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

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I. INTRODUCTION

What is a nice topic like this doing in a symposium on asbestos litigation? Well, it happens that products liability claims seeking to extend duties to rescue have occurred most recently in connection with asbestos claims. In that vexing context, an en banc panel of the Washington Supreme Court very recently overturned an appellate court and rejected component maker liability for failure to warn of asbestos-related hazards in products made by others. In *Simonetta v. Viad Corp.*,[1] the court held that a manufacturer may not be held liable for failure to warn of the dangers of asbestos exposure resulting from the post-sale application of insulation made by another.[2] The court said that the defendant evaporator manufacturer was only responsible for the "chain of distribution" of its product, and that the addition of asbestos-containing insulation manufactured by another company constituted a separate chain of distribution.[3] In a companion case, *Braaten v. Saberhagen Holdings*,[4] the court rejected failure to warn claims against pump and valve manufacturers relating to replacement packing and replacement gaskets made by others. Earlier, the United States Court of Appeals for the Sixth Circuit reached a

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1. 2008 WL 5175068 (Wash. Dec. 11, 2008).
2. *See id.* at *5, 10.
3. *Id.* at *10.
4. 2008 WL 5175083 (Wash. Dec. 11, 2008).

similar conclusion.[5] Thus, although the title of this article frames the problem in general terms and the analysis admits of wider application, its roots are in asbestos litigation. Consistent with the Washington Supreme Court's decisions, this article argues that imposing liability on distributors merely because their products are subsequently used with asbestos-containing products made by others would clearly go too far. Moreover, the debate surrounding the issue is sometimes unnecessarily confusing.

To begin to straighten things out, Part II explains exactly what the problem is, and what it is not. Part II arranges the topic conceptually so that the rest of the article can explain how courts should be handling these product-interaction, rescue-by-warning claims. Part III then demonstrates that courts in a wide variety of contexts courts have traditionally refused to require one group of actors to perform "watchdog" functions over the risky conduct of a second group in order to rescue victims of the second group from harm. These traditional lines of decision strongly suggest that courts should show similar restraint in connection with failure-to-warn claims in products liability. Part IV develops the policy reasons why expanded duties to rescue via warnings are inappropriate in the products liability cases of interest here. Assigning watchdog responsibilities to the sellers of safe, nondefective products will achieve neither the instrumental objective of efficiency nor the noninstrumental objective of doing justice between the parties. Part IV then proposes a no-duty rule with which to sort out these product-interaction claims. The article concludes that, while it is understandably tempting for courts to try accomplish rescue to give asbestos plaintiffs new financial resources on which to draw, courts must resist the temptation in this instance.

II. WHAT THE PROBLEM IS—AND WHAT IT IS NOT

A simple hypothetical illustrates the factual situations of interest here. Suppose that *M* manufacturers swimsuits and that *M* knows that wearers of its suits will swim in a variety of swimming pools, both above-ground and in-ground. Assume further that some of the risks generally associated with swimming pool usage are neither obvious nor generally known to swimmers—for example, the risks of attempting head-first dives into shallow, above-ground pools—and that *M* does not mention these risks in

5. *See* Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488 (6th Cir. 2005) (Ohio law). The central issue in *Lindstrom* was causation as it related to component parts rather than the existence of a duty. The court found no causation, concluding that a manufacturer cannot be held responsible for asbestos contained in another product. *See id*. at 496.

marketing its swimsuits.[6] Assume finally that *V*, wearing one of *M*'s suits, attempts a shallow dive into an above-ground pool, manufactured by *P*, and suffers spinal cord injury. Does *V* have a viable claim[7] against *M*, the swimsuit manufacturer, for failing to warn *V* of the risks of shallow dives? *P*, the pool manufacturer, may be liable to *V*,[8] but is *M*? One's first reaction to this hypothetical may be that it is academically unrealistic—that no court in its right mind would consider holding *M* liable on these assumed facts. But courts recently have, in fact, been presented with failure-to-warn claims of this sort. As observed at the outset, these new cases do not involve swimsuits made by *M*, but nondefective pumps and valves, and *P*'s products are not above-ground pools, but asbestos gaskets and insulation materials applied internally and externally to *M*'s pumps and valves upon their post-sale installation.[9] More will be said about these actual cases subsequently; the point here is that the swimsuit hypothetical cannot be dismissed summarily as being academic.

Even if variations on the swimsuit claim may actually arise in litigation, they may be likely to strike many observers as manifestly weak on the merits. If this assessment is accurate, wherein, exactly, does the weakness lie? The inquiry here is not whether, after thorough analysis, this initial assessment of weakness is borne out. Later discussions in this article, based on precedents and public policy, argue that it is. Rather, the objective for the moment is to test the adequacy of attempts to deal with the swimsuit claim dismissively. Something about the swimsuit claim is clearly strange. But may the strangeness be captured in a simple turn of phrase? For example, one might attempt to dismiss such a claim on the ground that there is nothing wrong with the swimsuit—that there is no evidence that the swimsuit was defective in any way. But this response overlooks the legal basis of *V*'s claim—if the swimsuit lacks a required warning about diving in shallow water, it is defective for that reason. Technically, the assertion of nondefectiveness simply begs the question of *M*'s failure to warn, the very basis of *V*'s claim.

Another dismissive response might be that the swimsuit did not actually or proximately cause *V*'s broken neck—the swimsuit did not induce *V* to attempt the shallow dive. Once again, however, this response

6. The reader may balk at the idea that the risks of diving into shallow water are neither obvious nor generally known, but a number of courts have held otherwise. *See, e.g.*, Corbin v. Coleco Indus., Inc., 748 F.2d 411, 420 (7th Cir. 1984).

7. By "viable claim" I mean one that survives a defendant's motion for summary judgment. *See, e.g.*, *id.*

8. *See, e.g.*, Klen v. Asahi Pool Inc., 643 N.E.2d 1360, 1363 (Ill. App. Ct. 1994), *appeal denied, sub nom.* Klen v. Doughboy Recreational, Inc., 649 N.E.2d 417 (Ill. 1995).

9. *See Braaten*, 2008 WL 5175083; *Simonetta*, 2008 WL 5175068.

overlooks the fact that the swimsuit was presumably a necessary, but-for condition of *V*'s going swimming in the first place—even if the suit did not induce *V* to dive, it made it possible for him to do so—and is therefore a but-for cause-in-fact of *V*'s accident.[10] And if *M* failed to warn about the risks of diving, that failure could be found by a jury to be a proximate cause of *V*'s injuries.[11]

Yet another response might be that no warning need be given because the risks of diving in shallow water are obvious. But this response ignores the explicit assumption of non-obviousness at the outset—a minority of courts have held pool manufacturers liable for failing to warn swimmers of the risks of diving into shallow above-ground pools.[12] To be sure, some swimsuit-type claims can be dismissed on the ground that the relevant risk is obvious—suppose that *V*'s claim were that *M* failed to warn about the risk of drowning in a pool full of water. The general risk of drowning is obvious enough that it need not be warned about, either by *M* or by *P*.[13] But not all of these rescue-by-warning cases can be dismissed on the basis of the obviousness of the relevant risks.[14]

Regarding most of these dismissive responses to the failure-to-warn claim presented in the swimsuit hypothetical, their inadequacies reside in their failure to take sufficient account of the foundational premise of *V*'s claim—that *M* owes *V* a duty to warn about the risks of shallow diving. Only by attacking the premise of *M*'s duty to warn may *M* disentangle itself from the doctrinal web of "defect combined with causation" revealed in this discussion. Responding that the risks are obvious may attack the duty

10. Most courts apply variations of the test, "but for the defendant having acted at all, would the plaintiff nevertheless have suffered the same harm?" *See* JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 105 (7th ed. 2007). If the answer is "No," the defendant's conduct is a but-for cause-in-fact of plaintiff's harm. Presumably *V* would not have been swimming in the first place without the swimsuit. *Id.*

11. *See* JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 405-06 (6th ed. 2008).

12. *See, e.g.*, Corbin v. Coleco Indus., Inc., 748 F.2d 411, 420-21 (7th Cir. 1984) (reversing summary judgment in favor of pool manufacturer and allowing jury to consider whether a warning would have deterred plaintiff from diving); Klen v. Asahi Pool Inc., 643 N.E.2d 1360, 1369-70 (Ill. App. Ct. 1994), *appeal denied*, *sub nom.* Klen v. Doughboy Recreational, Inc., 649 N.E.2d 417 (Ill. 1995) (affirming the trial court's ruling that it was for jury to decide whether danger of diving into above-ground pool was open and obvious to 14-year-old); Jonathan v. Kvaal, 403 N.W.2d 256, 258 (Minn. Ct. App. 1987) (reversing summary judgment in favor of pool manufacturer). *But see* Glittenberg v. Doughboy Recreational Indus., 491 N.W.2d 208 (Mich. 1992) (summary judgment for defendants affirmed), *reh'g denied*, *sub nom.* Horan v. Coleco Indus., 495 N.W.2d 388 (Mich. 1992).

13. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. j (1998). Section 2 also offers Illustration 12, in which a ladder manufacturer need not warn of the risks of setting up a ladder in front of an unlocked door. *Id.*

14. *See, e.g.*, *Klen*, 649 N.E.2d at 1369-70.

premise, but it falls short because it does not defeat *M*'s duty in every case.[15]

Of all of the other ways of couching a no-duty response, the most commonly encountered is "A manufacturer owes no duty to warn about the risks presented by another manufacturer's product."[16] On the face of it, this assertion is powerful. Not only does it reject the strange, instinctively questionable notion that a swimsuit manufacturer might owe a duty to warn of the risks presented by a swimsuit wearer's diving into a shallow, above-ground pool; but it also refers directly to, and attempts to negate, the more general proposition that one manufacturer should perform a watchdog function to rescue its product users from risks created by other products. Upon further reflection, however, the problem with this often-encountered assertion is that it proves too much. Thus, in order to fulfill its duty to warn about the risks presented by its own product, a manufacturer may legitimately be required to warn about the risks to which another product contributes when its own product and the other product are combined interactively in use. In the swimsuit hypothetical, for example, suppose the fabric out of which the swimsuit is made reacts caustically and harmfully when the pool water contains an abnormally high concentration of chlorine? Even if the pool manufacturer or the chlorine manufacturer must warn about the risks of high-chlorine-content pool water,[17] the swimsuit manufacturer may also owe a duty to warn about the risk of a caustic interaction between the swimsuit fabric and the chlorine.[18] Although such a warning could be said to be a warning "about the risks presented by another manufacturer's product"—i.e., the pool and the chlorine—the non-obvious risks presented by the swimsuit fabric may be sufficient to require a warning from the swimsuit manufacturer.[19]

This last-described, "caustic interaction" variation on the swimsuit hypothetical involves non-obvious risks presented by a synergistic combination of two different products—the swimsuit and the above-ground

15. *See id.*

16. *See, e.g.*, John W. Petereit, *The Duty Problem with Liability Claims Against One Manufacturer for Failing to Warn About Another Manufacturer's Product*, TOXIC TORTS & ENVTL. L. COMMITTEE NEWSLETTER (DRI, Chicago, Ill.), Winter 2005, at 5-9.

17. One question would be whether the risks of high chlorine-content water are obvious to reasonable persons. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. j (1998). The other would be whether the pool manufacturer, rather than simply the chlorine distributor, owes a duty to warn. This article addresses the latter issue.

18. *See, e.g.*, Vail v. KMart Corp., 25 A.D.3d 549, 551 (N.Y. App. Div. 2006) (stating that clothing manufacturer could have duty to warn of especially flammable garment fabric); Bigham v. J.C. Penney Co., 268 N.W.2d 892, 895-96 (Minn. 1978) (affirming manufacturer liability for garments' "melt and cling" characteristics).

19. *See Vail*, 25 A.D.3d at 551.

pool—giving rise to a legitimate duty to warn on the part of both manufacturers.[20]

Faced with such synergistic product interactions, some courts have selected one manufacturer to bear the entire responsibility to provide a warning, based on circumstances that render warnings by the other manufacturer relatively more difficult and ineffectual.[21] But even there, the manufacturer required to warn may be said to be warning, to some extent, "about the risks presented by another manufacturer's product." By contrast, in the original swimsuit hypothetical involving the shallow dive, no synergism is present. The swimsuit itself does not interact synergistically with the shallowness of the swimming pool to increase the risk of a dangerous dive.[22] Nor, in the asbestos cases alluded to earlier, does a pump interact synergistically with the asbestos that a purchaser adds internally or externally after sale.[23] Thus, the earlier-noted strangeness of imposing a duty on the swimsuit or the pump manufacturer to warn about the risks of diving or covering the pump with asbestos derives from the fact that the only connection between the swimsuit and the pump, on the one hand, and the injury to the plaintiff, on the other, was a but-for, condition-precedent connection. In that instance, the swimsuit and the pump manufacturer are being asked to warn about the risks presented *entirely* (nonsynergistically) by another manufacturer's product.

It follows that in deciding when a manufacturer should warn about another manufacturer's product, a line must be drawn between those situations in which two (or more) products interact synergistically to create joint risks greater in magnitude than the sum of the risks measured separately, and those in which they do not. Later discussions in Part IV consider more precisely how, and why, such a line must be drawn. Those discussions necessarily touch upon how courts should deal with the concept of duty. For now, two conclusions follow from what has been said so far. First, simple, dismissive explanations, such as a manufacturer never being required to warn about other manufacturers' products, will not suffice; a

20. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. j (1998); *supra* notes 13, 17 and accompanying text.

21. *See, e.g.*, Gonzalez v. Volvo of Am. Corp., 752 F.2d 295, 301 (7th Cir. 1985) (holding that automobile manufacturer did not have a duty to warn of mis-match between bumper and bumper hitch, but hitch lessor owed duty to warn user-lessee); Persons v. Salomon N. Am., Inc., 265 Cal. Rptr. 773, 779 (Cal. Ct. App. 1990) (holding that ski binding manufacturer owed no duty to warn of mis-match between binding and ski boot, but ski rental agency owed duty to warn skier).

22. The swimsuit may be a necessary, but-for condition to the swimmers attempting such a dive, *see supra* note 10 and accompanying text, but once in place, the swimsuit does not increase the risk of the swimmer making such an attempt.

23. *See Braaten*, 2008 WL 5175083, at *3.

duty may be imposed when two different products interact synergistically to create joint risks. And second, when courts cross the line and impose failure-to-warn liability on one manufacturer for the risks presented entirely and nonsynergistically by the products of another manufacturer, the former is being required to perform a watchdog function in order to rescue product users from risks it had no active part in creating and over which it cannot exert meaningful control.[24] These cases do not involve "pure rescue" because the watchdog manufacturer's product is a but-for cause-in-fact of the tort plaintiff's being put at risk, but they clearly involve "rescue" in a meaningful sense of the term.[25] Part III, which follows immediately, describes a number of analogous contexts in which courts have refused to impose such a watchdog status on defendants, strongly suggesting, in the aggregate, that doing so in this products liability context would likewise be inappropriate.

III. COURTS HAVE TRADITIONALLY REFUSED TO REQUIRE ACTORS TO PERFORM WATCHDOG FUNCTIONS IN ORDER TO RESCUE VICTIMS FROM RISKS CREATED AND CONTROLLED BY OTHERS

Each example about to be considered does not necessarily and independently justify the denial of plaintiffs' failure-to-warn claims in the swimsuit/diving and pump/asbestos cases of primary interest here. Instead, the objective is to show a consistent pattern of decisions, supported by recurring policy considerations, that point strongly in that direction. At the very least, plaintiffs in the cases being considered in this article bear a heavy burden of showing that allowing them to recover will promote the objectives of fairness and efficiency believed to underlie the tort system.[26]

24. *See, e.g.*, S. Agency Co. v. Hampton Bank of St. Louis, 452 S.W.2d 100, 105 (Mo. 1970).

25. So-called "pure rescue" occurs when the rescuer has had no part whatever in causing the need for rescue, and the one needing rescue is a total stranger. Were courts to impose a duty to engage in pure rescue, it would be referred to as a "general duty to rescue." *See* HENDERSON ET AL., *supra* note 10, at 230. In the cases of interest here, technically the defendants are causes-in-fact of the plaintiffs' need to be rescued. *See supra* note 10 and accompanying text. But the causal links here are more attenuated than in the cases in which courts have traditionally imposed a duty to rescue. *See infra* note 32 and accompanying text. For more on the essence of rescue *see infra* note 36 and accompanying text.

26. For a summary of the policies underlying tort *see* HENDERSON, ET AL., *supra* note 10, at 34-37.

A. Examples From Outside the Products Liability System

1. The Traditional Judicial Bias Against a General Duty to Rescue

Every student of American tort law knows that American courts will not impose a legal duty to rescue another merely because the would-be rescuer knows that the other requires help that the rescuer is in a position to render.[27] Under this rule, the mere fact that a swimsuit manufacturer is in a position to warn about diving does not justify imposing a legal duty to do so.[28] Of course, this "no general duty to rescue" rule is subject to a number of exceptions, which may seem so numerous as to swallow the rule.[29] Because one of these exceptions applies when an actor knows that her conduct (whether or not tortious) has helped to place another in the position of requiring rescue, technically the claims of primary interest in this article are not "pure rescue" claims.[30] Thus, the swimsuit manufacturer in the earlier hypothetical knows that its product has in fact contributed, albeit passively and non-tortiously, to placing the swimmer in a position where he may be injured while attempting a shallow dive. Likewise, the pump manufacturer knows that it has created a predicate for the post-sale application of dangerous, asbestos-containing fire retardants.[31] But the leading cases establishing the cause-in-fact exception to the no-duty-to-rescue rule are distinguishable from the swimsuit and pump cases in ways that would justify courts in rejecting duty-to-rescue arguments in the latter circumstances.[32] Thus, while the general rule against imposing a duty to rescue does not, by itself, warrant denying the claims in these cases, neither does the exception based on actual causation require courts to recognize those claims.

27. *See* RESTATEMENT (SECOND) OF TORTS § 314 (1965); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM, § 37 (Proposed Final Draft No. 1, 2005).

28. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM, § 37 (Proposed Final Draft No. 1, 2005).

29. *See id*. §§ 38-44.

30. *See* HENDERSON ET AL., *supra* note 10, at 34-37. A leading case on the cause-in-fact exception is *Tubbs v. Argus*, 225 N.E.2d 841 (Ind. Ct. App. 1967).

31. *See Simonetta*, 2008 WL 5175068, at *2.

32. In *Tubbs v. Argus*, the defendant was the driver of an automobile who crashed the vehicle and injured the plaintiff, a passenger, placing her in need of rescue. 225 N.E.2d at 841. Because of Indiana's guest law, the defendant was not liable in tort for causing the plaintiff's initial injuries. *Id.* at 842. But the appellate court reversed a demurrer below on the plaintiff's claim that the defendant breached his duty to rescue after the accident. *Id.* at 843. Compared with those facts, the cases of interest here involve more attenuated causal links between the defendant's sale of a nondefective product and the plaintiff's need to be rescued from a more dangerous, defective product. *See, e.g.*, *Simonetta*, 2008 WL 5175068, at * 3-4.

For present purposes the main relevance of the strong judicial tradition against imposing legal duties to rescue, then, resides in the policy reasons supporting the general no-duty rule. From an instrumental efficiency perspective, courts and commentators doubt that such a rule would encourage rescue, and fear that it might actually discourage it.[33] And from the non-instrumental fairness perspective, courts and commentators feel that imposing an objective standard of reasonableness in judging would-be rescuers' conduct would unfairly punish those who are subjectively incapable of responding to such a duty.[34] Moreover, the unavoidable vagueness of such a standard would lead to arbitrary, emotion-driven outcomes at trial that would undermine shared notions of fair play.[35] When courts insist that product sellers warn of the hidden risks of their own products, rescue does not come into play.[36] But in the cases of interest here, when a court asks a manufacturer to warn about risks created entirely and nonsynergistically by other, more dangerous products, rescue is clearly involved and the traditional bias against requiring rescue strongly suggests that such a duty to warn should not be imposed.

2. The Traditional Refusal of Courts to Require Banks to Act as Watchdogs Regarding Their Customers' Financial Transactions

When a fiduciary establishes a trust account in a bank and thereafter writes checks to himself individually in the course of embezzling trust assets, does the bank owe the beneficiaries a duty to warn them of what the fiduciary appears to be doing? Most courts that have considered the question have refused to impose such a duty.[37] Not only are the check-

33. *See, e.g.*, Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 354-62 (Cal. 1976) (Mosk, J., concurring and dissenting); *infra* notes 61-63 and accompanying text; *see also* William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 94 (1978).

34. *See* James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 935 (1982).

35. *Id.* at 912.

36. One could, of course, speak of all tort duties in terms of rescue. A person driving recklessly fast could be said to owe a duty to rescue others from the risks of his driving by slowing down to a reasonable speed. But such a driver is held for misfeasance, not nonfeasance. In essence, rescue involves a duty to act to prevent harm that is threatened entirely from external circumstances, including the conduct of others.

37. *See, e.g.*, Matter of Knox, 64 N.Y.2d 434, 438 (N.Y. 1985) ("A bank is not in the normal course required to conduct an investigation to protect funds from possible misappropriation by a fiduciary . . . ."); Helig Trust & Beneficiaries v. First Interstate Bank of Wash., 969 P.2d 1082, 1085 (Wash. Ct. App. Div. 2d 1998) (holding that without actual knowledge of trustee's breach of fiduciary duty, bank had no duty to notify beneficiaries of trustee's withdrawals).

writing actions of the fiduciary almost always ambiguous—there may be innocent explanations for such admittedly questionable transactions—but also the costs of imposing open-ended watchdog responsibilities on banks are likely to be great.[38] In the end, such a duty to warn based on ambiguous appearances of impropriety would translate into insurers' liability for fiduciary self-dealing, which banks would simply treat as a cost of doing business and pass on to all of their customers. Of course, if a bank becomes more actively involved in assisting a fiduciary in committing a breach of trust, exposure to liability may be appropriate.[39] But as a general rule, courts refuse to require banks to monitor checking account activities in a watchdog capacity.[40]

One interesting (and timely) exception to this reluctance to assign watchdog status to banks and other financial institutions is the United States Patriot Act,[41] aimed at helping to prevent terrorism activities after the September 11, 2001, attacks. The Patriot Act amends the Bank Secrecy Act,[42] requiring financial institutions to establish anti-money laundering programs in order to inhibit the financing of terrorism.[43] Under 2003 amendments to regulations promulgated under the Bank Secrecy Act, financial institutions are required to report to a designated federal officer or agency any and all suspicious transactions that appear to involve money laundering or the financing of terrorist activity.[44] Clearly, the Patriot Act requires these financial institutions to perform watchdog functions in relation to their customers' activities.[45] Does this suggest that the traditional reluctance to assign such responsibilities is undergoing a significant sea change that might call for a reassessment of the thesis that American law is biased against turning banks into watchdogs? Three important considerations suggest that no such broad-scale change is underway. First, the Bank Secrecy Act regulations and related customs in the relevant industries define the concept of suspicious activities with

38. *See, e.g.*, *Helig Trust*, 969 P.2d at 1084.

39. *See, e.g.*, S. Agency Co. v. Hampton Bank of St. Louis, 452 S.W.2d 100, 105 (Mo. 1970) ("[A]ctual notice of misappropriation or conduct amounting to bad faith on the part of the bank must be shown in order . . . to recover.").

40. *See id.*

41. H.R. 3162, 107 Cong., 1st Sess. (Oct. 24, 2001).

42. Pub. L. 91-508, codified as amended at 12 U.S.C. §1829b, 12 U.S.C. §§1951-1959, and 31 U.S.C. §§5311-5314; 5316-5332.

43. Cheryl R. Lee, *Constitutional Cash: Are Banks Guilty of Racial Profiling in Implementing the United States Patriot Act?*, 11 MICH. J. RACE & L. 557 (2006).

44. 31 C.F.R. Part 103, 68 Fed. Reg. 65392 et seq. (Nov. 20, 2003).

45. *See* Maureen A. Young, *New Developments and Compliance Issues in a Security Conscious World*, 866 PLI/Pat 347 (2006).

relative specificity.[46] Second, the extraordinary background circumstances —helping in the fight against international terrorism—suggest that the approach under the Patriot Act will not be transported to other, more pedestrian financial contexts. And finally, notwithstanding the strong national-security justifications supporting the Patriot Act, the suspicious-activity reporting under the Act has proven to be costly and controversial.[47]

3. The Traditional Refusal of Courts to Require Defendants to Warn Others of the Proclivities of Relatives and Close Associates to Engage in Sexually Abusive Behavior

When a wife knows that her husband has, in the past, shown a predilection to molest children sexually, and she knows that he will find himself in circumstances that provide him the opportunity to repeat such abusive behavior, does the wife owe a legal duty to warn the children thereby placed at risk, or the children's parents? Because the facts are emotionally charged and the case for rescue is ostensibly compelling, such a circumstance provides a good test of the hypothesis that courts are generally biased against compelling actors to perform watchdog functions. Consistent with a strong no-duty-to-rescue tradition, most courts in such cases refuse to recognize a duty to warn.[48] Among the reasons given for this response are the absence of a preexisting personal relationship between the would-be rescuer and the victim;[49] the lack of custody or control of the rescuer over the victim;[50] the absence of any "just and sensible legal guidelines;"[51] and the virtual impossibility of defining a sensible starting or

46. 31 C.F.R. § 103.17 (setting a threshold on transactions involving at least $5,000); 31 C.F.R. § 103.17(a)(2) (requiring reporting if a specified financial institution knows, suspects, or has reason to suspect that a transaction is one of four classes of transactions enumerated in the regulations).

47. *See, e.g.*, Christopher J. Zinski, *Patriotism, Secrecy and the Long Arm of the Law*, 124 BANKING L.J. 457 (2007) (arguing that criminals know how to avoid detection); Maureen A. Young, *New Developments and Compliance Issues in a Security Conscious World*, 866 PLI/Pat 347 (2006) (describing litany of problems); Cheryl R. Lee, *supra* note 43, at 557 (noting that financial returns on SARs have been meager).

48. *See, e.g.*, Eric J. v. Betty M., 90 Cal. Rptr. 2d 549 (Cal. Ct. App. 2000) (ruling that, where parolee molested girlfriend's eight-year-old son, parolee's family owed no duty to warn girlfriend of parolee's felony conviction for child molestation); D.W. v. Bliss, 112 P.3d 232, 242 (Kan. 2005) (holding wife not liable for failing to warn 15-year-old boy of her husband's prior sexual activities with men in her home); Meyer v. Lindala, 675 N.W.2d 635, 641 (Minn. Ct. App. 2004) (holding that religious congregation in which both plaintiffs and their sexual abuser were members owed no duty to warn based on knowledge of prior sexual offenses perpetrated by abuser).

49. *See Meyer*, 675 N.W.2d at 641.

50. *See Bliss*, 112 P.3d at 242.

51. *See* Gritzner v. Michael R., 611 N.W.2d 906, 915 (Wis. 2000).

stopping point for such liability.[52] A minority of courts have allowed plaintiffs to succeed with failure-to-warn claims in these cases.[53] Among the minority decisions imposing liability for failure to warn of the risk of child abuse, some courts rely on child abuse reporting statutes.[54] For example, a decision for the plaintiffs by the Supreme Court of New Jersey relies on the fact that its statute applies to "any person 'having reasonable cause to believe'" that a child has been subject to abuse.[55]

4. One Controversial Exception to the General Rule: The *Tarasoff* Decision in California

More than thirty years ago the Supreme Court of California imposed liability on a psychologist for failing to warn a young woman that a patient had confided his intentions to the therapist to kill the woman.[56] The majority of the court reasoned that, although the therapist and the victim were strangers, the relationship between the therapist and his patient gave rise to a duty to warn the victim and her parents of her imminent peril.[57] Based on the traditional criteria developed in the child abuse cases in the preceding section, the court should have denied the plaintiff's claims against the psychologist, who had no preexisting relationship with the victim, did not cause the victim's predicament, and did not control his patient's behavior.[58] It appears that the defendant's status as a professional, combined with the unique opportunity to warn presented by the facts, led a majority of the court to base a duty to warn merely on the opportunity to do so, in direct conflict with the Restatement of Torts, Second.[59] One Justice concurred in the result only to the extent that it rested on the circumstance that the defendant therapist had actually predicted that his patient would kill the victim; the concurrence insisted that no duty to use reasonable care in reaching that assessment should be imposed.[60] And one Justice dissented on the ground that "[o]verwhelming policy considerations weigh against

52. *See* Kelli T-G. v. Charland, 542 N.W.2d 175, 178 (Wis. Ct. App. 1995).

53. *See, e.g.*, Doe v. Franklin, 930 S.W.2d 921 (Tex. App. – El Paso 1996) (grandmother liable when grandfather abused granddaughter).

54. *See* J.S. & M.S. v. R.T.H., 714 A.2d 924, 931 (N.J. 1998).

55. *Id.*

56. Tarasoff v. Regents of Univ. of Calif., 551 P.2d 334 (Cal. 1976).

57. *See id.* at 343-44. The Restatement view is reflected in Restatement (Second) of Torts, § 314.

58. *See supra* note 48.

59. This is the author's assessment of the holding. *See* RESTATEMENT (SECOND) OF TORTS § 314.

60. *See Tarasoff*, P.2d at 353-54, (Mosk, J., concurring and dissenting).

imposing a duty on psychotherapists to warn a potential victim against harm."[61]

The policy reasons offered by the dissenting Justice in *Tarasoff* are relevant to this general discussion of the duty to rescue. According to the dissent, threatening therapists with liability for failing to warn will not serve to increase public safety; those in need of therapy will not seek it so readily, nor will therapy be as effective as it otherwise might.[62] Moreover, therapists will respond to such a duty by committing greater numbers of patients to civil confinement, thereby significantly increasing the relevant social costs.[63] Surprisingly, in light of the analysis in this article, a majority of courts that have addressed the issue have followed *Tarasoff*,[64] although several have narrowed the holding to reduce possible open-endedness.[65] Has the duty imposed by *Tarasoff* and its progeny had the adverse effects that the dissenting Justice predicted? Some writers insist that *Tarasoff* has generated negative effects.[66] Others reach opposite conclusions.[67] In recent years, several state legislatures have codified the holding, almost always narrowing the duty to make outcomes more predictable.[68] On any fair assessment, *Tarasoff* has proven to be controversial, and does not appear to have spawned similar duties in areas other than psychotherapy. The decision is useful in the context of this article mainly because it reveals how non-traditional extensions of duties to rescue by warning are likely to stir up controversy when, on rare occasions, they are made. And the dissent in *Tarasoff* provides an eloquent essay on how and why extending duties to rescue may prove to be wasteful, ineffectual, and downright counterproductive.[69]

61. *See id.* 355 (Clark, J., dissenting).

62. *See id.* 359-60 (Clark, J., dissenting).

63. *See id.* 361-62 (Clark, J., dissenting).

64. *See, e.g.*, Shuster v. Altenberg, 424 N.W.2d 159 (Wis. 1988); Estates of Morgan v. Fairfield Family Counseling Ctr., 673 N.E.2d 1311, 1320-22 (Ohio 1997). *But see* Nasser v. Parker, 455 S.E.2d 502 (Va. 1995). *See also* Peter F. Lake, *Revisiting* Tarasoff, 58 ALB. L. REV. 97, 98-100 (1994).

65. *See, e.g.*, Thompson v. Alameda County, 614 P.2d 728, 738 (Cal. 1980) (stating that duty to warn is triggered only when a therapist is aware of specific threats to specific victims).

66. *See, e.g.*, Alan A. Stone, *The* Tarasoff *Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358 (1976); Toni Pryor Wise, Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of* Tarasoff, 31 STAN. L. REV. 165, 166 (1978).

67. *See, e.g.*, David B. Wexler, *Victimology and Mental Health: An Agenda*, 66 VA. L. REV. 681, 683-84 (1980); Daniel J. Givelber et al., Tarasoff, *Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443 (1984).

68. *See, e.g.*, N.J. STAT. ANN. § 2A:62A-16(b) (West 2000).

69. *See Tarasoff*, 551 P.2d at 354 (Clark, J., dissenting).

B. Examples From Within the Products Liability System

1. The Traditional Rule That Repairers Need Not Warn of Other Risks Presented by the Products They Repair

The general rule is that product repairers provide services, for which they are liable only when proven negligent.[70] When they supply component parts they may be strictly liable for defects;[71] but repairs, as such, constitute services.[72] Consequently, the issue here is not one of strict liability versus negligence, but whether a repairer's duty of care includes the duty to warn product owners and users about non-obvious risks, not relating to the repair, which the repairer discovers during his work.[73] Even though it might be argued that such a duty is owed, given that the repairer often has a preexisting (and perhaps an on-going) relationship with the product owner or user who hires him, courts have refused to impose a general duty to warn on repairers in such circumstances.[74] The main reasons advanced by the courts for such refusals are the open-endedness and vagueness of the responsibilities to inspect and report that a duty to warn would place on repairers, and the substantial financial costs that such a duty would generate, both in searching for defects and insuring against what would in fact amount to strict liability, that customers of repairers would ultimately be forced to bear.[75]

2. The Traditional Rule That Pharmacists Need Not Warn of Risks Presented by the Prescription Products They Dispense

What makes this traditional limit on the duty to warn unusual is that it applies to commercial entities that are clearly in the business of selling products, and that frequently have ongoing relationships with their customers.[76] The general rule is that pharmacists are strictly liable for harm caused by manufacturing defects in the prescription products they dispense,

70. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 19 cmt. f (1998).

71. *Id.*

72. *Id.*

73. *See* Seo v. All-Makes Overhead Doors, 119 Cal. Rptr. 2d 160 (Cal. Ct. App. 2002).

74. *Id.* at 162 (finding no duty on part of repairer to correct or warn of defects on other portions of remote-controlled gate); Ayala v. V. & O. Press Co., 126 A.D.2d 229 (N.Y. App. Div. 1987) (no duty to warn of design defect in machine being repaired).

75. *See Seo*, 119 Cal. Rptr. 2d at 168.

76. *See id.*; RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6 (1998).

to the same extent as are commercial retailers of nonprescription products;[77] but pharmacists are otherwise liable to their customers only if proven negligent.[78] Courts conceptualize the latter portion of this traditional approach by asserting that pharmacists primarily provide a service in regard to prescription products, but courts do not explain how that assertion is consistent with imposing strict liability for harm caused by manufacturing defects in such products. In any event, the issue of primary importance here is whether a pharmacist's duty of care includes a duty to warn customers of the non-obvious risks presented by prescription products. Clearly pharmacists must exercise reasonable care to fill prescriptions correctly and to pass on any warnings to customers supplied by manufacturers.[79] But do they owe a duty to use care to protect patients against misprescription in the sense that the wrong drug or device has been prescribed for a particular customer, or that two or more drugs will prove dangerous if taken together by the same customer? Must a pharmacist exercise reasonable care to alert customers that they may have developed a dependence on prescription drugs that may lead to addiction over time?

The traditional response to these questions is "No"—pharmacists do not owe their customers a duty to serve as watchdogs over the decisions of physicians regarding which drugs and medical devices to prescribe to which patients; they are not liable for injuries so long as prescriptions are accurately filled.[80] This general rule is subject to sensible exceptions. Thus, courts have held that pharmacists owe a duty to be alert for obvious errors on the face of the prescription.[81] And when pharmacists voluntarily undertake to warn customers of side effects of medications, or risks from drug interactions, they must do so reasonably.[82] Moreover, if a pharmacist has specific factual information about a particular customer that would cause a reasonable person to realize that the customer is at greater than normal risk, a court may recognize a duty to warn that customer.[83] The

77. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6(e)(1) (1998).

78. *Id.* § 6(e)(2).

79. *Id.* § 6 cmt. h, illus. 4.

80. *See, e.g.*, Morgan v. Wal-Mart Stores, Inc., 30 S.W.3d 455, 461-66 (Tex. App. 2000); Johnson v. Walgreen Co., 675 So. 2d 1036, 1037 (Fla. Dist. Ct. App. 1996).

81. *See, e.g.*, McKee v. Am. Home Prod. Corp., 782 P.2d 1045, 1055 (Wash. 1989); Horner v. Spalitto, 1 S.W.3d 519, 521-23 (Mo. Ct. App. 1999) (prescription called for three times the normal dosage).

82. *See, e.g.*, Cottam v. CVS Pharmacy, 764 N.E.2d 814, 821-22 (Mass. 2002) (pharmacy voluntarily distributed list of potential side effects; duty to warn customers that list was not exhaustive); Baker v. Arbor Drugs, Inc., 544 N.W.2d 727, 731 (Mich. Ct. App. 1996) (pharmacy advertising that it had established a drug-interaction database to protect customers), *appeal denied*, 588 N.W.2d 725 (Mich. 1997).

83. *See, e.g.*, Happel v. Wal-Mart Stores, Inc., 766 N.E.2d 1118, 1124-25 (Ill. 2002)

major reason that courts give for adhering to the basic rule of no duty to warn is that courts do not wish to force pharmacists to second-guess the judgments of prescribing physicians, or to interfere with the physician-patient relationship.[84] At a deeper level, undoubtedly, the reasons are similar to those already observed in other legal contexts: imposing a duty to monitor and warn would not add very much to customer safety, given the reliance of patients on their physicians, and might actually increase risk.[85] And requiring pharmacists to monitor prescriptions would greatly increase customer costs.[86]

3. The Traditional Rule That Trademark Licensors Need Not Police Their Trademarks Nor Protect Purchasers From the Risks Presented by the Products to Which Their Trademarks Are Attached

When the owner of a well-known trademark licenses its logo to be attached to a product it has neither manufactured nor distributed and over which it exerts no control, does it owe a duty to police the trademark in order to protect purchasers from non-obvious risks presented by the product? Even though the logo may be a major reason why many persons purchase the product; and even though product purchasers may assume that the trademark licensor has distributed, or at least vouches for, the product; the traditional rule is that the trademark licensor who does not participate in the manufacture or distribution of the product owes no duty to rescue the purchasers by warning them of hidden, non-obvious risks, whether or not the licensor knows that the risks exist and are significant.[87] By contrast, when trademark licensors do participate in the distribution of the products to which their trademarks attach, they are liable as sellers for any shortcomings in the manufacture, design and marketing of the products.[88]

(pharmacy knew of customer's allergies and of risks that drug posed for her); Lasley v. Shrake's Country Club Pharmacy, Inc., 880 P.2d 1129, 1130 (Ariz. Ct. App. 1994) (failure to warn customer of risk of dependency over 30-year period of taking drug).

84. *See, e.g.*, *McKee*, 782 P.2d at 1051 ("Requiring the pharmacist to warn of potential risks associated with a drug would interject the pharmacist into the physician-patient relationship and interfere with ongoing treatment.").

85. *See, e.g.*, Ramirez v. Richardson-Merrell, Inc., 628 F. Supp. 85, 88 (E.D. Pa. 1986) ("Interference in the patient-physician relationship can only do more harm than good.").

86. *See, e.g.*, *McKee*, 782 P.2d at 1055 (requiring pharmacists to supply customers with all package insert material would impose "the economic and logistic burden of copying the inserts as well as developing a storage, filing and retrieval system to ensure the current insert is dispensed with the proper drug.").

87. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 14 cmt. d (1998).

88. *Id.*; *see, e.g.*, Torres v. Goodyear Tire & Rubber Co., Inc., 786 P.2d 939, 946-47 (Ariz.

These rules governing trademark licensor liability conform to the patterns reflected in previously considered examples of courts refusing to require commercial actors to perform watchdog (or, in this context, policing) functions.[89] When the trademark licensor lacks control over the distribution of the product, the questionable gains in safety from imposing a duty on the licensor are presumably outweighed by the costs of doing so.[90]

4. The Traditional Rule That Component Part Manufacturers Need Not Monitor Use of Their Components by Subsequent Manufacturers who Combine Those Components With Others to Produce Dangerous End-Products

When the manufacturer of a nondefective component part supplies the part to another manufacturer who combines it with other components to produce a defectively dangerous end-product, is the component part supplier liable to those who are harmed by the defective design of the end-product? Parallel to their treatment of trademark licensors,[91] courts generally refuse to impose responsibility on component part suppliers to monitor the end-uses of their components and to rescue, via warnings, those exposed to risks created by the integration of those components into dangerous end-products.[92] This no-duty rule applies even though the component part directly and synergistically contributes to the risks of injury presented by the end-product, and whether or not the component part manufacturer knows or should know that its component part is contributing to those risks.[93] If the component supplier substantially participates in the integration of the component into the design of the end-product, the supplier will be liable.[94] But not otherwise, even though the component combines with other components synergistically to create joint risks in the end-product.[95] Whether an exception to this no-duty rule should be made for unusual circumstances, as when a component supplier knows that its purchaser (the manufacturer of the integrated end-product) lacks expertise

1990).

89. *See supra* Part III.A.

90. *See supra* notes 28, 36, 46-48 and accompanying text.

91. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 14 cmt. d (1998).

92. *See id.* § 5 cmt. a (1998); Mitchell v. Sky Climber Inc., 487 N.E.2d 1374, 1376 (Mass. 1986).

93. *See, e.g.*, Zaza v. Marquess & Nell, Inc., 675 A.2d 620, 632-33 (N.J. 1996).

94. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 5(b) (1998).

95. *See Zaza*, 675 A.2d at 629-30.

and knowledge of the relevant risks, is unclear.[96] But the general rule against watchdog responsibility for component parts manufacturers is solid.[97]

The rationales most often advanced for this no-duty rule should by now be familiar to the reader. The Restatement, Third, of Torts: Products Liability expresses them this way:

> As a general rule, component sellers should not be liable when the component itself is not defective as defined in this Chapter. If the component is not itself defective, it would be unjust and inefficient to impose liability solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective. Imposing liability would require the component seller to scrutinize another's product which the component seller has no role in developing. This would require the component seller to develop sufficient sophistication to review the decisions of the business entity that is already charged with responsibility for the integrated product.[98]

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

> To impose responsibility on the supplier of the compnent part in the context of the larger defectively designed machine system would simply extend liability too far. This would mean that suppliers would be required to hire machine design experts to scrutinize machine systems that the supplier had no role in developing. Suppliers would be forced to provide modifications and attach warnings on machines that they never designed nor manufactured. Mere suppliers cannot be expected to guarantee the safety of other manufacturers' machinery.[99]

C. Some General Observations

The preceding descriptions of traditional caselaw, drawn non-exhaustively from both outside and inside the products liability system, demonstrate quite clearly that courts generally refuse to require actors to perform watchdog functions in order to rescue would-be victims from risks created and controlled by others. Even when the would-be rescuers' conduct is linked causally to placing the would-be victims in need of

96. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 5 cmt. b (1998).

97. *See* HENDERSON & TWERSKI, *supra* note 11, at 537 ("The rule set forth in § 5 is firmly established in American law.").

98. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 5 cmt. a (1998).

99. *See* Crossfield v. Quality Control Equip. Co., 1 F.3d 701, 704 (8th Cir. 1993).

rescue;[100] and even when the would-be rescuers are arguably in a position to render assistance by warning the victims;[101] courts have refused to compel such rescue-by-warning efforts because the courts have perceived that such an imposition would be both unfair and ineffective.[102] In connection with the cases of interest in this article—variations on the earlier swimsuit hypothetical in which victims seek to hold the sellers of safe products liable for failing to warn of the risks presented entirely by other, more dangerous products—the preceding descriptions of traditional caselaw strongly support judicial rejection of such claims. Part IV, which follows directly, provides a policy analysis of why courts should reject these rescue-by-warning claims.

IV. REQUIRING SELLERS OF SAFE PRODUCTS TO RESCUE USERS OF DANGEROUS PRODUCTS CONSTITUTES BAD PUBLIC POLICY

A. Relying on Failure to Warn As the Doctrinal Vehicle for Accomplishing Rescue Is Unfortunate

Although the reported decisions that prompt this article involve failure to warn of risks of asbestos exposure, some of the rescues of which this article speaks could be accomplished by product design modifications. Thus, the pumps and valves to which asbestos products are applied post-distribution might conceivably be redesigned to discourage such post-sale applications of asbestos, or to reduce the risks they create.[103] But clearly, redesigning swimsuits to discourage diving into shallow above-ground pools would not be feasible. It is, therefore, not surprising that plaintiffs in the rescue case of interest here rely on claims of failure to warn. The very ease with which these rescue-by-warning claims may be formulated belies how inherently problematic they really are. The author of this article has elsewhere described failure-to-warn doctrine as an empty shell of rhetoric that does not give courts adequate basis on which to distinguish spurious claims from valid ones.[104] It is easy for a plaintiff to assert that, if an

100. *See* RESTATEMENT (SECOND) OF TORTS § 314 (1965).

101. *See supra* note 27 and accompanying text.

102. *See supra* note 34 and accompanying text.

103. For example, the product surfaces might be designed to make application of asbestos more difficult, or to somehow contain the asbestos particles before they become air-borne. The author assumes these possibilities are far-fetched.

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

inherently safe pump or valve had carried warnings about the risks of asbestos that may be attached by purchasers post-sale, the plaintiff would have heeded the warnings and avoided exposure. Evidence of the wishful thinking behind such an assertion is to be found in the fact that many jurisdictions deem it necessary to supply plaintiffs with "heeding presumptions" in order to render such claims facially plausible.[105]

These heeding presumptions, which have been confusing and controversial,[106] lie near the heart of the difficulties with failure-to-warn doctrine in the present context. To return to the swimsuit hypothetical, is it realistic to presume that a swimsuit manufacturer could somehow reach its purchaser/users with a warning against diving that would overcome the other considerations—including daredevil impulses—that would lead an individual to dive head first into shallow water?[107] Or that placing warnings on pumps and valves would somehow convince an entire industry to refuse to use insulating materials that had been traditionally used, were relatively cheap and readily available, and that had proven very effective as fire retardants?[108] Failure-to-warn doctrine allows defendants to raise these questions, but almost always leaves them for the triers of fact to decide.[109] It must be borne in mind that these difficulties inhere in the application of failure-to-warn doctrine in all contexts,[110] not just in the one of primary interest here. But when these difficulties are placed side-by-side with the historical reality that courts in many different contexts have refused to impose watchdog responsibilities on commercial actors to rescue victims from risks created and controlled by others,[111] plaintiffs in these rescue-by-

105. *See* HENDERSON & TWERSKI, *supra* note 11, at 391-400.

106. *See, e.g.*, Karen L. Bohmholdt, Note, *The Heeding Presumption and Its Application: Distinguishing No Warning from Inadequate Warning*, 37 LOY. L.A. L. REV. 461, 461-62 (2003); Richard C. Heinke, *The Heeding Presumption in Failure to Warn Cases: Opening Pandora's Box?*, 30 SETON HALL L. REV. 174, 174-75 (1999); Hildy Bowbeer & David S. Killoran, Liriano v. Hobart Corp.*: Obvious Dangers, The Duty to Warn of Safer Alternatives, and the Heeding Presumption*, 65 BROOK. L. REV. 717, 717-18 (1999).

107. The author's problems with this rhetorical question are set forth in HENDERSON & TWERSKI, *supra* note 11, at 402-03.

108. The plaintiff might be better off arguing that, if the warnings had been given, he would have quite a well paying job rather than continue to expose himself to the marginally increased risks of pump-related asbestos in an environment already contaminated with asbestos from other sources. Such a hypothesis strikes the author as so fantastically unrealistic that what must be happening is that the plaintiff is, in actual fact, seeking strict, fault-free enterprise liability. *Cf. infra* notes 114-19, and accompanying text.

109. *See* Henderson & Twerski, *supra* note 104, at 306. ("[T]he plaintiff's prima facie case [of causation] is too easy to establish [and] the tools available to defendants to rebut it are almost nonexistent.").

110. *See supra* Part III.

111. *See supra* Part III.

warning cases of the swimsuit and pump/valve variety should bear a heavy burden of showing that sound public policies support the outcomes they seek. The following section reveals that quite the opposite is true.

B. Legitimate Public Policy Objectives Would Not Be Served by Imposing These Duties to Rescue

Requiring sellers of safe products to rescue users of other, more dangerous products would not serve to achieve the policy goals of allocative efficiency or fundamental fairness.[112] Regarding the instrumental objective of promoting the efficient allocation of resources, such a requirement in the form of a duty to warn of risks entirely created and controlled by other manufacturers would be too open-ended and vague to serve as a meaningful guide to a seller's conduct. In the swimsuit hypothetical, for example, would the swimsuit manufacturer also be required to warn of the risks of running around a wet and slippery pool deck? Or swimming at a beach that might be subject to deadly undertows? Or sharks? Should the swimsuit manufacturer be required to warn of the risks of swimming on a full stomach? Or while drunk? And regarding sellers of pumps and valves, should they also warn of the dangers of installing the pumps in unseaworthy vessels? Or in vessels that may become contaminated with contagious disease? These are not far-fetched possibilities, were courts to recognize a duty to warn of risks that originate from, and are controlled entirely by, sources other than the defendant seller of the inherently safe product. Combining this indeterminancy with the serious questions regarding whether warnings really make a difference in people's behaviors,[113] what emerges is a regime of de facto enterprise liability, in which failure-to-warn is a means by which to shift costs from one enterprise to another in order to achieve social objectives having no necessary connection with modifying user behavior.[114]

The author of this article has argued elsewhere that enterprise liability on a grand scale is unworkable and inefficient, even when the risks that result in injury can be traced to the enterprise being held strictly liable.[115]

112. *See supra* note 18.

113. *See supra* notes 107-08 and accompanying text.

114. If one assumes that warnings in these settings do not actually reduce accident costs significantly, and that plaintiffs almost always reach triers of fact with failure-to-warn claims, *see supra* note 109, then the defendants' liability amounts to strict enterprise liability based on the fact of distributing products that contribute in attenuated, cause-in-fact ways, *see supra* notes 10, 32, to causing plaintiffs to be harmed.

115. *See* James A. Henderson, Jr., *Why Negligence Dominates Tort*, 50 UCLA L. REV. 377

In much more constrained forms, enterprise liability may be justifiable as a means of making sure that enterprises that create risks bear their fair share of the social costs that those risks generate.[116] But in the present context, when a court holds the seller of a safe product strictly liable for the harm caused entirely by more dangerous products, the relevant social costs are not allocated to the appropriate enterprise. Users and consumers of the safe product under such a regime end up compensating (and thereby subsidizing) the users and consumers of the dangerous products, thereby generally discouraging use and consumption of relatively safe products and encouraging use and consumption of relatively dangerous ones. The end result is that extending failure-to-warn doctrine to effect the rescue of users and consumers of dangerous products will not promote efficiency, but rather the opposite. Unless they have some other instrumental objective in mind, such as providing asbestos victims with a source of funding regardless of how unprincipled the means of doing so,[117] courts should not think seriously about extending these duties to warn in the name of promoting allocative efficiency.

Even if extending these duties to warn will not promote allocative efficiency—indeed, will probably prove wasteful—what of the non-instrumental goal of achieving fairness and justice between the parties? The author of this article has elsewhere identified three fairness values that products liability may be seen to promote: (1) compensating victims of defective products for the disappointment of their reasonable expectations; (2) requiring those who deliberately appropriate the well-being of others to make their victims whole; and (3) shifting the social costs of risky activities from the innocent victims of those activities to those who directly benefit from them.[118] Taken together, promoting these values helps to achieve corrective justice. The unifying principle is that those whose self-promoting activities cause harm to others should compensate their victims in order to make them whole and set things right. How do these principles of corrective justice inform an assessment of the proposed extension of failure-to-warn doctrine to require sellers of safe products to rescue victims of other, more dangerous products? Upon reflection, they argue against imposing such liability. As both the swimsuit and the pump/valves

(2002).

116. *See* James A. Henderson, Jr., *Echoes of Enterprise Liability in Product Design and Marketing Litigation*, 87 CORNELL L. REV. 958 (2002).

117. It should be remembered that the decisions that prompted this article, which is deliberately couched in more general terms, are asbestos cases. *See supra* note 7.

118. *See* James A. Henderson, Jr., *Coping With the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 935-38 (1981).

examples make clear, the sellers of the relatively safe products have not deliberately or actively caused harm to the victims, nor have they unjustly enriched themselves (or their customer bases) at the victims' expense.[119] Indeed, given the roles of the defendants as non-rescuers in these examples, it is difficult to conceptualize these cases in corrective-justice terms. It follows that the only policy justification for imposing this kind of duty to rescue must be instrumental—even if the sellers of the safe products do not ethically deserve to be held liable, threatening them with liability will cause them effectively to rescue victims from injury. On this view, the defendant product sellers must be seen instrumentally as a means of achieving efficiency. But this brings the analysis full circle—imposing what amounts to strict liability in these cases will not promote efficiency. Once this efficiency rationale is revealed as a false promise, hope for a public policy justification for extending the duty to rescue by warning vanishes.

To this point the policy discussion has focused on what might be termed "nearly pure" rescue claims, where the safe product does not combine synergistically with the more dangerous product to produce joint risks.[120] When such synergism does occur, the policy arguments supporting liability are much stronger. From an instrumental standpoint, a failure-to-warn regime based on synergistic interaction is more workable because the synergism identifies the risks to be warned about, significantly reducing the open-endedness of the duty to warn that courts would encounter in the absence of synergism.[121] And from a fairness perspective, it is easier when synergism occurs to say that the relatively safe product, itself (apart from any failure to warn), is significantly contributing to causing the victim's injuries.[122] When the post-distribution, synergistic creation of risk results from purchaser/manufacturers subsequently combining components to

119. These are the essential difficulties of making out an ethical case for imposing a "nearly pure" duty to rescue. The defendant is liable for something it did *not* do, not something it *did* do. For ethical arguments supporting a duty to rescue on non-instrumental grounds, see Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980); Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1 (1993). For arguments against a duty to rescue, see Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

120. For a discussion of "pure" and "nearly pure" rescue, *see supra* note 25.

121. Earlier discussions have rehearsed the virtually limitless range of risks about which a swimsuit or a pump manufacturer might be required to warn in the absence of any requirement of synergism. *See supra* text following note 112. The earlier example of the swimsuit disintegrating caustically in high-chlorine-content pool water, *see supra* text preceding note 17, makes this clear. The required warning in that instance would focus on the effects of chlorine, not a limitless number of other risks.

122. In the example of the caustic interaction of the swimsuit and the chlorine, the swimsuit is an active participant in causing the dangerous synergism.

produce an integrated end-product, traditionally courts hold the component seller liable for end-product defects only if it substantially participates in the combining of the components.[123] This limitation on a component seller's liability appears consistent with the preceding policy analysis, from both efficiency and fairness perspectives.[124]

C. Working Out a No-Duty Rule to Cover These Rescue-by-Warning Claims

This section assumes that strong lines of precedent and careful considerations of public policy support judicial rejection of claims requiring sellers of relatively safe products to rescue users and consumers from risks presented entirely by other, more dangerous products.[125] It remains to work out a sufficiently clear no-duty rule that will allow courts to dispose of such claims as a matter of law.[126] Mindful of the admonitions of Part II about avoiding oversimplified, dismissive rules of decision,[127] the author offers the following first effort at formulating an appropriate no-duty rule: a commercial product seller owes no duty to design or warn against the risks presented by other products with which the seller's product interacts after sale or distribution unless either (1) the seller participates actively and substantially in causing the interaction to occur, or (2) the post-sale interaction synergistically creates joint risks that are significantly greater than the sum of the risks that the product and the other products would present independently. If either or both of the exceptions apply, the rules generally governing negligence and product defectiveness determine liability.

This approach is not offered as a proposed revision of the Restatement of Products Liability, on which the author served as Co-Reporter.[128] At most, some of the proffered language might have been included in official comments.[129] It will be noted that the proposal might be phrased,

123. *See supra* notes 92-95 and accompanying text.

124. Substantial participation in the integration of the components implies control by the component seller, which supports instrumental objectives. And the participation makes the component part supplier an active contributor to the risk, strengthening noninstrumental arguments based on corrective justice.

125. *See supra* Parts II, III.B.

126. In general, no-duty rules should provide clear guidelines based on considerations other than the policy objectives, themselves. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM, § 7 cmt. a (Proposed Final Draft 2005).

127. *See supra* text preceding and accompanying notes 10-15.

128. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998).

129. Perhaps it might have been to § 2(c), dealing with the basic subject of failure to warn, *id.*

alternatively, in "product defectiveness" language, leaving courts to fit it into the conceptual framework of their products liability law.[130] Note also that the proposal covers both rescue by warning and rescue by design, a point raised earlier in this discussion.[131] The most important aspect of this proposed no-duty rule is that the vast majority of products liability claims will come within one or both of the two exceptions—the cases that the no-duty rule covers will presumably be few in number, perhaps limited to asbestos claims depending on whether other courts decide to follow the recent decisions of the Washington Supreme Court.[132]

Perhaps the most efficient way to understand what the proposed rule would accomplish is to walk through some illustrative cases to see how they would come out. For example, how would a court respond to the swimsuit hypothetical considered at various junctures in this analysis? Clearly, the proposed no-duty rule would require judgment as a matter of law for the swimsuit manufacturer. Although swimsuit distributors promote swimming generally, they do not promote diving into shallow water, the dangerous interaction in that case; even if swimsuit manufacturers know that such conduct occurs, they do not actively participate in causing it to occur.[133] Moreover, as explained earlier, the swimsuit and the swimming pool do not interact synergistically.[134] The same outcome would result in the pump/asbestos cases. Pump manufacturers may know that asbestos will be applied post-sale within and without their products, but this analysis assumes that the manufacturers do not actively participate in causing that to occur.[135] And the pumps and the asbestos do not interact synergistically to create "significantly greater" joint risks.[136]

§ 2(c), or § 5, dealing with component parts that get combined to create integrated end-products, *id.* § 5. The author would have preferred the first alternative, since these cases do not fit easily into the component parts paradigm.

130. The Restatement (Third) of Torts sections dealing with time-of-sale failure to warn rely on defectiveness rather than distributor's negligence. But the reasonableness-based tests for liability for design and marketing defects are functionally equivalent to negligence. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. a (1998) (The provisions governing design and warning defects "achieve the same general objectives as does liability predicated on negligence.").

131. *See supra* note 103 and accompanying text.

132. *See Braaten*, 2008 WL 5175083; *Simonetta*, 2008 WL 5175068.

133. *See supra* note 119 and accompanying text.

134. *See supra* note 22 and accompanying text.

135. *See supra* text accompanying note 119.

136. *See supra* text following note 22. There, the text speaks of asbestos applied to the outside of the pumps. What of asbestos-containing gaskets installed post-sale inside the pumps? On the assumption that the asbestos becomes dangerous only when disturbed during servicing, the defendant can argue persuasively that any small degree of synergism between the pumps and the

What about the majority of products liability claims that do (and should) fall within the exceptions—the claims that the proposed no-duty rule should not bar? The earlier hypothetical involving the swimsuit that interacts dangerously with high-chlorine-content pool water is easy—the products interact synergistically under the second exception and plaintiff is free to invoke design and warning principles in seeking recovery.[137] What about a claim that the manufacturer of an automobile should warn users about driving while intoxicated? One's first reaction may be that the proposed no-duty rule bars the claim because it is similar to the claim in the swimsuit/diving and pump/asbestos cases. Upon reflection, that reaction will be seen to be in error. Drunkenness and automobile driving are poster children for dangerous synergistic interaction; the combination of the two product-related activities creates joint risks that are "significantly greater" than the sum of the risks that the activities present independently. If the reader nevertheless believes that such a failure-to-warn claim is weak, it is probably because the risks of drunk driving are well-known and plainly obvious, and no duty to warn exists for that reason.[138] But observe that even obvious risks may require modifications in product design—although courts and other regulators have not required automobile manufacturers to design their products to reduce the frequency of drunk driving, it is at least conceivable that they might.[139]

How does the proposed no-duty rule interface with the problem of determining a component part manufacturer's responsibility for dangerously designed end-products? It will be recalled from an earlier discussion that sellers of non-defective components are liable for the dangerous designs of integrated end-products only when the sellers substantially participate in the integrative design process.[140] However, even if a component seller does not actively participate in integrating its product into the end-design, its component may nevertheless combine synergistically with the other components, falling within the second exception to the proposed no-duty rule. But then the separate no-duty rule governing non-participating component suppliers kicks in, and the component seller would be off the liability hook as a matter of law. Thus, courts should first apply the proposed no-duty rule and, if a defendant seller

gaskets does not create joint risks that are significantly greater than if the asbestos had been applied externally to the pumps.

137. *See supra* note 18 and accompanying text.

138. *See supra* note 13 and accompanying text.

139. *See supra* text accompanying notes 103, 131. On the subject of anti-drunk-driving devices in automobiles, *see* JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 550 (4th ed. 2000).

140. *See supra* notes 92-95 and accompanying text.

comes within an exception, move to the further question of whether another no-duty rule applies to warrant judgment for defendant as a matter of law.

V. CONCLUSION

A manufacturer's duty to provide reasonable warnings and to adopt reasonably safe designs ordinarily does not involve rescue.[141] Thus, when a defectively designed or marketed product interacts synergistically with products manufactured by others, the commercial distributor of the defective product is liable for misfeasance, not nonfeasance. In these routine situations, the manufacturer is being held liable for harm its unreasonably dangerous product actively causes, not for harm that the manufacturer has failed to prevent. By contrast, the cases of interest in this article, wherein the sellers of nondefective products are required to warn or design against risks that are entirely generated by unsafe products with which their products happen to interact non-synergistically, do involve rescue in a very real sense.[142] In these cases, the seller of the safe product is held for nonfeasance, not misfeasance—for failing to rescue users of its inherently safe products from risks that its products did not actively contribute to creating.[143]

This article has considered two concrete examples of product-interaction, rescue-by-warning products liability claims: one purely hypothetical—a swimsuit manufacturer's alleged duty to warn swimsuit users against the risks of diving into shallow, above-ground swimming pools; and one quite real—a pump manufacturer's alleged duty to warn its users of the risks presented entirely by asbestos products added to its pumps only after purchase and installation. The preceding analysis demonstrates that imposing liability on either the swimsuit manufacturer or the pump manufacturer runs counter to a strong bias in traditional American liability law against requiring one group of actors to function as watchdogs to prevent another group of actors from wrongfully causing harm. And this analysis shows that imposing liability of this sort constitutes bad public policy. In response to these difficulties, this article proposes a no-duty rule that will enable courts to sort out these product-interaction, rescue-by-warning claims, one that would properly dispose of the swimsuit/diving and the pump/asbestos claims for defendants as a matter of law while allowing more sensible product-interaction claims to reach triers of fact. Simply

141. *See supra* note 36 and accompanying text.

142. *See supra* text following note 36.

143. *See supra* note 36 and accompanying text.

stated, the proposed rule recognizes product-interaction claims when either the seller actively and substantially participates in causing the product interaction to occur, or the product interaction synergistically creates significant joint risks of harm.

To date, courts have not allowed plaintiffs to proceed with product-interaction, rescue-by-warning claims,[144] but some of these cases are still under review.[145] If future courts choose to impose liability in these situations and these holdings catch on and spread, courts may eventually be involved in an unprecedented, unfortunate expansion of the duty to rescue. This author predicts that such an expansion will not occur. Most judges will understand what their predecessors have always understood—that hanging liability on such a slender thread does not promote the efficient allocation of resources, nor does it achieve justice among the parties involved.

144. *See* Braaten v. Saberhagen Holdings, 2008 WL 5175083 (Wash. Dec. 11, 2008); Simonetta v. Viad Corp., 2008 WL 5175068 (Wash. Dec. 11, 2008); *cf.* Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488 (6th Cir. 2005) (Ohio law).

145. *See* Taylor v. A.W. Chesterton, Nos. A116816 and A117648 (Cal. App. 1st Div.); Merrill v. Leslie Controls, Inc., No. B200006 (Cal. App. 2d Div.).