR. REP. 17-18 Chart 1 (Feb. 2012) (documenting four asbestos-related

bankruptcies of the traditional thermal insulation defendants, plaintiffs' attorneys shifted their focus towards "peripheral and new defendants associated with the manufacturing and distribution of alternative asbestos-containing products such as gaskets, pumps, automotive friction products, and residential construction products."[9] "Parties formerly viewed as peripheral defendants are now bearing the majority of the costs of awards relating to decades of asbestos use."[10]

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bankruptcies in 2000, twelve in 2001, and thirteen in 2002 – nearly as many as in the previous two decades combined). By filing bankruptcy, these companies were able to channel their asbestos liabilities into trusts and insulate themselves from tort claims in perpetuity. *See* 11 U.S.C. § 524(g) (2010); LLOYD DIXON ET AL., ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS, xi (2010), *available at* http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR872.sum.pdf. According to the U.S. Government Accountability Office, "the number of asbestos personal injury trusts increased from 16 trusts with a combined total of $4.2 billion in assets in 2000 to 60 with a combined total of over $36.8 billion in assets in 2011." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-819, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 3 (Sept. 2011), *available at* http://www.gao.gov/assets/590/ 585380.pdf; *see also* LLOYD DIXON & GEOFFREY MCGOVERN, ASBESTOS BANKRUPTCY TRUSTS AND TORT COMPENSATION 2 (2011), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_ MG1104.pdf.; Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance*, 11:1 MEALEY'S ASBESTOS BANKR. REP. 1 (June 2012), *available at* http://www.bateswhite.com/media/pnc/0/media.580.pdf.

[9] Mark Scarcella et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010*, 27:1 MEALEY'S LITIG. REP.: ASBESTOS 1 (Oct. 10, 2012), *available at* http://www.bateswhite.com/media/pnc/7/media.617.pdf; *see also* Charles E. Bates et al., *The Naming Game*, 24:1 MEALEY'S LITIG. REP.: ASBESTOS 4 (Sept. 2, 2009), *available at* http://www.bateswhite.com/media/pnc/9/media.229.pdf ("As the bankrupt companies exited the tort environment, the number of defendants named in a complaint increased, on average, from fewer than 30 on average to more than 60 defendants per complaint."); Charles E. Bates et al., *The Claiming Game*, 25:1 MEALEY'S LITIG. REP.: ASBESTOS 1 (Feb. 3, 2010), *available at* http://www.bateswhite.com/media/pnc/2/media.2.pdf.

[10] American Academy of Actuaries' Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends*, AMER. ACAD. ACTUARIES 1, 3 (Aug. 2007), *available at* http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf [hereinafter American Academy of Actuaries].

This article will provide an overview of asbestos plaintiffs' lawyers' pursuit of what Mr. Scruggs called "solvent bystanders."[11] The article provides a line to achieve fairness in situations where a plaintiff seeks to hold a defendant responsible for an asbestos-related injury that was largely or entirely someone else's fault. One factor permeating all of the evaluations of fairness we discuss is whether liability is justified under basic principles of tort law. Liability in tort law is appropriate if a plaintiff has proven a breach of duty, product defect, causation, and damages.[12] By way of contrast, tort law should not impose liability simply because a particular defendant can pay for it.

II. EARLY ATTEMPTS BY PLAINTIFFS TO IMPOSE LIABILITY FOR OTHERS' PRODUCTS

Early in the asbestos litigation, before the wave of bankruptcy filings by former insulation manufacturers, plaintiffs' lawyers made some efforts to overcome product identification problems and impose liability on defendants that may have sold large quantities of asbestos products, but perhaps not the actual product which injured the plaintiff.[13] Plaintiffs' lawyers sought to impose "guilt by association" liability through market share liability, enterprise liability, and alternative causation theories developed in other contexts.[14] These efforts were not successful because courts almost uniformly rejected invitations to stretch tort law and apply niche theories that did not fit in the asbestos litigation context and

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[11] Scruggs & Schwartz, *supra* note 1, at 5.

[12] *See* CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS 44 (Harry W. Jones ed., 2nd ed. 1980).

[13] *See generally* Mark A. Behrens & Christopher E. Appel, *The Need for Rational Boundaries in Civil Conspiracy Claims*, 31 N. ILL. U. L. REV. 37, 51-60 (2010) (discussing theories by plaintiffs' lawyers seeking to hold defendants liable for harms caused by others).

[14] *See id.* at 39. Additionally, civil conspiracy claims have been tried by a few asbestos plaintiffs' lawyers to pursue defendants that did not make or sell the particular product that harmed the plaintiff. *Id.* at 38. Several jurisdictions, however, have held that "liability for civil conspiracy is limited to those defendants that owed an independent duty to the specific plaintiff." *Id.* at 43; *see also* Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 459 (Cal. 1994); Firestone Steel Prods. Co. v. Barajas, 927 S.W.2d 608, 614 (Tex. 1996).

would be highly unfair.[15] Instead, courts applied the common sense principle that manufacturers should not be held responsible for harms caused by products made by others.[16]

A. Market Share Liability

Several decades ago, the Supreme Court of California, in *Sindell v. Abbott Laboratories*,[17] pioneered the doctrine of "market share liability."[18] Market share liability arose in the context of DES cases.[19] DES was the common name for diethylstilbestrol, an artificial hormone that was widely prescribed to pregnant women from about 1950 to 1970 to prevent miscarriages or premature deliveries.[20]

Unfortunately, some two decades after DES was first widely prescribed, it was discovered that the drug was associated with a rare form of vaginal cancer and abnormalities of the reproductive tract in so-called "DES daughters" who had been exposed to the drug *in utero*.[21] There was, however, a proof problem in some DES cases. Because the drug was a fungible product and its harmful effects arose years after a plaintiff's mother ingested the drug, it was often impossible for a plaintiff to identify the manufacturer of the DES her mother took.[22] To facilitate recoveries for DES daughters, the Supreme Court of California chose to shift the burden to each defendant to prove that it did not manufacture the drug that caused the plaintiff's harm.[23] Otherwise, each defendant would be liable for a share of the plaintiff's injury equal to its share of the market for the product.[24]

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[15] *See* Behrens & Appel, *supra* note 13, at 56.
[16] *See infra* text accompanying notes 26-64.
[17] Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980).
[18] *Id.* at 937-38.
[19] *Id.* at 925.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 925.
[23] *Sindell*, 607 P.2d at 934.
[24] *Id.* at 937.

The theory was adopted by several courts in DES cases,[25] but its acceptance in DES cases has not been universal.[26] There was debate about whether market share liability was either workable or justified in the DES context.[27] Serious questions were raised about how to define market share.[28] Questions were also raised about whether the theory created a disincentive for plaintiffs' lawyers to find out what brand of DES their client's mother had used.[29] The Supreme Court of Illinois rejected market share liability in a DES action as unsound and as too great of a deviation from traditional tort principles.[30] The court said "[e]ach manufacturer owes a duty to plaintiffs who will use its drug or be injured by it. However, the duty is not so broad as to extend to anyone who uses the type of drug manufactured by a defendant."[31]

Some enterprising plaintiffs' lawyers tried to apply market share liability to asbestos cases.[32] These attempts were almost uniformly rejected by courts, including the Supreme Courts of Florida,[33] Ohio,[34] Oklahoma,[35] and North Dakota;[36] state appellate

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[25] *See, e.g.*, Conley v. Boyle Drug Co., 570 So. 2d 275, 286 (Fla. 1990); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1078 (N.Y. 1989); Martin v. Abbott Labs., 689 P.2d 368, 382 (Wash. 1984) (en banc); Collins v. Eli Lilly Co., 342 N.W.2d 37, 49 (Wis. 1984); *see also* Morris v. Parke, Davis & Co., 667 F. Supp. 1332, 1342 (C.D. Cal. 1987) (DPT vaccine); Smith v. Cutter Biological, Inc., 823 P.2d 717, 727 (Haw. 1991) (blood products).

[26] *See* Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67, 75-76 (Iowa 1986) (rejecting market share theory as social engineering that is more appropriately left to the legislative branch); Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 247 (Mo. 1984) (en banc) (holding that DES plaintiffs could not maintain a cause of action absent proof establishing a causal relationship between defendants and injury-producing agents).

[27] *See* David M. Schultz, *Market Share Liability in DES Cases: The Unwarranted Erosion of Causation in Fact*, 40 DEPAUL L. REV. 771, 772-73 (1991).

[28] *See Martin*, 689 P.2d at 381.

[29] *See* Victor E. Schwartz & Liberty Mahshigian, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution*, 73 CALIF. L. REV. 941, 941 (1985).

[30] Smith v. Eli Lilly & Co., 560 N.E.2d 324, 337 (Ill. 1990).

[31] *Id.* at 343.

[32] *See infra* notes 33-46; *see also* L. Joel Chastain, Note, *Market Share Liability and Asbestos Litigation: No Causation, No Cause*, 37 MERCER L. REV. 1115, 1134 (1986).

[33] Celotex Corp. v. Copeland, 471 So. 2d 533, 537, 539 (Fla. 1985).

courts in California,[37] Illinois,[38] and New Jersey;[39] several federal circuit courts;[40] and numerous federal district courts.[41] These courts recognized that even if market share liability were viable or justified in the DES context, it was only in the unique set of circumstances where each pill was *exactly* alike and the *dosage* was exactly the same for each manufacturer.[42] In contrast, asbestos-containing products are not uniformly dangerous, so

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[34] Goldman v. Johns-Manville Sales Corp., 514 N.E.2d 691, 702 (Ohio 1987).

[35] Case v. Fibreboard Corp., 743 P.2d 1062, 1067 (Okla. 1987).

[36] Black v. Abex Corp., 603 N.W.2d 182, 189 (N.D. 1999).

[37] Mullen v. Armstrong World Indus., Inc., 256 Cal. Rptr. 32, 37 (Cal. Ct. App. 1988).

[38] Leng v. Celotex Corp., 554 N.E.2d 468, 471 (Ill. App. Ct. 1990).

[39] Sholtis v. Am. Cyanamid Co., 568 A.2d 1196, 1204 (N.J. Super. Ct. App. Div. 1989); *see also* Shackil v. Lederle Labs., 561 A.2d 511, 518, 520-21 (N.J. 1989) (declining to adopt market share liability in the vaccine context and noting that most courts decline to apply market share liability in the asbestos context because "products containing asbestos are not uniformly harmful—many products contain different degrees of asbestos") (quoting Starling v. Seaboard Coast Line R.R. Co., 533 F. Supp. 183, 191 (S.D. Ga. 1982)).

[40] Stark v. Armstrong World Indus., Inc., 21 F. App'x 371, 375 n.4 (6th Cir. 2001); Cimino v. Raymark Indus., Inc., 151 F.3d 297, 314 (5th Cir. 1998); Jackson v. Anchor Packing Co., 994 F.2d 1295, 1303 (8th Cir. 1993); Benshoof v. Nat'l Gypsum Co., 978 F.2d 475, 477 (9th Cir. 1992); White v. Celotex Corp., 907 F.2d 104, 106 (9th Cir. 1990); Robertson v. Allied Signal, Inc., 914 F.2d 360, 366-67 (3d Cir. 1990); Bateman v. Johns-Manville Sales Corp., 781 F.2d 1132, 1133 (5th Cir. 1986); Blackston v. Shook & Fletcher Insulation Co., 764 F.2d 1480, 1481 (11th Cir. 1985); Thompson v. Johns-Manville Sales Corp., 714 F.2d 581, 583 (5th Cir. 1983).

[41] Kraus v. Celotex Corp., 925 F. Supp. 646, 652 (E.D. Mo. 1996); Harris v. AC & S, Inc., 915 F. Supp. 1420, 1437 (S.D. Ind. 1995), *aff'd sub nom.* Harris v. Owens-Corning Fiberglas Corp., 102 F.3d 1429, 1434 (7th Cir. 1996); 210 E. 86th St. Corp. v. Combustion Eng'g, Inc., 821 F. Supp. 125, 146-47 (S.D.N.Y. 1993); Fitzgerald v. Keene Corp., No. 87 C 6139, 1991 WL 136019, at *2 (N.D. Ill. July 17, 1991); Univ. Sys. of N.H. v. U.S. Gypsum Co., 756 F. Supp. 640, 653 (D.N.H. 1991); Rogers v. Armstrong World Indus., Inc., 744 F. Supp. 901, 905 (E.D. Ark. 1990); Marshall v. Celotex Corp., 651 F. Supp. 389, 393 (E.D. Mich. 1987); Vigiolto v. Johns-Manville Corp., 643 F. Supp. 1454, 1462-63 (W.D. Pa. 1986), *aff'd*, 826 F.2d 1058 (3d Cir. 1987); Lillge v. Johns-Manville Corp., 602 F. Supp. 855, 856 (E.D. Wis. 1985); Hannon v. Waterman S.S. Corp., 567 F. Supp. 90, 92 (E.D. La. 1983); *Starling*, 533 F. Supp. at 186; *In re* Related Asbestos Cases, 543 F. Supp. 1152, 1158 (N.D. Cal. 1982).

[42] Schultz, *supra* note 27, at 775.

"courts should not treat those products as a monolithic group."[43] Courts that have rejected market share liability in the asbestos context have said that application of such a "novel theory of causation" would "raise serious questions of fairness due to the fact that different manufacturers' asbestos products differ in degrees of harmfulness." [44] Furthermore, "elimination of a causation requirement would render every manufacturer an insurer not only of its own products, but also of all generically similar products manufactured by its competitors." [45] Additionally, "expanding culpability of asbestos manufacturers could reduce the ability to spread losses by insurance and otherwise distribute risk."[46]

B. Enterprise Liability

Enterprise liability is a burden-shifting theory which stems from a New York federal court case, *Hall ex rel. Hall v. E.I. Du Pont De Nemours & Co.*,[47] involving children injured by blasting caps.[48] The explosions destroyed the blasting caps, making it impossible to identify the manufacturer.[49] Because there was a strong likelihood that the blasting caps were produced by one of

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[43] Becker v. Baron Bros., Coliseum Auto Parts, Inc., 649 A.2d 613, 621 (N.J. 1994); *see also Robertson*, 914 F.2d at 379-80 (declining to impose market share liability in the asbestos context for a number of reasons, including that "different manufacturers' asbestos products differ in degrees of harmfulness") (quoting *Vigiolto*, 643 F. Supp. at 1464); *Univ. Sys. of N.H.*, 756 F. Supp. at 656 (agreeing with "[m]ost courts, [which] have refused to apply market share liability in asbestos cases due to the 'non-fungibility' of asbestos"); Mullen v. Armstrong World Indus., Inc., 256 Cal. Rptr. 32, 36 (Cal. Ct. App. 1988) (declining to apply market share liability in the asbestos context because asbestos products are not made from the same formula, come in various forms, and carry different risks of harm); Goldman v. Johns-Manville Sales Corp., 514 N.E.2d 691, 697 (Ohio 1987) (declining to apply alternative or market share liability in the asbestos context because "[a]sbestos-containing products do not create similar risks of harm because there are several varieties of asbestos fibers, and they are used in various quantities, even in the same class of product").

[44] *Blackston*, 764 F.2d at 1483 (citing *Starling*, 533 F. Supp. at 190).

[45] *Id.* (citing *Starling*, 533 F. Supp. at 190).

[46] *Id.* (citing *Starling*, 533 F. Supp. at 190).

[47] Hall *ex rel*. Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972).

[48] *Id.* at 358.

[49] *Id.*

six major manufacturers, the court declined to dismiss the complaints against those companies and indicated that it might be appropriate to shift the burden of causation to the defendants.[50] The court found:

> If plaintiffs can establish by a preponderance of the evidence that the injury-causing caps were the product of some unknown one of the named defendants, that each named defendant breached a duty of care owed to plaintiffs and that these breaches were substantially concurrent in time and of a similar nature, they will be entitled to a shift of the burden of proof on the issue of causation.[51]

Courts have almost universally rejected invitations to broadly adopt enterprise liability or have found the theory inapplicable under the facts of a particular case.[52] For example, the Supreme Court of Texas said that enterprise liability could not be applied to asbestos cases because of the theory's "limited application to cases which involve only a small number of manufacturers in a highly

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[50] *Id.* at 359, 374.

[51] *Id.* at 380.

[52] For example, a South Carolina federal court described enterprise liability as "repugnant to the most basic tenets of tort law." Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1017 (D.S.C. 1981). The Third Circuit has noted that "enterprise liability has been rejected by virtually every jurisdiction." City of Phila. v. Lead Indus. Ass'n, 994 F.2d 112, 129 (3d Cir. 1993); *see also* Kurczi v. Eli Lilly & Co., 113 F.3d 1426, 1433-34 (6th Cir. 1997); *In re* Consol. Fen-Phen Cases, No. 03-CV-3081(JG), 2003 WL 22682440, at *4 (E.D.N.Y. 2003); *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 175 F. Supp. 2d 593, 622 (S.D.N.Y. 2001); Hamilton v. Accu-tek, 935 F. Supp. 1307, 1331 (E.D.N.Y. 1996); Swartzbauer v. Lead Indus. Ass'n, 794 F. Supp. 142, 145-46 (E.D. Pa. 1992); Univ. Sys. of N.H. v. U.S. Gypsum Co., 756 F. Supp. 640, 656-57 (D.N.H. 1991); Lewis v. Lead Indus. Ass'n, 793 N.E.2d 869, 875 (Ill. App. Ct. 2003); Catherwood v. Am. Sterilizer Co., 532 N.Y.S.2d 216, 220 (N.Y. App. Div. 1988); Jackson v. Glidden Co., 647 N.E.2d 879, 883 (Ohio Ct. App. 1995); Gaulding v. Celotex Corp., 772 S.W.2d 66, 70 (Tex. 1989); Lillge v. Johns-Manville Corp., 602 F. Supp. 855, 856 (E.D. Wis. 1985); Martin v. Abbott Labs., 689 P.2d 368, 379-80 (Wash. 1984); Thomas *ex rel*. Gramling v. Mallett, 701 N.W.2d 523, 567 (Wis. 2005).

centralized industry."[53] Other courts have likewise rejected the application of enterprise liability theory in asbestos cases.[54]

C. Alternative Liability

Alternative liability is another theory sometimes evoked by plaintiffs alongside market share liability and enterprise liability.[55] The theory was initially developed by the Supreme Court of California in *Summers v. Tice*,[56] where the plaintiff was hit in the eye after two hunters negligently discharged their shotguns in his direction.[57] Because the defendants fired at the same time, it was impossible for the plaintiff to identify which defendant was responsible for his injuries.[58] The Supreme Court of California shifted the burden of proof to the defendants to offer evidence as to which actually caused the plaintiff's injuries.[59]

Many courts that have rejected market share and enterprise liability in asbestos cases have also rejected alternative liability.[60]

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[53] *Gaulding*, 772 S.W.2d at 70.

[54] Case v. Fibreboard Corp., 743 P.2d 1062, 1067 (Okla. 1987); *Gaulding*, 772 S.W.2d at 70; *Lillge*, 602 F. Supp. at 856; Celotex Corp. v. Copeland, 471 So. 2d 533, 535 (Fla. 1985); Thompson v. Johns-Manville Sales Corp., 714 F.2d 581, 583 (5th Cir. 1983); Vigiolto v. Johns-Manville Corp., 643 F. Supp. 1454, 1459 (W.D. Pa. 1986), *aff'd*, 826 F.2d 1058 (3d Cir. 1987); *Univ. Sys. of N.H.*, 756 F. Supp. at 657 n.16; Marshall v. Celotex Corp., 651 F. Supp. 389, 395 (E.D. Mich. 1987).

[55] *See infra* text accompanying notes 60-64.

[56] Summers v. Tice, 199 P.2d 1, 4 (Cal. 1948).

[57] *Id.* at 1-2.

[58] *Id.* at 3.

[59] *Id.* at 4.

[60] *See, e.g.*, Black v. Abex Corp., 603 N.W.2d 182, 191 (N.D. 1999); Nutt v. A.C. & S. Co., 517 A.2d 690, 694 (Del. Super. Ct. 1986); Univ. Sys. of N.H. v. U.S. Gypsum Co., 756 F. Supp. 640, 654-55 (D.N.H. 1991); Case v. Fibreboard Corp., 743 P.2d 1062, 1067 (Okla. 1987); Rutherford v. Owens-Ill., Inc., 941 P.2d 1203, 1220-21 (Cal. 1997); Gaulding v. Celotex Corp., 772 S.W.2d 66, 69 (Tex. 1989); Celotex Corp. v. Copeland, 471 So. 2d 533, 535 (Fla. 1985); Vigiolto v. Johns-Manville Corp., 643 F. Supp. 1454, 1460 (W.D. Pa. 1986), *aff'd*, 826 F.2d 1058 (3d Cir. 1987); Marshall v. Celotex Corp., 651 F. Supp. 389, 392 (E.D. Mich. 1987); Leng v. Celotex Corp., 554 N.E.2d 468, 471 (Ill. App. Ct. 1990); Goldman v. Johns-Manville Sales Corp., 514 N.E.2d 691, 697 (Ohio 1987); Thompson v. Johns-Manville Sales Corp., 714 F.2d 581, 582-83 (5th Cir. 1983); Starling v. Seaboard Coast Line R.R. Co., 533 F. Supp. 183,

Courts have found that plaintiffs cannot satisfy the crucial element that *all* possible tortfeasors in such cases be brought before the court.[61] As a California appellate court explained:

> Unlike *Summers*, there are hundreds of possible tortfeasors among the multitude of asbestos suppliers. As our Supreme Court has recognized, the probability that any one defendant is responsible for plaintiff's injury decreases with an increase in the number of possible tortfeasors. When there are hundreds of suppliers of an injury-producing product, the probability that any of a handful of joined defendants is responsible for plaintiff's injury becomes so remote that it is unfair to require defendants to exonerate themselves.[62]

Additionally, the Supreme Court of Alabama has explained that alternative liability is inapplicable to asbestos cases because asbestos products "do not exhibit equal propensities for the release of noxious fibers."[63] "The relative toxicity of each product depends on a number of factors, including the 'physical properties of the product . . . the percentage of asbestos used in the product, the form of the product and the amount of dust it generates,' as well as the 'geographical origin of the mineral' itself."[64]

III. PRESENT ATTEMPTS BY PLAINTIFFS TO IMPOSE LIABILITY FOR OTHERS' PRODUCTS

Presently, asbestos plaintiffs' lawyers are pursuing a number of theories to impose liability in situations that are not in accord with basic tort law or fairness principles.[65]

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189 (S.D. Ga. 1982); Hannon v. Waterman Steamship Corp., 567 F. Supp. 90, 92 (E.D. La. 1983).

[61] *See, e.g.*, *Rutherford*, 941 P.2d at 1220-21.

[62] *Id.* (citations omitted).

[63] Sheffield v. Owens-Corning Fiberglass Corp., 595 So. 2d 443, 452 (Ala. 1992).

[64] *Id.* (citations omitted).

[65] *See infra* Part III.A-C.

A. The Any Exposure Theory of Causation

The exit of most primary historical asbestos defendants from the tort system in the early 2000s led plaintiffs' lawyers to target defendants associated with encapsulated products (for example, gaskets, floor tiles, and automotive friction products) and residential construction products (for example, joint compound) containing chrysotile asbestos fibers, among other defendants.[66] When asbestos suits were first brought, some plaintiff's' lawyers named an array of defendants, not just manufacturers of asbestos insulation products.[67] This "scatter-shot approach" to naming defendants is a common litigation tactic. When plaintiffs' lawyers pursued the actual cases, however, they focused on the insulation defendants.[68] This was to be expected as these "'high dose'" defendants–makers of friable, amphibole fiber asbestos products–bore primary responsibility.[69] When these companies were no longer subject to suit, plaintiffs' lawyers pivoted and focused their attention on "'low dose'" defendants, raising costs for those companies.[70] As trust proceeds became available to pay claims, the

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[66] *See* Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501, 528 (2009) ("Now, an increasing number of plaintiffs are bringing claims for *de minimis* or remote exposures, such as 'shade tree' brake work on the family car or one remodeling job using asbestos-containing joint compound."); Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1155 n.223 (2010) (noting the expansion of asbestos personal injury litigation to "more remote defendants outside the traditional asbestos industry"); Sheila Jasanoff & Dogan Perese, *Welfare State or Welfare Court: Asbestos Litigation in Comparative Perspective*, 12 J.L. & POL'Y 619, 628 (2004) ("Defendants' bankruptcies . . . however, have not dissuaded further asbestos mass tort claims as might have been expected. Instead, plaintiffs' lawyers are filing even more claims . . . against defendants whose involvement with asbestos production is increasingly tangential.").

[67] *See* Scarcella et al., *supra* note 9, at 1-2.

[68] *See* Mark A. Behrens & William L. Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 SW. U. REV. 479, 507 (2008).

[69] *See* Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made Over the Past Decade and Hurdles You Can Vault in the Next*, 36 AM. J. TRIAL ADVOC. 1, 4 n.18 (2012).

[70] *See* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 556 (2007) ("The surge of bankruptcies in 2000-2002 . . . triggered higher settlement demands on other established defendants,

litigation morphed into a two-tiered system of asbestos bankruptcy trust claims and tort claims.[71]

The path for asbestos plaintiffs' lawyers to sue low dose defendants is the "any exposure" theory of causation.[72] The any exposure theory is a litigation construct designed to expand the asbestos litigation to increasingly attenuated defendants.[73] Plaintiffs' experts who espouse this theory frequently opine that any occupational or product-related exposure to asbestos fibers above or different from background exposures is a substantial contributing factor to the ultimate disease, without regard to dosage.[74] These experts also claim, paradoxically, that background exposures that one can get from simply living in the world and breathing the air do *not* contribute to the development of disease.[75] The concept of dose is important in asbestos cases because courts have "acknowledged that asbestos-containing products are not

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including those attempting to ward off bankruptcy, as well as a search for new recruits to fill the gap in the ranks of defendants through joint and several liability."); STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION xxiii (2005), *available at* http://www.rand.org/pubs/monographs/MG162.html ("When increasing asbestos claims rates encouraged scores of defendants to file Chapter 11 petition . . . the resulting stays in litigation . . . drove plaintiff attorneys to press peripheral non-bankrupt defendants to shoulder a larger share of the value of asbestos claims and to widen their search for other corporations that might be held liable for the costs of asbestos exposure and disease.").

[71] *See* Schwartz, *supra* note 69, at 16-20 (discussing "recent, major development" of asbestos bankruptcy trusts and efforts to promote greater transparency between the asbestos bankruptcy trust and tort systems); 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, 273 (2008) (stating that "many courts are inclined to permit [trust claims] discovery from the plaintiffs").

[72] *See* Behrens & Anderson, *supra* note 68, at 487 n.48.

[73] *See* Jim Sinunu, *The Rise of Gatekeepers and the 'Single Fiber' Theory*, 35 WESTLAW ASBESTOS J., no. 11, Mar. 15, 2013, at 3 (stating that plaintiffs' exposures to asbestos have "continued to drop, to the point where some companies are defending against doses admittedly equal to or less than the dose the average citizen would receive from the atmosphere").

[74] *See* Behrens & Anderson, *supra* note 68, at 480; William L. Anderson et al., *The "Any Exposure" Theory Round II – Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008*, 22 KAN. J.L. & PUB. POL'Y 1, 1-2 (2012).

[75] Behrens & Anderson, *supra* note 68, at 480.

uniformly dangerous and thus that courts should not treat them all alike."[76]

The tort system's early efforts to reject any exposure theories were reflected in *Lohrmann v. Pittsburgh Corning Corp.*,[77] where the Fourth Circuit Court of Appeals held that "whether a plaintiff could successfully get to the jury or defeat a motion for summary judgment . . . would depend upon the frequency of the use of the product and the regularity or extent of the plaintiff's employment in proximity thereto."[78] Many jurisdictions apply a *Lohrmann* or *Lohrmann*-like test.[79] Recently, a unanimous Supreme Court of

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[76] Becker v. Baron Bros., Coliseum Auto Parts, Inc., 649 A.2d 613, 620 (N.J. 1994); *see also* Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1145 (5th Cir. 1985) ("[A]sbestos-containing products cannot be lumped together in determining their dangerousness."); Celotex Corp. v. Copeland, 471 So. 2d 533, 538 (Fla. 1985) ("Asbestos products . . . have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others.").

[77] Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986).

[78] *Id.* at 1162.

[79] *See* Hyde v. Owens-Corning Fiberglas Corp., 751 F. Supp. 832, 833-34 (D. Ariz. 1990); Chavers v. Gen. Motors Corp., 79 S.W.3d 361, 369 (Ark. 2002); Jackson v. Anchor Packing Co., 994 F.2d 1295, 1303 (8th Cir. 1993) (Arkansas law); Blackston v. Shook & Fletcher Insulation Co., 764 F.2d 1480, 1481, 1483 (11th Cir. 1985) (Georgia law); Nolan v. Weil-McLain, 910 N.E.2d 549, 558 (Illinois 2009); Thacker v. UNR Indus., Inc., 603 N.E.2d 449, 457 (Ill. 1992); Wehmeier v. UNR Indus., Inc., 572 N.E.2d 320, 337 (Ill. App. Ct. 1991); Tragarz v. Keene Corp., 980 F.2d 411, 420 (7th Cir. 1992) (Illinois law); Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 859 (Iowa 1994); Lyons v. Garlock, Inc., 12 F. Supp. 2d 1226, 1229 (D. Kan. 1998); Hoerner v. ANCO Insulations, Inc., 812 So. 2d 45, 56 (La. Ct. App. 2002); *In re* Asbestos v. Bordelon, Inc., 726 So. 2d 926, 939 (La. Ct. App. 1998); Quick v. Murphy Oil Co., 643 So. 2d 1291, 1293 (La. Ct. App. 1994); Dixon v. Ford Motor Co., 70 A.3d 328, 335 (Md. 2013); Eagle-Picher Indus., Inc. v. Balbos, 604 A.2d 445, 460 (Md. 1992); O'Connor v. Raymark Indus., Inc., 518 N.E.2d 510, 511 (Mass. 1988); E.I. DuPont de Nemours & Co. v. Strong, 968 So. 2d 410, 418 (Miss. 2007); Monsanto Co. v. Hall, 912 So. 2d 134, 137 (Miss. 2005); Gorman-Rupp Co. v. Hall, 908 So. 2d 749, 757 (Miss. 2005); Chism v. W.R. Grace & Co., 158 F.3d 988, 992 (8th Cir. 1998) (Missouri law); Kraus v. Celotex Corp., 925 F. Supp. 646, 652 (E.D. Mo. 1996); Menne v. Celotex Corp., 861 F.2d 1453, 1468 (10th Cir. 1988) (Nebraska law); Holcomb v. Georgia Pac., L.L.C., 289 P.3d 188, 198 (Nev. 2012); James v. Bessemer Processing Co., 714 A.2d 898, 911 (N.J. 1998); Bass v. Air Prods. & Chems., Inc., 2006 WL 1419375, at *19 (N.J. Super. Ct. App. Div. May 25, 2006); Provini v. Asbestospray Corp., 822 A.2d

Nevada agreed that both evidence of actual exposure to each defendant's asbestos-containing products and sufficient proof of "frequency, regularity, and proximity" are necessary to establish substantial factor causation.[80] The court said: "[T]he courts that adopt the three-factor test of frequency, regularity, and proximity regularly reject the 'any' exposure argument . . . . Thus, more than any exposure must be shown . . . [and] *de minimis* exposures are insufficient to prove that the exposure was a substantial factor in causing mesothelioma."[81] Nor could causation be based on vague, unquantified references to possible exposure to a defendant's products.[82]

Recent trends show that courts are applying a more rigorous analysis of the concept of dose and its role in substantial factor causation in asbestos cases.[83] In the last several years, many courts

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627, 629 (N.J. Super. Ct. App. Div. 2003); Sholtis v. Am. Cyanamid Co., 568 A.2d 1196, 1207 (N.J. Super. Ct. App. Div. 1989); Jones v. Owens-Corning Fiberglas Corp., 69 F.3d 712, 716 n.2 (4th Cir. 1995) (North Carolina law); Dillon v. Fibreboard Corp., 919 F.2d 1488, 1491-92 (10th Cir. 1990) (Oklahoma law); Howard *ex rel*. Estate of Ravert v. A.W. Chesterton, Inc., 78 A.3d 605, 608 (Pa. 2013); Betz v. Pneumo Abex, L.L.C., 44 A.3d 27, 58 (Pa. 2012); Gregg v. V-J Auto Parts Inc., 943 A.2d 216, 227 (Pa. 2007); Eckenrod v. GAF Corp., 544 A.2d 50, 53 (Pa. Super. Ct. 1988); Robertson v. Allied Signal, Inc., 914 F.2d 360, 364, 376 (3d Cir. 1990) (Pennsylvania law); Sweredoski v. Alfa Laval, Inc., No. PC 2011-1544, 2013 WL 3010419, at *5 (R.I. Super. Ct. June 13, 2013); Henderson v. Allied Signal, Inc., 644 S.E.2d 724, 727 (S.C. 2007); Cox v. Foster Wheeler Corp., No. 1-272-01, 2004 WL 5212683, at *3 (Tenn. Cir. Ct. July 8, 2004); Borg-Warner Corp. v. Flores, 232 S.W.3d 765, 770, 772-73 (Tex. 2007); Wood v. Celotex Corp., No. 89-0887-R, 1991 U.S. Dist. LEXIS 15819, at *4 (W.D. Va. May 9, 1991); Lockwood v. AC & S, Inc., 744 P.2d 605, 613 (Wash. 1987); Allen v. Asbestos Corp., 157 P.3d 406, 409 (Wash. Ct. App. 2007); Berry v. Crown Cork & Seal Co., 14 P.3d 789, 794-95 (Wash. Ct. App. 2000); White v. Dow Chem. Co., 321 F. App'x 266, 268, 273-74 (4th Cir. 2009) (West Virginia law); McMahon v. Celotex Corp., 962 F.2d 17, at *1-2 (10th Cir. 1992) (Wyoming law); FLA. STAT. ANN. § 774.203(30) (West 2006); GA. CODE ANN. § 51-14-3(23) (West 2007); KAN. STAT. ANN. § 60-4907 (West 2006); OHIO REV. CODE ANN. § 2307.96(B) (West 2004).

[80] *See Holcomb*, 289 P.3d at 196 (quoting *Gregg*, 943 A.2d at 227).

[81] *Id.* at 197.

[82] *See id.* at 200.

[83] *See* David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 59 (2008) ("The recent, increasingly strict exposure cases . . . reflect a welcome realization by state courts that holding defendants liable for causing asbestos-related disease when their products were responsible

have rejected the any exposure theory as unscientific, including the Sixth Circuit Court of Appeals;[84] the highest courts of Texas,[85] New York,[86] and Pennsylvania[87] (and arguably Virginia);[88] several federal district courts;[89] and trial and state appellate courts in Georgia,[90] Washington,[91] Mississippi,[92] and Florida.[93]

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for only *de minimis* exposure to asbestos, and other parties were responsible for far greater exposure, is not just.").

[84] *See* Moeller v. Garlock Sealing Techs., L.L.C., 660 F.3d 950, 954 (6th Cir. 2011); Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439, 443 (6th Cir. 2009); Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 492 (6th Cir. 2005); *see also* Pluck v. B.P. Oil Pipeline Co., 640 F.3d 671, 676-77 (6th Cir. 2011) (benzene); Nelson v. Tennessee Gas Pipeline Co., 243 F.3d 244, 252 (6th Cir. 2001) (PCBs).

[85] *See* Borg-Warner Corp. v. Flores, 232 S.W.3d 765, 771-72 (Tex. 2007).

[86] *See* Parker v. Mobil Oil Corp., 857 N.E.2d 1114, 1121-22 (N.Y. 2006) (quoting Wright v. Willamette Indus. Inc., 91 F.3d 1105, 1107 (8th Cir. 1996)).

[87] *See* Howard *ex rel*. Estate of Ravert v. A.W. Chesterton, Inc., 78 A.3d 605, 608 (Pa. 2013); Betz v. Pneumo Abex, L.L.C., 44 A.3d 27, 40, 58 (Pa. 2012); Gregg v. V-J Auto Parts Inc., 943 A.2d 216, 226-27 (Pa. 2007).

[88] *See* Ford Motor Co. v. Boomer, 736 S.E.2d 724, 732 (Va. 2013).

[89] *See* Anderson v. Ford Motor Co., No. 2:06-cv-00741, 2013 WL 3326832, at *1 (D. Utah July 1, 2013); Sclafani v. Air & Liquid Sys. Corp., No. 2:12-cv-3013-SVW-PJW, 2:12-cv-3037-SVW-PJW, 2013 WL 2477077, at *4 (C.D. Cal. May 9, 2013); Smith v. Ford Motor Co., No. 2:08-cv-630, 2013 WL 214378, at *5 (D. Utah Jan. 18, 2013); Bartel v. John Crane, Inc., 316 F. Supp. 2d 603, 611 (N.D. Ohio 2004), *aff'd sub nom*. Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 499 (6th Cir. 2005); *In re* W.R. Grace & Co., 355 B.R. 462, 490 (Bankr. D. Del. 2006); *see also* Newkirk v. Conagra Foods, Inc., 727 F. Supp. 2d 1006, 1030 (E.D. Wash. 2010), *aff'd*, 438 F. App'x 607, 608 (9th Cir. 2011) (microwave popcorn); Henricksen v. ConocoPhillips Co., 605 F. Supp. 2d 1142, 1148, 1155 (E.D. Wash. 2009) (benzene); Baker v. Chevron USA, Inc., 680 F. Supp. 2d 865, 887 n.9 (S.D. Ohio 2010), *aff'd*, Nos. 11-4369, 12-3995, 2013 WL 3968783 (6th Cir. Aug. 2, 2013) (plume from crude oil refinery); Adams v. Cooper Indus., Inc., No. 03-476-JBC, 2007 WL 2219212, at *7 (E.D. Ky. July 30, 2007) (chemical emissions).

[90] *See* Butler v. Union Carbide Corp., 712 S.E.2d 537, 544-45 (Ga. Ct. App. 2011).

[91] *See* McPhee v. Ford Motor Co., 135 Wash. App. 1017, 2006 WL 2988891, at *4-5 (Wash. Ct. App. Oct. 16, 2006).

[92] *See* Brooks v. Stone Architecture, P.A., 934 So. 2d 350, 355 (Miss. Ct. App. 2006).

[93] *See* Daly v. Arvinmeritor, Inc., No. 07-19211, 2009 WL 4662280, at *8 (Fla. Cir. Ct. Nov. 30, 2009).

For example, in *Moeller v. Garlock Sealing Technologies, L.L.C.*,[94] the Sixth Circuit held:

> While [decedent's] exposure to Garlock gaskets may have contributed to his mesothelioma, the record simply does not support an inference that it was a *substantial* cause of his mesothelioma. Given that the Plaintiff failed to quantify [decedent's] exposure to asbestos from Garlock gaskets and that the Plaintiff concedes that [decedent] sustained massive exposure to asbestos from non-Garlock sources, there is simply insufficient evidence to infer that Garlock gaskets probably, as opposed to possibly, were a substantial cause of [decedent's] mesothelioma.[95]

According to the court, "saying that exposure to Garlock gaskets was a substantial cause of [decedent's] mesothelioma would be akin to saying that one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume."[96]

The Supreme Court of Pennsylvania unanimously affirmed the exclusion of expert testimony based on the any exposure theory in *Betz v. Pneumo Abex*, *L.L.C.*[97] The *Betz* court found that an any exposure opinion was in "irreconcilable conflict with itself" because "one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose responsive."[98] The court added: "[W]e do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation in every 'direct-evidence' case."[99]

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[94] Moeller v. Garlock Sealing Techs., L.L.C., 660 F.3d 950 (6th Cir. 2011).

[95] *Id.* at 955.

[96] *Id.*; *see also* Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439, 443 (6th Cir. 2009) (noting that the any exposure approach "would make every incidental exposure to asbestos a substantial factor").

[97] Betz v. Pneumo Abex, L.L.C., 44 A.3d 27, 40 (Pa. 2012).

[98] *Id.* at 56.

[99] *Id.* at 56-57 (quoting Gregg v. V-J Auto Parts, Inc., 943 A.2d 216, 226-27 (Pa. 2007)); *see also In re* Asbestos Litig., No. 0001, 2008 WL 4600385, at *35 (Pa. C.P. Sept. 24, 2008); Basile v. Am. Honda Motor Co., No. 11484 CD 2005, 2007 WL 712049 (Pa. C.P. Feb. 22, 2007).

Even more recently, in *Howard ex rel. Estate of Ravert v. A.W. Chesterton, Inc.,*[100] the Supreme Court of Pennsylvania reaffirmed the following:

> The theory that each and every exposure, no matter how small, is substantially causative of disease may not be relied upon as a basis to establish substantial-factor causation for diseases that are dose-responsive.
>
> —Relatedly, in cases involving dose-responsive diseases, expert witnesses may not ignore or refuse to consider dose as a factor in their opinions.
>
> —Bare proof of some *de minimus* exposure to a defendant's product is insufficient to establish substantial-factor causation for dose-responsive diseases.
>
> —Relative to the testimony of an expert witness addressing substantial-factor causation in a dose-responsive disease case, some reasoned, individualized assessment of a plaintiff's or decedent's exposure history is necessary.
>
> —Summary judgment is an available vehicle to address cases in which only bare *de minimus* exposure can be demonstrated and where the basis for the experts testimony concerning substantial-factor causation is the any-exposure theory.[101]

The Supreme Court of Texas rejected the any exposure approach in *Borg-Warner Corp. v. Flores*.[102] In *Flores*, a former automobile mechanic sued a brake-pad manufacturer alleging that he suffered from asbestosis as a result of working with the manufacturer's brake product "on five to seven of the roughly twenty brake jobs he performed each week" for thirty of the nearly

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[100] Howard *ex rel*. Estate of Ravert v. A.W. Chesterton, Inc., 78 A.3d 605 (Pa. 2013).

[101] *Id.* at 608 (internal citations omitted).

[102] Borg-Warner Corp. v. Flores, 232 S.W.3d 765, 765-66 (Tex. 2007).

forty years he worked with brakes.[103] A doctor testified that the plaintiff could have been exposed to "some" fibers during his years of brake work.[104] The court said that merely showing regular exposure to "some" unspecified quantity of asbestos is "necessary but not sufficient, as it provides none of the quantitative information necessary to support causation under Texas law."[105] Instead, a plaintiff must present evidence of regular exposure plus "[d]efendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease."[106]

The Supreme Court of Virginia, while declining to address any exposure testimony directly, nevertheless requires plaintiffs' experts to "opine as to what level of exposure is sufficient to cause mesothelioma, and whether the levels of exposure at issue in this case were sufficient."[107]

Georgia's intermediate appellate court has stated that the any exposure theory "is, at most, scientifically-grounded speculation: an untested and potentially untestable hypothesis."[108] A Utah federal court recently "agree[d] with the general assessment of . . . various state and federal courts that the every exposure theory does not qualify as admissible expert testimony."[109] In Washington, trial courts have rejected any exposure testimony as an unproven hypothesis:

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[103] *Id.* at 766.

[104] *Id.* at 774.

[105] *Id.* at 772.

[106] *Id.* at 773; *see also* Ga.-Pac. Corp. v. Stephens, 239 S.W.3d 304, 312 (Tex. App. 2007); *In re* Asbestos Litig., No. 2004-03964, 2004 WL 5183959, at *3 (Tex. Dist. Ct. Harris Cnty. Jan. 20, 2004); *In re* Asbestos, No. 2004-3964, 2007 WL 5994694, at *3 (Tex. Dist. Ct. Harris Cnty. July 18, 2007); Smith v. Kelly-Moore Paint Co., 307 S.W.3d 829, 838 (Tex. App. 2010); *In re* Asbestos Prods. Liab. Litig. (No. VI) (Freeman v. AMF, Inc.), MDL 875, No. 11-60070, 2012 WL 760739, at *3 (E.D. Pa. Feb. 17, 2012), *report and recommendation adopted*, 2012 WL 775681 (E.D. Pa. Mar. 9, 2012) (applying Texas law).

[107] Ford Motor Co. v. Boomer, 736 S.E.2d 724, 733 (Va. 2013).

[108] Butler v. Union Carbide Corp., 712 S.E.2d 537, 552 (Ga. Ct. App. 2011).

[109] Smith v. Ford Motor Co., No. 2:08-cv-630, 2013 WL 214378, at *5 (D. Utah Jan. 18, 2013).

> [T]he assumption that every exposure to asbestos over a life's work history, even every exposure greater than 0.1 fbrs/cc yr, is a substantial factor contributing to development of an asbestos-related disease, is not a scientifically proved proposition that is generally accepted in the field of epidemiology, pulmonary pathology, or any other field relevant to this case.[110]

These cases reflect the application of standard tort law causation rules to asbestos cases.[111] If, however, courts permit plaintiffs to prevail based on any identifiable exposure to asbestos,

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[110] Free v. Ametek, No. 07-2-04091-9 SEA, 2008 WL 728387, at *3-4 (Wash. Super. Ct. King Cnty. Feb. 28, 2008).

[111] A few courts have permitted any exposure testimony but only by declining to investigate the foundation of the theory and, instead, accepting what the experts say at face value. *See* Buttitta v. Allied Signal, Inc., No. A-5263-07T1, A-5268-07T1, 2010 WL 1427273, at *10 (N.J. Super. Ct. App. Div. Apr. 5, 2010); Chapin v. A & L Parts, Inc., 732 N.W.2d 578, 587 (Mich. Ct. App. 2007); Dixon v. Ford Motor Co., 70 A.3d 328, 337 (Md. 2013); *see also In re* Asbestos Prods. Liab. Litig. (No. VI) (Larson v. Bondex Int'l), MDL 875, No. 09-69123, 2010 WL 4676563, at *5-6 (E.D. Pa. Nov. 15, 2010); *In re* Asbestos Prods. Liab. Litig. (No. VI) (Anderson v. Saberhagen Holdings, Inc.), MDL 875, No. 10-cv-61118, 2011 WL 677290, at *1 (E.D. Pa. Feb. 16, 2011); *In re* Asbestos Prods. Liab. Litig. (No. VI) (Rabovsky v. Air & Liquid Sys. Corp.), MDL 875, No. 10-cv-03202, 2012 WL 252919, at *4 (E.D. Pa. Jan. 25, 2012), *report and recommendation adopted*, 2012 WL 876752, at *3-4 (E.D. Pa. Mar. 13, 2012). *Larson* has been undercut by a recent opinion that essentially reversed the federal MDL judge. *See* Anderson v. Ford Motor Co., No. 2:06-cv-00741, 2013 WL 3179497, at *5 (D. Utah June 24, 2013). *Anderson* is erroneous under Washington law as stated in *Free v. Ametek*, No. 07-2-04091-9 SEA, 2008 WL 728387, at *3-4 (Wash. Super. Ct. King Cnty. Feb. 28, 2008), and *McPhee v. Ford Motor Co*., 135 Wash. App. 1017, 2006 WL 2988891, at *4-5 (Wash. Ct. App. Oct. 16, 2006). *Rabovsky* turned out to be erroneous under the Pennsylvania Supreme Court's *Betz* and *Ravert* decisions. *See* Betz v. Pneumo Abex, L.L.C., 44 A.3d 27, 58 (Pa. 2012); Howard *ex rel*. Estate of Ravert v. A.W. Chesterton, Inc., Nos. 48 EAP 2012, 49 EAP 2012, 50 EAP 2012, 2013 WL 5379379, at *2 (Pa. Sept. 26, 2013). Additionally, a federal MDL magistrate has noted that "a mere 'minimal exposure' to a defendant's product [is] not sufficient to establish causation." *In re* Asbestos Prods. Liab. Litig. (No. VI) (Sweeney v. Saberhagen Holdings, Inc.), MDL 875, No. 09-64399, 2011 WL 346822, at *6 (E.D. Pa. Jan. 13, 2011) (citing Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 492 (6th Cir. 2005)), *report and recommendation adopted*, 2011 WL 359696 (E.D. Pa. Feb. 3, 2011).

without regard to the dose, the dragnet search for "solvent bystanders" will continue.

B. Take-Home Exposure Cases Against Premises Owners

Asbestos personal injury litigation against premises owners, like litigation against manufacturers of low dose asbestos products, increased sharply after the primary historical manufacturer defendants filed bankruptcy.[112] These actions initially involved independent contractor plaintiffs who worked at job sites containing asbestos.[113] A huge amount of litigation was spawned.[114]

More recently, asbestos premises liability litigation has produced remote plaintiffs–spouses and family members of occupationally exposed workers.[115] The theory of these take-home cases is that premises owners negligently failed to warn workers or take precautions to prevent household members from being exposed to asbestos brought home on the occupationally exposed worker's person or clothes.[116]

Any first year law student, however, should understand that the concept of duty is the standard of liability for tort law.[117] As Supreme Court of the United States Justice Benjamin Cardozo, then on New York's highest court, so aptly recognized in that bastion of tort law curricula, *Palsgraf v. Long Island Railroad*

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[112] *See* American Academy of Actuaries, *supra* note 10, at 7.

[113] *Id.* at 3.

[114] *See* Susan Warren, *Asbestos Quagmire – Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, WALL ST. J., at B1 (Jan. 27, 2003) (discussing asbestos-related lawsuits targeting companies with little or no apparent connection to the material); Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, WALL ST. J., at B1 (Apr. 12, 2000) (discussing the "vast and growing fraternity of unlikely new targets of asbestos litigation," and noting that "[a]s the coffers of asbestos makers and heavy asbestos users have been depleted by litigation expenses, plaintiffs' attorneys have cast their nets wider to find companies to blame").

[115] *See* Mark A. Behrens & Frank Cruz-Alvarez, *A Potential New Frontier in Asbestos Litigation: Premises Owner Liability for "Take Home" Exposure Claims*, 21:11 MEALEY'S LITIG. REP.: ASBESTOS 5 (July 5, 2006).

[116] *See* Behrens, *supra* note 66, at 545-46.

[117] *See* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 416-17 (12th ed. 2010).

Co.,[118] duty is not based solely on whether a defendant could foresee that his or her conduct might injure another.[119] Courts have realized that there are policy reasons to limit the economic pursuit of potential defendants, even in situations where a harm arguably was foreseeable.[120]

"Most of the courts which have been asked to recognize a duty to warn household members of employees of the risks associated with exposure to asbestos conclude that no such duty exists."[121] In jurisdictions where the duty analysis focuses on the relationship between the parties, "the courts *uniformly* hold that an employer/premises owner owes *no* duty to a member of a household injured by take home exposure to asbestos."[122] These courts include the Supreme Courts of Delaware,[123] Georgia,[124] Iowa,[125] Maryland,[126] Michigan,[127] and New York;[128] appellate courts in California[129] and Illinois;[130] and federal and state courts

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[118] Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

[119] *Id.* at 99-100.

[120] *See, e.g.*, Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1059-60 (N.Y. 2001) (finding that no duty was owed by firearm manufacturer to victim of crimes for negligent marketing and distribution of weapons).

[121] Van Fossen v. MidAm. Energy Co., 777 N.W.2d 689, 697 (Iowa 2009).

[122] *In re* Asbestos Litig., No. 04C-07-099-ASB, 2007 WL 4571196, at *8 (Del. Super. Ct. Dec. 21, 2007) (emphasis added), *aff'd sub nom.* Riedel v. ICI Ams. Inc., 968 A.2d 17, 26-27 (Del. 2009).

[123] *See* Price v. E.I. DuPont de Nemours & Co., 26 A.3d 162, 169-70 (Del. 2011); *Riedel*, 968 A.2d at 26-27.

[124] *See* CSX Transp., Inc. v. Williams, 608 S.E.2d 208, 210 (Ga. 2005).

[125] *See Van Fossen*, 777 N.W.2d at 697.

[126] *See* Doe v. Pharmacia & Upjohn Co., 879 A.2d 1088, 1089, 1095, 1097 (Md. 2005) (HIV transmission); *see also* Adams v. Owens-Ill., Inc., 705 A.2d 58, 66 (Md. Ct. Spec. App. 1998).

[127] *See In re* Certified Question from Fourteenth Dist. Court of Appeals of Tex., 740 N.W.2d 206, 218, 220, 222 (Mich. 2007).

[128] *See In re* N.Y.C. Asbestos Litig. (Holdampf v. A.C. & S., Inc.), 840 N.E.2d 115, 116 (N.Y. 2005); *see also In re* Eighth Judicial Dist. Asbestos Litig. (Rindfleisch v. Allied Signal, Inc.), 815 N.Y.S.2d 815, 817, 821 (N.Y. Sup. Ct. 2006).

[129] *See* Campbell v. Ford Motor Co., 141 Cal. Rptr. 3d 390, 400, 402-03, 405 (Cal. Ct. App. 2012); *see also* Swanson v. Simpson Timber Co., No. B244266, 2013 WL 5469261, at *1 (Cal. Ct. App. Oct. 2, 2013).

[130] *See* Nelson v. Aurora Equip. Co., 909 N.E.2d 931, 939 (Ill. App. Ct. 2009).

interpreting Pennsylvania law.[131] Ohio and Kansas have statutorily preempted secondhand asbestos exposure claims against premises owners.[132]

For example, the Supreme Court of Georgia in *CSX Transportation, Inc. v. Williams*[133] unanimously held that "Georgia negligence law does not impose any duty on an employer to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace."[134] The appeal involved a wrongful death action on behalf of a woman and negligence claims by three children who were exposed to asbestos emitted from the clothing of family members employed at the defendant's facilities.[135]

New York's highest court, with one justice abstaining, unanimously reached the same conclusion in *In re New York City Asbestos Litigation* (*Holdampf v. A.C. & S., Inc.*).[136] The action was brought by a former Port Authority employee and his wife after the wife developed mesothelioma from washing her husband's asbestos-soiled work clothes.[137] The court explained that a defendant cannot be held liable for injuries to a plaintiff unless a "specific duty" exists; "otherwise a defendant would be subjected to 'limitless liability to an indeterminate class of persons

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[131] *See* Jesensky v. A-Best Prods. Co., No. 96-680, 2003 WL 25518083, at *2 (W.D. Pa. Dec. 16, 2003) (Magistrate's supplemental report and recommendation), *adopted in part and rejected in part on other grounds*, 2004 WL 5267498, at *1 (W.D. Pa. Feb. 17, 2004), *aff'd on other grounds*, 287 F. App'x 968, 973 (3d Cir. 2008); *In re* Asbestos Litig. (McCoy v. PolyVision, Corp.), No. N10C-04-203-ASB, 2012 WL 1413887, at *1, *4 (Del. Super. Ct. Feb. 21, 2012) (mem.) (applying Pennsylvania law).

[132] *See* KAN. STAT. ANN. § 60-4905(a) (West 2006); OHIO REV. CODE ANN. § 2307.941(a)(1) (LexisNexis 2004); *see also* Boley v. Goodyear Tire & Rubber Co., 929 N.E.2d 448, 452-53 (Ohio 2010) (discussing the statute barring tort liability for asbestos exposure not occurring at premises owner's property applied to bar claims).

[133] CSX Transp., Inc. v. Williams, 608 S.E.2d 208 (Ga. 2005).

[134] *Id.* at 210.

[135] *Id.* at 208.

[136] *In re* N.Y.C. Asbestos Litig. (Holdampf v. A.C. & S., Inc.), 840 N.E.2d 115, 123 (N.Y. 2005).

[137] *Id.* at 116-17.

conceivably injured' by its negligent acts."[138] That duty, the court said, is not defined solely by the foreseeability of harm.[139] Rather, courts must balance a variety of factors, "including the reasonable expectation of parties and society generally, . . . the likelihood of unlimited or insurer-like liability," and public policy.[140]

The court held that the Port Authority did not owe a duty to the plaintiff as her husband's employer.[141] The court noted that at common law, now codified in New York, an employer's duty to provide a safe workplace is limited to employees.[142] The court also said there was no relationship between the Port Authority and Mrs. Holdampf that would give rise to liability,[143] as contrasted with relationships such as "master and servant (employer and employee), parent and child or common carrier and passenger," where tort liability has been imposed.[144]

The court also held that the Port Authority did not owe a duty to the plaintiff as a landowner.[145] Under New York law, "a landowner's duty of reasonable care can run to the surrounding community[, such as] when mining practices carried out on the landowner's property cause the negligent release of toxins into

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[138] *Id.* at 119 (quoting Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1060 (N.Y. 2001)).

[139] *Id.*

[140] *Id.*

[141] *Id.* at 120.

[142] *In re* N.Y.C. Asbestos Litig. (Holdampf v. A.C. & S., Inc.), 840 N.E.2d 115, 120 (N.Y. 2005). The *Holdampf* court said that in *Widera v. Ettco Wire & Cable Corp.*, 611 N.Y.S.2d 569 (N.Y. App. Div. 1994), the court "properly refused to recognize a cause of action for common-law negligence against an employer for injuries suffered by its employee's family member, allegedly as a result of exposure to toxins brought home from the workplace on the employee's work clothes." *Holdampf*, 840 N.E.2d at 120. The *Widera* court had concluded: "The recognition of a common-law cause of action under the circumstances of this case would . . . expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs." *Widera*, 611 N.Y.S.2d at 571; *see also* Ruffing v. Union Carbide Corp., 766 N.Y.S.2d 439, 441 (N.Y. App. Div. 2003) (holding that a worker whose wife and daughter *in utero* were exposed to toxic substances carried home by the worker, resulting in the daughter's birth defects, failed to state a cause of action against the employer).

[143] *Holdampf*, 840 N.E.2d at 122.

[144] *Id.* at 120.

[145] *Id.* at 122.

. . . the air[,]" but the court said that asbestos carried home on a worker or his clothes is "far different from" those situations.[146] Mrs. Holdampf's "exposure came from handling her husband's work clothes; none of the [Port Authority's] activities released asbestos into the community generally."[147]

"In nearly every instance where courts *have* recognized a duty of care in a take-home exposure case, the decision turned on the court's conclusion that the foreseeability of risk was the primary (if not only) consideration in the duty analysis." [148] In these jurisdictions, the time period when the exposures occurred is critical. For example, most courts in foreseeability-based duty jurisdictions have concluded that premises owners owed no duty to guard against non-occupational asbestos exposures before 1972.[149] Other courts have held that premises owners owed no duty with

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[146] *Id.* at 121.

[147] *See* Behrens & Cruz-Alvarez, *supra* note 115, at 3.

[148] *In re* Asbestos Litig., No. 04C-07-099-ASB, 2007 WL 4571196, at *11 (Del. Super. Ct. June 26, 2007) (emphasis in original), *aff'd sub nom.* Riedel v. ICI Ams. Inc., 968 A.2d 17, 20 (Del. 2009). Examples include *Satterfield v. Breeding Insulation, Co.*, 266 S.W.3d 347, 352, 366 (Tenn. 2008), and *Olivo v. Owens-Ill., Inc*., 895 A.2d 1143, 1149 (N.J. 2006).

[149] *See* Martin v. Gen. Elec. Co., No. 02-201-DLB, 2007 WL 2682064, at *5 (E.D. Ky. Sep. 5, 2007) ("Although the general danger of prolonged occupational asbestos exposure to asbestos manufacturing workers was known by at least the mid-1930's, the extension of that harm . . . was not widely known until at least 1972, when OSHA regulations recognized a causal connection."), *aff'd sub nom*. Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439, 447 (6th Cir. 2009). In *Exxon Mobil Corp. v. Altimore*, 256 S.W.3d 415, 422 (Tex. Ct. App. 2008), the court explained:

> According to [plaintiff's expert], 1972 was a crucial year in the history of asbestos research. By 1972, experts agreed that a certain degree of exposure to asbestos could cause asbestosis or cancer. After this postulate was generally accepted, the debate focused on what constituted a safe level of exposure for workers. In June of 1972, OSHA released its initial asbestos exposure standard . . . . This was the first asbestos exposure standard to cover all industries on a nationwide basis. Under these new regulations, workers were prohibited from taking their work clothes home to be laundered if they had been exposed to asbestos. Also in 1972, while it had insufficient information to issue a single standard protective of all asbestos-related disease, the National Institute for Occupational Safety and Health ("NIOSH") proposed an asbestos exposure standard.

Id.

respect to off-site exposures that occurred before the first study showing an association between asbestos disease and fibers brought home from the workplace was presented in October 1964 and published in 1965.[150]

A Dallas appellate court has explained that the "first case study of *non-occupational* asbestos . . . was published in 1965," that "regulations instituted in 1972 by the Occupational Safety and Health Administration (OSHA) . . . expressly mandated, for the first time, restrictions on allowing asbestos to be carried home on clothing," and "the first epidemiological study of the link between females with mesothelioma and non-occupational asbestos

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[150] *See* Hoyt v. Lockheed Shipbuilding Co., No. C12-1648 TSZ, 2013 WL 3270371, at *7 (W.D. Wash. June 26, 2013) ("The Court concludes that the risk of danger from 'take home' asbestos exposure to family members . . . was not foreseeable in the 1950s. . . . The first case study of non-occupational asbestos exposure was published by Newhouse and Thompson in 1965."), *aff'd*, No. 13-35573, 2013 WL 4804408, at *1 (9th Cir. Sept. 10, 2013) ("[N]o reasonable factfinder could conclude that harm from take-home exposure to asbestos should have been foreseeable to Lockheed by 1958. [Plaintiff's] own scientific expert . . . stated that '[s]tudies on the occurrence of asbestos disease that included family members of asbestos-exposed workers were not published until the 1960s.'"). As explained by Maryland's highest court in a recent product liability take-home exposure case:

> The study that experts from both sides regarded as more significant was one by Muriel Newhouse and Hilda Thompson in 1965. *See* [Muriel L. Newhouse & Hilda Thompson,] *Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area*, [22 BRIT. J. INDUS. MED. 261, 261 (1965)]. The study concerned 76 persons who lived in the vicinity of an asbestos factory in the London area and who contracted lung disease. Although most (67) of those persons had neither an occupational nor a household exposure to asbestos but . . . may have been exposed because they lived in the vicinity of the factory, nine of the subjects were exposed to dust brought home by a family member and later were diagnosed with mesothelioma or asbestosis.
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> Shortly before publication in the British journal, the Newhouse/Thompson findings were presented, along with other papers, to a Conference on Biological Effects of Asbestos held in New York in October 1964. The Conference was organized by Dr. Irving Selikoff, a leading researcher into the connection between exposure to asbestos and lung-related diseases, and was hosted by the New York Academy of Sciences. The papers presented at that Conference were published in the Annals of the New York Academy of Sciences, 1965, Vol. 32.

Ga.-Pac., L.L.C. v. Farrar, 69 A.3d 1028, 1036-37 (Md. 2013).

exposure was published in 1978."[151] Consequently, the court held that "the danger of non-occupational exposure to asbestos dust on workers' clothes was neither known nor reasonably foreseeable . . . in the 1950s." [152] An Illinois appellate court likewise held that a premises owner owed a plaintiff "no duty, in the period of 1953 to 1956, to warn her against the danger of asbestos carried home on clothing (in contrast to the danger of intensive exposure to asbestos in factories)" because "the infliction of illness merely from asbestos carried home on clothing was not reasonably foreseeable, given what was known during that period." [153] Several other courts have reached the same conclusion.[154]

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[151] Alcoa, Inc. v. Behringer, 235 S.W.3d 456, 461 (Tex. Ct. App. 2007) (emphasis in original).

[152] *Id.* at 462; *see also Martin*, 561 F.3d at 445 ("Plaintiff's expert report concedes that the first studies of bystander exposure were not published until 1965. Mr. Martin's father's exposure to asbestos materials stopped in 1963.").

[153] Rodarmel v. Pneumo Abex, L.L.C., 957 N.E.2d 107, 109 (Ill. App. Ct. 2011); *see also* Estate of Holmes v. Pneumo Abex, L.L.C., 955 N.E.2d 1173, 1178 (Ill. App. Ct. 2011) ("[P]laintiff's expert . . . testified the first epidemiological study showing an association between disease and asbestos fibers brought home from the workplace was presented . . . in October 1964.").

[154] *See In re* Certified Question from Fourteenth Dist. Court of Appeals of Tex., 740 N.W.2d 206, 218 (Mich. 2007) ("From 1954 to 1965 . . . we did not know what we know today about the hazards of asbestos . . . . Further, plaintiff's own expert conceded that the first published literature suggesting a 'specific attribution to washing of clothes' was not published until 1965.") (internal citations omitted); Hudson v. Bethlehem Steel Corp., No. 1991-C-2078, 1995 WL 17778064, at *4 (Pa. C.P. Dec. 12, 1995) ("[W]e can find nothing in the record which would have put Bethlehem Steel on notice, prior to 1960, that Mrs. Hudson was in a position to contract mesothelioma even though she was not in the employ of any asbestos-related industry. . . . Mrs. Hudson was not a foreseeable victim of the asbestos-containing products utilized by Bethlehem Steel during the time periods in issue."); Dube v. Pittsburgh-Corning Corp., No. 83-0224 P, 1988 WL 64733, at *1 (D. Me. June 9, 1988) ("It was generally unknown until 1964 that asbestos could cause mesothelioma . . . to people . . . who were not directly involved in asbestos production or working with asbestos, but were exposed only in a domestic context, that is, through dust brought home on the person or clothes of one who was working with the substance. The United States became aware of that risk in October of 1964, and the knowledge was available then or soon after to the manufacturers.") *rev'd on other grounds*, 870 F.2d 790, 801 (1st Cir. 1989).

By way of comparison, courts in states that essentially equate foreseeability with duty have found it easier to impose liability for post-1972 secondary asbestos exposures.[155] As a Louisiana appellate court held, "a company aware of the 1972 OSHA standards regarding the hazards of household exposure to asbestos, had a duty to protect third party household members from exposure to asbestos from a jobsite it knew contained asbestos."[156]

A few courts have failed to carefully distinguish between knowledge of the general danger of substantial, prolonged occupational asbestos exposure and the pivotal issue of when it became generally known that non-occupational exposure to asbestos could be dangerous.[157]

It is important in take-home exposure cases that courts not fall into the fallacy that Justice Cardozo warned about in *Palsgraf*.[158]

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[155] *See, e.g.*, Chaisson v. Avondale Indus., Inc., 947 So. 2d 171, 183 (La. Ct. App. 2006).

[156] *Id.*; *see also id.* at 200 (per curiam opinion on rehearing) ("[T]he Court's opinion does not create a categorical duty rule . . . .").

[157] *See* Simpkins v. CSX Corp., 929 N.E.2d 1257, 1264 (Ill. App. Ct. 2010) ("[W]e believe that it takes little imagination to presume that when an employee who is exposed to asbestos brings home his work clothes, members of his family are likely to be exposed as well. Thus, the general character of the harm to be prevented was reasonably foreseeable . . . . from 1958 to 1964."), *aff'd but criticized*, 965 N.E.2d 1092, 1100 (Ill. 2012); Zimko v. Am. Cyanamid, 905 So. 2d 465, 472, 483 (La. Ct. App. 2005) (regarding asbestos fibers brought home on the clothes and person of the plaintiff's father from 1945 through 1966, the court said the defendant's "duty is the general duty to act reasonably in view of the foreseeable risks of danger to household members of its employees resulting from exposure to asbestos fibers carried home on its employee's clothing, person, or personal effects"); Francis v. Union Carbide Corp., 116 So. 3d 858, 859 (La. Ct. App. 2013) (permitting take-home exposure claim to proceed where plaintiff alleged his father brought asbestos fibers home on his work clothes from 1943-1945). *But see* Thomas v. A.P. Green Indus., Inc., 933 So. 2d 843, 870-71 (La. Ct. App. 2006) (Tobias, J., concurring) ("Any person citing *Zimko* in the future should be wary of the problems of the majority's opinion in *Zimko* in view of the Louisiana Supreme Court never being requested to review the correctness of the liability of American Cyanamid.").

[158] Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99-100 (N.Y. 1928) (quoting W. Va. Cent. & Pittsburgh Ry. Co. v. State, 54 A. 669, 671-72 (Md. 1903) ("In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury.")

Relying on foreseeability alone – particularly without a careful analysis of what was known about *non-occupational* exposure risks in the relevant time period – can create an infinite pool of potential plaintiffs.[159] A premises owner's duty to guard against secondhand asbestos exposures could potentially cover anyone who might come into contact with a dusty employee or that person's dirty clothes, such as a babysitter, relative, neighbor, or laundry service employee.[160]

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[159] *See In re* N.Y.C. Asbestos Litig. (Holdampf v. A.C. & S., Inc.), 840 N.E.2d 115, 119 (N.Y. 2005) (quoting Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1061 (N.Y. 2001)) (stressing the existence of a duty does not depend on foreseeability of injury, but instead is based on the defendant's relationship with the plaintiff, and thus "the specter of limitless liability is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship").

[160] *See, e.g.*, *In re* Certified Question from Fourteenth Dist. Court of Appeals of Tex., 740 N.W.2d 206, 219 (Mich. 2007) (quoting Behrens & Cruz-Alvarez, *supra* note 115, at 5) (noting that potential plaintiffs could include "extended family members, renters, house guests, carpool members, bus drivers, and workers at commercial enterprises visited by the worker"); Van Fossen v. MidAm. Energy Co., 777 N.W.2d 689, 699 (Iowa 2009) (explaining that the plaintiff's proposed expansion of duty "would be incompatible with public policy" and "would arguably also justify a rule extending the duty to a large universe of other potential plaintiffs who never visited the employers' premises but came into contact with a contractor's employee's asbestos-tainted clothing in a taxicab, a grocery store, a dry-cleaning establishment, a convenience store, or a laundromat"); *In re* Asbestos Litig., No. 04C-07-099-ASB, 2007 WL 4571196, at *12 (Del. Super. Ct. June 26, 2007) ("[T]here is no principled basis in the law upon which to distinguish the claim of a spouse or other household member . . . from the claim of a house keeper or laundry mat operator who is exposed while laundering the clothing, or a co-worker/car pool passenger who is exposed during rides home from work, or the bus driver or passenger who is exposed during the daily commute home, or the neighbor who is exposed while visiting with the employee before he changes out of his work clothing at the end of the day."); Adams v. Owens-Ill., Inc., 705 A.2d 58, 66 (Md. Ct. Spec. App. 1998) ("If liability for exposure to asbestos could be premised on [decedent's] handling of her husband's clothing, presumably Bethlehem [the premises owner] would owe a duty to others who came in close contact with [decedent's husband], including other family members, automobile passengers, and co-workers."); Campbell v. Ford Motor Co., 141 Cal. Rptr. 3d 390, 403 (Cal. Ct. App. 2012) ("[W]here the claim is that the laundering of the worker's clothing is the primary source of asbestos exposure, the class of secondarily exposed potential plaintiffs is far greater [than just family members of an occupationally

C. Third-Party Duty to Warn Claims

As explained, after most former asbestos insulation manufacturers exited the tort system, the plaintiffs' bar began to focus more on gasket and packing defendants, including manufacturers of pumps and valves.[161] In an attempt to further stretch the liability of these low dose defendants, some plaintiffs' counsel are now promoting the theory that pump and valve manufacturers should be held liable for harms allegedly caused by asbestos-containing replacement internal gaskets or packing, asbestos-containing replacement external flange gaskets, or asbestos-containing external thermal insulation manufactured and sold by third parties and attached post-sale, for example, by the United States Navy.[162] This third-party duty to warn theory is attractive to plaintiffs' lawyers because most former asbestos insulation manufacturers and the Navy are immune as a result of prior bankruptcies and sovereign immunity, respectively.[163] As a substitute, plaintiffs seek to impose liability on defendants for harms caused by products they never made, sold, installed, or profited from.[164]

Asbestos third-party duty to warn claims have been rejected by almost every court that has considered this novel theory, including the Supreme Courts of California[165] and Washington;[166]

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exposed employee], including fellow commuters, those performing laundry services and more.").

[161] *See Thomas*, 933 So. 2d at 857 (noting that the plaintiffs contended that the decedent was fatally exposed to gaskets, insulation, and pipe coverings that contained asbestos); *see also* O'Neil v. Crane Co., 266 P.3d 987, 991-93 (Cal. 2012) (noting that the family of a Navy seamen sued a pump and valve manufacturer for wrongful death allegedly caused by asbestos exposure from gaskets, external insulation, and packing materials while serving on a naval warship).

[162] *O'Neil*, 266 P.3d at 991.

[163] Gray v. Bell, 712 F.2d 490, 506 (D.C. Cir. 1983) ("The United States is protected from unconsented suit under the ancient common law doctrine of sovereign immunity.").

[164] *See* Behrens, *supra* note 66, at 542-45; Schwartz, *supra* note 69, at 24-28.

[165] *See O'Neil*, 266 P.3d at 1005; *see also* Lee v. Clark Reliance Corp., No. B241656, 2013 WL 3677250, at *6 (Cal. Ct. App. July 15, 2013); McNaughton v. Gen. Elec. Co., MDL 875, No. 11-00791, 2012 WL 5395008, at *1 n.1 (E.D.

appellate courts in Maryland,[167] Massachusetts,[168] New York,[169] and Pennsylvania;[170] state trial courts in Connecticut,[171] Delaware

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Pa. Aug. 9, 2012) (applying California law); Floyd v. Air & Liquid Sys. Corp., MDL 875, No. 10-01960, 2012 WL 975756, at *1 n.1 (E.D. Pa. Feb. 10, 2012) (applying California law); Floyd v. Air & Liquid Sys. Corp., MDL 875, No. 10-01960, 2012 WL 975684, at *1 n.1 (E.D. Pa. Feb. 9, 2012); Floyd v. Air & Liquid Sys. Corp., MDL 875, No. 10-01960, 2012 WL 975359, at *1 (E.D. Pa. Feb. 8, 2012); Brewer v. Crane Co., No. B213096, 2012 WL 3126523, at *1 (Cal. Ct. App. Aug. 2, 2012); Nolen v. Foster Wheeler Energy Corp., No. B216202, 2012 WL 3126765, at *1 (Cal. Ct. App. Aug. 2, 2012). For pre-*O'Neil* decisions rejecting asbestos third-party duty to warn claims in California, *see* Woodard v. Crane Co., No. B219366, 2011 WL 3759923, at *1 (Cal. Ct. App. Aug. 25, 2011); Walton v. William Powell Co., 108 Cal. Rptr. 3d 412, 420 (Cal. Ct. App. 2010); Hall v. Warren Pumps, L.L.C., No. B208275, 2010 WL 528489, at *1 (Cal. App. Dep't Super. Ct. Feb. 16, 2010); Merrill v. Leslie Controls, Inc., 101 Cal. Rptr. 3d 614, 626 (Cal. Ct. App. 2009); Taylor v. Elliott Turbomachinery Co., 90 Cal. Rptr. 3d 414, 418 (Cal. Ct. App. 2009); Petros v. 3M Co., No. RG09429427, 2009 WL 6390885, at *1 (Cal. Super. Ct. Sept. 30, 2009).

[166] *See* Simonetta v. Viad Corp., 197 P.3d 127, 134 (Wash. 2008); Braaten v. Saberhagen Holdings, 198 P.3d 493, 501 (Wash. 2008); *see also* Yankee v. APV N. Am., Inc., 262 P.3d 515, 522 (Wash. Ct. App. 2011); Wangen v. A.W. Chesterton Co., 163 Wash. App. 1004, 2011 WL 3443962, at *5-6 (Wash. Ct. App. Aug. 8, 2011); Anderson v. Asbestos Corp., 151 Wash. App. 1005, 2009 WL 2032332, at *2 (Wash. Ct. App. July 13, 2009).

[167] *See* Ford Motor Co. v. Wood, 703 A.2d 1315, 1332 (Md. Ct. Spec. App. 1998), *abrogated on other grounds*, John Crane, Inc. v. Scribner, 800 A.2d 727, 743 (Md. 2002).

[168] Whiting v. CBS Corp., 982 N.E.2d 1224, 2013 WL 530860, at *1 (Mass. App. Ct. Feb. 14, 2013); *see also* Dombrowski v. Alfa Laval, Inc., No. 08-1938, 2010 WL 4168848, at *3 (Mass. Super. Ct. July 1, 2010) (mem.).

[169] *See In re* Eighth Judicial Dist. Asbestos Litig. (Drabczyk v. Fisher Controls Int'l, L.L.C.), 938 N.Y.S.2d 715, 715-17 (N.Y. App. Div. 2012). New York City asbestos cases have proceeded, however, under a third-party duty to warn theory relying on *Berkowitz v. A.C. & S., Inc*., 733 N.Y.S.2d 410, 411-12 (N.Y. App. Div. 2001), a single paragraph opinion, devoid of legal analysis, which misstates New York law as decided in *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222, 225-26 (N.Y. 1992). *See* Sawyer v. A.C. & S., 938 N.Y.S.2d 230, 2011 WL 3764074, at *9 (N.Y. Sup. Ct. June 24, 2011); *In re* N.Y.C. Asbestos Litig. (Dummitt v. A.W. Chesterton), 960 N.Y.S.2d 51, 2012 WL 3642303, at *2, *5 (N.Y. Sup. Ct. Aug. 20, 2012); Romero v. A.C. & S., Inc., No. 113260/01, 2012 WL 1776984, at *5-6 (N.Y. Sup. Ct. May 2, 2012); Kraljic v. A.C. & S., Inc., No. 123078/01, 2012 WL 1068129, at *3 (N.Y. Sup. Ct. Mar. 16, 2012); Contento v. A.C. & S., Inc., No. 121539/01, 2012 WL 910305, at *4 (N.Y. Sup. Ct. Mar. 13, 2012); Defazio v. A.W.

(applying the law of Delaware and many other states),[172] Maine,[173] Minnesota,[174] and New Jersey;[175] several federal courts;[176] and

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Chesterton, 938 N.Y.S.2d 226, 2011 WL 3667717, at *4 (N.Y. Sup. Ct. Aug. 12, 2011); Kersten v. A.O. Smith Water Prods. Co., No. 190129/10, 2011 WL 1096996, at *5 (N.Y. Sup. Ct. Mar. 14, 2011). A New York City federal judge has explicitly distinguished *Berkowitz*, stating that the decision "hardly stands for the broad proposition that a manufacturer has a duty to warn whenever it is foreseeable that its product will be used in conjunction with a defective one. Rather, the specifications there apparently *prescribed* the use of asbestos." Surre v. Foster Wheeler L.L.C., 831 F. Supp. 2d 797, 802-03 (S.D.N.Y. 2011).

[170] *See* Schaffner v. Aesys Techs., L.L.C., Nos. 1901 EDA 2008, 1902 EDA 2008, 2010 WL 605275, at *6 (Pa. Super. Ct. Jan. 21, 2010); *see also* Montoney v. Cleaver-Brooks, Inc., No. 3253, 2012 WL 359523, at *1, *3 (Pa. C.P Jan. 5, 2012); Kolar v. Buffalo Pumps, Inc., 15 Pa. D. & C. 5th 38, 49 (Pa. C.P Aug. 2, 2010); Ottinger v. Am. Standard, Inc., No. 001674, 2007 WL 7306556, at *11 (Pa. C.P Sept. 11, 2007) (mem.); *cf.* Eckenrod v. GAF Corp., 544 A.2d 50, 52 (Pa. Super. Ct. 1988) ("[A] plaintiff must present evidence to show that he inhaled asbestos fibers shed by the specific manufacturer's product."). *But see In re* Asbestos Prods. Liab. Litig. (No. VI) (Hoffeditz v. Am. Gen. L.L.C.), No. 2:09–70103, 2011 WL 5881008, at *1 n.1 (E.D. Pa. July 29, 2011) (applying Pennsylvania law); Chicano v. Gen. Elec. Co., No. 03-5126, 2004 WL 2250990, at *9 (E.D. Pa. Oct. 5, 2004) (applying Pennsylvania law); Urian v. Ford Motor Co., CA No. 06C-09-246-ASB, 2010 WL 3005539, at *3 (Del. Super. Ct. July 30, 2010) (applying Pennsylvania law).

[171] *See* Abate v. AAF-McQuay, Inc., No. CV106006228S, 2013 WL 812066, at *5 (Conn. Super. Ct. Jan. 29, 2013), *reconsideration denied*, 2013 WL 5663462, at *3 (Conn. Super. Ct. Sept. 24, 2013).

[172] *See* Farrall v. Ford Motor Co., No. N11C-05-257-ASB, 2013 WL 4493568, *1 n.5 (Del. Super. Ct. Aug. 19, 2013); *In re* Asbestos Litig. (James Petroski), No. N10C-11-139 ASB, at 1 (Del. Super. Ct. June 27, 2012) (applying Arizona law); *In re* Asbestos Litig. (Thomas Milstead), No. N10C-09-211 ASB, 2012 WL 1996799, at *4 (Del. Super. Ct. May 31, 2012) (applying Maryland law); *In re* Asbestos Litig. (Anita Cosner), No. N10C-12-100 ASB, 2012 WL 1694442, at *1 (Del. Super. Ct. May 14, 2012) (applying Massachusetts law); *In re* Asbestos Litig. (Reed Grgich), No. N10C-12-011 ASB, 2012 WL 1408982, at *4 (Del. Super. Ct. Apr. 2, 2012) (applying Utah law), *reargument denied*, 2012 WL 1593123 (Del. Super. Ct. Apr. 11, 2012), *appeal refused sub nom.* Crane Co. v. Grgich, 44 A.3d 921, at *1 (Del. Super. Ct. 2012); *In re* Asbestos Litig. (Frederick & Patricia Parente), No. N10C-11-140 ASB, 2012 WL 1415709, at *2 (Del. Super. Ct. Mar. 2, 2012) (applying Connecticut Law); *In re* Asbestos Litig. (Ralph Curtis & Janice Wolfe), No. N10C-08-258 ASB, 2012 WL 1415706, at *5 (Del. Super. Ct. Feb. 28, 2012) (applying Oregon law); *In re* Asbestos Litig. (Robert Truitt), No. 10C–06–072, 2011 WL 5340597, at *3 (Del. Super. Ct. Oct. 5, 2011); *In re*

courts applying maritime law, including the manager of the federal asbestos multidistrict litigation.[177]

Asbestos Litig. (Irene Taska), No. 09C-03-197 ASB, 2011 WL 379327, at *1-2 (Del. Super. Ct. Jan. 19, 2011) (applying Connecticut law); *In re* Asbestos Litig. (Arland Olson), No. 09C-12-287 ASB, 2011 WL 322674, at *2 (Del. Super. Ct. Jan. 18, 2011) (applying Idaho law); Bernhardt v. Ford Motor Co., No. 06C-06-307 ASB, 2010 WL 3005580, at *2-3 (Del. Super. Ct. July 30, 2010); Wilkerson v. Am. Honda Motor Co., No. 04C-08-268 ASB, 2008 WL 162522, at *2-3 (Del. Super. Ct. Jan. 17, 2008). *But see In re* Asbestos Litig. (Dorothy Phillips) (Limited to Hoffman/New Yorker Inc.), No. N12C–03-057-ASB, 2013 WL 4715263, at *2 (Del. Super. Ct. Aug. 30, 2013) (applying Virginia law); *In re* Asbestos Litig. (Kenneth Carlton), No. N10C-08-216 ASB, 2012 WL 2007291, at *3-4 (Del. Super. Ct. June 1, 2012) (applying Arkansas law); *In re* Asbestos Litig. (Darlene K. Merritt & James Kilby Story), No. N10C-11-200 ASB, 2012 WL 1409225, at *3 (Del. Super. Ct. Apr. 5, 2012) (applying Virginia law).

[173] *See* Rumery v. Garlock Sealing Techs., Inc., No. 05-CV-599, 2009 WL 1747857, at *9 (Me. Super. Ct. Apr. 24, 2009).

[174] *See* Nelson v. 3M Co., No. 62-CV-08-6245, 2011 WL 3983257, at *5-6 (Minn. Dist. Ct. Aug. 16, 2011).

[175] *See* Mystrena v. A.W. Chesterton Co., No. MID-L-4208-10, at 23 (N.J. Super. Ct. Law Div. May 8, 2012); Fayer v. A.W. Chesterton Co., No. MID-L-5016-10, at 23 (N.J. Super. Ct. Law Div. May 8, 2012).

[176] *See* Morgan v. Bill Vann Co., No. 11-0535-WS-B, 2013 WL 4657502, *5 (S.D. Ala. Aug. 30, 2013); Dalton v. 3M Co., No. 10-113-SLR-SRF, 2013 WL 4886658, at *10 (D. Del. Sept. 12, 2013) (applying Mississippi law), *report and recommendation adopted*, 2013 WL 5486813 (D. Del. Oct. 1, 2013); Faddish v. Buffalo Pumps, 881 F. Supp. 2d 1361, 1374 (S.D. Fla. 2012); Niemann v. McDonnell Douglas Corp., 721 F. Supp. 1019, 1028 (S.D. Ill. 1989); Surre v. Foster Wheeler L.L.C., 831 F. Supp. 2d 797, 804 (S.D.N.Y. 2011).

[177] *See* Stark v. Armstrong World Indus., Inc., 21 F. App'x 371, 381 (6th Cir. 2001); Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 499 (6th Cir. 2005); Various Plaintiffs v. Various Defendants, 856 F. Supp. 2d 703, 712 (E.D. Pa. 2012); Conner v. Alfa Laval, Inc., 842 F. Supp. 2d 791, 801 (E.D. Pa. 2012); Floyd v. Air & Liquid Sys. Corp., MDL 875, No. 2:10-CV-69379-ER, 2012 WL 975756, at *1 n.1 (E.D. Pa. Feb. 10, 2012); Floyd v. Air & Liquid Sys. Corp., MDL 875, No. 2:10-CV-69379-ER, 2012 WL 975615, at *1 n.1 (E.D. Pa. Feb. 8, 2012); Cabasug v. Crane Co., No. 12-00313 JMS/BMK, 2013 WL 6212151, *13 (D. Haw. Nov. 26, 2013); *In re* Asbestos Prods. Liab. Litig (No. VI) (Sweeney v. Saberhagen Holdings, Inc.), MDL 875, No. 09-64399, 2011 WL 346822, at *6-7 (E.D. Pa. Jan. 13, 2011), *report and recommendation adopted*, 2011 WL 359696 (E.D. Pa. Feb. 3, 2011); Abbay v. Armstrong Int'l, Inc., MDL 875, No. 2:10-CV-83248-ER, 2012 WL 975837, *1 (E.D. Pa. Feb. 29, 2012); *In re*Asbestos Litig. (Harold & Shirley Howton), No. N11C-03218 ASB, 2012 WL 1409011, at *6 (Del. Super. Ct. Apr. 2, 2012), *appeal*

The Supreme Court of California's decision in *O'Neil v. Crane Co.*[178] is perhaps the most significant of these decisions. The case involved a mesothelioma plaintiff allegedly exposed to asbestos in the late 1960s in the course of his job supervising individuals who repaired equipment in the engine and boiler rooms of a World War II-era naval ship.[179] The plaintiff sued two companies that sold valves and pumps to the Navy at least twenty years before the plaintiff worked on the ship.[180] It was undisputed that the defendants never manufactured or sold any of the asbestos-containing materials to which the plaintiff was exposed.[181] Instead, the plaintiff's asbestos exposures came from external insulation and replacement internal gaskets and packing made by third parties.[182] The Supreme Court of California applied general principles of tort law, concluding that, while "manufacturers, distributors, and retailers have a duty to ensure the safety of their products . . . we have never held that these responsibilities extend to preventing injuries caused by *other* products that might foreseeably be used in conjunction with a defendant's product."[183] The court reasoned that requiring manufacturers to warn about the dangerous propensities of products they did not design, make, or sell would be contrary to the purposes of strict products liability.[184] The court added, "[i]t is also unfair to require manufacturers of nondefective products to shoulder a burden of liability when they derived no economic benefit from the sale of the products that injured the plaintiff."[185] In reaching its decision, the court rejected the notion that a manufacturer has a duty to warn about the dangers of products that it knew or should have known would be used

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refused, 44 A.3d 921 (Del. 2012); *In re* Asbestos Litig. (Wesley K. Davis), No. 09C-08-258 ASB, 2011 WL 2462569, at *6 (Del. Super. Ct. June 7, 2011).

[178] O'Neil v. Crane Co., 266 P.3d 987, 1007 (Cal. 2012).

[179] *Id.* at 993.

[180] *Id.* at 991, 993.

[181] *Id.* at 996.

[182] *Id.*

[183] *Id.* at 991 (emphasis in original).

[184] *See O'Neil*, 266 P.3d at 995-96 ("[T]he reach of strict liability is not limitless. We have never held that strict liability extends to harm from entirely distinct products that the consumer can be expected to use with, or in, the defendant's nondefective product.").

[185] *Id.* at 1006.

alongside its own.[186] The court concluded that "expansion of the duty of care as urged here would impose an obligation to compensate on those whose products caused the plaintiffs no harm. To do so would exceed the boundaries established over decades of product liability law."[187]

The *O'Neil* decision, and those like it which have rejected third party duty to warn claims,[188] reflect traditional tort law principles.[189] For years, courts in non-asbestos cases have refused to impose liability on manufacturers of non-defective products that are used in conjunction with defective products made by others.[190] Likewise, courts in non-asbestos cases have refused to impose liability on manufacturers for harms caused by replacement parts sold by third parties.[191]

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[186] *Id.*

[187] *Id.* at 1007.

[188] *See* Dalton v. 3M Co., No. 10-113-SLR-SRF, 2013 WL 4886658, at *10 (D. Del. Sept. 12, 2013) ("The majority of courts embrace the principles of the bare metal defense and refuse to impose liability upon manufacturers for the dangers associated with asbestos-containing products manufactured and distributed by other entities.").

[189] *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, 621 (2008).

[190] *See, e.g.*, Rastelli v. Goodyear Tire & Rubber Co., 591 N.E.2d 222, 225-26 (N.Y. 1992) (holding that there was no duty to warn against the defendant's non-defective tire being used in conjunction with a defective tire rim manufactured by another company); Childress v. Gresen Mfg. Co., 888 F.2d 45, 46, 49 (6th Cir. 1989) (holding that a non-defective hydraulic valve manufacturer was not liable for a defective log splitter); Toth v. Econ. Forms Corp., 571 A.2d 420, 423 (Pa. Super. Ct. 1990) (holding that a non-defective metal forming equipment manufacturer was not liable for a defective wood planking used in conjunction with its product); Walton v. Harnischfeger, 796 S.W.2d 225, 228 (Tex. App. 1990) (holding that a non-defective crane manufacturer was not liable for another party's defective rigging).

[191] *See, e.g.*, Baughman v. Gen. Motors Corp., 780 F.2d 1131, 1132-33 (4th Cir. 1986) (holding that a defendant auto manufacturer was not liable when a tire mounted on a replacement wheel made by a third-party exploded); Cousineau v. Ford Motor Co., 363 N.W.2d 721, 727-28 (Mich. Ct. App. 1985) (holding that a truck manufacturer was not liable for injuries caused by a defective replacement wheel made by another company); Hansen v. Honda Motor Co., 480 N.Y.S.2d 244, 245-46 (N.Y. App. Div. 1984) (holding that a motorcycle manufacturer was not liable for a defective replacement wheel manufactured by another).

In these cases, plaintiffs have argued for liability to be imposed based on foreseeability, but *Palsgraf* teaches that foreseeability alone should not be the bridge for the imposition of tort liability.[192] Many things, especially in hindsight, are foreseeable. There would be "legal and business chaos" if suppliers had a duty to warn of the foreseeable dangers of other manufacturers' products.[193] For example, "a syringe manufacturer would be required to warn of the dangers of any and all drugs it may be used to inject, and the manufacturer of bread would be required to warn of peanut allergies, as a peanut butter and jelly sandwich is a foreseeable use of bread."[194] "Packaging companies might be held liable for hazards regarding contents made by others . . . . 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."[195]

IV. CONCLUSION

In tort law, including asbestos litigation, the pursuit of solvent defendants is only justified under generally accepted principles of tort law, namely, proof of breach of duty to a plaintiff, product defect, causation, and damages. Problems arise where those principles are ignored, normal rules of duty are not applied, or proof of causation is minimized. In those situations, the path that Mr. Scruggs suggested – the "endless search for a solvent

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[192] *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99-100 (N.Y. 1928).

[193] John W. Petereit, *The Duty Problem with Liability Claims Against One Manufacturer for Failing to Warn About Another Manufacturer's Product*, HARRISMARTIN'S COLUMNS—ASBESTOS, Aug. 15, 2005, at 5.

[194] Thomas W. Tardy, III & Laura A. Frase, *Liability of Equipment Manufacturers for Products of Another*, HARRISMARTIN'S COLUMNS—ASBESTOS, Apr. 1, 2007, at 4, 6.

[195] 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 J.L. & POL'Y 589, 629–30 (2008); *see also* 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 . . . .").

bystander"[196] – should be brought to a halt and not be part of American jurisprudence.

[196] *See* Scruggs & Schwartz, *supra* note 1, at 5.