THE CONTROVERSIAL CONTRADICTION BETWEEN
TRADITIONAL PRECEDENT AND RECENT FAILURE TO
WARN JURISPRUDENCE IN NEW YORK

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I. INTRODUCTION

It is axiomatic that an entity is ultimately responsible to
adequately warn about any hazards associated with the use of a
product it manufactures, sells, or distributes. However, what
liability issues arise when a relatively safe product is used in
conjunction with a hazardous product manufactured by another
company? Some attorneys maintain that a manufacturer of a sound
product has a duty to warn about hazards associated with a
separate manufacturer’s product if the manufacturer knew or
should have known that the dangerous product would be used in
conjunction with its own product. The category of hazardous
products used in conjunction with safe products includes items such
as replacement parts, products that are components of larger
systems, and, expansively, could include any other instance where a
manufacturer could foresee its product being used in conjunction
with another. Although New York law indicates that there is no
duty to warn about the hazards of another entity’s product, New
York courts are struggling with this issue and a uniform resolution
is necessary.

This article discusses liability for “failure to warn” under New
York products liability law, with a focus on whether a manufacturer

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has a duty to warn for a product in which it had no hand in introducing into the stream of commerce. We will examine how products liability law came into existence, both in the United States as a whole and in New York specifically; how liability for "failure to warn" developed as part of the doctrine; and how the narrow scope of the duty to warn in the majority of jurisdictions has been called into question in New York. Specifically, we will address the decision in *Berkowitz v. A.C. & S., Inc.*, which muddied the waters by arguably implying that a manufacturer may have a duty to warn for products it did not manufacture, sell, or distribute.¹ The *Berkowitz* decision has had an impact, particularly in asbestos litigation, which may be incongruous with its actual representation of the law of the state, and we will explore whether such an influence is warranted.²

II. PRODUCTS LIABILITY LAW GENERALLY

Many have noted New York’s role at the forefront of the creation of modern products liability law, dating back to Judge Cardozo’s 1916 decision in *MacPherson v. Buick Motor Co.*³ In *MacPherson*, a case involving a defectively manufactured automobile, Judge Cardozo noted that legal standards must adapt to a changing civilization and expanded a manufacturer’s duty from only those with whom the manufacturer was in privity of contract (in the case of Buick, the car dealerships) to include the people that would actually be using the product.⁴ Judge Cardozo’s conception of products liability in *MacPherson* had roots in the doctrine of res ipsa loquitur,⁵ and it was under that framework that courts applied

² See infra notes 42–62 and accompanying text.
⁴ MacPherson, 217 N.Y. at 390, 111 N.E. at 1053.
⁵ Of course, the doctrine of res ipsa loquitur required that (1) the instrumentality causing the injury was in the exclusive control of the defendant; (2) the circumstances of the accident are such that it would not ordinarily occur without negligence; and (3) the plaintiff did nothing that contributed to his injury. The standard applied to products in these years
the decision for nearly three decades. This basis in res ipsa loquitur is evident in much of the basic reasoning behind products liability even today. Unlike res ipsa, where the instrumentality causing the injury must be in the exclusive control of the defendant, most products change hands many times before they reach the consumer. However, the logical underpinnings are the same: those parties that had a hand in placing the product into the stream of commerce (the manufacturer, the distributor, the seller, etc.) are the parties in the best position to prevent a defect that could potentially lead to injury.

The MacPherson decision gained wide acceptance throughout American jurisdictions, and remained at the forefront of products liability jurisprudence until 1944 when developments in the law shifted to the west coast of the United States. In 1944, writing for the high court of California in a concurring opinion for Escola v. Coca Cola Bottling Co., Justice Traynor first advocated “absolute liability” for the manufacturers of defective products, arguing that manufacturers were better able to spread losses amongst their customers, and that strict liability would encourage safety research and development. Later, after Justice Traynor had become Chief Justice, California became the first state to adopt strict liability in tort for defective products in Greenman v. Yuba Power Products, Inc.

Traynor, ... writing for a unanimous court, held that


6 See, e.g., Harriman v. N.Y., Chi. & St. Louis R.R. Co., 53 N.Y. 396, 403, 171 N.E. 686, 687 (1930) (imposing a legal duty on manufacturers when its products are used by someone other than the vendee); Chyske v. Drake Bros. Co., 235 N.Y. 468, 473, 139 N.E. 576, 578 (1923) (holding manufacturers liable to a third party even when no contractual privity exists).


9 An example of this influence is demonstrated by the fact that, in practice, many courts equate section three of the Restatement (Third) of Torts with res ipsa loquitur because of the obvious conceptual linkages between the doctrines. See, e.g., Myrlak, 723 A.2d at 56–57 (noting that “the historical antecedent to Section 3 of the Restatement is traceable to the negligence doctrine of res ipsa loquitur,” and that “Section 3 of the Restatement in a products liability case does precisely what res ipsa loquitur does in a negligence context” (emphasis omitted).

10 Leebron, supra note 3, at 397.

11 Id.; see also Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944).

12 Leebron, supra note 3, at 397; see also Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1963).
because such liability was rooted in tort, it was not subject to technical defenses, such as a requirement of notice, that might be available in a contract or warranty action. Two years after the Greenman decision, the American Law Institute adopted the theory of strict products liability in Section 402A of the Restatement (Second) of Torts. Today, the basic principles of Section 402A are accepted in nearly every American jurisdiction.¹³

As the products liability doctrine continued to develop, courts struggled with the definition of defect, eventually “enunciating three basic categories of defectiveness: manufacturing defects, design defects, and defectiveness because of a failure to warn.”¹⁴

Comparatively, manufacturing defects have posed... few problems of conception or application. Such defects were foremost in the minds of the formulators of the Restatement and were usually involved in the early cases. What generally distinguishes manufacturing defects from other types of product defects is that the product is not as the manufacturer intended it to be.¹⁵

Strict liability for design defects has “proved to be [much more] controversial.”¹⁶ “[I]n the context of design defects, both commentators and courts have found it difficult to distinguish strict liability from negligence.”¹⁷ Where a difference is recognized, “the most important distinction is timing.”¹⁸

[N]egligence liability must always be based on what the defendant producer knew or should have known at the time the product entered the stream of commerce[.] In contrast], under strict liability, information that only later became available is in many jurisdictions relevant to determining whether the product is defective. ... [I]n some jurisdictions liability may be imposed even though there is no safer alternative design. ...
In terms of strict products liability, the more important category includes claims that the product could have been made safe, or at least safer, had adequate instructions been provided.

The importance of the duty to warn in product liability litigation should not be underestimated. A duty to warn of dangers posed by the product exists even though there is absolutely nothing wrong with the product. In other words, the failure to warn of inherent risks itself constitutes a defect. Thus, a duty to warn case comes much closer to imposing absolute liability than either of the other two liability theories.  

Whereas manufacturers and distributors are strictly liable for harm caused by manufacturing defects, warning and design claims also sound in negligence. Some courts resist the notion that the negligence doctrine plays a role in warning and design claims, taking quite seriously the notion that all three bases of products liability are “strict.” It should not be surprising, however, that negligence is at the root of warning and design claims. Pure strict liability is equivalent to liability without fault. Any claim of an intended warning, or a failure to warn, is inadequate and must practically imply that the manufacturer has breached a duty.

III. THE DUTY TO WARN UNDER NEW YORK PRODUCTS LIABILITY LAW

It is well-settled that a plaintiff may recover in strict products liability or negligence when a manufacturer fails to provide adequate warnings regarding the use of its own product. However, the New York Court of Appeals has historically declined “to hold that one manufacturer has a duty to warn about another manufacturer’s product when the first manufacturer produces a

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19 Id. at 403, 415.
20 RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. a (1988) (“In general, the rationale for imposing strict liability on manufacturers for harm caused by manufacturing defects does not apply in the context of imposing liability for defective design and defects based on inadequate instruction or warning.” Thus, the provisions for design and warning-based liability “speak of products being defective only when risks are reasonably foreseeable.”).
sound product which is compatible for use with a defective product of the other manufacturer."\textsuperscript{23} This position is echoed in decisions in many other jurisdictions.\textsuperscript{24}

The Restatement (Third) of Torts on products liability states that it will apply to "[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product."\textsuperscript{25} The drafters reiterated this point in comment (c): "The rule stated in this Section applies only to manufacturers and other commercial sellers and distributors who are engaged in the business of selling or otherwise distributing the type of product that harmed the plaintiff."\textsuperscript{26}

Courts have consistently and emphatically held that a manufacturer does not have a duty to warn about another manufacturer's products, even though a third party might use both products in connection with each other. In reaching their determinations, courts throughout the United States have adhered to the fundamental principle that manufacturers do not have a duty to warn about another manufacturer's product.\textsuperscript{27}

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\textsuperscript{24} See Blackwell v. Phelps Dodge Corp., 203 Cal. Rptr. 3d 706, 710 (Ct. App. 1984) (affirming summary judgment for defendant sulfuric acid supplier who did not have a duty to warn of dangers caused by the defective design of a tank car manufactured by another, even though combined use was foreseeable); Wenrick v. Schloemann-Siemag Aktiengesellschaft, 564 A.2d 1244, 1246–47 (Pa. 1989) (rejecting the assertion that knowledge of a potential danger of a defective product created by another gives rise to a duty to abate the danger by the designer of the non-defective product used in conjunction with the defective product).

\textsuperscript{25} RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (1998) (emphasis added).

\textsuperscript{26} Id., § 1 cmt. c (emphasis added).

\textsuperscript{27} See Fricker v. Owens-Corning Fiberglas Corp., 618 So.2d 473, 475 (La. Ct. App. 1993) (declining to hold manufacturer responsible for alleged inadequate warning concerning product it neither manufactured nor sold, and stating, "[w]e cannot abandon the general rule of products liability requiring identification of the product with the manufacturer. [The defendant] should not be required to warn about the use of a product it did not produce or sell"); Mitchell v. Sky Climber, Inc., 487 N.E.2d 1374, 1376 (Mass. 1986) (finding that a manufacturer of a scaffolding lift motor had no duty to warn about improper rigging on the scaffolding of another manufacturer because "a manufacturer [has never been held] liable . . . for the failure to warn of risks created solely in the use or misuse of the product of another manufacturer" (citing Carrier v. Riddell, Inc., 721 F.2d 867, 869–70 (1st Cir. 1983))); Ford Motor Co. v. Wood, 703 A.2d 1315, 1331 n.7 (Md. Ct. Spec. App. 1998) (finding no duty to warn for replacement asbestos-containing brake and clutch parts that Ford did not make, market, or supply, and stating, "regardless of whether Ford's duty to warn sounds in negligence or strict liability, it has a duty to warn only by virtue of its manufacture or sale of unreasonably dangerous products"); Rastelli, 79 N.Y.2d at 297–98, 591 N.E.2d at 225–26; 582 N.Y.S.2d at 376–77 (1992) (holding that a manufacturer of a sound product has no duty to warn about another manufacturer's defective product when the first manufacturer "did not contribute to the alleged defect in a product, had no control over it, and did not produce it" (citations omitted)); Lindstrom v. A-C Prosds. Liab. Trust, 264 F. Supp. 2d 583, 591, 595 (N.D. Ohio 2003) (dismissing strict liability and negligence claims because plaintiff's exposure was
In *Kaloz v. Risco*, the plaintiffs brought an action against a pool manufacturer for injuries sustained by an infant when the infant fell from a pool ladder and landed on a bucket near the foot of the ladder.\(^{28}\) The plaintiffs claimed both failure to warn and negligence for the defective ladder, even though the pool manufacturer did not manufacture, install, or maintain the ladder. The court ruled that the failure to warn theory of liability could “not be stretched to require a warning as to a conjunctive product manufactured by another even though such other product may be a *sine qua non* to the use of the first.”\(^{29}\)

The negligence claim in *Kaloz* was grounded “on an underlying duty owed to another the possible danger to whom is reasonably foreseeable as a result of the conduct of the alleged wrongdoer.”\(^{30}\) However, the court recognized “that even though a defendant [manufacturer] could have foreseen the accident[, the defendant] cannot be held liable for the consequences of the foreseeable accident if he did not have power to control the conduct of the negligent actor.”\(^{31}\) The court in *Kaloz* concluded “that a fall from a defective ladder manufactured by another onto a bucket placed at the foot” of the ladder was not foreseeable by the pool manufacturer; and, even if it was, “the pool manufacturer could not be held liable because it had no control over the manufacture, use, or maintenance of the ladder, nor the placement of the bucket at the foot thereof.”\(^{32}\)

In *Kaloz*, the court conceded that the pool ladder could not be used without the pool, and, in fact, was designed for use in conjunction with nothing except a pool, but still declined to extend a duty to warn to the pool manufacturer.\(^{33}\) Similar conclusions have been reached in analogous cases in jurisdictions throughout the country.\(^{34}\) In fact, in a clear majority of jurisdictions that have


\(^{29}\) Id. at 588, 466 N.Y.S.2d at 220.

\(^{30}\) Id.

\(^{31}\) Id. at 589, 466 N.Y.S.2d at 221 (citing the *Pulka* holding: “A garage owner could not be liable to a pedestrian for the negligence of a patron while driving out of the parking facility.” (citing *Pulka v. Edelman*, 40 N.Y.2d 781, 783, 358 N.E.2d 1019, 1021, 390 N.Y.S.2d 393, 395 (1976))).

\(^{32}\) Id.

\(^{33}\) Id. at 588, 466 N.Y.S.2d at 220.

\(^{34}\) See cases cited, supra note 27.
decided the issue, it has been found that only those who had a hand in placing a product into the stream of commerce have a duty to warn of a potential defect. However, there is one very specific area of products liability law where this premise is being challenged: asbestos litigation. In New York, in fact, while there are numerous decisions by the Court of Appeals agreeing with the majority decisions in the general products liability context, an intermediate court decision by the Supreme Court Appellate Division for the First Department, in Berkowitz v. A.C. & S., Inc., seems to have carved out a narrow exception to this rule with respect to asbestos litigation, according to some interpretations.

IV. FAILURE TO WARN IN ASBESTOS LITIGATION

Manufacturers of asbestos-containing insulation were the original targets in asbestos litigation. Manufacturers and suppliers of other asbestos-containing products, such as gaskets and packing, gradually became more prominent defendants over the course of the litigation. However, once the majority of these original defendants had become insolvent, asbestos plaintiffs sought to impose responsibility for insulation, gaskets, and packing on manufacturers of industrial equipment. Much of this industrial equipment, such as pumps, valves, compressors, and turbines, was used in conjunction with asbestos insulation and gaskets due to the high temperatures at which it operated. In the search for solvent defendants, plaintiffs have taken the position that although the equipment manufacturers did not manufacture or supply the asbestos-containing products at issue, they should bear liability for harm resulting from exposure to such products because it was foreseeable that those products would be used in conjunction with the equipment manufacturer's own products. The same asbestos-containing insulation, gaskets, and packing are at issue, but the plaintiffs have forced a new group of defendants to stand in the shoes of the insolvent manufacturers of the actual asbestos-

35 Id.
38 See id.
39 See id.
41 See Brief of Respondent, supra note 37, at 34–35, 38.
containing products.

The alleged liability of equipment manufacturers for asbestos-containing products that they did not manufacture or supply remains a major issue in asbestos litigation. On the plaintiffs' side, they typically argue that the equipment manufacturers should be liable because the use of an equipment manufacturer's product with asbestos-containing ancillary products was a foreseeable risk. They argue that the use of insulation was necessary for equipment, such as pumps, valves, compressors, and turbines, to protect workers from burns, and to maintain proper ambient air temperatures in the workplace.

In response, the equipment manufacturers argue that they did not have a duty to warn of hazards associated with products they did not manufacture or supply. The manufacturers' own equipment did not give rise to, or even contribute to, the hazards inherent in asbestos and the products made therefrom. Further, the risks of hot surfaces were open and obvious dangers common to the system as a whole, not specific to certain equipment. The responsibility thus lies with the designer of the system and those who manufactured and supplied the insulation used to combat its flaws.

V. THE BERKOWITZ DECISION

Even though New York law seemed clear on whether or not a manufacturer has a duty to warn of the dangers of another product, the decision in Berkowitz has muddled this issue. Berkowitz involved a plaintiff who alleged exposure to asbestos from working on pumps aboard naval vessels. The court held that:

The inability of [the] plaintiff[] to identify ... Worthington as the manufacturer of the pumps containing the asbestos [was not fatal] where defendants' own witness conceded that Worthington pumps were [installed aboard] a very high percentage of Navy ships during the relevant time period, and workers in the Brooklyn Navy Yard testified at their

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42 See id.
43 See id. at 15–16.
45 See id. at 8–9.
depositions that the pumps they saw on ships in the Navy Yard were manufactured by Worthington.\textsuperscript{47}

This evidence made it reasonable for a trier of fact to infer that the pumps which the plaintiff disassembled at the Brooklyn Navy Yard were manufactured by Worthington, and that those pumps had internal components (gaskets and packing) that contained asbestos.\textsuperscript{48} The fact that Worthington admitted to using asbestos gaskets and packing, coupled with Worthington’s knowledge that military specifications “required asbestos use” aboard naval ships, created an issue of fact as to whether the Worthington pumps in the vicinity of the plaintiff at the Brooklyn Navy Yard contained asbestos to which the plaintiff was exposed.\textsuperscript{49}

The primary ruling in Berkowitz addressed the issue of whether it was reasonable to infer that the plaintiff was exposed to asbestos from Worthington pumps at the Brooklyn Navy Yard where the plaintiff testified about exposure to pumps, but failed to identify Worthington as the manufacturer.\textsuperscript{50} However, some read the Berkowitz decision as an expansion of the duty to warn in products liability law.

After its ruling, the Berkowitz court continued with a brief discussion as to whether Worthington had a duty to warn about another manufacturer’s asbestos-containing insulation where Worthington had knowledge that the relevant pumps were specified to be used with asbestos-containing products.\textsuperscript{51} The court reasoned that while Worthington pumps could technically operate without insulation, it was “questionable whether pumps transporting steam and hot liquids,” for which the government specified the use of asbestos insulation, “could be operated safely [on a ship] without [such] insulation.”\textsuperscript{52} This discussion can be viewed only as dicta.\textsuperscript{53} Even if the Berkowitz language on a duty to warn is not dicta, it is nonetheless inconsistent with Court of Appeals’ decisions, and thus should not be followed by New York courts.\textsuperscript{54}

\textsuperscript{47} Berkowitz, 288 A.D.2d at 149, 733 N.Y.S.2d at 411 (citing Salerno v. Garlock, Inc., 212 A.D.2d 463, 622 N.Y.S.2d 946 (App. Div. 1st Dep’t 1995)).

\textsuperscript{48} See Salerno, 212 A.D.2d at 464, 622 N.Y.S.2d at 946.

\textsuperscript{49} Id.; Berkowitz, 288 A.D.2d at 149, 733 N.Y.S.2d at 411.

\textsuperscript{50} Berkowitz, 288 A.D.2d at 149, 733 N.Y.S.2d at 411.

\textsuperscript{51} Id. at 149, 733 N.Y.S.2d at 412.

\textsuperscript{52} Id.

\textsuperscript{53} The duty to warn discussion in Berkowitz is clearly dicta because the court did not need to analyze the issue to reach its ultimate decision, and the language was not specifically relied upon in the relevant holding of the case. See generally In re N.Y.C. Asbestos Litig., 194 Misc. 2d 214, 750 N.Y.S.2d 469 (Sup. Ct. N.Y. Cnty. 2002).

\textsuperscript{54} Garricks v. City of N.Y., 300 A.D.2d 247, 248 n.1, 753 N.Y.S.2d 54, 55 n.1 (App. Div. 1st
In Berkowitz, the court, during its discussion as to whether Worthington may have a duty to warn, cited to Rogers v. Sears, Roebuck & Co. In Rogers, the decedent was killed by an explosion of a propane gas grill that the defendant argued was caused by a defect in a valve incorporated into a propane tank, neither of which the defendant manufactured. The defendant grill manufacturer in Rogers had acknowledged the inherent danger of the total product, and provided a warning with the grill concerning the risks of propane gas. The adequacy of the warning was at issue, not whether a duty to warn was obtained. The Rogers court reiterated that "[f]ailure-to-warn liability is intensely fact-specific, including such issues as obviousness of the risk and proximate cause." The court held that the reasonableness of the grill manufacturer’s warning to use and store the grill outdoors in a well-ventilated area had to be assessed by a jury because knowledge of the propensities of propane was not necessarily obvious. The grill manufacturer maintained that it had no duty to warn about the defective valve in the propane tank. Nevertheless, the court disagreed because the "grill could not be used without the tank, and [the defendant’s] own warning to use the grill only outdoors was itself [a] recognition of the danger of gas emission inherent in the use of the grill regardless of any defects."

Of significant note, both the Berkowitz and Rogers courts acknowledged the unique circumstances surrounding the fact pattern of each case by issuing a comparison citation to the opinion in Rastelli v. Goodyear Tire & Rubber Co. The fact patterns in Berkowitz and Rogers dealt with manufacturers whose products were either designed to be used specifically with asbestos insulation, or could not be used without the defective product of another, thus creating a duty to warn about the dangers of what was essentially one product that necessitated the use of the other. However, in Rastelli, discussed in more detail below, it was found

Dep’t 2002 (acknowledging that to the extent dicta in a case was inconsistent with a Court of Appeals decision, it was bound to follow the Court of Appeals).

55 Berkowitz, 288 A.D.2d at 149, 733 N.Y.S.2d at 412.
58 Id. at 245, 701 N.Y.S.2d at 359–60.
59 Id. at 246, 701 N.Y.S.2d at 360.
60 Id.
that a defective multi-piece tire rim was not necessary for the use of a Goodyear tire, as the rim was an optional product that was not specified or designed by Goodyear.62 Similarly, in Kaloz, the pool could be used safely without the particular pool ladder, and its installation was optional at the choice of the consumer and not the manufacturer.63

VI. RASTELLI, HAMILTON & HOLDAMPF

That the language of the First Department’s decision in Berkowitz has continued to be influential is remarkable when viewed against the backdrop of the seminal decisions of the Court of Appeals on failure to warn in both a negligence and strict liability context. As discussed above, the Rastelli decision held that no cause of action for strict liability sounding in tort arises out of the failure to warn for defects in another manufacturer’s product, even if it may be used in conjunction with one’s own product.

In Rastelli, the plaintiff’s decedent was inflating a truck tire manufactured by Goodyear when the multi-piece tire rim, not manufactured by Goodyear, violently separated, killing the decedent.64 The Court of Appeals found that “Goodyear had no control over the production of the subject multi-piece rim, had no role in placing th[e] rim in the stream of commerce, and derived no benefit from its sale.”65 The court further opined that Goodyear “did not create the alleged defect in the rim that caused the rim to explode.”66 The court then “conclude[d] that Goodyear had no duty to warn about the [dangers of the multipiece rim because it] did not contribute to the alleged defect in a product, had no control over it, and did not produce it.”67 The court in Rastelli “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.”68 The Rastelli court went on to distinguish a case “where the combination of one sound product

64 Rastelli, 79 N.Y.2d at 293, 591 N.E.2d at 223, 582 N.Y.S.2d at 374.
65 Id. at 298, 591 N.E.2d at 226, 582 N.Y.S.2d at 377.
66 Id.
67 Id.
68 Id. at 297–98, 591 N.E.2d at 225–26, 582 N.Y.S.2d at 376–77.
with another sound product creates a dangerous condition about which the manufacturer of each product has a duty to warn. 69 Similarly, equipment manufacturers cannot be liable simply because the equipment that they manufactured did not cause plaintiffs’ harm; rather, plaintiffs’ exposure was caused by products manufactured by third parties.

The rationale used by the First Department in Berkowitz is also inconsistent with the Court of Appeals’ decisions regarding the existence of a duty in a negligent failure to warn context. To the extent that Berkowitz relies upon foreseeability, it is inconsistent with long-settled principles of New York law, which hold that the question of whether or not the defendant owes a duty to the plaintiff is decided as a matter of law, and is based upon balancing a number of factors. These factors include “the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.” 70 “[F]oreseeability bears on the scope of a duty, not whether a duty exists in the first place.” 71 Under New York law, equipment manufacturer defendants should not be liable simply because it might have been foreseeable that their products would be used in conjunction with asbestos-containing products.

The Berkowitz decision fails to analyze whether the defendant owed a duty to workers who might be working with a third party’s product used in conjunction with its pumps. Rather, the First Department assumed that a duty existed, and its analysis focused on the likelihood that the Worthington pumps would be used with asbestos insulation. As the Court of Appeals stated in Hamilton v. Beretta U.S.A. Corp., “[t]he threshold question in any negligence action is: does the defendant owe a legally recognized duty of care to plaintiff? . . . Foreseeability, alone, does not define duty—it merely

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69 Id. at 298, 591 N.E.2d at 226, 582 N.Y.S.2d at 377.
71 In re N.Y. City Asbestos Liti., 5 N.Y.3d 486, 494, 840 N.E.2d 115, 119, 806 N.Y.S.2d 146, 150 (2005); see also 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 96 N.Y.2d 290, 298, 750 N.E.2d 1097, 1101, 727 N.Y.S.2d 49, 53 (2001) (“As we have many times noted, foreseeability of harm does not define duty. Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm.”) (citation omitted)).
determines the scope of the duty once it is determined to exist.”

The *Hamilton* court pointed out that without a specific duty, a defendant would be subject “to limitless liability to an indeterminate class of persons conceivably injured by any negligence’ [and] any extension of the scope of duty must be tailored to reflect accurately the extent that its social benefits outweigh its costs.”

Whereas *Hamilton* involved a gun manufacturer, a more recent decision by the Court of Appeals involved a failure to warn claim related to asbestos, and may afford a more direct comparison to the First Department’s holding in *Berkowitz*. In *Holdampf v. A.C. & S., Inc.*, the court heard a case involving a woman’s alleged asbestos exposure from cleaning her husband’s dusty clothes when he returned home from work. The plaintiff argued that the owner of her husband’s worksite had a duty to warn her because it was foreseeable that her husband would bring asbestos-containing dust home from work on his clothing. Nevertheless, the court reaffirmed the principle that foreseeability does not determine that a duty exists, and similar reasoning is anticipated to be applied if the duty to warn issue is addressed by New York’s highest court under a *Berkowitz* context. The court would then analyze the issue from a pure products liability standard, and the rationale in *Rastelli* would likely apply.

Additionally, in finding that her husband’s employer did not owe the plaintiff a duty, the *Holdampf* court emphasized its “reluctance to extend liability to a defendant for failure to control the conduct of others. ‘This judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another.’”

“The ‘key’ consideration critical to the existence of a duty in these

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72 *Hamilton*, 96 N.Y.2d at 232, 750 N.E.2d at 1060, 727 N.Y.S.2d at 7; see also Pulka v. Edelman, 40 N.Y.2d 781, 785, 358 N.E.2d 1019, 1022, 390 N.Y.S.2d 393, 396 (1976), rear gument denied, 41 N.Y.2d 901, 362 N.E.2d 640, 393 N.Y.S.2d 1028 (1977) (“Foreseeability should not be confused with duty. The principle expressed in *Palsgraf v. Long Is. R.R. Co.* . . . is applicable to determine the scope of duty—only after it has been determined that there is a duty.” (citation omitted)).


74 *Holdampf*, 5 N.Y.3d at 489–90, 840 N.E.2d at 116, 806 N.Y.S.2d at 147.

75 Id. at 491, 840 N.E.2d at 117, 806 N.Y.S.2d at 148.

76 Id. at 494, 840 N.E.2d at 119, 806 N.Y.S.2d at 150.

77 Id. at 493–94, 840 N.E.2d at 119, 806 N.Y.S.2d at 150 (quoting *Hamilton*, 96 N.Y.2d at 233, 750 N.E.2d at 1061, 727 N.Y.S.2d at 13).
circumstances is ‘[whether] the defendant’s relationship with either
the tortfeasor or the plaintiff places the defendant in the best
position to protect against the risk of harm’ . . . .”

This last point is critical to the application of this reasoning to the
imposition of liability for failure to warn for another manufacturer’s
products. The party in the best position to protect against harm is
the manufacturer of the defective product itself, the expert in the
specifications and applications of the product it manufactures. To
hold that one manufacturer has a duty to warn for another’s
products would impose a requirement that a manufacturer become
an expert in any product that could foreseeably be used in
conjunction with its own product. Courts in most jurisdictions have
been reluctant to infer such a duty, as it brings with it “the specter
of limitless liability.”

VII. OTHER JURISDICTIONS

Of the states that have precedent specifically on the failure to
warn for asbestos contained in a third party’s product, a clear
majority has held that no such duty exists. Delaware, Maine, Maryland, Massachusetts, New Jersey, and Washington have
held that there is no such duty, as has the Sixth Circuit Court of
Appeals. The recent opinions by Washington’s high court in
Simonetta and Braaten, discussed below, give the most thorough
discussion of the case against holding manufacturers liable for
products they had no hand in bringing to the market.

The number of jurisdictions that have found a duty to exist is
currently much smaller. Other than New York, courts in both
Pennsylvania and California have found such a duty. California

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78 Id. (quoting Hamilton, 96 N.Y.2d at 233, 750 N.E.2d at 1061, 727 N.Y.S.2d at 13).
79 Id. (quoting Hamilton, 96 N.Y.2d at 233, 750 N.E.2d at 1061, 727 N.Y.S.2d at 13).
is currently the main battleground for this issue. Two of its intermediate appellate courts have divided on the issue, and the question is now before the California Supreme Court.  

VIII. WASHINGTON STATE

The Washington Supreme Court is the highest state court to have addressed the “duty to warn” issue in relation to asbestos insulation and asbestos-containing component parts. The court’s companion opinions in Simonetta v. Viad Corp. and Braaten v. Saberhagen Holdings are the seminal decisions that did not impose liability upon equipment manufacturers whose products were used in association with asbestos-containing products that they did not manufacture or supply. Both cases were brought by individuals who had worked with equipment that was insulated with asbestos, but Braaten also contained allegations involving exposure to asbestos from replacement component parts. After a comprehensive review of the current law throughout the United States, the Washington Supreme Court concluded that, under either a negligence or strict liability theory, manufacturers are generally not liable for failure to warn of the dangers arising from the use of their product in conjunction with another product that was not manufactured, sold, or otherwise supplied by them. The Simonetta and Braaten decisions are not based upon any novel proposition. The Washington Supreme Court analyzed decades of tort jurisprudence, eventually concluding that Washington had never imposed such a duty to warn regarding products manufactured and supplied by others.

The Simonetta court found that “Washington cases discussing and analyzing [products] liability generally limit the analysis of the duty to warn of the hazards of a product to those in the chain of distribution of the product, such as manufacturers, suppliers, or sellers.” As a result, they found “little to no support under [its] case law for extending the duty to warn to another manufacturer’s

90 Simonetta, 197 P.3d at 127.
92 Braaten, 196 P.3d at 496; Simonetta, 197 P.3d at 130.
93 Braaten, 198 P.3d at 504; Simonetta, 197 P.3d at 138.
94 Simonetta, 197 P.3d at 133.
95 Id.
product." Additionally, "[c]ase law from other jurisdictions similarly limits the duty to warn in negligence cases to those in the chain of distribution of the hazardous product." The court noted that:

[The rationale for] imposing liability on the defendant who ... manufactur[es], sell[s], or market[s] a product, is [that such a defendant was] in the best position to know of the dangerous aspects of the product and to translate that knowledge into a cost of production against which liability insurance can be obtained.

Following this analysis, the Simonetta court did not extend a duty to warn to an equipment manufacturer that did not manufacture or market the asbestos insulation that a third party placed on its equipment, and over which it did not exercise any control. Furthermore, the court found that the equipment manufacturer had sold the piece of equipment at issue, an evaporator, bare and without insulation; the court noted that the equipment manufacturer had never manufactured, sold, or recommended the asbestos insulation that a third party applied to its evaporator post-

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96 Id.
97 Id. at 133–34. The Simonetta court referenced the following cases: Cleary v. Reliance Fuel Oil Assocs., 17 A.D.3d 503, 793 N.Y.S.2d 468 (App. Div. 2d Dept. 2005) (finding manufacturer of water heater had no duty to warn of dangers of misplacing an aquastat it did not manufacture in its product); In re Deep Vein Thrombosis, 356 F. Supp. 2d 1055, 1067–68 (N.D. Cal. 2005) (finding Boeing, a manufacturer of commercial aircrafts, had no duty to warn the airlines about defective seats, manufactured and installed by another, which could result in deep vein thrombosis in passengers, and stating that the "court can find no case law that supports the idea that a manufacturer, after selling a completed product to a purchaser, remains under a duty to warn the purchaser of potentially defective additional pieces of equipment that the purchaser may or may not use to complement the product bought from the manufacturer"); Blackwell v. Phelps Dodge Corp., 157 Cal. App. 3d 372, 203 Cal. Rptr. 706 (1984) (holding, in a case where sulfuric acid spewed out of a tank and injured plaintiff, that although defendant supplier of sulfuric acid knew the type of tank used to transport sulfuric acid, the supplier did not have duty to warn under section 388 of the danger of pressure buildup in the tank, rather the tank manufacturer had the duty); Walton v. Harnischfeger, 796 S.W.2d 225 (Tex. Ct. App. 1990) (finding defendant crane manufacturer had no duty to warn under negligence or strict liability theories of a nylon strap used as rigging material because defendant did not manufacture, distribute, sell, or otherwise place nylon strap into stream of commerce); Cipollone v. Yale Indus. Prods., Inc., 202 F.3d 376 (1st Cir. 2000) (holding manufacturer of component liable only if defect existed in manufacturer's component itself; manufacturer of nondefective lift, integrated by another company into larger package-handling system, was not liable under negligence theory for injury that resulted from defect in entire system); but see Cooley v. Quick Supply Co., 221 N.W.2d 763 (Iowa 1974) (upholding jury verdict that found under section 388 defendant supplier of dynamite fuse had duty to warn because fuse was sold as a trigger for detonating dynamite, a highly dangerous substance, supplied by another).
98 Simonetta, 197 P.3d at 134.
99 Id.
sale. The court held that the asbestos insulation, not the evaporator, was the unreasonably dangerous product and, accordingly, found that the equipment manufacturer was not “responsible for asbestos contained in another manufacturer’s product.”

Important in almost any analysis that has found no duty to warn in products liability jurisprudence, is that the duty to warn in relation to a particular product is generally limited to the harmful product’s manufacturer and those in the distribution chain. On this point, the Simonetta court reasoned that:

Because [the equipment manufacturer] was not in the chain of distribution of the dangerous product, we conclude not only that it had no duty to warn under [a theory of] negligence, but also that it cannot be strictly liable for failure to warn. That is, reasonable persons could conclude only that the evaporator was reasonably safe when it was sold without a warning of the dangers of asbestos exposure.

The theory underlying strict liability under Restatement (Second) of Torts section 402A is that by placing its product into the marketplace, the seller becomes responsible to the members of the public who are injured by that product, and that the public has the right to expect the seller to stand behind its goods. As such, “public policy demands that the burden of accidental injuries caused by [such] products . . . be placed upon those who market them, and [that this burden should] be treated as a cost of production against which liability insurance can be obtained.” According to the Restatement, consumers of these products are entitled to protection from those entities that place such products in the market. However, as a manufacturer cannot logically be expected to bear the cost of a third

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100 Id. at 138.
101 Id. (citing Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488 (6th Cir. 2005)).
102 Id.
103 RESTATEMENT (SECOND) OF TORTS § 402A (1965) (The Restatement addresses common law product liability claims and provides: “(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.”); see also RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998) (addressing categories of product defects, including failure to warn).
104 RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965).
105 Id.
party’s product in its own cost of production, the theory underlying
strict liability in the Restatement cannot extend to one who had no
hand in placing the product into the stream of commerce.

The *Braaten* court concluded, in accordance with its decision in
*Simonetta*, that “as a matter of law the manufacturers here are not
liable under § 402A for failure to warn of the danger of exposure
during maintenance of their products to asbestos-containing
insulation that was manufactured and supplied by third parties.”106
The *Braaten* court cited its findings in *Simonetta* stating:

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. It makes no difference whether the
manufacturer knew its products would be used in
conjunction with asbestos insulation. Our decision in
*Simonetta* is 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”;
“[t]he law generally does not require a manufacturer to study
and analyze the products of others and warn users of the
risks of those products.” Courts reason, among other things,
that in general a manufacturer has no obligation to become
an expert in another manufacturer’s product and that the
policy underpinnings for strict liability (where this is the
rule in the jurisdiction, as in Washington) do not apply when
a manufacturer has not placed the product in the stream of
commerce.107

The *Braaten* court’s analysis clearly found that equipment
manufacturers did not have a duty to warn because such a duty was
“limited to those in the chain of distribution of the hazardous
product,” such as the manufacturers of asbestos-containing
material.108 As the equipment defendants were not in the “chain of
distribution of the [asbestos insulation that a third party] applied to
their products,” the court upheld the dismissal of “plaintiff’s
negligence claims that were based upon [such] exposure.”109

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107 *Id.* at 498 (citations omitted).
108 *Id.* at 501 (quoting Simonetta v. Viad Corp., 197 P.3d 127, 134 (Wash. 2008) (en banc)).
109 *Id.*
IX. A BATTLE IN CALIFORNIA

California’s high court will soon rule on this issue. There is currently a split on this issue at California’s appellate level that nicely encapsulates the two sides of the argument. In March 2009, in Taylor v. Elliott Turbomachinery Co., California’s First District followed the lead of the Washington Supreme Court in finding that there was no duty to warn for another manufacturer’s product, and that the duty to warn only attached to those who had a hand in putting a product into the stream of commerce.110 Little over a half-year later, California’s Second District was faced with an almost identical fact pattern, and came to the opposite conclusion in O’Neil v. Crane Co.111 In O’Neil, the Court of Appeals for the Second District of California found, in a decision highly critical of the First Department’s decision in Taylor, that when a “product is necessarily used in conjunction with another,” the duty to warn applies.112

In Taylor, the fact pattern echoed the one that was before the court in Berkowitz. The plaintiff had served abroad a naval vessel for over three years as a fireman apprentice, fireman, and machinist mate.113 His duties included repairing and maintaining machinery, and according to his deposition testimony, he was required to remove and replace asbestos-containing internal gaskets, flange gaskets, packing, and blanket insulation from valves and pumps manufactured by the defendant pump manufacturers.114 While it was undisputed that the plaintiff had been exposed to asbestos-containing materials while aboard ship, his own naval expert testified that by the time the plaintiff served on ship, all of the original asbestos-containing parts of the subject manufacturer’s equipment would have been removed.115

In finding that no liability attached, the Taylor court explained that the defendants could not be held strictly liable for three reasons: (1) California law restricts the duty to warn to defendants who are within the chain of distribution of the allegedly harmful products; (2) a manufacturer has a duty to warn only if the manufacturer’s product actually causes or contributes to the harm

112 Id. at 547, 548.
113 Taylor, 90 Cal. Rptr. 3d at 419.
114 Id.
115 Id.
experienced by the plaintiff; and (3) “manufacturers or suppliers of nondefective component parts bear no liability when they simply build a product to a customer’s specifications but do not substantially participate in the integration of their components into the final product.”\textsuperscript{116}

As to the first rationale, the Taylor court explained that the defendants were not within the chain of distribution of the asbestos-containing products to which the plaintiff was exposed, and “California law imposed no duty on [the manufacturers] to warn of the hazards inherent in defective products manufactured or supplied by third parties.”\textsuperscript{117} The court further explained that “the purpose of strict liability is to ensure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market,”\textsuperscript{118} yet the defendants, who had manufactured and sold their equipment to the Navy in the 1940s, had no involvement in the manufacture or distribution of the asbestos-containing “gaskets, packing, discs, and insulation that [the plaintiff] encountered during his service” on the naval ship in the 1960s.\textsuperscript{119}

Second, the court determined that the equipment manufactured by the defendants did not cause or contribute to the risk of harm. The plaintiff’s harm was “caused not by any action” of the products manufactured by the defendants, but rather “by the release of asbestos from products produced by others.”\textsuperscript{120} The court went on to explain that, “manipulation and removal of the asbestos-containing products at issue here would have presented a danger to [the plaintiff’s] health whether they were used in combination with respondents’ equipment, some other type of equipment, or even all by themselves.”\textsuperscript{121}

Finally, referring to the component parts doctrine, the Taylor court stated, “the manufacturer of a product component is not liable for injuries caused by the finished product into which the component is incorporated unless the component itself was defective at the time it left the manufacturer.”\textsuperscript{122} The court determined that the defendants were shielded from liability under the component parts doctrine because the equipment manufactured by the

\textsuperscript{116} Id. at 421.
\textsuperscript{117} Id. at 418.
\textsuperscript{118} Id. at 424, 425 (citation omitted).
\textsuperscript{119} Id. at 432.
\textsuperscript{120} Id. at 433.
\textsuperscript{121} Id. at 429 (citations omitted).
defendants did not cause harm to the plaintiff and, instead, the harm suffered by the plaintiff was caused by his exposure to asbestos-containing products that were installed long after the equipment was supplied by the defendants. Finally, despite the fact that the equipment manufactured by the defendants was manufactured to the Navy’s specifications, there was no evidence that the defendants played any role in integrating their products into the overall propulsion system of the naval vessel, which included numerous asbestos-containing products.\textsuperscript{122}

The court also addressed the claims under a general negligence theory, contending that it was foreseeable that asbestos-containing replacement parts would be used with the defendants’ products. Under California law, “[f]oreseeability is not synonymous with duty; nor is it a substitute.”\textsuperscript{123} Further, whether a defendant owes a duty depends not only upon foreseeability of risk, but also on other policy considerations.\textsuperscript{124} In deciding that the defendants did not owe a duty as a matter of law, the court focused on five factors: (1) the connection between the products sold by the defendants to the Navy in the early 1940s and the harm caused by products manufactured by third parties several decades later was minimal; (2) the defendants were not blameworthy because product manufacturers do not have a duty to warn of the hazards inherent in products manufactured by third parties; (3) imposing liability would not prevent future harm because the asbestos exposure took place decades ago; (4) imposing liability outside the chain of distribution would unfairly impose severe burdens upon the defendants, making “[d]efendants whose products happened to be used in conjunction with defective products made or supplied by others” potentially liable “not only for their own products, but also for every other product with which their product” might be used”; and (5) “there can be no doubt in this case that [the defendants’] conduct was of high social utility” in that they “provided parts essential to powering an aircraft carrier that was used to defend the United States during the greatest armed conflict of the 20th century.”\textsuperscript{125}

In sharp contrast, California’s Court of Appeals for the Second District found in \textit{O’Neil v. Crane Co.} that a duty to warn existed for an asbestos product manufactured by a third party used in

\textsuperscript{122} \textit{Id.} at 430–31.
\textsuperscript{123} \textit{Id.} at 437 (quoting \textit{Erlich v. Menezes}, 981 P.2d 978, 983 (1999)).
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Id.} at 438–40.
conjunction with one’s own product. In an opinion sharply critical of the Taylor decision, the O’Neil court rebuffed almost every rationale that has been proffered as to why such a duty should not exist. In what by now is a familiar fact pattern, the plaintiff’s decedent husband in O’Neil had allegedly been exposed to asbestos-containing gaskets, packing, and insulation while working on and around the defendant equipment manufacturer’s products in the Navy. As a result, he had developed mesothelioma and passed away in 2005, leading his wife to bring this suit. After a trial, the lower court granted the defendant manufacturer’s motion for nonsuit, and the plaintiffs appealed.

The opinion systematically attacks the Taylor court’s reasoning. First, as to the Taylor court’s reliance on the component part doctrine, the court in O’Neil noted that this defense is normally applicable to manufacturers of raw materials or multi-use components. In contrast, it found that the manufacturers of pumps and other machinery used on naval vessels were not selling “generic or off-the-shelf components,” or “building block materials,” but that the products they were selling were “really a separate product with a specific purpose and use.” The court argued that such a finding was consistent with the Restatement (Third) of Torts because these products would not be altered during their integration into the overall system, and further stated that “respondents would not be shielded by the component parts defense even if they were manufacturers of components, because that

127 Id. at 542–43, 546–48.
128 Id. at 536.
129 Id.
130 Id. at 536 n.1.
131 Id. at 539.
132 Id. at 540–42 (quoting In re TMJ Implants Prods. Liab. Litig., 872 F. Supp. 1019, 1026 (D. Minn. 1995)).
133 Id. at 541.

The Restatement Third of Torts is in accord. In section 5, titled “Liability Of Commercial Seller Or Distributor Of Product Components For Harm Caused By Product Into Which Components Are Integrated,” it provides that “One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or property caused by a product into which the component is integrated if: (a) the component is defective in itself, as defined in this Chapter, and the defect causes the harm; or (b)(1) the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and (b)(2) the integration of the component causes the product to be defective, as defined in this Chapter; and (b)(3) the defect in the product causes the harm.

Id. (quoting RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 5 (1998)).
defense does not apply if the product itself is defective.”\textsuperscript{134}

The O’Neil court went on to attack the Taylor court’s finding that “although a manufacturer may owe a duty to warn when the use of its product in combination with the product of another creates a potential hazard, that duty arises only when the manufacturer’s own product causes or creates the risk of harm.”\textsuperscript{135} The court in O’Neil stated that this was unpersuasive “because Taylor does not seem to distinguish between harm caused by the original packing and insulation and harm caused by replacement parts, [and] the holding is contrary to the rule that a manufacturer is liable for the dangers of its product’s components.”\textsuperscript{136}

The O’Neil court went on to note that under California law,\textsuperscript{137} a manufacturer is liable when its product is necessarily used in conjunction with another product, and when danger results from the use of the two products together. Asbestos does of course have inherent dangers, but appellants’ evidence was that the asbestos incorporated into (and onto) respondents’ products caused injury when it was removed. In fact, there was no evidence that the asbestos packing or insulation was dangerous until it was baked on, and removed.\textsuperscript{138}

The California Supreme Court has granted certiorari in O’Neil and three other similar cases, but has deferred briefing in all but O’Neil,\textsuperscript{139} which is the only one of the four that rejected the holding of Taylor.\textsuperscript{140} Under California civil procedure, the grant of certiorari has the effect of vacating the O’Neil decision.\textsuperscript{141} The California Supreme Court did not grant certiorari in Taylor.\textsuperscript{142} This means

\textsuperscript{134} Id. at 543.
\textsuperscript{135} Id. at 546 (quoting Taylor v. Elliot Turbomachinery Co., Inc., 90 Cal. Rptr. 3d 414, 426 (Ct. App. 2009)).
\textsuperscript{136} Id. (citing Vandermark v. Ford Motor Co., 391 P.2d 168, 170–71 (Cal. 1964)).
\textsuperscript{137} Id. at 547 (citing the holding of Telles-Cordova v. Campell-Hausfeld/Scott Fetzer Co., 28 Cal. Rptr. 3d 744 (Ct. App. 2004)).
\textsuperscript{138} Id. (citation omitted).
\textsuperscript{139} O’Neil v. Crane Co., 223 P.3d 1, 1 (Cal. 2009); Greines, Martin, Stein & Richland LLP, California Supreme Court Watch: A List of All Civil Cases Now Pending Before the California Supreme Court, GMSR, http://www.gmsr.com/news_watch.cfm (last visited Mar. 14, 2011) (noting the following tort litigation cases that are pending review before the California Supreme Court, but for which the court has deferred briefing: Hall v. Warren Pumps LLC, 2010 WL 528849 (Ct. App. 2010); Walton v. Williams Powell Co., 108 Cal. Rptr. 3d 412 (Ct. App. 2010); Merrill v. Leslie Controls, Inc., 101 Cal. Rptr. 3d 614 (Ct. App. 2009)).
\textsuperscript{140} Hall, 2010 WL 528849, at *8; Walton, 108 Cal. Rptr. 3d at 423–24; Merrill, 101 Cal. Rptr. 3d at 627; O’Neil, 99 Cal. Rptr. 3d at 543.
\textsuperscript{141} See CAL. COURT RULES CODE §§ 8.1105(e)(1), 8.1115(a) (West 2010).
\textsuperscript{142} Taylor v. Elliot Turbomachinery Co., Inc., 90 Cal. Rptr. 3d 414 (Ct. App. 2009).
that Taylor remains good law and binding precedent for all the trial courts in the state. Briefing before the California Supreme Court has been completed in O'Neil, but argument has not been scheduled and a ruling is not expected before late 2011 or 2012.143

X. CONCLUSION: THE FUTURE OF BERKOWITZ IN NEW YORK

The decisions coming from Washington and California are at the forefront of this debate and encapsulate the arguments of both sides well. Just as Judge Cardozo's decision in MacPherson v. Buick Motor Co. once paved the way for Justice Traynor to take up the development of products liability law on the other side of the continent, it seems likely that the decisions in Simonetta and Braatten, and the outcome of the battle in California, will pave the way for the New York courts to revisit the Berkowitz decision.

When reviewing both sides of this debate, it becomes clear that the majority of jurisdictions have held that there is no duty to warn for another manufacturer's defective product, even when it is used in conjunction with your own, for sound public policy reasons based on longstanding tort principles. Courts must be ever vigilant of that "spector of limitless liability," and it seems to be the failure to adequately address this issue that is the largest flaw in the reasoning of the O'Neil decision, and in the niche jurisprudence that has sprung up in New York around the dicta at the end of the Berkowitz holding.

If the holdings in O'Neil and Berkowitz were to be upheld, the cost of production would sky-rocket to a level so unduly burdensome that it would have a noticeable impact on industry in this country. Every product manufacturer and supplier would be required to investigate and warn of hazards of numerous other products potentially used at a worksite in combination with its own, leading to a confusing proliferation of warnings by entities that possess no expertise in the product hazards about which they were warning, and a corresponding explosion of liability.

This theory of liability would not be limited to asbestos, a product that in hindsight turned out to be dangerous, but would logically extend to any other products used in conjunction with a manufacturer's product that might, upon investigation, have been revealed to pose health risks. For almost every product on the

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market, this would necessarily include numerous products made by a multitude of companies in other industries in which the manufacturer is not a participant. Under this theory, manufacturers, suppliers, marketers, and sellers have a duty to investigate and warn of the potential hazards of all such products, even though they do not manufacture or sell those products, and have no expertise regarding their potential dangers.

Public policy dictates that manufacturers be held liable for defects in their own products or in the use of their own products—not those of others. In the real world of product design and usage, virtually every product is connected in some manner with many others in ways that may be anticipated, if courts are willing to extend foresight far enough. Such a duty would lead to chaos, both legally and in the business world.

When the California Supreme Court hears argument in O'Neil, it is expected that these public policy reasons, and the longstanding tenets of tort law which logically spring forth from them, will be addressed just as in Simonetta and Braatten. Sometime in the near future, New York will also have to bring certainty to this potential minefield of liability. In New York, that examination of historic products-liability decisions should limit the duty to warn to those who had a hand in placing a product into the stream of commerce, thus overturning Berkowitz.