

Liability for Asbestos-Containing Connected or Replacement Parts Made by Third-Parties: Courts Are Properly Rejecting This Form of Guilt by Association

Mark A. Behrens[†]
Margaret Horn^{††}

Abstract

Some plaintiffs' lawyers are promoting the theory that manufacturers of products such as pumps and valves should be held liable for failure to warn individuals about the potential harms from exposure to asbestos in connected or replacement parts manufactured or sold by third-parties. This Article explores this issue and concludes that manufacturers should not be held liable for failure to warn about asbestos-containing external thermal insulation or replacement parts made by third-parties and used in conjunction with the manufacturer's product. This is the majority rule both inside and outside of the asbestos litigation context and is consistent with fundamental tort law principles and sound public policy.

Introduction

Originally, and for many years, asbestos lawsuits typically pitted occupationally exposed workers in the dusty trades “against the asbestos miners, 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.”¹ The occupations most

[†] B.A. (1987), University of Wisconsin; J.D. (1990), Vanderbilt University Law School. Mark A. Behrens co-chairs Shook, Hardy & Bacon L.L.P.’s Washington, D.C.-based Public Policy Group.

^{††} B.A. (2005), Vassar College; J.D. (2011), Georgetown University Law Center. Margaret Horn is an associate in Shook, Hardy and Bacon L.L.P.’s Washington, D.C. office.

Research support for this Article was provided by the Coalition for Litigation Justice, Inc.

¹ JAMES S. KAKALIK ET AL., COSTS OF ASBESTOS LITIGATION 3 (1983), available at <http://www.rand.org/pubs/reports/R3042.html>; see also Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or*

closely associated with asbestos exposure and disease included “ship-builders 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.”²

By the late 1990s, the asbestos litigation had reached such proportions that the United States Supreme Court noted “the elephantine mass”³ of cases and called the litigation a “crisis.”⁴ Mass filings pressured many primary historical defendants into bankruptcy,⁵ including virtually all manufacturers of asbestos-containing thermal insulation.⁶

As a result of these bankruptcies, “the net . . . spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing.”⁷ “[P]laintiff attorneys shifted their litigation strategy away

New Paradigm?, 23 WIDENER L.J. 97, 103 (2013) (“Miners, ship workers, construction workers, and those involved in manufacturing other asbestos-based products were at the highest risk of contracting such [asbestos-related] diseases.”); Jennifer L. Biggs et al., *Overview of Asbestos Claims Issues and Trends*, AM. ACAD. OF ACTUARIES, at 3, Aug. 2007 (“Many workers with asbestos-related injuries were employed in union trades (e.g., installers and electricians) and worked at a large number of sites with asbestos-containing products during their careers.”), available at http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf.

² Mark Behrens, *Testimony Before the Task Force on Asbestos Litigation and Bankruptcy Trusts of the American Bar Association’s Tort Trial and Insurance Practice Section*, SHB.COM 2-3 (June 6, 2013), <http://www.shb.com/newsevents/2013/AsbestosTaskForceTestimony.pdf>.

³ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

⁴ *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

⁵ See *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 83 (W.D.N.C. Bankr. 2014) (“There were some abuses involving mass screenings of potential claimants and bogus diagnoses of the disease. . . . As time passed and resources were exhausted, various defendants filed bankruptcy cases and exited the tort system.”); *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005) (“Labor unions, attorneys, and other persons with suspect motives caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms.”).

⁶ See LLOYD DIXON ET AL., ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS 25 (2010), available at http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR872.pdf; LLOYD DIXON & GEOFFREY MCGOVERN, ASBESTOS BANKRUPTCY TRUSTS AND TORT COMPENSATION (2011), available at http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG1104.sum.pdf.

⁷ Editorial, *Lawyers Torch the Economy*, WALL ST. J., Apr. 6, 2001, at A14; see also Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV.

from the traditional thermal insulation defendants and 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.”⁸ One plaintiffs’ attorney described the litigation as an “endless search for a solvent bystander.”⁹ This trend was recently described in a significant ruling from a federal bankruptcy court tasked with estimating Garlock Sealing Technologies, LLC’s liability for mesothelioma claims.¹⁰

AM. L. 525, 556 (2007) (“The surge of bankruptcies in 2000-2002 . . . triggered higher settlement demands on other established defendants, 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 66 (2005), available at http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf (“When increasing asbestos claims rates encouraged scores of defendants to file Chapter 11 petitions . . . the resulting stays in litigation . . . drove plaintiff attorneys to press peripheral non-bankruptcy defendants to shoulder a larger share of asbestos claims value and to widen their search for other corporations that might be held liable for the costs of asbestos exposure and disease.”).

⁸ Marc C. Scarcella et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010*, MEALEY’S ASBESTOS BANKR. REP., Oct. 2012, at 1, available at http://www.bateswhite.com/media/publication/11_media.617.pdf; see also Robreno, *supra* note 1, at 122 (“Those that did not manufacture or distribute asbestos, but that either manufactured or distributed component parts that contained asbestos, have become target defendants in the litigation. Defendants now include, among others, manufacturers or suppliers of brakes, turbines, and packing.”); S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 WIDENER L.J. 299, 306 (2013) (“Defendants who were once viewed as tertiary have increasingly become lead defendants in the tort system, and many of these defendants have also entered bankruptcy in recent years.”).

⁹ ‘*Medical Monitoring and Asbestos Litigation*’—*A Discussion with Richard Scruggs and Victor Schwartz*, MEALEY’S LITIG. REP.: ASBESTOS, Mar. 1, 2002, at 5; see also Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The “Endless Search for a Solvent Bystander,”* 23 WIDENER L.J. 59 (2013) (discussing a quote from Mr. Scruggs and the ways plaintiffs’ lawyers have tried to expand the asbestos litigation to impose liability on defendants for harms caused by others’ products, including the theory discussed in this Article); Brown, *supra* note 8, at 305 (“The bankruptcies of these early lead defendants triggered, and each successive wave of bankruptcies continued, an ‘endless search for a solvent bystander’ that continues today.” (footnotes omitted) (quoting ‘*Medical Monitoring and Asbestos Litigation*,’ *supra*)).

¹⁰ See *In re Garlock Sealing Techs.*, 504 B.R. at 73, 82 (“Beginning in the early 2000s, the remaining large thermal insulation defendants filed bankruptcy cases and were no longer participants in the tort system. As the focus of plaintiffs’ attention turned more to Garlock [a manufacturer and seller of asbestos gaskets and packing] as a remaining solvent defendant, evidence of plaintiffs’ exposure to other asbestos products often disappeared. Certain plaintiffs’ law firms used this control over the

In an attempt to further stretch the liability of solvent manufacturers, some plaintiffs' counsel are promoting the theory that makers of un-insulated products in "bare metal" form—such as turbines, boilers, pumps, valves, and evaporators used on ships to desalinize sea water—should have warned about potential harms from exposure to asbestos-containing external thermal insulation manufactured and sold by third-parties and attached post-sale, such as by the Navy.¹¹ Plaintiffs' lawyers are also claiming that manufacturers of products such as pumps and valves that originally came with asbestos-containing gaskets or packing should have warned about potential harms from exposure to replacement internal gaskets or packing or replacement external flange gaskets manufactured and sold by third-parties.¹² "It is easy to see what is suddenly driving this novel theory: most major manufacturers of asbestos-containing products have filed bankruptcy and the Navy enjoys sovereign immunity."¹³ "As a substitute, plaintiffs seek to impose liability on solvent manufacturers for harms caused by products they never made or sold."¹⁴

evidence to drive up the settlements demanded of Garlock. . . . Garlock's evidence . . . demonstrated that the last ten years of its participation in the tort system was infected by the manipulation of exposure evidence by plaintiffs and their lawyers."); *see also* Editorial, *Exposing Asbestos Fraud*, WALL ST. J., Aug. 19, 2013, at A14, *available at* <http://online.wsj.com/news/articles/SB1000142412788732360850457902318418111161>; Editorial, *Busting the Asbestos Racket*, WALL ST. J., Feb. 8-9, 2014, at A16, *available at* <http://online.wsj.com/news/articles/SB1000142405270230454950457932058305065251>.

¹¹ *See, e.g.*, *O'Neil v. Crane Co.*, 266 P.3d 987, 1004 (Cal. 2012); *see also* Peter Geier, *Asbestos Litigation Moves on with World War II Shipyard Cases 'Dying Off'*, *Plaintiff Attorneys Dig Deeper to Find New Strategies*, RECORDER (CAL.), Jan. 9, 2006, at 12, *available at* 2006 WLNR 25577320.

¹² *See, e.g.*, *O'Neil*, 266 P.3d at 992-93.

¹³ Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501, 542 (2009); *see also* Paul J. Riehle et al., *Product Liability for Third Party Replacement or Connected Parts: Changing Tides from the West*, 44 U.S.F. L. REV. 33, 38 (2009) ("Unable to collect against insolvent manufacturers, asbestos personal injury attorneys began searching for alternative and ancillary sources of recovery.") (citing Alan Calnan & Byron G. Stier, *Perspectives on Asbestos Litigation: Overview and Preview*, 37 SW. U. L. REV. 459, 463 (2008)).

¹⁴ 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, 24-25 (2012) (footnote omitted); *see also* Riehle et al., *supra* note 13, at 38 ("Not content with the remedies available through bankruptcy trusts and state and federal worker compensation programs, claimants' lawyers have extended the reach of products liability law to 'ever-more peripheral defendants' who

Ordinarily, manufacturers are named in asbestos cases with respect to asbestos that was contained in their *own* products—*not* to hold them liable for products *made by others*.¹⁵ This is an important point to keep clear. Whether couched in terms of strict liability or negligence, or in terms of manufacturing defect, design defect or failure to warn, it is black-letter product liability law that manufacturers are not liable for harms caused by others' products except in limited situations not presented in these cases.¹⁶ “The [defendant’s own] product must, in some sense of the word, ‘create’ the risk.”¹⁷

Plaintiffs’ third-party duty to warn theory is so extreme that almost no plaintiff raised it in an asbestos case until recently. Indeed, the lack of older case law on point—despite the fact that “[l]itigation over personal injuries due to asbestos exposure has continued for more than 40 years in the United States with hundreds of thousands of claims filed and billions of dollars in compensation paid”¹⁸—by itself, speaks volumes about the theory’s exotic nature. The theory, however, is not new. In fact, it has been tried by plaintiffs’ lawyers with many other products—and has been soundly rejected for decades.

This Article discusses the many cases outside of the asbestos context in which courts refused to impose liability on manufacturers for harms caused by products outside of their chain of distribution. The Article then discusses recent cases that have relied on this precedent, as well as fundamental tort principles and sound public policy, to reject third-party duty to warn claims in the asbestos context. The Article concludes that courts facing asbestos third-party duty to warn claims should follow the

used asbestos-containing materials on their premises or contemplated the use of asbestos-containing parts in connection with their products.” (quoting Calnan & Stier, *supra* note 13, at 463) (footnotes omitted)).

¹⁵ See *Powell v. Standard Brands Paint Co.*, 166 Cal. App. 3d 357, 362 (Cal. Ct. App. 1985) (“To our knowledge, no reported decision has held a manufacturer liable for its failure to warn of risks of using its product, where it is shown that the immediate efficient cause of injury is a product manufactured by someone else.”).

¹⁶ See James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 SW. U. L. REV. 595, 602 (2008).

¹⁷ James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 284 (1990).

¹⁸ DIXON ET AL., *supra* note 6, at xi; see also Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 SW. U. L. REV. 511, 511 (2008) (asserting asbestos litigation is “the longest running mass tort”).

clear majority view, both outside of and within the asbestos litigation context, and hold that liability may not be imposed on a manufacturer for injuries caused by adjacent products or replacement parts that were made by others and used in conjunction with the manufacturer's product.¹⁹

I. Courts Outside of the Asbestos Context Have Refused to Impose Liability for Harm-Causing Products Outside of a Manufacturer's Chain of Distribution

Courts in non-asbestos cases have refused to impose liability on manufacturers of products that are used in conjunction with harm-causing products made by others. For example, in an often-cited case, New York's highest court in *Rastelli v. Goodyear Tire & Rubber Co.*²⁰ “decline[d] to hold that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of the other manufacturer.”²¹ Plaintiff's decedent was inflating a Goodyear truck tire when a multipiece tire rim made by a different company separated explosively.²² Plaintiff claimed that “Goodyear ha[d] a duty to warn against its nondefective tire being used [in conjunction] with an allegedly defective [multipiece] tire rim manufactured by others” because Goodyear was aware that such rims could be used with its tires.²³ The court rejected plaintiff's foreseeability-based theory and said there could be no liability because “Goodyear had no control over the production of the subject multipiece rim, had no role in placing that rim in the stream

¹⁹ See *O'Neil v. Crane Co.*, 266 P.3d 987, 991 (Cal. 2012); see also *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.”).

²⁰ 591 N.E.2d 222 (N.Y. 1992).

²¹ *Rastelli*, 591 N.E.2d at 225-26.

²² *Id.* at 223.

²³ *Id.* at 225.

of commerce, and derived no benefit from its sale. Goodyear's tire did not create the alleged defect in the rim that caused the rim to explode."²⁴

Rastelli is joined by cases from the Eleventh Circuit;²⁵ the Supreme Courts of Texas²⁶ and Hawaii;²⁷ and California²⁸ and Michigan²⁹ appellate courts in holding that tire or vehicle manufacturers are not liable for defects in products that are outside of the manufacturers' chain of distribution.

In another case, *Brown v. Drake-Willock International, Ltd.*,³⁰ a Michigan appellate court held that dialysis machine manufacturers owed no duty to warn hospital employees of the risk of exposure to formaldehyde supplied by another company even though the dialysis machine manufacturers had recommended the use of formaldehyde to clean their machines.³¹ The court held: "The law does not impose upon manufacturers a duty to warn of the hazards of using products manufactured by someone else."³²

²⁴ *Id.* at 226.

²⁵ See *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 472 (11th Cir. 1993) (quoting *Sanders v. Ingram Equip., Inc.*, 531 So. 2d 879, 880 (Ala. 1988)) (finding that a tire company cannot be held liable for unreasonably dangerous tire rim made by a third-party).

²⁶ See *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 616 (Tex. 1996) (citing *Walton v. Harnischfeger*, 796 S.W.2d 225, 226 (Tex. App. 1990), *writ denied* (1991)) ("A manufacturer does not have a duty to warn or instruct about another manufacturer's products, though those products might be used in connection with the manufacturer's own products.").

²⁷ See *Acoba v. General Tire, Inc.*, 986 P.2d 288, 305 (Haw. 1999) (holding that a tire manufacturer and inner tube manufacturer did not have a duty to warn about third-party's defective rim assembly).

²⁸ See *Zambrana v. Standard Oil Co.*, 26 Cal. App. 3d 209, 217-18 (1972) (tire maker not liable for combination of parts attached to its tire which were said to be defective); *Wiler v. Firestone Tire & Rubber Co.*, 95 Cal. App. 3d 621, 629 (1979) (tire manufacturer could not be held liable for the defective valve stem made and attached to its tires by another company).

²⁹ See *Spencer v. Ford Motor Co.*, 367 N.W.2d 393, 397 (Mich. Ct. App. 1985) (truck manufacturer could not be held liable merely because its truck could accommodate a dangerous rim).

³⁰ 530 N.W.2d 510, 515 (Mich. Ct. App. 1995), *appeal denied*, 562 N.W.2d 198 (Mich. 1997).

³¹ *Brown*, 530 N.W.2d at 515.

³² *Id.*; see also *Blackwell v. Phelps Dodge Co.*, 157 Cal. App. 3d 372, 378 (1984) ("The product alleged to have been dangerous, and hence defective . . . was not the acid

The case law is full of other examples of courts refusing to impose liability on a defendant where it was foreseeable that the defendant's product would be used in conjunction with a harm-causing product from a third-party. These cases have held that an airplane manufacturer was not liable to passengers for circulatory problems caused by seats made by a third-party and installed post-sale;³³ an above-ground swimming pool manufacturer was not liable for a child's fall from an allegedly defective ladder made by another company to enter and exit the pool;³⁴ a gasoline pump manufacturer had no duty to warn of the dangers of misuse of gasoline and gasoline containers made by third-parties;³⁵ a stove manufacturer had no duty to warn that a lighted stove might ignite gas leaking from some other place;³⁶ a manufacturer of electrically powered lift motors used in conjunction with scaffolding equipment had no duty to warn of risks created by scaffolding made by others;³⁷ a manufacturer of a truck cab and chassis was not liable when a dump bed and hoist made by a third-party were added post-sale without a back-up alarm and resulted in an injury;³⁸ a crane manufacturer had no duty to warn about rigging it did not manufacture, integrate into its crane, or place in the stream of commerce;³⁹ a hydraulic valve manufacturer was not liable for a defective log splitter used in conjunction with its

supplied by defendant, but the tank car in which the acid was shipped by defendant to [plaintiff's employer] Under these circumstances, defendant incurred no liability to plaintiffs for its failure to warn them of danger from formation of pressure in the acid allegedly caused by defective design of the tank car"). *Cf. Palermo v. Port of New Orleans*, 951 So. 2d 425, 439 (La. Ct. App.) ("Whether the Dock Board knew generally that asbestos was being shipped through the port is irrelevant to this inquiry; absent a defect in its premises . . . the pertinent fact is that the Dock Board had no custody or control of the asbestos-containing cargo or of the loading, unloading or ship repair operations"), *writ denied*, 957 So. 2d 1289 (2007).

³³ *In re Deep Vein Thrombosis*, 356 F. Supp. 2d 1055, 1068, 71 (N.D. Cal. 2005).

³⁴ *Kaloz v. Risco*, 466 N.Y.S.2d 218, 221 (Sup. Ct. 1983) (denying motion to vacate judgment and for reargument and renewal).

³⁵ *Donnelly v. Kerr-McGee Refining Corp.*, No. Civ. 91-1046-W, 1992 WL 208016, at *5 (W.D. Okla. Apr. 13, 1992), *aff'd*, *Dickson v. Kerr-McGee Refining Corp.*, 993 F.2d 1551, 1993 WL 176605, at *3 (10th Cir. May 21, 1993).

³⁶ *Garman v. Magic Chef, Inc.*, 173 Cal. Rptr. 20, 22 (Ct. App. 1981).

³⁷ *Mitchell v. Sky Climber, Inc.*, 487 N.E.2d 1374, 1376 (Mass. 1986).

³⁸ *Shaw v. Gen. Motors Corp.*, 727 P.2d 387, 390 (Colo. App. 1986).

³⁹ *Walton v. Harnischfeger*, 796 S.W.2d 225, 226 (Tex. App. 1990).

product;⁴⁰ a manufacturer of a paint sprayer was not liable when a solvent sold by a third-party and used to clean the sprayer ignited and burned a user;⁴¹ a metal forming equipment manufacturer was not liable for a defective wood planking used in conjunction with its product;⁴² a manufacturer and seller of paint had no duty to warn users that dried paint should not be removed by the use of gasoline near an open flame;⁴³ a power saw stand manufacturer was not liable for an injury caused by a defective saw housing made by another and affixed to the stand;⁴⁴ a manufacturer of a garbage packer mounted on a truck chassis made by another company was not liable for a defect in the chassis;⁴⁵ a recycling machine component manufacturer was not liable for a malfunction in a different component made by another company;⁴⁶ and a water heater manufacturer had no duty to warn of dangers of misplacing a temperature control device it did not manufacture.⁴⁷

Similarly, courts in non-asbestos cases have refused to impose liability on manufacturers for harms caused by replacement parts sold by third-parties. For example, in *Baughman v. General Motors Corp.*,⁴⁸ the Fourth Circuit, applying South Carolina law, refused to hold a truck manufacturer liable for a tire mechanic's injuries when a tire mounted on a replacement wheel rim assembly exploded.⁴⁹ The plaintiff contended that even though the vehicle's manufacturer did not place the replacement wheel into the stream of commerce, the vehicle was nevertheless defective because the manufacturer failed to adequately warn of the dangers with similar wheels sold by others.⁵⁰ The Fourth Circuit rejected this

⁴⁰ *Childress v. Gresen Mfg. Co.*, 888 F.2d 45, 46, 49 (6th Cir. 1989).

⁴¹ *Dreyer v. Exel Indus., S.A.*, 326 F. App'x 353, 358 (6th Cir. 2009).

⁴² *Toth v. Econ. Forms Corp.*, 571 A.2d 420, 423 (Pa. Super. Ct. 1990), *appeal denied*, 593 A.2d 422 (Pa. 1991).

⁴³ *Johnson v. Jones-Blair Paint Co.*, 607 S.W.2d 305, 306 (Tex. App.), *writ refused* (1980).

⁴⁴ *McGoldrick v. Porter-Cable Tools*, 110 Cal. Rptr. 481, 482 (Ct. App. 1973).

⁴⁵ *Sanders v. Ingram Equip., Inc.*, 531 So. 2d 879, 880 (Ala. 1988).

⁴⁶ *Petrucci v. Bohringer & Ratzinger*, 46 F.3d 1298, 1309 (3d Cir. 1995).

⁴⁷ *Cleary v. Reliance Fuel Oil Assoc., Inc.*, 17 A.D.3d 503, 506 (N.Y. App. Div. 2005).

⁴⁸ 780 F.2d 1131, 1131 (4th Cir. 1986).

⁴⁹ *Baughman*, 780 F.2d at 1131.

⁵⁰ *Id.* at 1132-33.

argument, stating, “The duty to warn must properly fall upon the manufacturer of the replacement component part.”⁵¹ The court explained:

Where, as here, the defendant manufacturer did not incorporate the defective component part into its finished product and did not place the defective component into the stream of commerce, the rationale for imposing liability is no longer present. The manufacturer has not had an opportunity to test, evaluate, and inspect the component; it has derived no benefit from its sale; and it has not represented to the public that the component part is its own.⁵²

Similarly, in *Fleck v. KDI Sylvan Pools, Inc.*,⁵³ the Third Circuit, applying Pennsylvania law, held that it would be “unreasonable” to impose liability on a manufacturer of an above-ground swimming pool for serious injuries sustained by a diver as a result of a lack of depth markers and warnings on a replacement pool liner made by another manufacturer.⁵⁴

In *Exxon Shipping Co. v. Pacific Resources, Inc.*,⁵⁵ a manufacturer of a chafe chain used to moor a large ship was not liable for an accident stemming from a defectively designed replacement chain made by another company even though “the replacement part was identical, in terms of make and manufacture, to the original component.”⁵⁶ The court discussed the various justifications for holding manufacturers and sellers strictly liable for defects in their products and concluded that “a position in the chain of title is a critical link for the imposition of liability.”⁵⁷

⁵¹ *Id.* at 1133.

⁵² *Id.* at 1132-33; *see also* *Cousineau v. Ford Motor Co.*, 363 N.W.2d 721, 727-28 (Mich. Ct. App. 1985) (holding 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 (App. Div. 1984) (holding a motorcycle manufacturer was not liable for a defective replacement wheel made by another company).

⁵³ 981 F.2d 107 (3d Cir. 1992), *cert. denied*, 507 U.S. 1005 (1993).

⁵⁴ *Fleck*, 981 F.2d at 118.

⁵⁵ 789 F. Supp. 1521 (D. Haw. 1991) (order granting in part and denying in part defendant’s motion for partial summary judgment).

⁵⁶ *Exxon Shipping*, 789 F. Supp. at 1526.

⁵⁷ *Id.* at 1527; *see also* *Fricke v. Owens-Corning Fiberglas Corp.*, 618 So. 2d 473, 475 (La. Ct. App. 1993). The previous owner of a mustard vat tank showed it was not the manufacturer of vinegar in vat at the time of the accident, and thus did not owe any duty to a worker to warn users of dangers regarding vinegar/acetic acid. *Id.*

Courts have also long held that component part manufacturers are not liable for harms caused by products into which their components are integrated unless the component itself is defective or the component part maker substantially participated in

II. Courts in Asbestos Cases Reject Liability for Connected or Replacement Parts Made by Third-Parties

Asbestos litigation presents the most recent forum for plaintiffs' lawyers attempting to impose liability on defendants for harms caused by connected or replacement parts made by third-parties. Thus far, courts have almost uniformly drawn the line, holding that defendants are only responsible for harms caused by their own products. These courts include the Supreme Courts of California⁵⁸ and Washington;⁵⁹ appellate courts

the integration of its component into the design of the finished product and that integration caused the finished product to be defective. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 5 (1998); *see also* *Jacobini v. V. & O. Press Co.*, 588 A.2d 476, 480 (Pa. 1991) (reasoning that a component part manufacturer “cannot be expected to foresee every possible risk that might be associated with use of the completed product . . . and to warn of dangers in using that completed product”); *Sperry v. Bauermeister, Inc.*, 804 F. Supp. 1134, 1140 (E.D. Mo. 1992), *aff'd*, 4 F.3d 596 (8th Cir. 1993) (manufacturer of a component part incorporated into a spice mill system was not responsible for an injury when the milling system as a whole was defective); *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 996 F. Supp. 1110, 1116 (N.D. Ala. 1997) (“The issue is not whether GE was aware of the use to be put by [breast] implant manufacturers of its [silicone gel]—clearly it knew this— . . . such awareness by itself is irrelevant to imposition of liability.”); *Leahy v. Mid-W. Conveyor Co.*, 507 N.Y.S.2d 514, 516 (App. Div. 1986) (manufacturer of conveyors not liable for injuries caused by freestanding roller placed by third-party between the conveyors and one of the conveyor belts).

⁵⁸ *See* *O'Neil v. Crane Co.*, 266 P.3d 987, 1005 (Cal. 2012); *see also* *Paulus v. Crane Co.*, No. B246505, 2014 WL 667671, at *4 (Cal. Ct. App. Feb. 21, 2014); *Lee v. Clark Reliance Corp.*, No. B241656, 2013 WL 3677250, at *7 (Cal. Ct. App. July 15, 2013); *Brewer v. Crane Co.*, No. B213096, 2012 WL 3126523, at *8 (Cal. Ct. App. Aug. 2, 2012); *Nolen v. Foster Wheeler Energy Corp.*, No. B216202, 2012 WL 3126765, at *4 (Cal. Ct. App. Aug. 2, 2012); *Barker v. Hennessy Indus., Inc.*, 141 Cal. Rptr. 3d 616, 629 (Cal. Ct. App. 2012); *Olds v. 3M Co.*, No. CV-12-08539 R (MRWx), 2013 WL 5675509, at *1 (C.D. Cal. Oct. 16, 2013); *McNaughton v. Gen. Elec. Co.*, No. 2:11-63943-ER, 2012 WL 5395008, at *1 (E.D. Pa. Aug. 9, 2012) (applying California law); *Floyd v. Air & Liquid Sys. Corp.*, No. 2:10-CV-69379-ER, 2012 WL 975756, at *1 n.1 (E.D. Pa. Feb. 10, 2012) (applying California law in an order granting summary judgment for defendant); *Floyd v. Air & Liquid Sys. Corp.*, No. 2:10-CV-69379-ER, 2012 WL 975684, at *1 n.1 (E.D. Pa. Feb. 9, 2012) (same); *Floyd v. Air & Liquid Sys. Corp.*, No. 2:10-CV-69379-ER, 2012 WL 975681, at *1 n.1 (E.D. Pa. Feb. 9, 2012) (same); *Floyd v. Air & Liquid Sys. Corp.*, No. 2:10-CV69379-ER, 2012 WL 975359, at *1 (E.D. Pa. Feb. 8, 2012) (same). For pre-*O'Neil* decisions rejecting asbestos third-party duty to warn claims, *see* *Woodard v. Crane Co.*, No. B219366, 2011 WL 3759923, at *3 (Cal. Ct. App. Aug. 25, 2011); *Walton v. William*

in Maryland,⁶⁰ Massachusetts,⁶¹ New Jersey,⁶² New York,⁶³ and Pennsyl-

Powell Co., 108 Cal. Rptr. 3d 412, 415 (Ct. App. 2010); *Hall v. Warren Pumps, LLC*, No. B208275, 2010 WL 528489, at *8-9 (Cal. Ct. App. Feb. 16, 2010); *Merrill v. Leslie Controls, Inc.*, 101 Cal. Rptr. 3d 614, 617 (Ct. App. 2009); *Petros v. 3M Co.*, No. RG09429427, 2009 WL 6390885, at *1 (Cal. App. Dep't Super. Ct. Sept. 30, 2009); *Taylor v. Elliott Turbomachinery Co.*, 90 Cal. Rptr. 3d 414, 418 (Ct. App. 2009); *Cullen v. Indus. Holdings Corp.*, No. A097105, 2002 WL 31630885, at *7 (Cal. Ct. App. Nov. 21, 2002). For post-*O'Neil* cases permitting liability where the defendant's product was solely associated with third-party asbestos-containing products, see *Rollin v. Foster Wheeler, LLC*, No. B209935, 2012 WL 3126742, at *9 (Cal. Ct. App. Aug. 2, 2012); *Bettencourt v. Hennessy Indus., Inc.*, 141 Cal. Rptr. 3d 167, 177-78 (Cal. Ct. App. 2012); *Shields v. Hennessy Indus., Inc.*, 140 Cal. Rptr. 3d 268, 281 (Cal. Ct. App. 2012).

⁵⁹ See *Simonetta v. Viad Corp.*, 197 P.3d 127, 138 (Wash. 2008) (en banc); *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 503-04 (Wash. 2008) (en banc); see also *Wangen v. A.W. Chesterton Co.*, 163 Wash. App. 1004, No. 65258-3-I, 2011 WL 3443962, at *7 (Wash. Ct. App. Aug. 8, 2011); *Yankee v. APV N. Am., Inc.*, 262 P.3d 515, 520-21 (Wash. Ct. App. 2011); *Anderson v. Asbestos Corp.*, 151 Wash. App. 1005, No. 60271-3-I, 2009 WL 2032332, at *2 (Wash. Ct. App. July 13, 2009).

⁶⁰ See *Ford Motor Co. v. Wood*, 703 A.2d 1315, 1332 (Md. Ct. Spec. App. 1998), *abrogated on other grounds by John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002).

⁶¹ See *Whiting v. CBS Corp.*, No. 12-P-329, 2013 WL 530860, at *1 (Mass. App. Ct. Feb. 14, 2013); see also *Dombrowski v. Alfa Laval, Inc.*, No. CA08-1938, 2010 WL 4168848, at *1 (Mass. Supp. July 1, 2010) (citing *Mitchell v. Sky Climber, Inc.*, 487 N.E.2d 1374, 1376 (Mass. 1996)).

⁶² See *Hughes v. A.W. Chesterton Co.*, Nos. L-5671-08, L-10779-08, L-5016-10, L-4208-10, 2014 WL 1613394, at *4 (N.J. Super. A.D. Apr. 23, 2012).

⁶³ See *In re Eighth Judicial Dist. Asbestos Litig. (Drabczyk v. Fisher Controls)*, 938 N.Y.S.2d 715, 716 (N.Y. App. Div. 2012), *leave to appeal denied*, 969 N.E.2d 222 (N.Y. 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). See also, e.g., *Sawyer v. A.C. & S., Inc.*, No. 111152/99, 2011 WL 3764074, at *8 (N.Y. Sup. Ct. June 24, 2011); *Defazio v. Chesterton*, No. 127988/02, 2011 WL 3667717, at *4 (N.Y. Sup. Ct. Aug. 12, 2011); *In re N.Y. City Asbestos Litig. (Ronald Dummitt v. A.W. Chesterton et al.)*, No. 1090196/10, 2012 WL 3642303, at *5 (N.Y. Sup. Ct. Aug. 20, 2012). An Erie County judge who followed this approach in a replacement part case was affirmed without opinion in *In re Eighth Judicial Dist. Asbestos Litig. (Sutter v. Crane Co.)*, No. CA-13-01373, 2014 WL 1099070 (N.Y. App. Div. Mar. 21, 2014). *Berkowitz*, a single paragraph opinion devoid of legal analysis, misstates New York law as decided in *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222 (N.Y. 1992). 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 LLC*, 831 F. Supp. 2d 797, 802-03 (S.D.N.Y. 2011); see also *Kiefer v. Crane Co.*, No. 12-76-13, trans. at 14 (S.D.N.Y. Feb. 3, 2014) (telephone conference

vania;⁶⁴ state trial courts in Connecticut,⁶⁵ Delaware (applying the law of Delaware and various other states),⁶⁶ Maine,⁶⁷ Minnesota,⁶⁸ Ohio,⁶⁹ and

and decision). The manager of the federal asbestos multidistrict litigation has found the *Berkowitz* opinion, “without any explanation as to the New York court’s reasoning, unconvincing, especially in light of the authorities” that decline to impose liability on a defendant for a third-party’s asbestos products. *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 798 n.9 (E.D. Pa. 2012).

⁶⁴ *Schaffner v. Aesys Techs., LLC*, 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 (Pa. Ct. Com. Pl. Jan. 5, 2012); *Kolar v. Buffalo Pumps Inc.*, 15 Pa. D. & C. 5th 38, 45-46 (Pa. Ct. Com. Pl. Aug. 2, 2010); *Ottinger v. Am. Standard, Inc.*, No. 001674, 2007 WL 7306556, at *1 (Pa. Ct. Com. Pl. Sept. 11, 2007). *But see* *Chicano v. Gen. Elec. Co.*, No. 03-5126, 2004 WL 2250990, at *9 (E.D. Pa. Oct. 5, 2004); *In re Asbestos Prods. Liab. Litig. (No. VI)* (*Hoffeditz v. Am Gen. LLC*), No. 2:09-70103, 2011 WL 5881008, at *1 (E.D. Pa. July 29, 2011).

⁶⁵ *See* *Abate v. AAF-McQuay, Inc.*, No. CV106006228S, 2013 WL 812066, at *5 (Conn. Super. Ct. Jan. 29, 2013), *reconsideration denied*, No. CV106006228S, 2013 WL 5663462, at *3 (Sept. 24, 2013). For cases permitting liability where the defendant’s product was solely associated with third-party asbestos-containing products, *see* *Fortier v. A.O. Smith Corp.*, No. FBTCV065005849S, 2009 WL 455424, at *2 (Conn. Super. Ct. Jan. 13, 2009); *Abate v. Advanced Auto Parts, Inc.*, No. CV106005674S, 2014 WL 683843, at *1 (Conn. Super. Ct. Jan. 23, 2014).

⁶⁶ *See* *Farrall v. Ford Motor Co.*, CA No. N11C-05-257-ASB, 2013 WL 4493568, at *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*, No. 233, 2012 WL 1716788, at *1 (Del. Super. Ct. May 14, 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 Asbestos Litig. (Irene Taska)*, No. 09C-03-197 ASB, 2011 WL 379327, at *1 (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 (Del. Super. Ct. July 30, 2010); *Wilkerson v. Am. Honda Motor Co.*, No. 04C-08-268 ASB, 2008 WL 162522, at *2 (Del. Super. Ct. Jan. 17, 2008). *But see* *In re Asbestos Litig. (Dorothy Phillips)*, No. N12C-03-057 ASB, 2013 WL 4715263, at *2-3 (Del. Super. Ct. Aug. 30, 2013) (applying Virginia law); *In re Asbestos Litig. (Kenneth Carlton)*, No. N10C-08-216

Texas;⁷⁰ federal courts in Alabama,⁷¹ Delaware,⁷² Florida,⁷³ Illinois,⁷⁴ and New York;⁷⁵ and courts applying maritime law, including the Sixth Circuit Court of Appeals and the manager of the federal asbestos multidistrict litigation.⁷⁶

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); *Urian v. Ford Motor Co.*, No. 06C-09-246 ASB, 2010 WL 3005539, at *2 (Del. Super. Ct. July 30, 2010) (applying Pennsylvania law).

⁶⁷ See *Rumery v. Garlock Sealing Techs., Inc.*, No. 05-CV-599, 2009 WL 1747857, at *5 (Me. Super. Ct. Apr. 24, 2009); *Richards v. Armstrong Int'l, Inc.*, No. BCD-CV-10-19, 2013 WL 1845826, at *24-25 (Me. B.C.D. Jan. 25, 2013).

⁶⁸ See *Nelson v. 3M Co.*, No. 62-CV-08-6245, 2011 WL 3983257, at *4 (Minn. Dist. Ct. Aug. 16, 2011); see also James K. Toohey & Rebecca L. Matthews, *Liability for the Post-Sale Installation of Asbestos-Containing Replacement Parts or Insulation*, MEALEY'S ASBESTOS BANKR. REP., Dec. 1, 2010, at 40, 47 n.82, available at http://johnsonandbell.com/marketing2/JKT_RM_Asbestos.pdf (citing *McGuire v. Honeywell Int'l, Inc.*, No. 62-CV-09-10102 (Minn. Dist. Ct. Aug. 10, 2010)).

⁶⁹ See *Alexander v. A.W. Chesterton Co.*, No. 12-776463, slip op. at 4 (Ohio Ct. C.P. Cuyahoga Cnty. Mar. 7, 2014); *Roberts v. Adience, Inc.*, No. 04-523152, slip op. at 4 (Ohio Ct. C.P. Cuyahoga Cnty. Mar. 7, 2014).

⁷⁰ See *Nolen v. A.W. Chesterton Co.*, No. 153-200843-03, 2004 WL 5047438, at *1 (Tex. Dist. Ct. Aug. 11, 2004); *Nolen v. A.W. Chesterton Co.*, No. 153-200843-03, 2004 WL 5047437, at *1 (Tex. Dist. Ct. July 26, 2004).

⁷¹ See *Morgan v. Bill Vann Co.*, No. 11-0535-WS-B, 2013 WL 4657502, at *5 (S.D. Ala. Aug. 30, 2013).

⁷² See *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).

⁷³ See *Faddish v. Buffalo Pumps*, 881 F. Supp. 2d 1361, 1374 (S.D. Fla. 2012).

⁷⁴ See *Niemann v. McDonnell Douglas Corp.*, 721 F. Supp. 1019, 1030 (S.D. Ill. 1989).

⁷⁵ See *Surre v. Foster Wheeler LLC*, 831 F. Supp. 2d 797, 801 (S.D.N.Y. 2011).

⁷⁶ See *Lindstrom v. A-C Prods. Liab. Trust*, 424 F.3d 488, 497 (6th Cir. 2005); *Stark v. Armstrong World Indus.*, 21 F. App'x 371, 381 (6th Cir. 2001); *Vedros v. Northrop Grumman Shipbuilding, Inc.*, No. 11-1198, 2014 WL 1093678, at *3 (E.D. La. Mar. 14, 2014); *Crews v. Air & Liquid Sys. Corp.*, No. 7:12-CV-1678 (FJS/DEP), 2014 WL 639685, at *5 (N.D.N.Y. Feb. 18, 2014); *Cabasug v. Crane Co.*, No. 12-00313 JMS/BMK, 2013 WL 6212151, at *13 (D. Haw. Nov. 26, 2013); *In re Asbestos Litig.* (Harold & Shirley Howton), No. N11C-03218 ASB, 2012 WL 1409011, at *6 (Del. Super. Ct. Apr. 2, 2012), *appeal refused sub nom.* *Crane Co. v. Howton*, 44 A.3d 921 (Del. 2012); *In re Asbestos Litig.* (Wesley K. Davis), No. 09C-08-258 ASB, 2011 WL 2462569, at *5 (Del. Super. Ct. June 7, 2011); *Campbell v. A.W. Chesterton*, No. 2:11-66745-ER, 2012 WL 5392873, at *1 n.1 (E.D. Pa. Oct. 16, 2012); *Cardaro v.*

The Supreme Court of California's unanimous decision in *O'Neil v. Crane Co.*⁷⁷ is perhaps the most significant of these decisions. The court held "that a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products."⁷⁸ The case involved a former sailor who died from mesothelioma that he claimed was caused by exposure to asbestos in the engine and boiler rooms of a World War II-era naval ship in the late 1960s.⁷⁹ The sailor's family sued two companies that sold valves and pumps to the Navy at least twenty years before O'Neil worked on the ship.⁸⁰ "It [was] undisputed that defendants never manufactured or sold any of the asbestos-containing materials to which plaintiffs' decedent was

Aerojet Gen. Corp., No. 2:11-66763-ER, 2012 WL 3536243, at *1 n.1 (E.D. Pa. July 27, 2012); *Miller v. A.W. Chesterton Co.*, No. 2:07-67107-ER, 2012 WL 2914180, at *1 n.1 (E.D. Pa. May 14, 2012); *Serini v. A.W. Chesterton Co.*, No. 2:07-69109-ER, 2012 WL 2914188, at *1 n.1 (E.D. Pa. May 14, 2012); *Various Plaintiffs v. Various Defendants*, 856 F. Supp. 2d 703, 709 (E.D. Pa. 2012); *Lyautey v. Alfa Laval, Inc.*, No. 2:10-CV-84922-ER, 2012 WL 2877377, at *1 n.1 (E.D. Pa. Mar. 20, 2012); *Abbey v. Armstrong Int'l, Inc.*, No. 2:10-CV-83248-ER, 2012 WL 975837, at *1 n.1 (E.D. Pa. Feb. 29, 2012); *Floyd v. Air & Liquid Sys. Corp.*, No. 10-01960, 2:10-CV-69379-ER, 2012 WL 975756, at *1 n.1 (E.D. Pa. Feb. 10, 2012); *Floyd v. Air & Liquid Sys. Corp.*, No. 10-01960, 2:10-CV-69379-ER, 2012 WL 975615, at *1 n.1 (E.D. Pa. Feb. 8, 2012); *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 801 (E.D. Pa. 2012); *In re Asbestos Prods. Liab. Litig. (No. VI) (Sweeney v. Saberhagen Holdings, Inc.)*, No. 09-64399, 2011 WL 346822, at *7 (E.D. Pa. Jan. 13, 2011), *report and recommendation adopted*, 2011 WL 359696 (E.D. Pa. Feb. 3, 2011). For cases permitting liability where the defendant manufactured a product that, by necessity, contained asbestos components, where the asbestos-containing material was essential to the proper functioning of the defendant's product, and where the asbestos-containing material would necessarily be replaced by other asbestos-containing material, see *Quirin v. Lorillard Tobacco Co.*, No. 13 C 2633, 2014 WL 585090, at *8 (N.D. Ill. Feb. 14, 2014); *Salisbury v. Asbestos Corp.*, No. 2:12-60168-ER, 2014 WL 345214, at *1 n.1 (E.D. Pa. Jan. 29, 2014).

⁷⁷ 266 P.3d 987 (Cal. 2012).

⁷⁸ *O'Neil*, 266 P.3d at 991; *see also id.* at 1005 ("We reaffirm that a product manufacturer generally may not be held strictly liable for harm caused by another manufacturer's product. The only exceptions to this rule arise when the defendant bears some direct responsibility for the harm, either because the defendant's own product contributed substantially to the harm, or because the defendant participated substantially in creating a harmful combined use of the products." (citations omitted)).

⁷⁹ *Id.* at 993-94.

⁸⁰ *Id.* at 993.

exposed.”⁸¹ Instead, the decedent’s asbestos exposures came “from external insulation and [replacement] internal gaskets and packing, all of which were made by third-parties and added to the pumps and valves post sale.”⁸²

Applying general principles of product liability law, the California Supreme Court said 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.”⁸³ The court added that it has “not held that manufacturers must warn about potential hazards in replacement parts made by others when . . . the dangerous feature of these parts was not integral to the product’s design.”⁸⁴ The court reasoned that requiring manufacturers to warn about hazards with respect to “products they [did] not design, make, or sell” would be contrary to the purposes of strict products liability and sound public policy.⁸⁵

In reaching its decision in *O’Neil*, the Supreme Court of California said that “the reach of strict liability is not limitless” and does not “extend[] to harm from entirely distinct products that the consumer can be expected to use with, or in, the defendant’s nondefective product.”⁸⁶ “It is fundamental,” the court said, “that the imposition of liability requires a showing that the plaintiff’s injuries were caused by an act of the defendant or an instrumentality under the defendant’s control.”⁸⁷

⁸¹ *Id.* at 991.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 995.

⁸⁷ *Id.* at 996 (citing *Sindell v. Abbott Labs.*, 607 P.2d 924, 928 (Cal.), *cert. denied*, 449 U.S. 912 (1980)). In a footnote, the court said that “[a] stronger argument for liability might be made in the case of a product that *required* the use of a defective part in order to operate” or “if the product manufacturer specified or required the use of a defective replacement part.” *Id.* at 996 n.6. In *O’Neil*, the defendants’ products were designed to meet the Navy’s specifications, but there was no evidence the products *required* asbestos-containing gaskets or packing to function. *Id.* at 996. The court added, however, that even if the defendants required the use of a defective part or specified the use of a defective replacement part, “the policy rationales against imposing liability on a manufacturer for a defective part it did not produce or supply

“[T]he foreseeability of harm, standing alone, is not a sufficient basis for imposing strict liability on the manufacturer of a nondefective product, or one whose arguably defective product does not actually cause harm.”⁸⁸

The court said that this conclusion was “most consistent” with the policies served by the strict liability doctrine, fundamental fairness, and sound public policy.⁸⁹ “A contrary rule would require manufacturers to investigate the potential risks of all other products and replacement parts that might foreseeably be used with their own product and warn about all of these risks.”⁹⁰ The court said that “[s]uch a duty would impose an excessive and unrealistic burden on manufacturers.”⁹¹ In addition, the court was concerned that “such an expanded duty could . . . undermine consumer safety by inundating users with excessive warnings.”⁹²

The California Supreme Court in *O’Neil* also held that defendants had no duty in negligence to warn about the hazards of asbestos dust released from surrounding products that was a foreseeable consequence of maintenance work on defendants’ pumps and valves.⁹³ The court said, “[W]e have never held that a manufacturer’s duty to warn extends to hazards arising exclusively from *other* manufacturers’ products.”⁹⁴ The court found support in a line of California appellate cases that “hold[] instead that the duty to warn is limited to risks arising from the manufacturer’s own product.”⁹⁵ The court found further support in non-asbestos decisions from other jurisdictions, citing the Fourth Circuit’s decision in *Baughman v. General Motors Corp.*;⁹⁶ the Court of Appeals of New

would remain.” *Id.* at 996 n.6; *see also* *McNaughton v. Gen. Elec. Co.*, No. 2:11-63943-ER, 2012 WL 5395008, at *1 n.1 (E.D. Pa. Aug. 9, 2012) (“Plaintiff’s reliance upon footnote 6 of *O’Neil* to establish Defendant’s liability fails because . . . footnote 6 is merely dicta and does not reflect California law.”) (citing *Floyd v. Air & Liquid Sys. Corp.*, No. 2:10-CV-69379-ER, 2012 WL 975684, at *1 (E.D. Pa. Feb. 9, 2012) (“footnote 6 of *O’Neil* is dictum”).

⁸⁸ *O’Neil*, 266 P.3d at 1005.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1006.

⁹¹ *Id.* (citing *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 501-02 (Wash. 2008) (en banc)).

⁹² *Id.*

⁹³ *Id.* at 997.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 780 F.2d 1131 (4th Cir. 1986).

York's decision in *Rastelli v. Goodyear Tire & Rubber Co.*;⁹⁷ a California Court of Appeal decision in a prior asbestos case, *Taylor v. Elliott Turbomachinery Co.*,⁹⁸ that involved essentially the same facts and legal issues as *O'Neil*; and several out-of-state asbestos cases.⁹⁹ The California Supreme Court in *O'Neil* concluded that "expansion of the duty of care as urged [by plaintiffs] 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."¹⁰⁰

Prior to the *O'Neil* decision, the Washington Supreme Court was the first court of last resort to hold that a manufacturer is not liable for a harm caused by a third-party's asbestos-containing product. In *Simonetta v. Viad Corp.*,¹⁰¹ the court held that the successor corporation to the manufacturer of an evaporator used to desalinize water on a ship had no duty to warn a former naval machinist of the danger posed by externally applied asbestos insulation sold by a third-party.¹⁰² The court reviewed Washington case law interpreting failure to warn cases under the *Restatement (Second) of Torts*¹⁰³ and found that there was "little to no support . . . for extending the duty to warn to another manufacturer's product."¹⁰⁴ The court further noted that the "[c]ase law from other jurisdictions similarly limits the duty to warn in negligence cases to those in the chain of distribution of a hazardous product."¹⁰⁵ The court concluded that because the defendant "did not manufacture, sell, or supply the asbestos insulation, . . . as a matter of law it had no duty to warn."¹⁰⁶

⁹⁷ 591 N.E.2d 222 (N.Y. 1992).

⁹⁸ 90 Cal. Rptr. 3d 414 (Ct. App.), *review denied* (2009).

⁹⁹ See *O'Neil*, 266 P.3d at 1000-05 (citing *Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008); *Braaten v. Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008) (en banc); *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005); *Stark v. Armstrong World Indus., Inc.*, 21 F. App'x 371 (6th Cir. 2001); *Ford Motor Co. v. Wood*, 703 A.2d 1315 (Md. Ct. Spec. App. 1998), *abrogated on other grounds by John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002)).

¹⁰⁰ *Id.* at 1007.

¹⁰¹ 197 P.3d 127 (Wash. 2008) (en banc).

¹⁰² *Simonetta*, 197 P.3d at 129, 133-34.

¹⁰³ RESTATEMENT (SECOND) OF TORTS § 388 (1965).

¹⁰⁴ *Simonetta*, 197 P.3d at 132-33.

¹⁰⁵ *Id.* at 133.

¹⁰⁶ *Id.* at 134 (citing § 388).

Next, the court in *Simonetta* addressed the plaintiff's strict liability claim.¹⁰⁷ The court concluded that the product that caused the plaintiff's harm was "the asbestos insulation," not the defendant's evaporator.¹⁰⁸ Based on its review of Washington case law, the court concluded that "our precedent does not support extending strict liability for failure to warn to those outside the chain of distribution of a product."¹⁰⁹ The court refused to hold the evaporator manufacturer's successor liable for failure to warn because the predecessor company was not in the chain of distribution of the asbestos insulation to which plaintiff was exposed.¹¹⁰

In *Braaten v. Saberhagen Holdings*,¹¹¹ the Washington Supreme Court extended the *Simonetta* holding to reject failure to warn claims against pump and valve manufacturers for harm caused by asbestos-containing replacement packing and replacement gaskets made by third-parties.¹¹² The court began its opinion by rejecting plaintiff's liability theories with respect to externally applied third-party asbestos insulation.¹¹³ With respect to plaintiff's strict liability claim, the court said, "We held in *Simonetta* that a manufacturer is not liable for failure to warn of the danger of exposure to asbestos in insulation applied to its products if it did not manufacture the insulation and was not in the chain of distribution of the insulation."¹¹⁴ The court noted that its decision in *Simonetta* was "in accord with the majority rule nationwide: a 'manufacturer's duty to warn is restricted to warnings based on the characteristics of the manufacturer's own products.'"¹¹⁵ For similar reasons, the court also dismissed plaintiff's negligence claim.¹¹⁶ The court explained, "Because 'the duty to warn is limited to those in the chain of distribution of the hazardous product,' the defendants here had no duty to warn of the danger of exposure to asbestos in the insulation applied to their products."¹¹⁷

¹⁰⁷ *Id.* at 134-38.

¹⁰⁸ *Id.* at 134.

¹⁰⁹ *Id.* at 137.

¹¹⁰ *Id.* at 138.

¹¹¹ 198 P.3d 493 (Wash. 2008) (en banc).

¹¹² *See Braaten*, 198 P.3d at 504.

¹¹³ *Id.* at 497-501.

¹¹⁴ *Id.* at 498 (citing *Simonetta*, 197 P.3d at 136).

¹¹⁵ *Id.* (citation omitted).

¹¹⁶ *Id.* at 500-01.

¹¹⁷ *Id.* at 501 (quoting *Simonetta*, 197 P.3d at 133) (citation omitted).

The Washington Supreme Court in *Braaten* then rejected liability theories relating to the plaintiff's exposure to asbestos in replacement packing or gaskets.¹¹⁸ As the court explained in *Simonetta*, a manufacturer does not have an obligation to warn of the dangers of another manufacturer's product.¹¹⁹ Accordingly, the court in *Braaten* continued, "The defendant-manufacturers are not in the chain of distribution of asbestos-containing packing and gaskets that replaced the original packing and gaskets and thus fall within this general rule."¹²⁰ "Moreover, whether the manufacturers knew replacement parts would or might contain asbestos makes no difference because such knowledge does not matter, as we held in *Simonetta*."¹²¹

Finally, the court rejected plaintiff's negligence claim relating to the replacement packing and gaskets.¹²² "As in the case of the asbestos-containing insulation," the court said, "the general rule is that there is no duty to warn of the dangers of another manufacturer's product, the breach of which is actionable in negligence."¹²³ Because the defendant pump and valve companies were not in the chain of distribution of the replacement gaskets and packing, they "had no duty to warn of the danger of exposure to asbestos in packing and gaskets, breach of which would be actionable negligence."¹²⁴

An earlier influential opinion was issued by the Sixth Circuit Court of Appeals in *Lindstrom v. A-C Product Liability Trust*,¹²⁵ the leading admiralty case on the subject. In *Lindstrom*, the Sixth Circuit confirmed that a manufacturer is not liable for asbestos-containing components and replacement parts that it did not manufacture or distribute.¹²⁶ *Lindstrom* was a merchant seaman who worked in the engine rooms of various ships and developed mesothelioma as an alleged result of maintenance work

¹¹⁸ *Id.* at 500.

¹¹⁹ *Simonetta*, 197 P.3d at 137-38.

¹²⁰ *Braaten*, 198 P.3d at 501.

¹²¹ *Id.* (citing *Simonetta*, 197 P.3d at 136).

¹²² *Id.* at 504.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ 424 F.3d 488 (6th Cir. 2005).

¹²⁶ *Lindstrom*, 424 F.3d at 495-98 (citing *Stark v. Armstrong World Indus.*, 21 F. App'x. 371, 381 (6th Cir. 2001); *Koonce v. Quaker Safety Prods. & Mfg. Co.*, 798 F.2d 700, 715 (5th Cir. 1986), *reh'g overruled*, 814 F.2d 209 (1987)).

on pumps and valves.¹²⁷ Lindstrom claimed that he was exposed to asbestos while replacing gaskets on pumps manufactured by Coffin Turbo Pump, Inc.¹²⁸ But, as Lindstrom testified, the replacement gaskets themselves were not manufactured by Coffin Turbo.¹²⁹ The Sixth Circuit affirmed summary judgment and said that “Coffin Turbo cannot be held responsible for the asbestos contained in another product.”¹³⁰ Lindstrom also alleged exposure to asbestos packing that was attached to water pumps manufactured by Ingersoll Rand Company.¹³¹ Ingersoll Rand, however, did not manufacture the asbestos packing.¹³² The court, again, held “that Ingersoll Rand [could] not be held responsible for asbestos containing material [attached to Ingersoll Rand’s] products post-manufacture.”¹³³

In another early case, a Maryland appellate court in *Ford Motor Co. v. Wood*¹³⁴ rejected an automobile mechanic’s attempt to impose liability on Ford Motor Co. for injuries caused by replacement asbestos-containing brake pads and clutches manufactured by a third-party.¹³⁵ The plaintiff claimed “that, regardless of who manufactured the replacement parts, there was sufficient evidence from which a jury could infer that Ford had a duty to warn of the dangers involved in replacing the brakes and clutches on its vehicles.”¹³⁶ The court, however, was “unwilling to hold that a vehicle manufacturer has a duty to warn of the dangers of a product

¹²⁷ *Id.* at 491.

¹²⁸ *Id.* at 496.

¹²⁹ *Id.*

¹³⁰ *Id.* (citing *Stark*, 21 F. App’x at 381; *Koonce*, 798 F.2d at 715).

¹³¹ *Id.* at 497.

¹³² *Id.*

¹³³ *Id.*; see also *Stark*, 21 F. App’x at 381 (rejecting claim that turbine and boiler manufacturers should be held liable “because their equipment is integrated into the rest of the machinery of the vessel, much of which uses and may release asbestos,” and stating that “[t]his form of guilt by association has no support in the law of products liability”); *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 797-800 (E.D. Pa. 2012) (surveying cases and rejecting duty to warn for asbestos products made or sold by a third-party).

¹³⁴ 703 A.2d 1315 (Md. Ct. Spec. App. 1998), *abrogated on other grounds* by *John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002).

¹³⁵ See *Wood*, 703 A.2d at 1332,

¹³⁶ *Id.* at 1330.

that it did not manufacture, market, or sell, or otherwise place into the stream of commerce.”¹³⁷

In *Schaffner v. Aesys Technologies, LLC*,¹³⁸ a Pennsylvania appellate court relied upon prior Pennsylvania authority to hold “that a manufacturer cannot be held liable . . . for a product it neither manufactured nor supplied.”¹³⁹ The court noted that its holding was “consistent with the majority view nationwide that an equipment manufacturer can not [sic] be held liable for products it neither manufactured nor supplied.”¹⁴⁰

III. Imposition of Liability on a Manufacturer or Seller for an Asbestos Product Made by a Third-Party Would Represent Unsound Public Policy

“[C]ourts must be mindful of the precedential, and consequential, future effects of their rulings, and ‘limit the legal consequences of wrongs to a controllable degree.’”¹⁴¹ That policy would be significantly undermined by the theories being promoted by some plaintiffs’ lawyers to recover from solvent defendants for harms caused by third-parties’ asbestos products.

As explained by the manager of the federal asbestos multidistrict litigation, Judge Eduardo Robreno, “the policy motivating products-liability law confirms that manufacturers in the chain of distribution can be liable only for harm caused by their own products.”¹⁴² Judge Robreno added:

¹³⁷ *Id.* at 1332.

¹³⁸ Nos. 1901 EDA 2008, 1902 EDA 2008, 2010 WL 605275 (Pa. Super. Ct. Jan. 21, 2010).

¹³⁹ *Schaffner*, 2010 WL 605275, at *6 (citing *Toth v. Econ. Forms Corp.*, 571 A.2d 420, 423 (Pa. Super. Ct. 1990), *appeal denied*, 593 A.2d 422 (Pa. 1991)).

¹⁴⁰ *Id.* at *5.

¹⁴¹ *In re N.Y. City Asbestos Litig.*, 840 N.E.2d 115, 119 (N.Y. 2005) (quoting *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1060 (N.Y. 2001)).

¹⁴² *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 800 (E.D. Pa. 2012); *see also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (1965) (noting that § 402A “applies to any person engaged in the business of selling products” causing harm); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (1998) (“One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.”).

Indeed, products-liability theories rely on the principle that a party in the chain of distribution of a harm-causing product should be liable because that party is in the best position to absorb the costs of liability into the cost of production:

On whatever theory, *the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.*¹⁴³

None of these interests, however, supports the imposition of liability on manufacturers for asbestos-containing products made by third-parties.¹⁴⁴ In fact, if businesses “believe that tort outcomes have little to do with their own behavior, then there is no reason for them to shape their behavior so as to minimize tort exposure.”¹⁴⁵

The Supreme Court of California in *O’Neil* and other courts have appreciated that the doctrine of strict product was never intended to impose insurer-like absolute liability.¹⁴⁶ In contrast, plaintiffs’ theory in the “bare metal” product and third-party replacement part cases “would

¹⁴³ *Conner*, 842 F. Supp. 2d at 800 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. c) (emphasis added).

¹⁴⁴ *See, e.g., O’Neil v. Crane Co.*, 266 P.3d 987, 1005-06 (Cal. 2012) (“[A] manufacturer cannot be expected to exert pressure on other manufacturers to make their products safe and will not be able to share the costs of ensuring product safety with these other manufacturers. It 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.”) (citation omitted) (citing *Peterson v. Superior Court*, 899 P.2d 905, 913 (Cal. 1995)).

¹⁴⁵ *Riehle et al.*, *supra* note 13, at 61-62 (quoting *CARROLL ET AL.*, *supra* note 7, at 129) (internal quotation marks omitted).

¹⁴⁶ *See, e.g., O’Neil*, 266 P.3d at 1005 (“[I]t was never the intention of the drafters of the [strict liability] doctrine to make the manufacturer or distributor the insurer of the safety of their products. It was never their intention to impose *absolute* liability”) (quoting *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 529, 538 (Cal. 1991) (en banc)).

make all manufacturers the guarantors not only of their *own* products, but also of each and every product that could conceivably be used in connection with or in the vicinity of their product.”¹⁴⁷ As Cornell Law School Professor James Henderson, Jr. has explained, if a manufacturer is required to warn about someone else’s product, the manufacturer “is being required to perform a watchdog function in order to rescue product users from risks it had no active part in creating and over which it cannot exert meaningful control.”¹⁴⁸

In addition, as explained by the California Court of Appeals in *Taylor v. Elliott Turbomachinery Co.*,¹⁴⁹ imposing liability on a defendant for asbestos-containing connected or replacement parts made by third-parties would not “serve the policy of preventing future harm.”¹⁵⁰ The court said:

It is doubtful respondents had any ability to control the types of products that were used with their equipment so long after it was sold. They delivered various parts to the Navy during World War II and had no control over the materials the Navy used with their products twenty years later when [Plaintiff] was exposed to asbestos. Indeed, imposing a duty to warn on respondents now will do nothing to prevent the type of injury before us—latent asbestos-related disease resulting from exposure four decades ago. Such exposures have already taken place, and in light of the heavily regulated nature of asbestos today, it is most unlikely that holding respon-

¹⁴⁷ John W. Peterit, *The Duty Problem with Liability Claims Against One Manufacturer for Failing to Warn About Another Manufacturer’s Product*, HARRISMARTIN COLUMNS: ASBESTOS, Aug. 2005, at 4, available at http://www.klgates.com/files/tbl_s48News/PDFUpload307/11985/Peterit.pdf. A California court of appeal explained:

The social consequences of a rule imposing a duty in these circumstances would be to widen the scope of potential liability for failure to warn far beyond persons in the distribution chain of the defective product to whole new classes of defendants whose safe products happen to be used in conjunction with a defective product made or sold by others. Manufacturers, distributors, and retailers would incur potential liabilities not only for the products they make and sell, but also for every other product with which their product might be used.

Cullen v. Indus. Holdings Corp., No. A097105, 2002 WL 31630885, at *7 (Cal. Ct. App. Nov. 21, 2002).

¹⁴⁸ Henderson, *supra* note 16, at 601 (citing *S. Agency Co. v. Hampton Bank of St. Louis*, 452 S.W.2d 100, 105 (Mo. 1970)).

¹⁴⁹ 90 Cal. Rptr. 3d 414 (Ct. App. 2009).

¹⁵⁰ *Taylor*, 90 Cal. Rptr. 3d at 439.

dents liable for failing to warn of the danger posed by other manufacturers' products will do anything to prevent future asbestos-related injuries.¹⁵¹

Furthermore, in the real world of product design and usage, virtually every product is connected in some manner with many others in ways that could conceivably be anticipated if courts were willing to extend foresight far enough. “[M]anufacturers cannot be expected to determine the relative hazards of various products that they do not manufacture or sell and have not had the opportunity to inspect, test and evaluate, much less warn consumers about using such products.”¹⁵² If such a duty existed, it “would lead to more legal and business chaos—every product supplier would be required to warn of the foreseeable dangers of numerous other manufacturers’ products used at a jobsite.”¹⁵³

Hundreds of companies made products that arguably were used in the vicinity of asbestos insulation, which in earlier years was ubiquitous in industry and buildings. Many of these companies may have never manufactured a product containing asbestos (for example, manufacturers of steel pipe and pipe hangers; makers of nuts, bolts, washers, wire, and other fasteners of pipe systems; makers of any equipment attached to and using the pipe system; and paint manufacturers), but they could nonetheless be held liable under the theory being promoted by some plaintiffs’ counsel.¹⁵⁴

Presumably, the duty rule sought by plaintiffs’ counsel would not be limited to asbestos cases, but could result in the broad imposition of liability against any defendant whose product is foreseeably used in conjunction with a hazardous product made by a third-party that causes harm. “For example, a syringe manufacturer would be required to warn of the danger of any and all drugs it may be used to inject, and the

¹⁵¹ *Id.* (citations omitted) (citing *Romito v. Red Plastic Co.*, 38 Cal. App. 4th 59, 66-67 (1995); *United States v. Weintraub*, 273 F.3d 139, 149-50 (2d Cir. 2001)).

¹⁵² Petereit, *supra* note 147, at 5.

¹⁵³ *Id.*; *see also Taylor*, 90 Cal. Rptr. 3d at 422-23 (“[A] bright-line legal distinction tied to the *injury-producing product* in the stream of commerce . . . acknowledges that over-extending the level of responsibility could potentially lead to commercial as well as legal nightmares in product distribution.”).

¹⁵⁴ *See Taylor*, 90 Cal. Rptr. 3d at 439 (“Defendants whose products happen to be used in conjunction with defective products made or supplied by others could incur liability not only for their own products, but also for every other product with which their product might foreseeably be used.”).

manufacturer of bread [or jam] would be required to warn of peanut allergies, as a peanut butter and jelly sandwich is a foreseeable use of bread.”¹⁵⁵ Packaging companies might be held liable for hazards regarding contents made by others. Valve and pump manufacturers, as well as door or drywall manufacturers, could be held liable for failure to warn about the dangers of lead paint made by others and applied to their products post-sale. “Can’t you just see a smoker with lung cancer suing manufacturers of matches and lighters for failing to warn that smoking cigarettes is dangerous to their health?”¹⁵⁶ A Maryland appellate court has said that, if such a duty rule were the law,

[a] power saw maker must warn of the risks of asbestos exposure (because a power saw could foreseeably be used to cut into asbestos-containing insulation); manufacturers of paint brushes must caution against the hazards of breathing mineral spirits (because mineral spirits are commonly used to clean paint brushes); orange juice producers must warn of the dangers of alcohol intoxication (because orange juice is often mixed with vodka).¹⁵⁷

Perhaps the only limit on such an expansive legal requirement would be the imagination of creative plaintiffs’ lawyers. Indeed, if a manufacturer’s duty were defined by foreseeable uses of *other* products, the chain of warnings and liability would be so endless, unpredictable, and speculative that it would be worthless. No rational manufacturer could operate

¹⁵⁵ Thomas W. Tardy, III & Laura A. Frase, *Liability of Equipment Manufacturers for Products of Another: Is Relief in Sight?*, HARRISMARTIN COLUMNS, May 2007, at 6.

¹⁵⁶ Petereit, *supra* note 147, at 4; *see also* Cullen v. Indus. Holdings Corp., No. A097105, 2002 WL 31630885, at *7 (Cal. Ct. App. Nov. 21, 2002) (“As but one example, [the defendant] points out that makers of cigarette lighters, matches, and other products associated with cigarette smoking, would thereby become liable for smoking-related injuries.”).

¹⁵⁷ Joseph W. Hovermill et al., *Targeting of Manufacturers: Not Thy Brother’s Keeper: Whose Duty is It?*, INDUSTRYWIDE LITIG., Oct. 2005, at 52, 54 (quoting Smith v. Lead Indus. Ass’n, No. 2368, at 15 (Md. Ct. Spec. App. Sept. Term, 2002) (unreported), *vacated on other grounds*, 871 A.2d 545 (Md. 2005)), available at http://www.milesstockbridge.com/pdfuploads/110_NotThyBrothersKeeper-WhosDutyisit.pdf. Several years ago, the manager of the federal silica multidistrict litigation, Judge Janis Graham Jack, reportedly “responded with much skepticism” to a request by plaintiffs’ lawyers to name concrete saw manufacturers as defendants in that litigation, “stating that ‘to sue the saw people, it’s like suing somebody who sold them shoes to go work in the middle of silica.’” *Id.* at 54-55 (quoting Transcript of Status Conference at 72, *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2004)).

under such a system. Manufacturers cannot be expected to have research facilities to identify potential dangers with respect to all products that may be used in conjunction with or in the vicinity of their own products. Also, “[b]ecause it may often be difficult for a manufacturer to know what kind of other products will be used or combined with its own product, [manufacturers] might well face the dilemma of trying to insure against ‘unknowable risks and hazards.’”¹⁵⁸

Finally, “[c]onsumer safety . . . could be undermined by the potential for over-warning . . . and through conflicting information on different components and finished products.”¹⁵⁹ As the California Supreme Court said in *O’Neil*, “To warn of all potential dangers would warn of nothing.”¹⁶⁰

IV. Imposition of Liability for a Third-Party Product is Unnecessary and Would Worsen the Asbestos Litigation

“For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits.”¹⁶¹ So far, “roughly 100 companies have entered bankruptcy to address their asbestos liabilities,”¹⁶²

¹⁵⁸ *Taylor*, 90 Cal. Rptr. 3d at 439 (citation omitted) (quoting *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549, 559 n.14. (Cal. 1991) (en banc)).

¹⁵⁹ David C. Landin et al., *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Policy in Asbestos Litigation*, 16 J.L. & POL’Y 589, 630 (2008) (citing RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 5 cmt. a (1997); 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. . . .”)).

¹⁶⁰ *O’Neil v. Crane Co.*, 266 P.3d 987, 1006 (Cal. 2012) (quoting *Andre v. Union Tank Car Co.*, 516 A.2d 277, 286 (N.J. Super. Ct. Law Div. 1985) (internal quotation marks omitted), *affirmed*, 523 A.2d 278 (N.J. Super. Ct. App. Div. 1987)); *see also Straley v. United States*, 887 F. Supp. 728, 747 (D.N.J. 1995) (“Courts have held that it is unreasonable to impose a duty upon a manufacturer to warn of all possible dangers posed by all possible uses of a product because such ‘billboard’ warnings would deprive the user of an effective warning.”) (citing *Andre*, 516 A.2d at 285).

¹⁶¹ *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005).

¹⁶² Brown, *supra* note 8, at 301; *see also Furthering Asbestos Claim Transparency (Fact) Act of 2013*, H.R. REP. NO. 113-254, at 5 (Oct. 30, 2013) (stating that “more than

leading to devastating impacts on the debtors' employees, retirees, shareholders, and surrounding communities.¹⁶³

Imposition of liability on defendants for asbestos products made by third-parties would worsen the asbestos litigation and lead to a flood of claims against solvent manufacturers for asbestos products made by third-parties. This is especially problematic because the influx of asbestos claims shows no signs of abating. A 2012 review of asbestos-related liabilities reported to the Securities and Exchange Commission by over 150 publicly traded companies showed that “[s]ince 2007, filings have been fairly stable.”¹⁶⁴ “Typical projections based on epidemiologic studies assume that mesothelioma claims arising from occupational exposure to asbestos will continue for the next 35 to 50 years.”¹⁶⁵ Industry analysts predicted in 2013 that approximately 28,000 mesothelioma claims would be filed in 2013 and subsequent years.¹⁶⁶ Furthermore, the unpredictability that would be created by the imposition of liability for third-parties' products would make it harder for businesses to grow and create jobs. Commentators have observed with respect to asbestos litigation:

The uncertainty of how remaining claims may be resolved, how many more may ultimately be filed, what companies may be targeted, and at what cost, casts a pall over the finances of thousands and possibly tens of thousands

half” of the asbestos-related bankruptcies have occurred “since the beginning of the year 2000”) (citing Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 526-27 (2007)).

¹⁶³ See Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. BANKR. L. & PRAC. 51, 52 (2003).

¹⁶⁴ Mary Elizabeth C. Stern & Lucy P. Allen, *Asbestos Payments per Resolved Claim Increased 75% in the Past Year—Is This Increase as Dramatic as it Sounds?*, NERA ECON. CONSULTING, Aug. 2012, at 7, available at http://www.nera.com/nera-files/PUB_Asbestos_Litigation_Trends_0812.pdf; see also Jenni Biggs et al., *A Synthesis of Asbestos Disclosures from Form 10-Ks*, TOWERS WATSON, Apr. 2010, at 1, available at <http://www.towerswatson.com/DownloadMedia.aspx?media=%7BC105B9D7-92B5-42B6-B6E2-BFD3AC9F51E2%7D>.

¹⁶⁵ Biggs et al., *supra* note 164, at 4.

¹⁶⁶ See Jenni Biggs et al., *A Synthesis of Asbestos Disclosures from Form 10-Ks—Updated*, June 2013, at 1, available at <http://www.towerswatson.com/en/Insights/Newsletters/Americas/americas-insights/2013/A-Synthesis-of-Asbestos-Disclosures-From-Form-10-Ks-Updated>.

of American businesses. The cost of this unbridled litigation diverts capital from productive purposes, cutting investment and jobs. Uncertainty about how future claims may impact their finances has made it more difficult for affected companies to raise capital and attract new investment, driving stock prices down and borrowing costs up.¹⁶⁷

Finally, it is important for courts to remember that trusts have been established to pay claims involving exposures to asbestos products made by bankrupt entities, such as the former manufacturers of asbestos thermal insulation. In fact, over sixty trusts have been established to collectively form a \$36.8 billion privately-funded asbestos personal injury compensation system that operates parallel to, but wholly independent of, the civil tort system.¹⁶⁸ Trust recoveries in individual cases can be substantial.¹⁶⁹ One study has concluded that “[f]or the first time ever, trust recoveries may fully compensate asbestos victims.”¹⁷⁰

¹⁶⁷ George Scott Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. TEX. L. REV. 981, 998 (2003).

¹⁶⁸ See *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts*, U.S. GOV'T ACCOUNTABILITY OFF. at 3, Sept. 23, 2011, available at <http://www.gao.gov/assets/590/585380.pdf>; see also DIXON & MCGOVERN, *supra* note 6, at 2; Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance*, MEALEY'S ASBESTOS BANKR. REP., June 2012, at 1, available at http://www.bateswhite.com/media/publication/17_media.580.pdf.

¹⁶⁹ For example, it is estimated that mesothelioma plaintiffs in Oakland, California (Alameda County) will receive an average \$1.2 million from active and emerging asbestos bankruptcy trusts, see Charles E. Bates et al., *The Naming Game*, MEALEY'S LITIG. REP. ASBESTOS, Sept. 2009, at 1, available at <http://www.bateswhite.com/media/pnc/9/media.229.pdf>, and could receive as much as \$1.6 million. See Charles E. Bates et al., *The Claiming Game*, MEALEY'S LITIG. REP. ASBESTOS, Feb. 2010, at 27, available at <http://www.bateswhite.com/media/pnc/2/media.2.pdf>. In a recent opinion stemming from the bankruptcy of gasket and packing manufacturer Garlock Sealing Technologies, LLC, a typical mesothelioma plaintiff's total recovery was estimated to be \$1-1.5 million, “including an average of \$560,000 in tort recoveries and about \$600,000 from 22 trusts.” *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 96 (W.D.N.C. Bankr. 2014).

¹⁷⁰ Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, MEALEY'S ASBESTOS BANKR. REP., Nov. 2006, at 1, available at <http://www.bateswhite.com/media/pnc/7/media.287.pdf>; see generally William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 J. BANKR. L. & PRAC. 257 (2008).

Conclusion

Some asbestos plaintiffs' lawyers are promoting the theory that manufacturers of uninsulated products in "bare metal" form should have warned about potential harms from exposure to asbestos-containing external thermal insulation manufactured and sold by third-parties and attached post-sale, such as by the Navy. Plaintiffs' lawyers are also claiming that manufacturers of products such as pumps and valves that originally came with asbestos-containing gaskets or packing should have warned about potential harms from exposure to replacement internal gaskets, packing, or replacement external flange gaskets manufactured and sold by third-parties.

These claims have been rejected by a diverse and growing body of courts, including the Supreme Courts of California and Washington, appellate and trial courts in many states, the Sixth Circuit Court of Appeals, and several federal district courts. In fact, virtually every court to consider the issue has held that well-settled principles of tort law, fundamental fairness, and sound public policy all support the conclusion that liability may not be imposed on a defendant for asbestos-containing connected or replacement parts made by third-parties. These decisions are supported by many cases outside of the asbestos context. Courts facing asbestos third-party duty to warn claims should follow the clear majority view and hold that a manufacturer is not liable for an injury caused by asbestos-containing adjacent products or replacement parts that were made by others and used in conjunction with the manufacturer's product.¹⁷¹

¹⁷¹ See *O'Neil v. Crane Co.*, 266 P.3d 987, 991 (Cal. 2012); see also 63A AM. JUR. 2D *Products Liability* § 1027 (2010) ("The manufacturer's duty to warn is restricted to warnings based on the characteristics of the manufacturer's own products. The law generally does not require a manufacturer to study and analyze the products of others and warn users of the risks of those products. Consequently, even where the manufacturer erroneously omits warnings, the most the manufacturer could reasonably be expected to foresee is that consumers might be subject to the risks of the manufacturer's own product, since those are the only risks the manufacturer is required to know. The manufacturer is not required to warn of dangers posed by use of another manufacturer's product in the same vicinity as its product was used."); 3 AM. L. PROD. LIAB. 3d § 32:9 (Richard E. Kaye ed. 1987) (same).