

# Products Liability for Third Party Replacement or Connected Parts: Changing Tides from the West

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## Introduction

WHETHER A MANUFACTURER bears liability for hazards associated with third-party replacement or connected parts remains a fiercely debated and unsettled issue in products liability litigation. The issue often arises in asbestos personal injury cases, where plaintiffs seek to impose liability on equipment manufacturers who had little or nothing to do with the distribution of asbestos-containing replacement parts or associated equipment. Despite their limited involvement in distribution, these third-party manufacturers are seeing an increasing number of claims given the insolvency of other parties. Several jurisdictions are beginning to address the issue and draw bright-line rules in the sand. How this issue is decided will likely affect the number of filings of asbestos injury and other products liability cases, as well as the manner in which the cases are litigated.

This Article will (1) examine the development of tort law as it applies to the compensation of victims of asbestos exposure, (2) survey the current landscape regarding the novel products liability claims

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brought against manufacturers for hazards associated with replacement or associated parts, as well as discuss how courts have wrestled with this issue, and (3) draw upon recent decisions from Washington and California to advocate a bright-line rule that limits liability to those third-party manufacturers in a harmful product's chain of distribution.

## I. Historical Perspective

### A. Asbestos and Its Uses

Asbestos, a word derived from a Greek adjective meaning indestructible or inextinguishable, is a naturally occurring silicate mineral with thin fibrous crystals.<sup>1</sup> Since ancient times, humans have used asbestos in their daily lives. The ancient Greeks wove asbestos into their cloth, the early Romans included asbestos in lamp wicks, and during the Middle Ages asbestos was used to insulate suits of armor.<sup>2</sup>

The popularity of asbestos grew in the late nineteenth century due in large part to its favorable industrial qualities, abundance, and relatively inexpensive mining and processing costs. Heralded by manufacturers and builders because of its strong, durable, and fire-retardant capability, asbestos became widely used in industrial and residential settings.<sup>3</sup>

The industrial revolution and World Wars of the twentieth century further fueled the demand for asbestos; more than 3000 products—including textiles, building materials, insulation, and brake linings—utilized what became known as a wonder product. World War II catapulted the United States Navy into shipbuilding efforts of unprecedented proportions.<sup>4</sup> Asbestos was the ideal material to insulate the heat-producing components in naval vessels' due to its ability to withstand high temperatures and corrosion and its relative abundance in nature.<sup>5</sup> The Navy used thousands of metric tons of asbestos to create thermal insulation that wrapped the pipes and lined the boil-

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1. MERRIAM-WEBSTER COLLEGIATE DICTIONARY 71 (11th ed. 2003), <http://www.merriam-webster.com/dictionary/asbestos> (defining asbestos); "Asbestos," AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, <http://www.atsdr.cdc.gov/substances/toxsubstance.asp?toxid=4> (last visited Aug. 29, 2009).

2. James E. Alleman & Brooke T. Mossman, *Asbestos Revisited*, SCI. AM., July 1997, at 70–71.

3. *Id.* at 70–75.

4. The American fleet grew from 394 vessels in 1939 to 6768 in 1945, with more than four million men and women called to build and repair that vast fleet. See Bill Burke, *Shipyards, a Crucible for Tragedy*, THE VIRGINIAN-PILOT, May 6, 2001, at A1.

5. See *id.*

ers, engines, and turbines of the ships.<sup>6</sup> In addition to thermal insulation, the Navy also used asbestos as a reinforcing agent in insulating mud, asbestos millboard, gaskets, and many other specialty products.

Reports of health hazards associated with asbestos began to emerge in the United States in the early 1930s. In the 1960s and 1970s, groundbreaking scientific research led by Dr. Irving Selikoff at Mount Sinai School of Medicine revealed the associations between asbestos and illness.<sup>7</sup> Doctors began to attribute the increase in respiratory diseases to asbestos exposures, and the United States government began implementing sweeping asbestos regulations in the 1970s through the Environmental Protection Agency (“EPA”) and the Occupational Safety and Health Administration (“OSHA”).<sup>8</sup> These standards have steadily become stricter over the last thirty years.<sup>9</sup> However, despite the efforts of government and industry to limit exposures and reduce the risk of illness, the number of deaths attributed to asbestos has remained constant due to the typical twenty- to forty-year latency period between exposure to asbestos and the onset of an asbestos-related disease.<sup>10</sup> Some reports estimate that approximately 230,000 asbestos-related deaths will have occurred between 1985 and 2009.<sup>11</sup>

## B. Waves of Asbestos-Related Personal Injury Claims

Asbestos-related personal injury litigation against asbestos manufacturers and suppliers began in the late 1960s. Johns-Manville and Owens Corning were among the first defendants subjected to waves of asbestos-related personal injury claims. Formed in 1901 as a pipe cov-

6. *See id.*

7. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 12 (RAND Inst. for Civ. Just. 2005) available at [http://www.rand.org/pubs/monographs/2005/RAND\\_MG162.pdf](http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf); Alan Calnan & Byron G. Stier, *Perspectives on Asbestos Litigation: Overview and Preview*, 37 Sw. U. L. REV. 459, 460 (2008).

8. *See* CARROLL ET AL., *supra* note 7, at 12.

9. For example, in 1971, the first permissible exposure limit (“PEL”) for asbestos under OSHA rules was 12 fibers (of asbestos) per cubic centimeter (“f/cc”) within an eight-hour period. Later that year, the PEL was reduced to 5 f/cc, and by 1986, it was reduced to 0.2 f/cc. In 1986, the construction industry standard added specific provisions to cover the increasingly prevalent hazards relating to asbestos abatement and demolition jobs. Today, the PEL under both OSHA and the EPA is 0.1 f/cc for asbestos work in all industries, including construction, shipyards, and asbestos abatement. *See* Marc Alan Lappé, *Principles of Occupational Toxicology*, in OCCUPATIONAL MEDICINE SECRETS 15–20 (Rosemarie M. Bowler & James E. Cone eds., 1999).

10. *John Crane, Inc. v. Scribner*, 800 A.2d 727, 730–36, 740 n.4 (Md. Ct. App. 2002); Calnan & Stier, *supra* note 7, at 461 n.12.

11. Calnan & Stier, *supra* note 7, at 461.

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ering and insulation company, Johns-Manville became one of the largest asbestos manufacturers in the world, offering more than 200 asbestos products and applications, and eventually became the face of asbestos litigation.<sup>12</sup> Owens Corning likewise enjoyed immense success selling asbestos-containing pipe insulation and fireproofing agents.<sup>13</sup>

The first modern-day asbestos-related personal injury case was brought in 1967 by Claude Tomplait of Beaumont, Texas, against eleven manufacturers of asbestos-containing insulation products, including Johns-Manville and Owens Corning.<sup>14</sup> Tomplait alleged in his complaint that the defendants either knew, or should have known, of the health hazards associated with asbestos.<sup>15</sup> Tomplait claimed that defendants' liability was based on a failure to warn of these hazards.<sup>16</sup> The case proceeded to trial on May 12, 1969.<sup>17</sup> Of the eleven defendants, five were ultimately dropped from the suit, five settled, and the jury found in favor of the remaining defendant.

Clarence Borel, a co-worker of Tomplait, also suffered from an asbestos-related disease and brought suit against multiple asbestos manufacturers.<sup>18</sup> Borel sought to hold the defendants liable for the following acts of negligence: (1) failing to take reasonable precautions or to take reasonable care to warn Borel of the danger to which he was exposed as a worker when using the defendants' insulation products; (2) failing to inform Borel as to what would be safe and sufficient apparel, protective equipment, or methods of handling and using the insulation products; (3) failing to test the asbestos products in order to ascertain the dangers involved in their use; and (4) failing to remove the products from the market upon learning they could cause asbestos-related disease.<sup>19</sup> Borel also contended that the defendants'

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12. *Travelers Indem. Co. v. Bailey*, 129 S. Cl. 2195 (2009); *JOHNS MANVILLE, JOHNS MANVILLE 150 YEAR COMMEMORATION PUBLICATION*, <http://www.jm.com/marketing/jm150/pdf/JM150thCommemorativePublication-English.pdf> (last visited Aug. 29, 2009).

13. Owens Corning, *Financial Reorganization, Asbestos Chronology*, <http://www.owenscorning.com/finre/asbestos.html> (last visited Aug. 29, 2009).

14. D. ALAN RUDLIN, *TOXIC TORT LITIGATION* 352-53 (2007); Scott Sabatini, *Beyond the Rhetoric: The Impact of Asbestos Litigation*, *THE SOUTHEAST TEXAS RECORD*, Nov. 17, 2008, <http://www.setexasrecord.com/news/215936-beyond-the-rhetoric-the-impact-of-asbestos-litigation>.

15. RUDLIN, *supra* note 14, at 352-53; Bill Mulligan, *Mesothelioma Litigation*, *ASBESTOS NET*, Apr. 29, 2009, <http://www.asbestos.net/asbestos-legal-issues/mesothelioma-litigation.html>.

16. *Id.*

17. *Id.*

18. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1086 (5th Cir. 1973).

19. *Id.*

insulation products were unreasonably dangerous and defective because the products lacked adequate warnings of the foreseeable dangers.<sup>20</sup> Unlike Tomplait's case, the jury returned a verdict for Borel based on strict liability, and the Fifth Circuit affirmed.<sup>21</sup> In its opinion, the Court of Appeals confirmed the application of the theory of strict liability set forth in section 402A of the Restatement (Second) of Torts<sup>22</sup> and further clarified that where an unavoidably unsafe product such as asbestos-containing insulation is not capable of being safe for its ordinary and intended use, the failure to give adequate warnings renders the product unreasonably dangerous or defective.<sup>23</sup>

The Fifth Circuit's decision in *Borel* paved the way for other asbestos victims to initiate similar legal battles in other parts of the United States. As of 2002, approximately 730,000 individuals have filed asbestos suits, and many more are expected thereafter.<sup>24</sup>

### C. Bankruptcies, the Search for New Defendants, and the Expansion of Tort Law to Compensate Victims

The onslaught of asbestos personal injury claims led the principal asbestos manufacturer and supplier, Johns-Manville, to file for Chapter 11 bankruptcy in 1982.<sup>25</sup> In 1988, the insolvent company formed the Manville Trust to pay asbestos claims. However, a resulting rush of initial claims on the trust forced a reorganization. The trust now pays claims on a sliding scale, much less than jury awards and only a fraction of amounts originally awarded in the 1980s. In the wake of the Johns-Manville bankruptcy, dozens of other manufacturers have filed

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20. *Id.* at 1088.

21. *Id.* at 1081.

22. Section 402A of the Restatement (Second) of Torts states: "One who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm thereby caused to the ultimate user or consumer." Section 402A grew out of two California Supreme Court decisions. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963), held that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Id.* at 900. Similarly, *Vandermark v. Ford Motor Co.*, 391 P.2d 168 (Cal. 1964), held that retailers, like manufacturers, are engaged in the business of distributing goods to the public, and that they are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. *Id.* at 171.

23. *Borel*, 493 F.2d at 1088-89.

24. Calnan & Stier, *supra* note 7, at 462.

25. Mark D. Plevin & Paul W. Kalish, *Where Are They Now? A History of the Companies That Have Sought Bankruptcy Production Due to Asbestos Claims*, in MEALEY'S ASBESTOS BANKR. REP., Aug. 2001, at 1-2; Johns-Manville, Company History (2009), <http://www.jm.com/corporate/56.htm>.

bankruptcies and created trusts.<sup>26</sup> Today, most of the former asbestos industry manufacturers and suppliers are bankrupt, and companies that never made asbestos are being named as defendants in asbestos litigation.

Unable to collect against insolvent manufacturers, asbestos personal injury attorneys began searching for alternative and ancillary sources of recovery.<sup>27</sup> 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"<sup>28</sup> who used asbestos-containing materials on their premises or contemplated the use of asbestos-containing parts in connection with their products.<sup>29</sup> One plaintiff's attorney candidly described asbestos litigation as an "endless search for a solvent bystander."<sup>30</sup> Indeed, the litigation has ensnared as defendants at least 8400 entities across seventy-five industries.<sup>31</sup>

These new classes of defendants contributed very little to the asbestos crisis, and they have a minimal connection to the now defunct industry that mined, milled, processed, and sold asbestos products to the public. As a result, litigants and the courts continue to struggle to apply tort law theories in assigning legal and financial responsibility for injuries to asbestos victims.<sup>32</sup> Whether rooted in negligence or strict liability, plaintiffs have asserted that any foreseeable use of asbestos imposes duties upon manufacturers to warn against and/or take measures to prevent resulting harm, and that their failure to satisfy these duties renders the otherwise safe products defective. While a vast body of tort law provides some appeal for the applicability of these theories, many defenses and policy reasons negate any obligation to warn against exposure to asbestos added or caused by others during post-sale use. The varying tests and results underscore the need for a bright-line rule that will restore fairness, predictability, and appropriate deterrence to the tort system.

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26. Plevin & Kalish, *supra* note 25, at 2-3.

27. Calnan & Stier, *supra* note 7, at 463.

28. *Id.*

29. Keith N. Hylton, *Asbestos and Mass Torts with Fraudulent Victims*, 37 SW. U. L. REV. 575, 592 (2008) ("[T]he remaining defendants today involve conduct that may have been negligent at worst.").

30. "Medical Monitoring and Asbestos Litigation"—A Discussion with Richard Scruggs and Victor Schwartz, in MEALEY'S LIT. REP.: ASBESTOS, Mar. 1, 2002, at 5 (quoting Mr. Scruggs).

31. Calnan & Stier, *supra* note 7, at 462.

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

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## II. Drawing an Appropriate Standard for Liability for Replacement and Affixed Parts

As tort law evolves and the efforts to impose liability for asbestos exposure on ever more remote parties increase, courts must develop standards to better assess and impose liability on those parties who bear responsibility for causing injury. Manufacturers and distributors of an array of products face claims based on strict liability and negligence theories that seek to extend responsibility for mere use of the products and impose liability for failure to warn of harm caused by the “foreseeable use.”<sup>33</sup> But virtually any product can be deemed “defective,” and its manufacturer deemed responsible, if a “foreseeable use” causes harm. Therefore, courts have developed limitations and have refused to extend liability for harm caused by components or affixed products outside the manufacturers’ control.<sup>34</sup> These courts have relied on principles of products liability which state that only those in the marketing chain should bear the risk of harm, as they alone have the ability to spread the risk and expense among users.<sup>35</sup> However, consistent bright-line standards for liability have not emerged, and clearer rules are needed.

### A. Imposing Liability Based on Foreseeability and Failure to Warn

Many courts have held that a product can be considered harmful and can give rise to a duty to warn when used with a third-party product that creates a dangerous condition. For example, *Teagle v. Fischer & Porter Co.*<sup>36</sup> involved a strict liability suit for failure to warn of potential hazards resulting from the use of a metal and glass flowrator to measure ammonia.<sup>37</sup> The flowrator required third-party manufactured O-rings to seal the open ends of the glass tube component.<sup>38</sup> In

33. See, e.g., *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549, 553 (Cal. 1991) (holding that any product is defective in design when it fails to perform “as safely as an ordinary consumer would expect when used in an intended and reasonably foreseeable manner”). In *Anderson*, the California Supreme Court commented on prior opinions that recognized “a failure to give adequate warnings might subject a manufacturer or distributor to *strict liability* when [the manufacturer] knew or should have known of the danger and the necessity of warnings to ensure safe use.” *Id.* at 554. Although the cases cited in *Anderson* did not directly discuss the manufacturer’s knowledge as a separate element of strict liability, the court nevertheless explained that “a knowledge or knowability component clearly was included as an implicit condition of strict liability.” *Id.*

34. *DeLeon v. Commercial Mfg. & Supply Co.*, 195 Cal. Rptr. 867 (Ct. App. 1983).

35. *Id.*

36. 570 P.2d 438 (Wash. 1997).

37. *Id.* at 441.

38. *Id.*

particular, the manufacturer knew that Viton brand O-rings would harden and disintegrate when used with ammonia and thus would significantly increase the likelihood that the flowrator could explode. Despite this knowledge, defendant Fischer & Porter did not warn purchasers of the potential danger from using Viton O-rings and only recommended the use of Buna brand O-rings, which did not have the same harmful reaction when used with ammonia.<sup>39</sup> The Supreme Court of Washington found the defendant's solution inadequate and held that the defendant's lack of warning of the dangers associated with using Viton brand O-rings with ammonia rendered the flowrator itself unsafe,<sup>40</sup> and that the defendant manufacturer was not absolved of its duty to warn customers who used ammonia that Viton brand O-rings should not be used with the flowrator.<sup>41</sup> Therefore, the *Teagle* court found that the manufacturer's mere use of a third-party product in its product could give rise to a duty to warn.

The Fifth Circuit encountered a similar situation in *Stapleton v. Kawasaki Heavy Industries, Ltd.*<sup>42</sup> where the normal use of a product that incorporated a third-party product caused injury. In that case, a motorcycle was tipped over while its fuel switch was in the "on" position. Gasoline leaked out of the engine and ignited on a nearby pilot light. In *Stapleton*, the jury found no design defect with the motorcycle, but still concluded that Kawasaki breached its duty to warn about the danger of gasoline leakage when the fuel switch was in the "on" position.<sup>43</sup> The Fifth Circuit affirmed, reasoning that the defendant should have made greater efforts to warn users of the potential danger from failing to turn the fuel switch to the "off" position and that such a failure to warn was sufficient to hold the defendant liable under both negligence and strict liability theories. The court also clarified that, while the motorcycle itself was not dangerous, its design required the use of a hazardous substance—gasoline—during normal use, and that design condition required the defendant to warn about the hazards of gasoline leakage despite the fact the company did not manufacture or supply the gasoline.<sup>44</sup>

The "foreseeable use" argument draws support from *DeLeon v. Commercial Manufacturing & Supply Co.*,<sup>45</sup> which held that a manufac-

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39. *Id.*

40. *Id.* at 442.

41. *Id.*

42. 608 F.2d 571 (5th Cir. 1979).

43. *Id.* at 572.

44. *Id.* at 572-73.

45. 195 Cal. Rptr. 867 (Ct. App. 1983).



turer has a duty to warn of hazards arising from the foreseeable uses of its product even if the hazards arise from the addition of a product which, although manufactured by another, is used in the normal operation of the defendant's product.<sup>46</sup> In *DeLeon*, defendant Commercial manufactured a sorting bin for use on the plaintiff's employer's conveyer belt line in close proximity to an overhead line shaft manufactured by another.<sup>47</sup> The overhead line shaft "ha[d] nothing to do with the operation of the bin" and was not manufactured by the defendant.<sup>48</sup> Cleaning the bin, however, put the plaintiff in danger of being injured by the overhead line shaft. The trial court granted a summary judgment in favor of Commercial on the theory that the manufacturer was not responsible for choosing the location of the equipment in the fruit processing line; therefore, the lower court concluded that the equipment had no inherent defect and could not have been the cause of the plaintiff-employee's injury. The appellate court reversed and found that Commercial, as the bin manufacturer, could have foreseen this danger and therefore had a duty to warn.<sup>49</sup>

In reversing summary judgment, the California Court of Appeal found that even though there was a safe way to clean the bin, "the important factor is whether it is foreseeable that someone would climb onto the belt [for cleaning] . . . ."<sup>50</sup> The court further explained that "Commercial did not show that such an act was unforeseeable, so even if plaintiff's acts constituted misuse of the product, if her acts were foreseeable, Commercial is not absolved of blame."<sup>51</sup> The appellate court emphasized that a product must not be viewed in isolation, but must take into account the reality of the circumstances in which the product operates.<sup>52</sup> Thus, the Court of Appeal extended liability to also encompass instances of foreseeable misuse.

The Alabama Supreme Court confronted the issue of whether a manufacturer remains liable for foreseeable uses of their product in *Hannah v. Gregg, Bland & Berry, Inc.*<sup>53</sup> *Hannah* involved the widow of a worker who was crushed to death between two large industrial ma-

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46. *Id.* at 872.

47. *Id.*

48. *Id.* at 870.

49. *Id.* at 875-76.

50. *Id.* at 872.

51. *Id.*

52. *Id.* (citing *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1157 (Cal. 1972) ("The design and manufacture of products should not be carried out in an industrial vacuum but with recognition of the realities of their everyday use.")).

53. 840 So. 2d 839 (Ala. 2002).

chines, known as a “belt wrapper” and a “recoiler.”<sup>54</sup> Plaintiff brought a wrongful-death action alleging negligence against the company that reconfigured the belt wrapper and the supplier of electrical components on the plant line.<sup>55</sup> The belt wrapper was originally configured to operate in an overwind direction, but it was modified a few decades later to operate in an underwind direction.<sup>56</sup> The new specifications did not include barriers to protect persons working between the belt wrapper and the recoiler.<sup>57</sup> While inspecting the belt wrapper and the recoiler, the plaintiff’s husband became trapped and was crushed between the machines.<sup>58</sup> During the accident, machine controllers attempted to shut down the belt wrapper and recoiler, but the systems did not respond.<sup>59</sup> The supplier of the electrical components argued that it could not be held liable for alleged defects in the control panels because the panels underwent substantial modification following installation by the company that reconfigured the belt wrapper.<sup>60</sup> The trial court agreed, and granted a summary judgment motion in favor of the company.<sup>61</sup> The Alabama Supreme Court reversed the trial court’s decision, holding that a manufacturer or seller remains liable “if the alteration or modification was reasonably foreseeable to the manufacturer or seller.”<sup>62</sup>

The holding in *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzer Co.*<sup>63</sup> likewise supports claims that a manufacturer is liable for the danger of injury caused by products of another when it is foreseeable that such products will be used in connection with the sole intended purpose of the defendant’s product.<sup>64</sup> In *Tellez-Cordova*, the court held a manufacturer of grinders liable for failing to warn of injuries caused by the disintegration and release of respirable toxins from third-party discs used with the grinders.<sup>65</sup> The court rejected the grinder manufacturer’s argument that it was shielded by a bright-line rule that prevented any manufacturer from liability for “defects in a final product

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54. *Id.* at 844.

55. *Id.*

56. *Id.*

57. *Id.* at 845.

58. *Id.* at 845–46.

59. *Id.* at 846.

60. *Id.* at 854.

61. *Id.* at 846.

62. *Id.* at 855.

63. 28 Cal. Rptr. 3d 744 (Ct. App. 2004).

64. *Id.* at 748.

65. *Id.* at 747.

over which they had no control.”<sup>66</sup> Rather, the court found that defendant was not “asked to warn of defects in a final product over which they had no control, but of defects which occur when their products are used as intended . . . .”<sup>67</sup>

Similarly in *Gonzales v. Carmenita Ford Truck Sales, Inc.*,<sup>68</sup> the court reversed a defense judgment where the trial court failed to instruct the jury that the defendant truck manufacturer could be liable for failing to warn with respect to the hazards arising in brake repairs and maintenance.<sup>69</sup> The court held that “the warning requirement is not limited to unreasonably or unavoidably dangerous products. Rather, directions or warnings are in order where reasonably required to *prevent the use of a product from becoming unreasonably dangerous.*”<sup>70</sup>

Likewise, in *Davis v. Pak-Mor Manufacturing Co.*,<sup>71</sup> the court focused on the issue of foreseeability. In that case, a widow of a garbage collector filed a wrongful death action against a manufacturer of the truck cab and chassis, a manufacturer of the packing device used to convert the truck into a garbage truck, and the seller/installer of the device.<sup>72</sup> The plaintiff’s deceased husband had been operating a garbage-packing device located at the rear of his truck when the truck began to move.<sup>73</sup> As he ran to the front of the truck and attempted to enter the cab, he fell.<sup>74</sup> The truck ran over him and caused fatal injuries.<sup>75</sup> Neither party disputed that the switch wiring of the truck had been altered to permit the operation of the packing device with the truck in gear.<sup>76</sup> Plaintiff argued that the garbage truck and the packing control switch constituted an unreasonably dangerous product, and that the defendants had a duty to guard against the alteration of the switch wiring.<sup>77</sup> The defendant packing manufacturer moved for summary judgment, arguing it could not have foreseen the alteration of the switch wiring enabling the device to operate while the truck was in gear.<sup>78</sup> The truck cab and chassis manufacturer also moved for sum-

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66. *Id.* at 748.

67. *Id.*

68. 238 Cal. Rptr. 18 (Ct. App. 1987).

69. *Id.* at 20–21.

70. *Id.* at 23.

71. 672 N.E.2d 771 (Ill. App. Ct. 1996).

72. *Id.* at 773.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 775.

78. *Id.*

mary judgment on the grounds that the alleged dangerous condition involved systems incorporated onto the cab and chassis after they left the manufacturer's control.<sup>79</sup> The trial court granted summary judgment for all three defendants and plaintiff appealed.<sup>80</sup>

The Illinois Appellate Court ruled that "[w]here an unreasonably dangerous condition is caused by a modification to the product after it leaves the manufacturer's control, the manufacturer is not liable unless the modification was reasonably foreseeable."<sup>81</sup> The appellate court also placed emphasis on the notion that, if a product is capable of easily being modified by its operator, and if the operator has a known incentive to effect the modification, then it is objectively reasonable for a manufacturer to anticipate the modification.<sup>82</sup> Based on the above rationale, the court reversed and found that a material issue of fact existed as to whether the defendants could foresee that a garbage truck operator could easily rewire the packing control switch in order to pack on the run.<sup>83</sup> The appellate court noted it was unable to identify any evidence indicating the rewiring of the switch was a complex procedure or that an average garbage truck operator would not have the knowledge necessary to accomplish the modification.<sup>84</sup>

Iowa courts addressed this issue in *Leaf v. Goodyear Tire & Rubber Co.*,<sup>85</sup> where a worker injured by a tire rupture sued the tire manufacturer for personal injuries based on strict liability. The plaintiff, an employee of a tire re-treading shop, sustained injuries when he attempted to install a newly re-treaded tire.<sup>86</sup> Under normal circumstances, he would have inflated the tire in a safety cage, but he was unable to do so because the bead on the re-treaded tire would not seal on the rim.<sup>87</sup> In order to inflate the tire, the plaintiff needed to use a "bead blaster," a device that forces a rush of air between the tire and rim, causing the tire to expand and seal against the rim.<sup>88</sup> Unable to use a bead blaster while the tire was in a safety cage, the plaintiff attempted to follow the accepted industry practice of partially inflating

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79. *Id.* at 773, 775.

80. *Id.*

81. *Id.* at 775 (citing *Woods v. Graham Eng'g Corp.*, 539 N.E.2d 316, 318 (Ill. App. Ct. 1989)).

82. *Id.* (citing *Spurgeon v. Julius Blum, Inc.*, 816 F. Supp. 1317 (C.D. Ill. 1993); *Wiedemann v. Indus. Erectors Inc.*, 483 N.E.2d 990 (Ill. App. Ct. 1985)).

83. *Id.* at 776.

84. *Id.*

85. 590 N.W.2d 525 (Iowa 1999).

86. *Id.* at 528.

87. *Id.*

88. *Id.*

the tire with an air hose after the bead blaster seals the tire on the rim and then completing the inflation process after the tire is placed in the safety cage.<sup>89</sup> In the instance leading to the injury, however, the plaintiff left an air hose attached to the tire, while still outside the cage, as he looked for a valve core.<sup>90</sup> Eventually, so much air entered the tire that it ruptured before the plaintiff could put it in the cage.<sup>91</sup> At trial, the jury awarded the plaintiff damages on his strict liability claim. On appeal, the defendant argued the plaintiff failed to satisfy the requirements of section 402A of the Restatement (Second) of Torts because he did not show the manufacturer expected the tire to reach the plaintiff without substantial change in its condition, and that the tire did reach the plaintiff without such change.<sup>92</sup> Goodyear supported this claim by arguing abuse by the prior owner of the tire and by plaintiff for over inflating the tire.<sup>93</sup> The Iowa Supreme Court recognized the rule that the manufacturer is not liable where mishandlings or other alterations beyond the manufacturer's control render a product defective, but the court reinforced the principle that a manufacturer will remain liable for an altered product if it is reasonably foreseeable that the alteration would be made.<sup>94</sup> Accordingly, the Iowa Supreme Court held the misuse of a tire by running it flat or underinflated was reasonably foreseeable, and a manufacturer should not be relieved from liability by any such misuse.<sup>95</sup>

In *Small v. Pioneer Machinery, Inc.*,<sup>96</sup> the plaintiff, an experienced logger, sued a manufacturer and seller of log skidders<sup>97</sup> for an alleged design defect. While working in the forest, the plaintiff's chainsaw became stuck in a tree.<sup>98</sup> The plaintiff asked a co-worker, who was operating a log skidder, to help him free his chainsaw by pushing against the tree with the skidder until he could remove the chainsaw. At trial, the plaintiff testified that using a skidder to free a wedged chainsaw

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89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 529.

93. *Id.* at 530.

94. *Id.*

95. *Id.*

96. 494 S.E.2d 835 (S.C. Ct. App. 1997).

97. A log skidder is a type of heavy machinery used in logging operations to pull cut trees out of a forest in a process called "skidding," in which the logs are transported from the cutting site to a landing. MERRIAM-WEBSTER COLLEGIATE DICTIONARY 168 (11th ed. 2003), <http://www.merriam-webster.com/dictionary/skidding> (defining skidding).

98. *Small*, 494 S.E.2d at 838.

was common practice on every such job.<sup>99</sup> Concerned about where the tree might land, the plaintiff instructed his co-worker who was operating the skidder to push the log just far enough to remove his saw.<sup>100</sup> Plaintiff's co-worker began pushing the tree, and the plaintiff was able to free his chainsaw. However, just as the plaintiff began to signal to his co-worker to stop pushing on the tree, the skidder's motor revved up and caused the tree to fall, strike another tree, and caused a limb to fall and injure the plaintiff.<sup>101</sup>

Alleging defective design, the plaintiff theorized that the skidder's throttle stuck, causing it to surge forward out of control and topple the tree. At trial, the defendants' expert testified that, because the skidder was equipped with a governor, the only way for the engine to "rev up" would be for the operator to depress the throttle pedal.<sup>102</sup> After the jury returned a verdict for the plaintiff, the defendants appealed on the grounds that the trial court erred in denying their motions for directed verdict on the theory that the skidder had been modified and was not in the same condition as when it was delivered.<sup>103</sup> The appellate court agreed with the defendants' argument that proof that the product was in the same condition as it was when it left the hands of the defendants is essential to any products liability claim.<sup>104</sup> However, the court went on to reject the defendants' appeal and clarified that, in a products liability case, a manufacturer or seller may still be liable, notwithstanding subsequent alteration of the product, when the alteration could have been anticipated.<sup>105</sup>

The above cases demonstrate that, under certain circumstances, courts will impose liability upon manufacturers for their failure to warn against or prevent harm caused by others' products if the following conditions exist: (1) the manufacturer has knowledge of a specific risk of harm from others' products, such as specified components; (2) the manufacturer's product requires use of another dangerous product or the intended use will necessarily result in injury; or (3) the resulting harm was the result of reasonably foreseeable alterations or modifications. However, as discussed below, courts addressing similar

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99. *Id.* at 838, 844–45.

100. *Id.* at 838.

101. *Id.* at 839–41.

102. *Id.* at 841. A governor is a device used to measure and regulate the speed of a machine. MERRIAM-WEBSTER COLLEGIATE DICTIONARY 541 (11th ed. 2003), <http://www.merriam-webster.com/dictionary/governor> (defining governor).

103. *Small*, 494 S.E.2d at 838.

104. *Id.* at 844.

105. *Id.*

cases and fact patterns have reached opposite results and have limited the liability of manufacturers for harm caused by third-party manufactured products.

## B. Limitations on Liability

Some courts have recognized the need for limitations on theories that attempt to impose liability for the “foreseeable use” of a product and have refused to extend liability for harm caused by components or affixed products outside a manufacturer’s control. These courts rely on principles of products liability which hold that only those in the marketing chain should bear the risk of harm, as they alone have the ability to spread the risk and expense among users.<sup>106</sup> For example, in the seminal case of *Powell v. Standard Brands Paint Co.*,<sup>107</sup> the California Court of Appeal determined that a manufacturer’s duty to warn is limited, and it is liable only for reasonably foreseeable risks from *its own products*.<sup>108</sup> In *Powell*, a defendant and other manufacturers supplied “certain equipment and cleaning solvents” such as “buffer[s] and/or thinner[s].”<sup>109</sup> While the plaintiff “was stripping a tile floor with said buffer and thinner, an explosion occurred.”<sup>110</sup> Plaintiff brought suit against Standard Brands for failing to warn of “the dangerous nature of lacquer thinner or of its highly flammable characteristics.”<sup>111</sup> The court found that Standard Brands had no such duty to warn.<sup>112</sup>

While acknowledging plaintiff’s argument that a manufacturer owes a foreseeable user of its product a duty to warn of risks of using the product, the court ruled that the evidence in the case showed “the immediate efficient cause” of plaintiff’s injuries was the explosion of a “product manufactured” by another.<sup>113</sup> The court held:

[I]t is clear the manufacturer’s duty is restricted to warnings based on the characteristics of *the manufacturer’s own product*. [ ] Understandably, the law does not require a manufacturer to study and analyze the products of others and to warn users of risks of those products. A manufacturer’s decision to supply warnings, and the

106. *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549 (Cal. 1991).

107. 212 Cal. Rptr. 395 (Ct. App. 1985).

108. *Id.* at 398.

109. *Id.* at 395.

110. *Id.* (emphasis omitted). The facts revealed that the plaintiff had run out of Standard Brands lacquer thinner and was using a different manufacturer’s lacquer thinner to finish the floor when the explosion occurred. *Id.* at 396.

111. *Id.* at 396–97.

112. *Id.* at 399–400.

113. *Id.* at 397.

nature of any warnings, are therefore necessarily based upon and tailored to the risks of use of the manufacturer's own product. Thus, even where the manufacturer erroneously omits warnings, the most the manufacturer could reasonably foresee is that consumers might be subject to the risks of the manufacturer's own product, since those are the only risks he is required to know.<sup>114</sup>

The Court of Appeal reaffirmed this holding in *Garman v. Magic Chef, Inc.*<sup>115</sup> In *Garman*, one of the appliances in plaintiffs' motor home was a stove manufactured by Magic Chef.<sup>116</sup> Faulty tubing attached to the motor home's propane tank resulted in a propane gas leak.<sup>117</sup> The flame on the stove, when lit by plaintiff, provided a source of ignition for the leaking gas.<sup>118</sup> A deadly explosion and fire ensued. Plaintiffs sued Magic Chef alleging "the instructions provided by defendant Magic Chef for the operation of the gas range were inadequate in that they did not warn the stove user to check inside the motor home for gas leaks before lighting the pilot and making use of the stove."<sup>119</sup>

The Court of Appeal noted that, while the gas "was ignited by the stove's flame. There was no physical defect in the stove. It was working properly."<sup>120</sup> The appellate court held that "the stove manufacturer had [no] duty to warn that a lighted but properly operating stove might ignite gas leaking from some other place."<sup>121</sup> The court explained that "[i]t was not any unreasonably dangerous condition or feature of [Magic Chef's] product which caused the injury. *To say that the absence of a warning to check for gas leaks in other products makes the stove defective is semantic nonsense.*"<sup>122</sup> The court elaborated:

The use of any product can be said to involve some risk because of the circumstances surrounding even its normal use. Nonetheless, the makers of such products are not liable under any theory, for merely failing to warn of injury which may befall a person who uses that product in an unsafe place or in conjunction with another product which because of a defect or improper use is itself unsafe.<sup>123</sup>

Noting that it was the tubing that was defective, and not the stove, the court unequivocally stated that Magic Chef "was under no duty to

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114. *Id.* at 398 (citations omitted).

115. 173 Cal. Rptr. 20 (Ct. App. 1981).

116. *Id.* at 21.

117. *Id.* 21-22.

118. *Id.* at 22.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* (emphasis added).

123. *Id.* at 23.



warn of the possible defect in the product of another and is not liable for failure to do so.”<sup>124</sup>

Other jurisdictions have also refrained from expanding on the principles of a manufacturer’s duty to warn when the manufacturer is only responsible for contributing a component of the overall product. In *Wenrick v. Schloemann-Siemag, A.G.*,<sup>125</sup> the Pennsylvania Supreme Court upheld a lower court’s decision in favor of a defendant switch manufacturer, finding it did not have a duty to warn of the dangers associated with the placement of its switch which activated a hydraulic loader that crushed the plaintiff’s husband.<sup>126</sup> Plaintiff initially settled with the manufacturer of the hydraulic loader, and then sued the manufacturer of the switch—presumably to obtain additional recovery.<sup>127</sup> Ultimately, the court concluded that no duty to warn existed because the switch manufacturer did not have control over the placement of the switch and had no knowledge as to the placement of the switch.<sup>128</sup>

In *Cipollone v. Yale Industrial Products, Inc.*,<sup>129</sup> the plaintiff was injured while working on a loading dock at a FedEx facility.<sup>130</sup> Defendant Yale had manufactured and delivered to FedEx a customized dock lift that was an integral part of FedEx’s material-handling system.<sup>131</sup> The dock lift was installed at the FedEx facility by another defendant, Davco Corporation, which was responsible for integrating Yale’s lift into the overall material handling system.<sup>132</sup> The lift was installed adjacent to a catwalk, which created a hazardous “pinch point” where something (or someone) could get caught and injured.<sup>133</sup> The pinch point caught the plaintiff’s arm while he was working on the dock, severing part of his hand.<sup>134</sup> In his lawsuit, the plaintiff claimed that Yale failed to warn him of this shearing hazard potentially created by their lift.<sup>135</sup>

The First Circuit rejected the plaintiff’s theory of liability against Yale, stating:

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124. *Id.*

125. 564 A.2d 1244 (Pa. 1989).

126. *Id.* at 1248.

127. *Id.* at 1246.

128. *Id.* at 1247–48.

129. 202 F.3d 376 (1st Cir. 2000) (applying Massachusetts law).

130. *Id.* at 377.

131. *Id.* at 378.

132. *Id.*

133. *Id.* at 378 n.2.

134. *Id.* at 378.

135. *Id.* at 379.

When a component of an integrated product is not itself defective, the maker of the component is not liable for injury that results from a defect in the integrated product. "If the component is not itself defective, it would be unjust and inefficient to impose liability solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective." Therefore, the manufacturer of a component is liable only if the defect existed in the manufacturer's component itself.<sup>136</sup>

The court continued: "In this case, Yale designed to FedEx's specifications a lift, which FedEx later integrated into a larger package-handling system."<sup>137</sup> The court determined there could be no liability against Yale "[b]ecause there is no evidence that Yale's lift itself was defective when Yale delivered it to FedEx and because Yale's product is merely a component of FedEx's larger package-handling system, summary judgment for Yale was proper."<sup>138</sup>

Similarly, in *Toth v. Economy Forms Corp.*,<sup>139</sup> the plaintiff's decedent was killed when he stepped on a wooden plank supported by scaffolding, and the plank broke away, causing him to fall to his death.<sup>140</sup> The scaffolding was attached to concrete-forming equipment which Economy Forms had supplied, while another company supplied the wooden plank.<sup>141</sup> The plaintiff tried to hold Economy Forms liable for "fail[ure] to instruct as to [the scaffolding's] proper use or warn of inherent dangers associated with its use."<sup>142</sup> The court held that "Pennsylvania law [did] not permit such a result[.]"<sup>143</sup> and denied the plaintiff recovery against Economy Forms.<sup>144</sup> The court said that "[i]n order for liability to attach in a products liability action such as this, the plaintiff must show the injuries suffered were caused by a product of the particular manufacturer or supplier."<sup>145</sup> The court further found that "[t]here is no legal authority supporting [plaintiff's] attempt to hold a supplier liable in strict liability for a product it does not even supply."<sup>146</sup>

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136. *Id.* (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 (1998)) (citations omitted).

137. *Id.*

138. *Id.*

139. 571 A.2d 420 (Pa. Super. Ct. 1990).

140. *Id.* at 421.

141. *Id.*

142. *Id.* at 423

143. *Id.*

144. *Id.* at 422.

145. *Id.* (citing *Eckenrod v. GAF Corp.*, 544 A.2d 50, 52 (Pa. Super. Ct. 1988)).

146. *Id.* at 422.

In *Walton v. Harnischfeger*,<sup>147</sup> a nylon strap rigged to carry a load of tin attached to a crane designed by the defendant broke, causing the load to fall on and injure the plaintiff.<sup>148</sup> The plaintiff alleged the defendant had a duty to warn or provide instruction regarding the nylon strap, even though he acknowledged the defendant did not manufacture, distribute, sell, or otherwise place the nylon strap into the stream of commerce.<sup>149</sup> After noting that rigging is a “complex art” outside the scope of Harnischfeger’s business and expertise, the court declared that “[t]o require [Harnischfeger] to warn of all rigging dangers would be unfair and unrealistic.”<sup>150</sup> Thus, under Texas law, a manufacturer that did not manufacture, distribute, sell, or otherwise place replacement parts into the stream of commerce would not be obligated to warn of all the dangers associated with those replacement parts.

A series of tire explosion cases also addressed limitations on a manufacturer’s duty to prevent harm caused by another’s product. In *Baughman v. General Motors Corp.*,<sup>151</sup> the Fourth Circuit considered the case of a tire mechanic who was injured while changing a tire on a 1979 General Motors (“GM”) truck. The facts established that GM only placed CR-3 model wheels on its trucks.<sup>152</sup> The tire on this particular truck was mounted on a CR-2 multi-piece wheel—a model that was not marketed by GM but had an identical locking mechanism to the CR-3 wheel and was a similar type of wheel.<sup>153</sup> After removing the wheel from the truck, and then changing and re-inflating the tire, the plaintiff was remounting the wheel when it suddenly exploded.<sup>154</sup> Plaintiff sued GM claiming it owed a duty to warn that the wheel could explode.<sup>155</sup>

Applying section 402A, the Fourth Circuit rejected plaintiff’s theory that GM had a duty to warn about the dangers of a product that GM did not design, manufacture, or place into the stream of commerce, and provided the following analysis:

Baughman’s position would require a manufacturer to test all possible replacement parts made by any manufacturer to determine their safety and to warn against the use of certain replacement

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147. 796 S.W.2d 225 (1990).

148. *Id.* at 226.

149. *Id.*

150. *Id.* at 227–28.

151. 780 F.2d 1131 (4th Cir. 1986).

152. *Id.* at 1132.

153. *Id.*

154. *Id.*

155. *Id.*

parts. If the law were to impose such a duty, the burden upon a manufacturer would be excessive. While a manufacturer can be fairly charged with testing and warning of dangers associated with components it decides to incorporate into its own product, it cannot be charged with testing and warning against any of a myriad of replacement parts supplied by any number of manufacturers. The duty to warn must properly fall upon the manufacturer of the replacement component part.<sup>156</sup>

Similarly, in *Reynolds v. Bridgestone/Firestone, Inc.*,<sup>157</sup> the Eleventh Circuit confronted a scenario where the plaintiff's decedent was killed while changing and re-mounting a Goodyear brand tire and Firestone rim assembly on a heavy equipment vehicle.<sup>158</sup> The rim failed, causing an explosive separation between the tire and the rim, which killed the decedent.<sup>159</sup> Plaintiff claimed that Goodyear "negligently and wantonly placed its tire on the market and failed to warn [decedent] of the imminent dangers involved in using its tires with a multi-piece rim."<sup>160</sup> The court described as "well-settled state law" the rule that Goodyear could not be held liable "for injuries caused by a product it did not manufacture, sell, or otherwise place in the stream of commerce."<sup>161</sup> Thus, Alabama law, as interpreted by the Eleventh Circuit, rejects the theory that a manufacturer has a duty to warn about third-party manufactured or affixed parts.

In *Rastelli v. Goodyear Tire & Rubber Co.*,<sup>162</sup> another "exploding tire" case, plaintiff's decedent was killed while inflating a truck tire (manufactured by Goodyear) when the multi-piece tire rim (not manufactured by Goodyear) "separated explosively" and struck him in the head.<sup>163</sup> The issue before the court was whether Goodyear had "a duty to warn against its nondefective tire being used with an allegedly defective tire rim manufactured by others."<sup>164</sup> Plaintiff alleged that the "Goodyear tire was made for installation on a multipiece rim, that Goodyear was aware of the inherent dangers of using its tires in conjunction with such rims and, thus, that Goodyear had a duty to warn of the dangers resulting from such an intended use of its tires."<sup>165</sup> Specifically, the plaintiff alleged that Goodyear was liable "based only

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156. *Id.* at 1133.

157. 989 F.2d 465 (11th Cir. 1993) (applying Alabama law).

158. *Id.* at 467.

159. *Id.*

160. *Id.* at 468.

161. *Id.* at 472.

162. 591 N.E.2d 222 (N.Y. Ct. App. 1992).

163. *Id.* at 223.

164. *Id.*

165. *Id.* at 225.

on the fact that the particular Goodyear tire could be used with multiple-piece rims which had their own alleged inherent defects.”<sup>166</sup> Though the court acknowledged that “a manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its products of which it knew or should have known,” it “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.”<sup>167</sup> The court justified its reasoning by noting that “Goodyear had no control over the production of the subject multi-piece rim, had no role in placing that rim in the stream of commerce, and derived no benefit from its sale.”<sup>168</sup> Importantly, the court pointed out that “Plaintiff does not dispute that if Goodyear’s tire had been used with a sound rim, no accident would have occurred.”<sup>169</sup>

Injuries resulting from chemical exposures or reactions have led courts to further explore and set limitations on the liability of manufacturers for the product of another. For example, in *Brown v. Drake-Willock International Ltd.*,<sup>170</sup> plaintiff worked as a dialysis technician in a hospital where “she was required to use a formaldehyde solution to clean the dialysis machines” daily.<sup>171</sup> She claimed serious injuries as a result of exposure to formaldehyde.<sup>172</sup> Plaintiff argued the defendant manufacturer of the dialysis machine had a duty to warn her about the dangers associated with formaldehyde exposure.<sup>173</sup> The Michigan Court of Appeals declined to find a duty to warn on the part of the

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166. *Id.*

167. *Id.* at 225–26 (citing *Cover v. Cohen*, 461 N.E.2d 864, 871 (N.Y. Ct. App. 1984); *Alfieri v. Cabot Corp.*, 235 N.Y.S.2d 753, 759 (N.Y. App. Div. 1962)).

168. *Id.*

169. *Id.* at 226. *Spencer v. Ford Motor Co.*, 367 N.W.2d 393 (Mich. Ct. App. 1985) is another exploding tire case with facts virtually identical to *Baugman* and *Reynolds*. Though defendant Ford did not design or manufacture the wheel rim which ultimately failed, plaintiff argued that Ford failed to warn of the danger of these multi-piece wheel rims. *Id.* at 395. Noting that a plaintiff “must trace [the] defect into the hands of the defendant,” the court ultimately resolved the case on the issue of causation, finding a lack of causal connection between Ford’s “negligence or product defect and the plaintiff’s injury.” *Id.* at 396 (citations omitted). However, as to the element of duty, the court stated that:

Although we do not discuss whether or not Ford had a duty to warn of the danger of another manufacturer’s replacement component, but disposed of plaintiff’s claim on the lack of a causal connection, we do not imply that we accept plaintiff’s argument that Ford had such a duty to warn.

*Id.* at 396 n.2.

170. 530 N.W.2d 510 (Mich. Ct. App. 1995).

171. *Id.* at 512.

172. *Id.*

173. *Id.* at 514.

defendant even though the plaintiff alleged the defendant manufacturer recommended the use of formaldehyde to clean its dialysis machine.<sup>174</sup> The court found:

In this case, [defendants] did not supply the formaldehyde that allegedly caused plaintiff's injury. Furthermore, formaldehyde [is] not related directly to the safe operation of defendants' dialysis machines. Plaintiff did not allege that the machines themselves were dangerous or defective; rather, plaintiff alleged that her use of formaldehyde caused her injuries.

In granting the summary disposition, the trial court determined that defendant dialysis machine manufacturers owed no duty to warn because they merely supplied the dialysis machines cleaned by plaintiff. The court held that defendant manufacturers did not have a duty to provide warnings for dangerous conditions present in other products. We agree. The law does not impose upon manufacturers a duty to warn of the hazards of using products manufactured by someone else. [ ] Because plaintiff did not allege that the dialysis machines themselves were dangerous or defective, she cannot assert that defendant manufacturers had a duty to warn of the dangers of formaldehyde.<sup>175</sup>

As demonstrated above, courts have long adjudicated claims in favor of a manufacturer that produces a sound product, which is then used with another manufacturer's defective product. Such a manufacturer has no control over the production of the third-party affixed or replacement part, plays no role in placing the third-party product in the stream of commerce, and derives no benefit from its sale. Notwithstanding otherwise expansive notions of foreseeability that result in liability for virtually any use of a product, these courts have refined the contours of liability by focusing on facts beyond the control of the manufacturer and have held a manufacturer is not responsible in such circumstances. Thus, the manufacturer in these cases has no duty to warn about the hazards of third-party affixed or replacement parts used with its products.

### III. Courts in the West Draw Bright-Line Rules

Today's products liability doctrine generally provides that manufacturers, retailers, and others, including successor corporations, will be liable in tort for injuries caused by a defective product for which they were in the marketing chain and exercised some measure of control in bringing the product to the market.<sup>176</sup> Yet, due to the flexibility

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174. *Id.* at 514–15.

175. *Id.* (citations omitted).

176. *Peterson v. Superior Court*, 899 P.2d 905 (Cal. 1995); *see Ray v. Alad Corp.*, 560 P.2d 3, 8 (Cal. 1977).

of tort law, courts have also found limitations to liability when applying tests of duty and foreseeability to manufacturers for harm caused by replacement and affixed parts manufactured and distributed by others. The inconsistent results demonstrate the need for a uniform bright-line rule that restores predictability and fairness to the victims and industry—especially in the context of asbestos litigation. Courts have determined that liability should attach, if at all, to the following defendants: (1) those who derive financial benefit from the sale of the injury-causing product; (2) those whose conduct was a necessary factor in bringing the product to market; and (3) those who have control over, or a substantial opportunity to influence through purchasing power, the manufacture and distribution of the injury-producing product.<sup>177</sup> Because those outside the marketing chain have no opportunity to inspect and evaluate the safety of the product, failure to apply a bright-line test can lead to “commercial as well as legal nightmares” in product distribution.<sup>178</sup>

To clarify this area of law, courts addressing asbestos claims and facing the questions of whether a manufacturer has a duty to warn of hazards associated with third-party replacement or connected parts should look to the bright-line standards recently set by Washington<sup>179</sup> and California,<sup>180</sup> and find that those outside the marketing chain

177. *Taylor v. Elliott Turbomachinery Co.*, 90 Cal. Rptr. 3d 414, 422 (Ct. App. 2009).

178. *Id.* at 423; see *Peterson*, 899 P.2d 905.

179. See *Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008); *Braaten v. Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008).

180. See *Taylor*, 90 Cal. Rptr. 3d at 423; see also *Merrill v. Leslie Controls, Inc.*, No. B200006, 2009 WL 3051534 (Cal. Ct. App. Sept. 25, 2009) (holding defendant value manufacturer not strictly liable for failure to warn or design defect for asbestos-containing products that it did not manufacture, supply, or place in the chain of distribution). However, another Division of the Second District of the California Court of Appeal recently reached a different conclusion, finding for defendant manufacturers of pumps and valves which incorporated the use of asbestos-containing components and required replacement parts were no different from the original parts, and reversed an order nonsuit issued before *Taylor*. See *O’Neil v. Crane Co.*, No. B208225, 2009 WL 2973657 (Cal. Ct. App. Sept. 18, 2009) (“*Taylor* was wrongly decided.”). There are also two factually similar cases now pending in the Second District of the California Courts of Appeal: *Wm. Powell Co. v. Walton*, No. B208214 (Cal. Ct. App. filed Apr. 9, 2009); *Hall v. Warren Pumps LLC*, No. B208275 (Cal. Ct. App. filed Apr. 10, 2009). Both cases were decided in the trial court before the *Taylor* opinion was published. In *Powell*, the lower court rejected the defendants’ argument that California does not recognize a duty to warn with respect to products that the defendants did not make or supply. In *Hall*, the trial court ruled that a defendant could not be liable for the combined use of a defendant’s products with products made by another company, and that the plaintiff had not proved exposure to any asbestos-containing product originally supplied by defendants.

bear no liability for asbestos-containing replacement or affixed parts.<sup>181</sup>

### A. Companion Cases from Washington State

On December 11, 2008, the Washington Supreme Court issued simultaneous opinions in *Simonetta v. Viad Corp.*<sup>182</sup> and *Braaten v. Saberhagen Holdings*.<sup>183</sup> These cases flatly rejected efforts to expand the “duty to warn” theory, finding that defendants cannot be held liable for failing to warn of the hazards of another manufacturer’s product that is applied to or incorporated into the defendants’ products.<sup>184</sup>

In *Simonetta*, a former machinist’s mate filed suit against Viad Corporation for both negligence and strict liability based on exposure to asbestos during Simonetta’s work on machinery while serving aboard a United States Navy ship.<sup>185</sup> The alleged exposure to asbestos occurred when the plaintiff opened a small door on an evaporator manufactured by Viad that was used to convert seawater into fresh water.<sup>186</sup> The plaintiff had to open the door to the evaporator in order to examine it and make necessary repairs to some of its internal mechanisms.<sup>187</sup> In order to open the evaporator, plaintiff was required to remove asbestos-containing block insulation, as well as asbestos-containing mud and asbestos cloth that was added to the machine by the Navy after its installation.<sup>188</sup> Viad did not manufac-

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181. To date, no published opinion has ruled otherwise or provided a reasoned analysis for the opposite conclusion. *See, e.g.,* Feidt v. Owens Corning Fiberglas Corp., 153 F.3d 124, 127 (3d Cir. 1998) (noting that the “sole potentially viable claim” against the defendant was based on the defendant’s failure to warn persons such as the plaintiff of the dangers of contact with asbestos-laden thermal insulation used with the turbines manufactured by the defendant); Chicano v. Gen. Elec. Co., No. Civ.A. 03-5126, 2004 WL 2250990, \*10 (E.D. Pa. Oct. 5, 2004) (applying Pennsylvania’s component manufacturer liability test, the district court found a triable issue of fact as to whether the manufacturer of a turbine bore liability for exposure to asbestos-containing insulation allegedly integrated with the turbine by others into a final product); Berkowitz v. A.C. and S., Inc., 733 N.Y.S.2d 410, 412 (N.Y.A.D. 2001) (undeveloped analysis affirming denial of summary judgment because it did not necessarily appear that a pump manufacturer “had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps,” but were apparently installed pursuant to government specifications). *O’Neil* disagrees with *Taylor* and has been certified for publication, but the decision is not yet final at the time of this writing. *O’Neil*, 2009 WL 2973657, at \*1.

182. 197 P.3d 127 (Wash. 2008).

183. 198 P.3d 493 (Wash. 2008).

184. *Simonetta*, 197 P.3d at 138; *Braaten*, 198 P.3d at 504.

185. *Simonetta*, 197 P.3d at 130.

186. *Id.* at 129–30.

187. *Id.*

188. *Id.*



ture, supply, or specify the use of any of these asbestos-containing products.<sup>189</sup>

The plaintiff claimed “that Viad breached its duty to warn him of the risks from the intended use of the evaporator, which included routine and necessary maintenance.”<sup>190</sup> The plaintiff argued that the product itself did not need to inflict harm “in order for a duty to warn to arise.”<sup>191</sup> Rather, it was enough that the harm was caused by the use of product “in the manner for which it is intended and by a person for whose use it is supplied.”<sup>192</sup> The plaintiff contended that the paramount question before the court was “whether the manufacturer of a potentially dangerous product must warn of the hazards associated with the product’s use,” which in this case would include the “risks arising from the expected use of the evaporator in conjunction with asbestos insulation.”<sup>193</sup>

In response, Viad argued that no duty to warn should be imposed for dangers of asbestos since it did not manufacture, supply, or sell any of the harmful asbestos-containing insulation. The Court of Appeals held that the danger of asbestos exposure was inherent in the use of the evaporator because it was built with the knowledge that insulation was required for operation, and that it would be disturbed during the course of maintenance.<sup>194</sup> The Supreme Court of Washington disagreed. It held that under section 388 of the Restatement (Second) of Torts, the analysis of the duty to warn of the hazards of a product should be limited to those in the chain of distribution of the product—that is, manufacturers, suppliers, or sellers.<sup>195</sup> The court concluded that Viad had no duty to warn as a matter of law because it

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189. *Id.* at 132.

190. *Id.* at 131.

191. *Id.*

192. *Id.*

193. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 388 (1965)). Section 388 of the Restatement (Second) of Torts states:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier: (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

194. *Id.* at 130.

195. *Id.* at 134.

did not manufacture, sell, or supply the asbestos insulation that harmed the plaintiff.<sup>196</sup>

The plaintiff also asserted a strict liability claim based on the argument that the proper use of the evaporator necessarily involved the use of asbestos insulation, which resulted in his exposure to asbestos and, thus, the evaporator itself was unreasonably dangerous without warnings.<sup>197</sup> The Supreme Court of Washington disagreed, holding that strict liability should not attach under section 402A of the Restatement (Second) of Torts because Viad did not sell an unreasonably dangerous product.<sup>198</sup> The court noted that Viad sold the evaporator without insulation, and that it did not manufacture, sell, or select the asbestos insulation.<sup>199</sup> The court concluded that, since Viad was not in the chain of distribution of the dangerous product, Viad bore no duty to warn under negligence or strict liability theories.<sup>200</sup>

The companion case of *Braaten v. Saberhagen Holdings*<sup>201</sup> involved a lawsuit filed by a former pipe-fitter against five manufacturers of various pumps, valves, and turbines because of their alleged failure to warn about the dangers of asbestos inhalation involved with using their products.<sup>202</sup> All five manufacturers either sold products (valves, pumps, or turbines) containing asbestos gaskets and packing, or were aware that asbestos insulation was regularly used in and around their machines when they were installed.<sup>203</sup> The trial court granted summary judgment in favor of all five manufacturers, ruling they had no duty to warn about asbestos products manufactured and installed by others.<sup>204</sup> The Supreme Court of Washington applied the same rationale used in its *Simonetta* opinion and concluded that a manufacturer has no duty under common law products liability or negligence principles to warn of the dangers of exposure to asbestos in products it did not manufacture and for which the manufacturer was not in the chain of distribution.<sup>205</sup> The court found it significant that defendants did not manufacture or sell the asbestos-containing replacement packing and gaskets and were not in the chain of distribution of those prod-

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196. *Id.*

197. *Id.* at 134–35.

198. *Id.*

199. *Id.*

200. *Id.* at 138.

201. 198 P.3d 493 (Wash. 2008).

202. *Id.* at 495.

203. *Id.* at 495–98.

204. *Id.* at 496.

205. *Id.* at 503–04.

ucts.<sup>206</sup> As a result, the court held that plaintiff's claims based on the failure to warn of the danger of exposure to asbestos in insulation applied to pumps and valves and in replacement packing and gaskets installed in or connected to the pumps and valves failed as a matter of law.<sup>207</sup> With the holdings in *Braaten* and *Simonetta*, the Supreme Court of Washington astutely observed the basis for the bright-line rule and rejected component maker liability for failure to warn of asbestos-related hazards made by others on the basis of foreseeability of harm.<sup>208</sup>

## B. California's Bright-Line Standard

As discussed above, California has long recognized limitations to a manufacturer's duty to warn and generally has only extended liability to reasonably foreseeable risks arising from a manufacturer's *own products*. Recently, this approach has been further refined, in line with the holdings in *Braaten* and *Simonetta*, to hold that component part manufacturers have no duty to warn, under either a strict liability or negligence theory, for products manufactured or supplied by others. The California Court of Appeal in *Taylor v. Elliott Turbomachinery Co.*,<sup>209</sup> held that a manufacturer is not liable for replacement and affixed parts.<sup>210</sup> In *Taylor*, the five defendants that were the subject of the appeal supplied various pieces of equipment, including pumps, valves, and de-aerating feed tanks, to the United States Navy for use in the propulsion system of the *USS Hornet*, a 1943 commissioned steam-driven aircraft carrier.<sup>211</sup> When first delivered to the Navy, the equipment incorporated asbestos-containing components—gaskets, packing, and sometimes insulation—that were made by manufacturers other than the five defendants.<sup>212</sup> According to plaintiffs' naval ex-

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206. *Id.* at 504.

207. *Id.*

208. The Washington State Court of Appeals recently applied the holdings from *Braaten* and *Simonetta* in *Anderson v. Asbestos Corp.*, No. 60271-3-I, 2009 WL 2032332 (Wash. Ct. App. July 13, 2009). In *Anderson*, the plaintiff argued that the trial court incorrectly excluded evidence regarding its theory that the defendant engine manufacturer had a duty to warn about asbestos insulation used with engines it manufactured. Following the *Braaten* and *Simonetta* decisions, the Court of Appeals reversed its prior finding that Caterpillar had a duty to warn. The Court held that "there is no duty under common law products liability or negligence principles to warn of the danger of exposure to asbestos in other manufacturers' products." *Id.* at \*2 (citation omitted). The Court also recognized that "[i]t makes no difference whether the manufacturer knew its products would be used in conjunction with asbestos insulation." *Id.* (citation omitted).

209. 90 Cal. Rptr. 3d 414 (Ct. App. 2009).

210. *Id.* at 425-26.

211. *Id.* at 418.

212. *Id.* at 425.

pert, by the time Taylor served on the *USS Hornet* in the 1960s, the original asbestos-containing components of the five defendants' equipment would have been removed.<sup>213</sup> The principle issues on appeal were whether the five defendants could be liable on a failure to warn or negligence theory with respect to the replacement gaskets or the addition of insulation. Plaintiffs primarily argued that each defendant was responsible for the foreseeable uses of its products, including any foreseeable changes.<sup>214</sup>

The Court of Appeal ruled in favor of the defendants on the failure to warn issue for three related reasons. First, under California law, the duty to warn is limited to entities in the chain of distribution of the defective product, and it was not the defendants' products that caused Taylor's injuries.<sup>215</sup> Second, a manufacturer in California has no duty to warn of defects in the products of others used in conjunction with the manufacturer's product, except where the manufacturer's product itself causes or creates the risk of harm.<sup>216</sup> Third, the component parts doctrine—that a manufacturer or supplier of a non-defective component has no liability when it builds a product to a customer's specifications, so long as it is not substantially involved in the integration of the components into the final product—shielded the defendants from liability.<sup>217</sup>

As to the plaintiffs' negligence claim, the Court of Appeal ruled that the defendants owed the plaintiffs no duty of care. The plaintiffs argued that it was foreseeable that asbestos insulation, gaskets, and packing would be used with the defendants' equipment.<sup>218</sup> The appellate court, however, concluded that the harm to Taylor—twenty years after the sale of the manufacturers' products—was of questionable foreseeability.<sup>219</sup> The court then ruled that policy considerations weighed against recognizing a duty of care owed by the five defendants for the following reasons: (1) the connection between the defendants' conduct and Taylor's injury caused by other manufacturers' products twenty years later was too remote; (2) little blame could be attributed to the conduct of the manufacturer defendants who did not supply the asbestos-containing products that the plaintiff actually encountered; (3) the policy of preventing future harm would not be

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213. *Id.* at 419–20.

214. *Id.*

215. *Id.* at 425.

216. *Id.* at 425–26.

217. *Id.* at 439.

218. *Id.* at 437.

219. *Id.* at 431.

served; (4) a duty under these circumstances would impose significant burdens on the defendants; and (5) the defendants' conduct providing parts essential to powering an aircraft carrier in World War II was of high social utility.<sup>220</sup>

The Court of Appeal in *Taylor* did not address the design defect theory of products liability. However, the court's analysis with respect to the failure to warn and negligence theories should apply with equal force to a design defect claim. In essence, like the bright-line rule established in Washington, the *Taylor* opinion supports the application of the same bright-line rule in California under any products liability theory; those manufacturers outside the marketing chain of injury-producing, asbestos-containing replacement or affixed parts bear no liability as a matter of law.

#### IV. Implications and Conclusion

Harm caused by replacement and affixed parts presents vexing problems, especially in the context of asbestos litigation where the manufacturers and distributors of those products are either insolvent or not readily identifiable. Nonetheless, the absence of blameworthy solvent defendants does not justify the imposition of expanded theories of liability to those parties who could not prevent the harm. From both compensation and deterrence perspectives, the issue is not whether asbestos victims should receive compensation from some entity, but rather which entity can fairly be called upon to shoulder the financial burden.

Manufacturers of equipment derive no financial benefit from the sale of replacement or affixed parts manufactured by others, nor do they have the financial leverage to influence the design of those parts. As the replacement and affixed parts manufacturers have their own motives for the design and manufacture of their products, the equipment manufacturers are not a necessary factor in bringing the replacement or affixed products to market. Thus, in requiring companies that played no more than a relatively small or attenuated "role in exposing workers to asbestos to bear substantial costs of compensating for asbestos injuries not only raises fundamental questions of fairness but undercuts the deterrence objectives of the tort system."<sup>221</sup> Further, "[i]f business [entities] believe that tort outcomes

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220. *Id.* at 437–40.

221. CARROLL ET AL., *supra* note 7, at 129.

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.”<sup>222</sup>

The recent decisions from Washington and California correctly address these problems head on. These opinions show how to restore fairness and predictability to products liability law and the court system by curtailing the commercial and legal nightmares in product distribution engendered by an otherwise expansive and novel application of tort law. By refusing to extend a manufacturer’s liability for defective or harmful third-party manufactured replacement or affixed parts, and instead applying a bright-line rule which requires a manufacturer to be in the chain of distribution of a product that caused the harm before any liability attaches, other jurisdictions can and should follow the changing tide from the West to ensure a fairer and functional tort law system.

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222. *Id.*