The Duty Problem with Liability Claims against One Manufacturer for Failing to Warn about Another Manufacturer’s Product

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As the title of this article indicates, the author strongly advocates that product liability law goes too far when it imposes a “duty” to warn or instruct about another manufacturer’s products, even though a third party might use those products in connection with the manufacturer’s own product.

Nevertheless, asbestos plaintiffs make such claims across this country against equipment defendants (such as pump and valve manufacturers) alleged asbestos-containing products affixed to the finished product of the defendants (such as asbestos containing flange gaskets and external insulation)—products neither made, sold, specified nor recommended by the manufacturers of the equipment.

Clearly, a “duty” to warn may exist for an unreasonably dangerous product. However, to argue that the absence of a warning for defects in other products (i.e., the external insulation) somehow makes unaltered, completed equipment defective is nothing less than “semantic nonsense” (Garman v. American Clipper Corp., 117 Cal.6 Toxic Torts and Environmental Law Winter 2005 App. 3d 634, 638 (Cal. Ct. App. 1981)). It is not the product supplied by the defendant (equipment) but the product used in connection with the equipment (external insulation, flange gaskets) that may be defective for lack of warnings (See Blackwell v. Phelps Dodge Corp., 157 Cal. App. 3d 372, 378 (Cal. Ct. App. 1984)). Therefore, regardless of whether phrased in strict liability, warranty or negligence terms, defense counsel must ensure that the plaintiffs and courts do not permit boundless, ludicrous duties.

In this article, we will look at several popular arguments put forth by plaintiffs in an attempt to impose a duty to warn with respect to another’s products that are used in connection with the defendant manufacturer’s product. Finally, we will evaluate counter-arguments and discuss a suggested defense strategy for eliminating the need for lengthy, costly defense of these absurd claims.

The Concept of “Duty”

In general terms, “duty” is a question of whether one party is so particularly situated in relation to another as to create a legal obligation for the benefit of the other (W. Page Keeton et al., Prosser & Keeton on Torts §53 (5th ed. 1984)). The concept of duty is firmly rooted in our law and remains an essential means of limiting a party’s legal responsibility. It is no surprise then that the analysis of the existence of a duty is so hard to confine to a simple formula. As observed by Dean Prosser, as our ideas of human relations change, the law as to duties changes with them (Prosser, Palsgraf Revisited, 52 Mich. L. Rev. 1, 12–15 (1953)).

In recent years, the role of public policy as an influence upon the definition of human relations has greatly increased. As a result, in deciding questions of duty, courts across this country have considered such issues of public policy (overtly and off the record) as convenience, capacity to bear the loss, prevention of future harm, moral blame, changing social conditions, foreseeability, certainty of injury and many others. (See, e.g., Vu v. Singer Co., 538 F. Supp. 26, 29 (N.D. Cal. 1981)). Thus, we must make a conscious effort to see that law is decided in a manner that achieves desirable social results.
Nature of Warning Claims

Among the three fundamental products liability defect claims, marketing or warning defects claims continue to offer fertile ground for the creative and artful pleader. Unfortunately, legal theorists and scholars have largely ignored warnings issues and the legal landscape has suffered as a result. The price of this unchecked artistic license, as described by Professors James A. Henderson and Aaron D. Twerski, two leading products liability theorists, is that “[f]ar too many frivolous failure-to-warn cases survive appellate review. The absence of principled standards has fostered an atmosphere of lawlessness” (Henderson & Twerski, Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn, 65 N.Y.U. L. Rev. 265, 269 (1990)). It is noteworthy that Henderson and Twerski also served as the reporters for the Restatement (Third) of Torts: Products Liability.

Whether defined by case law or statute, phrased in strict liability, warranty, or negligence terms, warnings claims are usually analyzed under a quasi negligence standard for the imposition of liability (See, e.g., Douglas R. Richmond, Renewed Look at the Duty to Warn and Affirmative Defenses, 61 Def. Couns. J. 205, 207-8 (1994); James T. O’Reilly, Product Warnings: Defects and Hazards, 6.02(A)-(B) (2d ed. 1999). Thus, the threshold inquiry for a warnings claim is the existence of a legal duty on the part of the manufacturer to warn of a danger. Further, most states, including Texas, Illinois, California, Michigan, Ohio, Mississippi, New York, Minnesota and Massachusetts, hold that the existence of a duty to warn is solely a question of law for the court to decide (See generally O’Reilly, supra, at 6.02(A); 63A Am. J. Juris. 2d. Prod. L. 1216 (1997 & Supp. 1999)). This should hold true regardless of whether the claimant has brought the claim sounding in strict liability, negligence or warranty (See, e.g., Brown Forman Corp. v. Brune, 893 S.W.2d 640, 644 (Tex. App.—Corpus Christi 1995, writ denied)).

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Judicial Treatment of Warnings Claims with Respect to Another’s Products

It seems axiomatic that a manufacturer has no duty to warn of the dangers of a defective product that it did not manufacture, design or place into the stream of commerce. Nevertheless, such claims are repeatedly made against equipment manufacturers for asbestos-containing products that are affixed to or used with their finished equipment by third parties after the equipment has left the manufacturer’s control.

In Texas, the Supreme Court has held in the clearest possible terms that “[a] manufacturer does not have a duty to warn or instruct about another manufacturer’s products, though those products might be used in connection with the manufacturer’s own products” (Firestone Steel Products Co. v. Barajas, 927 S.W.2d 608, 614 (Tex. 1996)(citing Walton v. Harnischferger, 796 S.W.2d 225 (Tex. App.—San Antonio, 1990, writ denied)). In Walton, the plaintiff was injured when the nylon strap rigging attached to the defendant manufacturer’s crane failed allowing the tin to fall and injure the plaintiff (See id. at 225). Plaintiff claimed that the crane manufacturer had a duty to warn regarding this rigging. However, the court held that the crane manufacturer had no duty to warn or instruct users of its crane about the nylon strap rigging because it was not a component part of the crane, was not incorporated into the crane by the manufacturer and was not placed into the stream of commerce by the crane manufacturer (See id. at 227–28). Finally, the court noted that to require the crane manufacturer to warn of all rigging dangers would be unfair and unrealistic. (See id. at 227.)

Numerous other state and federal courts have issued similar rulings (See e.g., Lindstrom v. AC Products Liability Trust, 264 F. Supp. 2d 583, 589, 591 & 595 (N.D. Ohio 2003)(dismissing strict liability and negligence claims because exposure limited to asbestos parts of another manufacturer); Spencer v. Ford Motor Co., 367 N.W.2d 393, 396 (Mich. Ct. App. 1985)(vehicle manufacturer not liable for defective wheelchair component added after sale); Mitchell v. Sky Climber, Inc., 487 N.E.2d 1374, 1376 (Mass. 1986)(manufacturer of lift motor had no duty to warn about rigging used with scaffolding of another manufacturer); Kaloz v. Risco, 466 N.Y.S.2d 218, 220 (N.Y. Sup. Ct. 1983) (re-fusing to require a warning as to a conjunctive product made by another even though such other product may be a sine qua non to the use of the first); Rastelli v. Goodyear Tire & Rubber Co., 591 N.E.2d 222, 225–26 (N.Y. 1992)(declining to hold that one manufacturer has a duty to warn about another manufacturer’s product when the first manufacturer produces a sound product that is compatible for use with a defective product of the other manufacturer); Fricke v. Owens-Corning Fiberglas Corp., 618 So. 2d 473 (La. App. 4 Cir. 1993) (declining to hold a manufacturer responsible for alleged inadequate warnings about a product
it neither manufactured nor sold); Niemann v. McDonnell Douglas Corp., 721 F. Supp. 1019, 1030 (S.D. Ill. 1989)(airplane manufacturer had no duty to warn about replacement asbestos chafing strips used in the engines that it did not manufacture); Ford Motor Co. v. Wood, 703 A.2d 1315, 1330 (Md. Ct. Spec. App. 1998)(no duty to warn for replacement asbestos brake and clutch parts that Ford did not make, market or supply).

For example, in Baughman v. General Motors Corp., 780 F.2d 1131, 1133 (4th Cir. 1986), the plaintiff was injured by the explosive separation of a multi-piece rim that had been installed, as a replacement part, on a truck manufactured by defendant. GM neither designed nor manufactured the rim. In affirming summary judgment in favor of GM, the court indicated that accepting the plaintiff’s position would require GM to test all possible replacement parts made by any manufacturer to determine their safety and to warn against the use of certain replacement parts. “If the law were to impose such a duty, the burden upon a manufacturer would be excessive. While the manufacturer can be fairly charged with testing and warning of dangers associated with components it decides to incorporate into its own product, it cannot be charged with testing and warning against any of a myriad of re-placement parts supplied by any number of manufacturers” (Id. At 1133).

Fortunately, the courts in the above-cited cases recognized the potential for creating a boundless duty to warn persons allegedly injured by another manufacturer’s products. The author submits that to hold otherwise would make all manufacturers the guarantors not only of their own products, but also of each and every product that could conceivably be used in connection with or in the vicinity of their product. Should the law with respect to warnings be allowed to get this far out of control, the ability to successfully defend such claims seems a near impossibility. Can’t you just see a smoker with lung cancer suing manufacturers of matches and lighters for failing to warn that smoking cigarettes is dangerous to their health? Perhaps this analysis would be different if a manufacturer had actually designed, supplied, or specified, a particular asbestos-containing product be used in connection with its product; certainly a plaintiff’s argument in favor of a duty to warn on the part of the manufacturer would be stronger and more palatable.

Creative “Spin” Used to Argue for the Existence of A Duty

Apparently aware of the overwhelming weight of authority and logic, plaintiffs may attempt one or more arguments in an attempted end-run around the nonexistent duty to warn for another’s products. Two examples of such arguments are examined below.

First, plaintiffs may argue that a distinction exists between their claim based on “conduct” and their claim based on “product.” This is a distinction without merit and plaintiffs should be hard pressed to cite authority for the proposition that a manufacturer may not have a duty to warn of dangers regarding a product it did not manufacturer (i.e., strict liability claim), but does have the very same duty for purposes of a negligence claim, primarily on grounds of foreseeability. Indeed, federal courts applying Texas law have rejected such tactics by litigants bringing product liability claims.

In one such case, a plaintiff attempted to avoid application of the learned intermediary doctrine by attempting to characterize his product liability claim as a deceptive trade practices claim. “The gravamen of all of Plaintiffs’ causes of action, including misrepresentation and violation of the DTAPA, is that Wyeth failed to adequately warn of or disclose the severity of Norplant’s side effects. Therefore, the learned intermediary doctrine applies to all of Plaintiff’s causes of action…If the doctrine could be avoided by casting what is essentially a failure to warn claim under a different cause of action such as violation of the DTAPA or a claim for misrepresentation, then the doctrine would be rendered meaningless” (In re: Norplant Contraceptive Prods. Liab. Litig., 955 F. Supp. 700, 709 (E.D. Tex. 1997), aff’d, 165 F.3d 374 (5th Cir. 1999); see also Sanchez v. Liggett & Myers, Inc., 187 F.3d 486, 491 (5th Cir. 1999)). Thus, both law and logic compel the rejection of any attempt by plaintiffs to recast their products liability warnings claims as negligence claims to avoid the non-existent duty with regard to another’s products.

Second, plaintiffs may argue that another manufacturer’s products affixed to or used with the equipment by a third party after distribution of the equipment are “components” of the equipment (i.e., the flange gaskets and external insulation were required for the equipment to function properly). Again, using basic rules of construction and established product liability precedent, this argument should be easily discredited.

According to its ordinary, plain-English meaning, the term “component” is “a constituent element, as of a system” (American Heritage Dictionary of the English Language (4th ed., 2000)). Texas courts, like others, limit the definition of component to those parts of a finished product that are integrat-ed into the finished product before the finished product is placed into the stream of commerce. For example, in the Walton case
discussed earlier, the court expressly held that nylon strap rigging was not a component of the crane where the crane manufacturer did not supply its crane with any rigging, but rather, the rigging was affixed to the crane after it left the crane manufacturer's control (See also Bostrom Seating Inc. v. Crane Carrier Co., 140 S.W.3d 681 (Tex. 2004)(seat installed in garbage truck prior to truck's distribution was component of truck); Smith v. Aqua-Flo, Inc., 23 S.W.3d 473, 479–80 (Tex. App.—Houston [1st Dist] 2000, pet. denied)(water pump was “component” of spa; distribution was component of truck); Smith v. Aqua-Flo, Inc., 23 S.W.3d 473, 479–80 (Tex. App.—Houston [1st Dist] 2000, pet. denied)(water pump was “component” of spa pool); Molina v. Kelo Tool & Die, Inc., 904 S.W.2d 857, 861 (Tex. App.—Houston [1st Dist] 1995, writ denied)(molding die integrated into punch press prior to distribution was “component” of press)). Based on the above, unless plaintiffs can present evidence that a piece of equipment was distributed with exterior insulation and/or flange gaskets integrated in or attached to the equipment, such products should never be held to be a “component” of the equipment since they left the factory in exactly the condition contemplated by the ultimate consumer (without insulation or flange gaskets).

Public Policy Must Be Addressed for the “Duty” Analysis

As we discussed above, public policy plays an important role in defining the concept of duty. Social, economic and political questions and their applicability to the facts at hand must be taken into consideration in the determination of the existence of a duty to warn. Longstanding principles of public policy underlying products liability dictate that responsibility for a product’s danger rests with companies in the chain of distribution that inform strict liability principles seek to encourage the responsible manufacturer and design of products and therefore declining to impose strict liability on defendant that did not sell, manufacture or design product).

Accordingly, fundamental principles of public policy require that plaintiffs’ novel and far-fetched theory of duty in warnings/marketing defect claims be rejected. Manufacturers cannot be expected to determine the relative hazards of various products that they do not manufacture or sell and have not had the opportunity to inspect, test and evaluate, much less warn consumers about using such products. Moreover, if adopted by the law, such a duty would lead to more legal and business chaos—every product supplier would be required to warn of the foreseeable dangers of numerous other manufacturers’ products used at a jobsite. The result?—an extraordinary and confusing proliferation of warnings, arguably removing any meaningful benefit to the product user.

Defensive Strategy for Warnings Claims

Given that most states properly treat the existence of duty as a question of law, the author submits that a traditional motion for summary judgment (as opposed to no-evidence) on the duty issue should be filed as early in a case as possible, perhaps along with the answer. Using this type of motion avoids any procedural requirement of “adequate time for discovery” and offers an opportunity to be in control of the arguments and law to which the plaintiffs must respond.

Recently trial courts in Texas and California have granted summary judgments in favor of equipment manufacturers, holding that they had no duty to warn of alleged hazards of asbestos-containing products, manufactured, designed, supplied and affixed to the equipment by unrelated third parties, after the equipment left the manufacturers’ control (e.g., Harry and Janet Simkins v. Alfa Laval, Inc., et al., Cause No. CC-03- 02935-B, County Court at Law No. 2, Dallas County, Texas, May 5, 2004; Mary Nolen, et al. v. A.W. Chesterton Co., et al., Cause No. 153-200843-03, 153rd Judicial District Court, Tarrant County, Texas, June 17, 2004; George and Ruth LaChapelle v. American Standard, Inc, et al., Case No. BC 303899, Superior Court of California, Los Angeles County, April 26, 2004; Ernesto and Maria Escamilla v. American Standard, Inc., et al., Case No. BC 303900, Superior Court of California, Los Angeles County, May 11, 2004). For example, in Nolen, the plaintiff claimed exposure to asbestos-containing products installed on and around defendant manufacturers’ valves and pumps. The court rejected the plaintiff’s duty arguments and granted summary judgment in favor of the equipment manufacturers.

Conclusion

Regardless of how artfully pled, law and public policy prohibit the imposition of a legal duty to warn or instruct for the defects in other manufacturers’ products. This follows from the simple fact that a manufacturer of a completed product is not legally the designer, manufacturer or marketer of the numerous other products that may be used in connection with the manufacturer’s product.

Particularly in toxic tort litigation with warnings claims for external insulation and flange gaskets that are brought against equipment manufacturers, it is not an unreasonably dangerous condition or feature of the equipment itself that caused any alleged injury. Plaintiffs’ theories to the contrary would place a heavy, unjustified burden on manufacturers. These absurd claims can and should be effectively dealt with using a well-drafted traditional motion for summary judgment on the sole issue of legal duty. This strategy will allow a manufacturer to properly frame the issue for the court and require the plaintiffs to respond to the overwhelming weight of authority against their theories to find the existence of a duty. Moreover, this approach should anchor the motion to the law, without the need for consideration of facts and mountains of irrelevant evidentiary exhibits.