IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S209927

WILLIAM B. WEBB, et al.
Plaintiffs and Appellants,

v.

SPECIAL ELECTRIC COMPANY, INC.
Defendant and Respondent.

After an Opinion by the Court of Appeal,
Second Appellate District, Division One
(Case No. B233189)

On Appeal from the Superior Court of Los Angeles County
(Case No. BC436063, Honorable John Wiley, Jr., Judge)

APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANT AND RESPONDENT

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APPLICATION TO FILE BRIEF AMICUS CURIAE

Pursuant to California Rule of Court 8.520(f),[1] Pacific Legal Foundation requests leave to file the attached brief amicus curiae in support of Defendant/Respondent Special Electric Co., Inc. Amicus is familiar with the issues and scope of their presentation, and believes the attached brief will aid the Court in its consideration of the issues presented in this case.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation's (PLF) Free Enterprise Project was developed to protect the free enterprise system from abusive regulation, the unwarranted expansion of claims and remedies in tort law, and barriers to the freedom of contract. PLF has participated in cases across the country on matters affecting the expansion of product liability, including cases that involve asbestos liability and the component parts doctrine, *see*, *e.g.*, *O'Neil v. Crane Co.*, 53 Cal. 4th 335 (2012); *Macias v. Saberhagen Holdings, Inc.*, 282 P.3d 1069 (Wash. 2012); *Aubin v. Union Carbide Corp.*, No. SC2012-2075 (Fla. S. Ct. filed Oct. 1, 2012), and the benefits to be derived from the Restatement (Third) of Torts: Prod. Liab. (Third Restatement) (1998).

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[1] Pursuant to California Rule of Court 8.520, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Tincher v. Omega Flex, Inc., No. 17 MAP 2013 (Penn. S. Ct. filed Oct. 15, 2013).

INTRODUCTION AND SUMMARY OF ARGUMENT

Special Electric Company, Inc. served as a broker for a South African mining company to supply raw asbestos to Johns-Manville. Johns-Manville allegedly recycled scraps from the manufacture of a pipe that contained asbestos into a type of pipe that ordinarily does not contain asbestos, then sold the potentially contaminated pipe to a pipe supplier that sold it to another supply company, where William Webb was employed. *Webb v. Special Elec. Co., Inc.*, 214 Cal. App. 4th 595, 153 Cal. Rptr. 3d 882, 886 (2013). When Webb later contracted mesothelioma, he attributed it at least partially to working with the pipe and he and his wife sued an array of defendants, including Special Electric. *Id.* The trial court ruled that "although it would have been relatively easy for Johns-Manville to provide warnings to users of its products such as Webb, it would be unreasonable to obligate Special Electric to require Johns-Manville to do so." *Id.* at 889. Alternatively, the trial court found that the bags in which Special Electric transported the asbestos to Johns-Manville all bore legally sufficient warnings. *Id.* The court of appeals subsequently held that both Johns-Manville and Special Electric had a duty to warn end users, including Webb, about the dangers of asbestos. *Id.* at 895, 897-98.

The appellate court's interpretation of design defect liability would, contrary to existing law, render a component supplier liable for failure to warn if the supplier warned the intermediaries, but somehow is deemed to "know" that the intermediaries will fail to convey the warning to end-users. *See* Answer Brief on Merits at 37-39. Such a rule would shift the costs of injuries resulting from product use to attenuated businesses that have only a hypothetical ability to prevent the harm through pointless warnings, which would not protect consumers. It would create a tremendous, unjustified burden on a broad array of industries by increasing the difficulty and expense of countless transactions.

This Court should clarify the responsibilities of suppliers by adopting the component parts doctrine, as articulated by Third Restatement § 5, that a manufacturer or supplier of a component part is not liable for harm caused by a product that included the part unless the part itself was defective and the defect caused the harm. The doctrine is fair, efficient, and places legal responsibility with the party best suited to prevent the harm. The overwhelming majority of jurisdictions that have considered the Third Restatement's component parts doctrine have adopted it, and the doctrine's rationale is consistent with California law.

In this case, Special Electric supplied raw asbestos to Johns-Manville, which used the asbestos as a component in new products. Of all the

overlapping supply-chain liability limitation doctrines (bulk supplier, sophisticated user/purchaser/intermediary, learned intermediary, component parts), the component parts doctrine is most appropriate for this context by defining a supplier's duty of care. If the raw asbestos was packaged with adequate warnings given the facts in this case, then the duty ends there. An adequate warning may be *no* warning, where the danger is open and obvious, or the recipient of the warning already knows (is sophisticated) about the dangers. *See* Mary-Christine (M.C.) Sungaila & Kevin C. Mayer, *Limiting Manufacturers' Duty to Warn: The Sophisticated User and Purchaser Doctrines*, 76 Def. Couns. J. 196, Appendix B (2009) (comprehensive listing of obvious danger cases and statutes). Johns-Manville was fully knowledgeable about the risks of all types of asbestos. A warning by Special Electric detailing the risks of asbestos would have provided no new information to Johns-Manville, or effected any changes in Johns-Manville's practices. For this reason, the raw asbestos sold to Johns-Manville was not defective whether it had a warning or not.

The specific question in this case is whether a broker/supplier has a duty to warn the eventual end-user, no matter how far removed, of the dangers presented by the use or maintenance of another product in which the original raw material was a component part. But the overriding policy question is whether courts should impose a duty on a defendant to warn a victim whose

injury is so distant from the defendant's involvement that imposing liability on the defendant could have seriously harmful consequences for a valuable, socially productive industry. Liability costs are a serious burden on business, unnecessarily over-deterring economic activity, stifling investment, economic growth, and job creation. Allowing negligence liability to attach here would expand the duty of care too far, with potentially dangerous consequences to California's already fragile economy.

ARGUMENT

I

PUBLIC POLICY REQUIRES COURTS TO DRAW LINES, BEYOND WHICH THERE IS NO DUTY TO ACT

The extent to which parties in a supply or manufacturing chain have a duty to warn end-users is discussed in an array of often-overlapping doctrines such as the "bulk supplier/raw materials rule," the "sophisticated intermediary/purchaser/user" doctrines, and the "component parts" doctrine. All of these doctrines derive from the public policy that tort duties are most appropriate when there is a close connection between the defendant's action and the plaintiff's injury, and that courts are less inclined to impose duties where the defendant's actions are attenuated. *See*, *e.g.*, *Campbell v. Ford Motor Co.*, 206 Cal. App. 4th 15, 31 (2012) (refusing to impose a duty to warn in a "take-home" asbestos case); *Gray v. Badger Mining Corp.*, 676 N.W.2d

268, 277 (Minn. 2004) (supply-chain doctrines create needed boundaries on liability in "circumstances where it is highly impractical for the supplier to provide a warning directly to the end user"). Plaintiffs must prove a legal duty of care to limit " 'the otherwise potentially infinite liability' " that would otherwise flow from every negligent act. *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 397 (1992) (citations omitted).

The law of torts is about line-drawing. It is achieved by formulating rules that take into account public policy and balance those policies against the interests of freedom and of injured plaintiffs. *See*, *e.g.*, *Koehrer v. Superior Court*, 181 Cal. App. 3d 1155, 1165 (1986) (" '[T]ort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily upon social policy.' ") (quoting William Lloyd Prosser, *Law of Torts* 613 (4th ed. 1971)). Courts have long understood that the line of potential liability must be drawn somewhere. *See*, *e.g.*, *Romito v. Red Plastic Co., Inc.*, 38 Cal. App. 4th 59, 67 (1995) (holding that manufacturer owed no duty to protect against unforeseeable and accidental misuse of a product: "Any product is potentially dangerous if accidentally misused or abused, and predicting the different ways in which accidents can occur is a task limited only by the scope of one's imagination.").

In drawing that line, courts rely on the concepts of duty, foreseeability, and proximate cause. The duty to use care to avoid injury to others arises from the foreseeability of the risk created. *Lugtu v. Cal. Highway Patrol*, 26 Cal. 4th 703, 716 (2001). But in each case, public policy considerations—not the single factor of foreseeability—are paramount. *Erlich v. Menezes*, 21 Cal. 4th 543, 552 (1999) ("[F]oreseeability alone is not sufficient to create an independent tort duty."); *Parsons v. Crown Disposal Co.*, 15 Cal. 4th 456, 472 (1997) (" '[D]uty' is not an immutable fact of nature 'but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.' ") (citations omitted). The importance of foreseeability does not permit a court to abdicate its responsibility to consider the public policy implications should tort liability be expanded. *Id*. at 477, 492 (declining to impose "an expansive duty to guard against frightening horses" on the policy grounds that it would have "obvious and detrimental consequences stifling to the community").

Public policies are drawn from two main functions of tort law. The first is compensation. *See*, *e.g.*, *Kizer v. County of San Mateo*, 53 Cal. 3d 139, 146-47 (1991) ("In tort actions, damages are normally awarded for the purpose of compensating the plaintiff for injury suffered, i.e., restoring the plaintiff as nearly as possible to his or her former position, or giving the plaintiff some pecuniary equivalent." (citation omitted)). The second is to deter conduct that

creates an unreasonable risk of injury to others. *See Hunter v. Up-Right, Inc.*, 6 Cal. 4th 1174, 1191 (1993); Michael S. Jacobs, *Toward a Process-Based Approach to Failure-to-Warn Law*, 71 N.C. L. Rev. 121, 180-81 (1992) ("To the extent that tort law seeks to deter personal injury, a doctrine that encourages manufacturers to spend their dollars and energy effectively to avoid product-related harms is far better suited to consumer interests than one which compensates some consumers generously after the fact, but which does little beforehand to reduce product risk for all consumers.").

Every act has a potentially infinite number of consequences; if a defendant were required to pay for every potential wrong resulting from an action, economic enterprise simply could not go on. "At some point," therefore, "it is generally agreed that the defendant's act cannot fairly be singled out from the multitude of other events that combine to cause loss." Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 70 (1982). Modern industrial society is full of potential hazards, and imposing severe costs on parties with only tenuous connections to the harm runs the risk of stifling important economic activity. *See* James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required To Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 Sw. U. L. Rev. 595, 616 (2008) (If a court holds that a seller of a safe product is strictly liable for

injuries caused entirely by other, more dangerous, products, the users and consumers of the safe product "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 theory adopted by the court below contains no logical stopping point, and thus policy considerations counsel against finding liability. As Nobel Laureate Friedrich Hayek noted, liability rules "will normally raise the cost of production, or, what amounts to the same thing, reduce over-all productivity." Friedrich A. Hayek, *The Constitution of Liberty* 224 (1960). A presumption against imposing liability is justified because the "over-all cost is almost always underestimated." *Id*. at 225. The concern for unseen costs is especially acute in a case like this one, where the connection between the alleged wrong and the injury suffered is so distant. As the Georgia Supreme Court explained in an asbestos case, there was a "responsibility to consider the larger social consequences of the notion of duty and to correspondingly tailor that notion so that the illegal consequences of wrongs are limited to a controllable degree." *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 209 (Ga. 2005).

Tort liability is appropriate only where the defendant owed a duty to the plaintiff, and the plaintiff can prove that the defendant breached that duty,

causing harm for which a remedy exists. *Ladd v. County of San Mateo*, 12 Cal. 4th 913, 917 (1996). "By way of contrast, tort law should not impose liability simply because a particular defendant can pay for it." Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander"*, 23 Widener L.J. 59, 62 (2013).

II

CALIFORNIA SHOULD ADOPT THE THIRD RESTATEMENT'S COMPONENT PARTS DOCTRINE

California courts discuss many of the supply chain doctrines interchangeably, with resulting confusion. Amicus believes that the Third Restatement, Section 5, most clearly identifies when and to whom the supplier of a raw material or component part should have a legal duty to warn. The supply-chain doctrines as a whole "recognize that component sellers who do not participate in the integration of the component into the design of the product should not be liable merely because the integration of the component causes the product to become dangerously defective." Third Restatement, § 5 cmt. a (1998). The component parts doctrine is specifically defined in this way:

> One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or property caused by a product into which the component is integrated if:
>
> (a) the component is defective in itself, as defined in this Chapter, and the defect causes the harm; or

> (b) (1) the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and
> (2) the integration of the component causes the product to be defective, as defined in this Chapter; and
> (3) the defect in the product causes the harm.

Third Restatement § 5 (1998). This Court should adopt the Third Restatement's articulation of the rule, providing much needed clarity to the lower courts and protecting suppliers from becoming insurers of their clients' goods.

The adoption of Section 5 would be a natural extension of the holding in *O'Neil*, 53 Cal. 4th at 348, in which this Court apparently followed the substance of the Third Restatement's component parts doctrine, albeit without citing to it. In that case, a retired Naval worker sued the manufacturers of valves and gaskets that were used with asbestos insulation in ships. *Id*. at 345. This Court refused to hold a component supplier liable for the defects of another manufacturer's product:

> [A] product manufacturer generally may not be held strictly liable for harm caused by another manufacturer's product. The only exceptions to this rule arise when the defendant bears some direct responsibility for the harm, either because the defendant's own product contributed substantially to the harm, or because the defendant participated substantially in creating a harmful combined use of the products.

Id. at 362 (citation omitted). The exceptions to the rule stated in *O'Neil* closely align with the exceptions articulated in the Third Restatement.

A. The Component Parts Doctrine Places the Duty To Warn on the Party Who Can Most Effectively Deliver It

The component parts doctrine also aligns with this Court's policy goals. California's approach to product liability law has been based largely on the policy goals of compensating victims and providing consumers with reasonably safe products, by motivating manufacturers to make better products. *O'Neil*, 53 Cal. 4th at 348. These purposes are not served when suppliers are held liable for the defects in other manufacturers' products. *Id*. at 363. As the Third Restatement § 5 cmt. a, explains:

> If the component is not . . . defective, it would be unjust . . . 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.

In most cases, it is impractical and inefficient to force suppliers to warn down-the-line consumers about products that they neither made, marketed, nor packaged. *See O'Neil*, 53 Cal. 4th at 343 ("Nor would public policy be served by requiring manufacturers to warn about the dangerous propensities of products they do not design, make, or sell.").

The supplier of a component part is best positioned to generate information about its own product and to warn its own buyers. Richard C. Ausness, *Learned Intermediaries and Sophisticated Users: Encouraging the Use of Intermediaries to Transmit Product Safety Information*, 46 Syracuse L.

Rev. 1185, 1227-29 (1996). Similarly, a supplier that uses component parts is best positioned to generate information about the dangers of its own product and to warn its buyers about the dangers of its product. *See id.*; *Taylor v. Elliott Turbomachinery Co., Inc.*, 171 Cal. App. 4th 564, 584 (2009). Manufacturers are most familiar with their own products and therefore are best positioned to "identify new safety risks by pre-market product testing or by post-market analysis of product performance data." Ausness, 46 Syracuse L. Rev. at 1228.

Without a limitation on duty, component suppliers would have the duty to monitor and evaluate all of their manufacturing clients' products. If clients' products are used to make other products by yet other manufacturers, the component supplier would have to monitor and evaluate those products as well, because there would be no clear line as to when a supplier has the duty to bypass intermediaries to warn the ultimate users of the processed products, three or more times removed from the component supplier. Imposing liability on suppliers of component parts "would impose an intolerable burden on the business world," because they would then "be expected to become experts in the infinite number of finished products that might conceivably incorporate their multi-use raw materials or components." *Maxton v. Western States Metals*, 203 Cal. App. 4th 81, 90 (2012) (quoting *In re TMJ Implants Prods. Liab. Litig.*, 97 F.3d 1050, 1057 (8th Cir. 1996)).

How could the supplier determine whether its users' warnings are sufficient as they relate the dangers of the many component parts purchased from multiple suppliers? How would each supplier determine the risks of all of the finished products that use its ingredients? Who among the many suppliers, and the actual manufacturer of the retail product, decides the precise wording of the warning and who is liable if it is deemed inadequate? What if the resulting plethora of warnings turns out, on the whole, to be ineffective due to sheer volume, conflating trivial and significant risks? *See* James A. Henderson, Jr. & Aaron D. Twerski, *The Products Liability Restatement in the Courts: An Initial Assessment*, 27 Wm. Mitchell L. Rev. 7, 16 (2000).

If a component supplier has a duty to warn end-users, then there are no easy or clear answers to these questions. Imposing such a duty "would force the supplier to retain an expert in every finished product manufacturer's line of business and second-guess the finished product manufacturer whenever any of its employees received any information about any potential problems." *Artiglio v. Gen. Elec. Co.*, 61 Cal. App. 4th 830, 839 (1998) (quoting *Kealoha v. E.I. Du Pont de Nemours & Co.*, 844 F. Supp. 590, 594 (D. Haw. 1994)); *see also O'Neil*, 53 Cal. 4th at 363 ("[A] manufacturer cannot be expected to exert pressure on other manufacturers to make their products safe and will not be able to share the costs of ensuring product safety with these other manufacturers."). These experts would be less likely to determine the safest

designs because "[i]n today's world it is often only the manufacturer who can fairly be said to know and understand when an article is suitably designed and safely made for its intended purpose." *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80, 88 (Fla. 1976) (quoting *Codling v. Paglia*, 298 N.E.2d 622, 627 (N.Y. 1973)). The most versatile products would require the greatest management expenses, because suppliers would "be forced to retain experts in a huge variety of areas" to determine "risks associated with each potential use." *Taylor*, 171 Cal. App. 4th at 584 (citations omitted).

During the twentieth century more than 3,000 products—including textiles, building materials, insulation, and brake linings—contained some amount of asbestos. Paul J. Riehle, et al., *Products Liability for Third Party Replacement or Connected Parts: Changing Tides from the West*, 44 U.S.F. L. Rev. 33, 34 (2009). Each manufacturer of these products was and is in the best position to warn end-users about the risks of the component parts. As explained in *Hoffman v. Houghton Chem. Corp.*, 751 N.E.2d 848, 855-57 (Mass. 2001), it would be "crushingly" difficult and ineffective to require a component part supplier to foresee all potential dangers and warn purchasers accordingly. *See* Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. Cin. L. Rev. 38, 43 (1983) ("The extension of workplace warnings liability unguided by practical consideration has the unreasonable potential to impose

absolute liability . . . .”). Moreover, it would be a superfluous duty because the intermediary “has its own independent obligation to provide adequate safety measures for its end users, an obligation on which bulk suppliers should be entitled to rely.” *Hoffman*, 751 N.E.2d at 857.

A failure to shelter component suppliers could also render products less safe or effective as suppliers whose expertise is naturally only in their own field would be required to become involved in downline designs and other companies’ warnings as a means to limit their own liability. Unfortunately, the possibly competing needs of the (multiple) component suppliers and the end product manufacturer could compromise the quality of the final design or warning. Requiring manufacturers to include extensive warnings on their products often leads to consumer frustration and confusion. Such warnings “ ‘invite mass consumer disregard and ultimate contempt for the warning process.’ ” *Johnson v. American Standard, Inc.*, 43 Cal. 4th 56, 70 (2008) (quoting *Finn v. G.D. Searle & Co.*, 35 Cal. 3d 691, 701 (1984), (quoting A.D. Twerski, et al., *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 Cornell L. Rev. 495, 521 (1976)).

B. The Third Restatement’s Component Parts Doctrine Promotes Innovation

Requiring bulk suppliers or component part manufacturers to warn end-users would stifle innovation because component suppliers would have to micromanage their buyers to ensure compliance with their own duty to warn.

See Brett W. Roubal, *Protecting Suppliers of Safe Component Parts and Raw Materials Through the Component Part Doctrine and the Sophisticated Purchaser Doctrine: In re Temporomandibular Joint (TMJ) Implants Products Liability Litigation*, 31 Creighton L. Rev. 617, 663 (1998). For example, in *Jacobs v. E.I. Du Pont de Nemours & Co.*, 67 F.3d 1219, 1241 (6th Cir. 1995), plaintiffs received Teflon-coated implants from a company called Vitek. Du Pont (Teflon's manufacturer) warned Vitek that Teflon was intended for industrial use and likely dangerous if used in implants. But Vitek conducted its own research showing it was safe and received approval from the Food and Drug Administration. *Id*. at 1224 n.10. As it turned out, the Teflon was harmful, leading to numerous lawsuits against Vitek. After Vitek went bankrupt, the plaintiffs sought compensation from Du Pont. However, the court refused to hold Du Pont liable, because the Teflon itself was not defective and liability would have impeded innovation:

> If we adhered to Appellants' theory, access to raw materials like Teflon for entrepreneurs seeking new applications would either disappear or be undermined by an inevitable increase in price. This . . . would stymie the kind of beneficial scientific innovation which, sadly, did not take place here, but which has occurred in many other areas of human endeavor.

Id. at 1241. In the case of the Teflon coated implants, the Teflon accounted for only a few cents' worth of the cost of the fifty dollar implant. *Id.* at 1225 n.14. Huge liability potential and small profit might lead component manufacturers to bar start-ups and innovative companies from purchasing their

goods as component parts. Alternatively, they could acquire insurance, but even if insurance is available, it would be an enormous cost passed on to consumers. M. Stuart Madden, *Component Parts and Raw Materials Sellers: From the Titanic to the New Restatement*, 26 N. Ky. L. Rev. 535, 570 (1999). The availability of insurance, however, is not a sure thing:

> Those saddled with the task of actuarially determining a proper rate would be faced with indeterminate liability because they would not know what products would eventually be made. Delineating a rational starting point for, or cessation of potential liability, would be impossible. By way of contrast, an insurer for the end-use product producer can look at, and evaluate, based on history and rational projections, insurance risks of end-use products. Information on liability costs, past and projected, is crucial to carriers seeking to make coverage decisions and to set premiums. This information is available to the manufacturer of the end product, while it is normally unavailable to the supplier of raw materials potentially suited to a large number of potential end uses.

Id. Thus, a product that otherwise would have cost a few cents would become much more expensive, pricing some valuable and innovative technologies out of range of most consumers. Fortunately, in *Jacobs* and similar cases, courts rejected plaintiffs' arguments against Du Pont. Roubal, 31 Creighton L. Rev. at 635 (citing, *e.g.*, *Bond v. E.I. DuPont de Nemours & Co.*, 868 P.2d 1114, 1118 (Colo. App. 1993)).

Such policy considerations have persuaded most courts and scholars that liability should be limited for component suppliers, particularly for raw materials. *See* Madden, 26 N. Ky. L. Rev. at 539-40; Roubal, 31 Creighton L.

Rev. at 661-64 (component parts doctrine is an important defense for allowing innovation).

C. The Component Parts Doctrine of the Third Restatement Is Consistent with California Law

California law recognizes the sophisticated user doctrine, *Johnson*, 43 Cal. 4th at 70, and the learned intermediary doctrine. *See*, *e.g.*, *Plenger v. Alza Corp.*, 11 Cal. App. 4th 349, 362 (1992). California tort law does not require a manufacturer to warn users of obvious risks. *Johnson*, 43 Cal. 4th at 67 ("California law also recognizes the obvious danger rule, which provides that there is no need to warn of known risks under either a negligence or strict liability theory.") (citing *Bojorquez v. House of Toys, Inc.*, 62 Cal. App. 3d 930, 933-34 (1976); *Holmes v. J.C. Penney Co.*,133 Cal. App. 3d 216, 220 (1982)). There are "shades of difference between these rules," but "the fundamental tenet is that a manufacturer should be allowed to rely upon certain knowledgeable individuals to whom it sells a product to convey to the ultimate users warnings regarding any dangers associated with the product." *In re TMJ Implants Prods. Liab. Litig.*, 872 F. Supp. 1019, 1029 (D. Minn. 1995), *aff'd*, 97 F.3d 1050 (8th Cir. 1996).

These doctrines share common policy rationales. *See* Third Restatement § 2 cmt. j (1998) ("Warning of an obvious or generally known risk in most instances will not provide an effective additional measure of safety."); Jeffrey W. Kemp & Lindsy Nicole Alleman, *The Bulk Supplier,*

Sophisticated User, and Learned Intermediary Doctrines Since the Adoption of the Restatement (Third) of Torts, 26 Rev. Litig. 927, 934 (2007) (the various supply-chain doctrines are governed by the concept that "it is wasteful to warn of a danger already known by the product user."); *see also Plenger*, 11 Cal. App. 4th at 362 (manufacturer not required to warn the consumer—a doctor—of risk known to the doctor, and not required to bypass the doctor to warn end-user—the patient); *Johnson*, 43 Cal. 4th at 70 (manufacturer not required to warn HVAC technician, a sophisticated user, of dangers he should already know about); *Phelps v. Sherwood Med. Indus*., 836 F.2d 296, 304 (7th Cir. 1987) (manufacturer has no duty to warn sophisticated intermediary "of those dangers which he already knew"). These rules recognize that liability can be discharged when other parties are "in a better position to warn." *McCormick v. Nikkel & Assocs., Inc.*, 819 N.W.2d 368, 375 (Iowa 2012). *See also*, *e.g.*, *Morgan v. Brush Wellman, Inc.*, 165 F. Supp. 2d 704, 718 (E.D. Tenn. 2001) (manufacturer of beryllium oxide did not have a duty to directly warn employees of government contractors at nuclear armament facility under sophisticated user doctrine); *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 465-66 (5th Cir. 1976) (The adequacy of a warning "cannot be evaluated apart from the knowledge and expertise of those who may reasonably be expected to use or otherwise come in contact with the product as it proceeds along its intended marketing chain."). As California law has tracked the majority view

of constraining product liability in other similar contexts, so too it should adopt the Third Restatement's component parts doctrine.

III

THE THIRD RESTATEMENT'S COMPONENT PARTS DOCTRINE APPLIES IN ASBESTOS CASES

The Third Restatement's component parts doctrine contains no exception for "inherently dangerous" products such as asbestos. However, shortly after this Court adopted a component parts rule in *O'Neil*, the Second District Court of Appeal devised an unusual exception in *Maxton*, 203 Cal. App. 4th at 94: "Raw materials generally cannot by themselves be defective unless they are contaminated. The one notable exception to this rule is raw asbestos, which as we explained, *ante,* is inherently dangerous." (Citation omitted.). The raw asbestos exception was based on *Jenkins v. T&N PLC*, 45 Cal. App. 4th 1224, 1231 (1996), and *Arena v. Owens-Corning Fiberglas Corp.*, 63 Cal. App. 4th 1178, 1186 (1998), cases that held raw asbestos suppliers liable because the raw product carried the same injury-causing danger as the finished products. *Maxton*, 203 Cal. App. 4th at 91-92.

This interpretation is tempting if the only goal of tort law is compensating injured parties, regardless of blame. However, this Court has "repeatedly" explained that products liability does not make the manufacturer "the insurer of the safety of the product's user." *O'Neil*, 53 Cal. 4th at 362

(quoting *Daly v. Gen. Motors Corp.*, 20 Cal. 3d 725, 733 (1978)). Moreover, such asbestos-specific liability is ripe with policy problems,[2] which becomes apparent in cases involving other dangerous products. For example, *Maxton* distinguished the asbestos cases from *Walker v. Stauffer Chem. Corp.*, 19 Cal. App. 3d 669 (1971), where the plaintiff was hurt when a drain-cleaning product containing sulfuric acid exploded. *Maxton*, 203 Cal. App. 4th at 91-94. The supplier of sulfuric acid was not liable even though its ingredient caused the explosion:

> We do not believe it realistically feasible or necessary to the protection of the public to require the manufacturer and supplier of a standard chemical ingredient such as bulk sulfuric acid, not having control over the subsequent compounding, packaging or marketing of an item eventually causing injury to the ultimate consumer, to bear the responsibility for that injury.

Walker, 19 Cal. App. 3d at 674 (quoted in *Maxton*, 203 Cal. App. 4th at 91). *Maxton* distinguished asbestos cases from sulfuric acid cases on the presumption that "[a]sbestos itself is dangerous when handled in any form."

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[2] Asbestos litigation is widely recognized as the epicenter of a massive breakdown in American tort law. *See*, *e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597-98 (1997). *See also* James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 233 (2006) (identifying two "fundamental phenomena" that combine to create the asbestos litigation crisis: "claimant elasticity," defined as "the essentially inexhaustible supply of claimants," and "defendant elasticity," defined as "the correspondingly unbounded source of defendants," which stem from "the inability of the asbestos litigation system to discriminate both between those with real asbestos-related injuries and those without, and between defendants who are in fact culpable and those more appropriately viewed as 'solvent bystanders'" (footnotes and citations omitted)).

Maxton, 203 Cal. App. 4th at 93. This is a false distinction. Sulfuric acid is highly dangerous but useful for a variety of products, just like asbestos. *See*, *e.g.*, *Rhodes v. Interstate Battery Sys. of Am., Inc.*, 722 F.2d 1517, 1521 (11th Cir. 1984) ("[B]atteries contain sulfuric acid, a chemical which tends to ignite or explode if exposed to fire[.]"); *Adams v. Henderson*, 45 F. Supp. 2d 968, 971 (M.D. Fla. 1999) (sulfuric acid fumes in a drain-clearing product caused plaintiff to cough up blood); *Gougler v. Sirius Products, Inc.*, 370 F. Supp. 2d 1185, 1188, 1200 (S.D. Ala. 2005) (plaintiff allegedly died from inhaling cleaner containing sulfuric acid, a product that experts testified is "insidiously hazardous" and "highly corrosive to human lungs"). *Cf.* Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 Conn. Ins. L.J. 255, 256 (2006) (Asbestos is "wonderful but harmful" having "amazing fire-retardant qualities" used in many helpful products.).

Asbestos is dangerous only when it is not handled with adequate care. As the Fifth Circuit Court of Appeals explained:

> We have held that not all asbestos-containing finished products are defective or unreasonably dangerous. *See*, *e.g.*, *Gideon*, 761 F.2d at 1143 ("We have refused to hold asbestos products inherently dangerous"), and 1145 ("As to Raymark, we are unable to find . . . that the danger created by the use of its products [asbestos packings] outweighed their utility . . . all asbestos-containing products cannot be lumped together in determining their dangerousness"). If asbestos-containing finished products are not all unreasonably dangerous or defective, then it necessarily follows that ordinary raw asbestos

> sold to a sophisticated and knowledgeable manufacturer of such products is not of itself defective or unreasonably dangerous.

Cimino v. Raymark Indus., Inc., 151 F.3d 297, 331 (5th Cir. 1998) (citation omitted). The court correctly predicted that Texas would adopt the component parts doctrine and apply it to suppliers of raw asbestos. *See Bostrom Seating, Inc. v. Crane Carrier Co.*, 140 S.W.3d 681, 683 (Tex. 2004) (adopting the Third Restatement's component parts doctrine).

Also recognizing that "dangerous" does not equal "defective," a Utah court recently applied the component parts doctrine in *Riggs v. Asbestos Corp. Ltd.*, 304 P.3d 61 (Utah Ct. App. 2013). In *Riggs*, a woman's family sued after she died from an asbestos-related illness, which she allegedly developed from working with asbestos-containing joint compound tape. The court first held that a raw, naturally occurring substance cannot be defectively designed. *Riggs*, 304 P.3d at 69. Then it applied the component parts doctrine, holding that the supplier was only liable if it failed to adequately warn the intermediary manufacturer. The court reasoned that there were "two products—raw Calidria and tape joint compound—and two different types of users—companies [ ] using the raw asbestos, and consumers [ ] using the tape joint compound." Distinguishing the duties accordingly, the court decided "the mere presence of a nondefective component in a final product does not impose upon the component supplier the duty to warn end users of the final product's potential dangers." *Id. See also* Edward M. Mansfield, *Reflections on Current*

Limits on Component and Raw Material Supplier Liability and the Proposed Third Restatement, 84 Ky. L.J. 221, 231 (1996) (Applying a component parts doctrine, courts have exonerated suppliers in cases involving a wide range of products, including asbestos, silica, lumber, Kevlar fibers, raw ore, standardized motors, and more.); *see also PSI Energy, Inc. v. Roberts*, 829 N.E.2d 943, 955 (Ind. 2005) ("[W]orking with asbestos is not intrinsically dangerous such that anyone hiring a contractor to address it incurs strict liability for injuries sustained from exposure to it. . . . We . . . recognize, . . . that the consequences of mesothelioma can be horrific. But that does not render asbestos intrinsically dangerous. The same is true of electricity and a number of other substances that, if mishandled, can be dangerous.").

The broker/supplier of the raw asbestos should not be responsible for warning the end-user, three times removed from the manufacturer who purchased the asbestos.

CONCLUSION

The decision below should be reversed.

DATED: April 22, 2014.

Respectfully submitted,

By _____
DEBORAH J. LA FETRA

Attorney for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANT AND RESPONDENT is proportionately spaced, has a typeface of 13 points or more, and contains 6,049 words.

DATED: April 23, 2014.

_____
DEBORAH J. LA FETRA

DECLARATION OF SERVICE BY MAIL

I, SUZANNE M. MACDONALD, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On April 23, 2014, true copies of were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 23rd day of April, 2014, at Sacramento, California.

_____
SUZANNE M. MACDONALD