Disentangling DeVries: A Manufacturer’s Duty to Warn against the Dangers of Third-Party Products

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Disentangling *DeVries*: A Manufacturer’s Duty to Warn against the Dangers of Third-Party Products

*David Judd*

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INTRODUCTION

At 24 years old, Timothy finally caught a break. After two years of rejections from veterinary schools, Timothy was admitted to the Doctor of Veterinary Medicine program at a university in a nearby state. Of course, the prospect of hundreds of thousands of dollars of student loans covering Timothy’s out-of-state tuition tempered his excitement. Timothy, however, received additional good news soon after starting his first semester: his sister-in-law had given birth. As a new uncle, Timothy wanted nothing more than to meet his nephew back home. Encouraged by decent grades, Timothy was confident he could afford a small break from his incessant studies to return home.

While driving home, Timothy’s car violently swerved off the rural highway and crashed into a tree. The crushing impact broke his back, leaving him paralyzed from the waist down for the rest of his life. Timothy’s meager insurance policy only covered a fraction of his medical expenses, and without some form of financial recovery, Timothy could not afford to finish veterinary school. A post-crash analysis revealed that the car’s multipiece wheel was incompatible with the tire surrounding it,

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causing an explosive separation of the two parts.\(^4\) After filing suit against Manufacturer A, the manufacturer of the multipiece wheel, Timothy learned that an influx of claims like his had bankrupted the company. Timothy, consequently, had no hope of recovering substantial damages from Manufacturer A. Luckily, he later learned that Manufacturer B, the tire manufacturer, knew of its product’s incompatibility with the car’s multipiece wheel, yet never warned about the potential danger of integrating its tire with the wheel, despite a well-known tendency to use them together. With a second chance at recovery in hand, Timothy’s dream of becoming a veterinarian stays alive.

Whether Timothy and other similarly-situated plaintiffs can recover from manufacturers largely depends on whether courts can hold one manufacturer liable for failing to warn about the dangers of a product that is used in combination with its own but that is created by another company.\(^5\) Put more theoretically, the question becomes whether Manufacturer B’s duty to warn about the risks of using its tires encompasses warning about the risks that Manufacturer A’s wheels pose to consumers when used in conjunction or integrated with B’s product.\(^6\)

The United States Supreme Court’s recent decision in *Air and Liquid Systems Corp. v. DeVries* addressed this question in the context of maritime law.\(^7\) The Court articulated the scope of a product manufacturer’s duty to warn in the integrated-product setting described above as follows:

>a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product’s users will realize that danger.\(^8\)

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5. A claim premised on a defect in the product’s warning or instructions is not the only possible grounds for liability in Timothy’s case. The tire manufacturer may have defectively designed the injurious product, and Timothy may have a defective-design claim against the tire manufacturer. See 1 DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PRODUCTS LIABILITY § 8:1 (4th ed. 2019), Westlaw. This Comment exclusively examines alleged defects in a product’s warning material, not its design.

6. See generally In re Asbestos Products Liab. Litig. (No. VI), 873 F.3d 232, 236 (3d Cir. 2017) (noting that some courts conceptualize the issue of the third-party duty to warn in terms of the duty element of a negligence claim).


8. *Id.* at 996.
Under this standard, Timothy may recover if (i) the tire required incorporation of the multipiece wheel; (ii) the tire manufacturer knew or should have known of the danger of using its product as intended in conjunction with the multipiece wheel; and (iii) the manufacturer had no reason to believe its product’s users would become aware of that danger. Notably, however, the Court asserted, “We do not purport to define the proper tort rule outside the maritime context.” Thus, the standard governing claims like Timothy’s remains unsettled.

Outside the maritime context, courts disagree on the appropriate standard governing a manufacturer’s duty to warn about the dangers of third-party products used with the manufacturer’s own product. Some courts outright deny any such duty, others equate it to the uncontroversial duty to warn against the dangers of one’s own products, and the rest fall somewhere in the middle. DeVries reinvigorated the debate between courts that endorsed one or another of these conflicting approaches because much of the Supreme Court’s reasoning is applicable in non-maritime contexts. Essentially, DeVries brought the issue of the third-party duty to warn to the fore, with a new dynamic that courts must wrestle with moving forward. Although the DeVries decision resolved the

9. Id.
10. Id. at 995.
11. See cases cited infra notes 12–14.
15. See Kenneth Bradley, Attorneys offer views on high court’s ‘bare-metal defense’ asbestos ruling, 41 No. 22 WESTLAW J. ASBESTOS 05 (Aug. 15, 2019) (“But the reasoning underlying the [DeVries] decision is persuasive for cases that are land-based as well.”).
question of the third-party duty to warn in the maritime context, courts grappling with the same question in non-maritime contexts are revisiting their past precedent in light of the Supreme Court’s new decision.\textsuperscript{17}

Courts ought to formulate a rule that falls between a denial of the third-party duty to warn and an imposition of such a duty for every foreseeable risk associated with third-party products that will be used with the manufacturer’s own product.\textsuperscript{18} A manufacturer should have a duty to warn against the dangers of third-party products used in conjunction with its own when: (1) its product will inevitably be used together with a third-party part or product such that the conjoined use cannot be avoided as a result of the product’s design, the manufacturer’s instructions, or the absence of economically feasible alternative means of enabling the product to function as intended; (2) the product manufacturer knows or should know that the intended combined use of the products is likely to be dangerous; and (3) the product manufacturer knows or should know that the product’s users will not anticipate that danger.\textsuperscript{19} An apt name for this standard is the “inevitability approach.”\textsuperscript{20}

The inevitability approach is ideal for a number of reasons. First, it is fair. It does not hold manufacturers accountable for risks they cannot anticipate.\textsuperscript{21} Second, the inevitability approach comports with the sound public policy of allocating liability efficiently, as the manufacturer that is best equipped to cost-effectively protect against the risk that its product poses to consumers bears the burden of implementing those protections.\textsuperscript{22} Finally, the proposed rule improves upon DeVries’ third condition, which implies that if a manufacturer has any reason to believe that a product’s users will realize the dangers associated with that product, then that

defendant-manufacturers’ motions for summary judgment until after filing supplemental briefing on how DeVries may impact causation and the failure-to-warn analysis).


\textsuperscript{18} See, e.g., Air & Liquid Sys. Corp., 139 S. Ct. at 996.

\textsuperscript{19} See generally Quirin, 17 F. Supp. 3d 760; In re N.Y.C. Asbestos Litig., 59 N.E.3d 458; May, 129 A.3d 984.

\textsuperscript{20} See discussion infra Part III.C.

\textsuperscript{21} See generally Air & Liquid Sys. Corp., 139 S. Ct. at 995 (finding that manufacturers will know when a warning is required because they will know when their product requires a part in order to function as intended).

\textsuperscript{22} See generally id. at 994 (arguing that a product manufacturer often stands in a better position than the parts manufacturer to warn of the dangers of the combined product).
manufacturer has no duty to warn of such dangers.23 This condition allows manufacturers to hide behind other manufacturers’ warnings so as to avoid liability, but the third condition of the inevitability standard prevents such behavior.24

Part I of this Comment will discuss the general duty to warn in products liability cases, presenting the duty’s history and development over the years. Part I will continue to introduce some of the different factual contexts in which the question arises of whether the scope of a manufacturer’s duty to warn encompasses the dangers associated with a third-party product, including when a product’s intended use involves conjunction or integration with another product, such as replacement parts, component parts, or asbestos-containing materials. Next, Part II will survey the different approaches that courts have taken to the third-party duty to warn, with an emphasis on the underlying disagreements between each. Subsequently, Part III will argue that among the three frontrunners in the debate over the duty to warn against the dangers of third-party products, the middle-ground approach of the inevitability standard is best. This Part will demonstrate how the inevitability standard enjoys all of the legal and policy-based upsides of the other approaches with fewer downsides. Part IV will conclude by reiterating the advantages that courts stand to gain by adopting the proposed inevitability standard.

II. DEVELOPMENT OF THE THIRD-PARTY DUTY TO WARN

Whether manufacturers have a third-party duty to warn is really a question about manufacturers’ general duty to warn about the risks inherent in their own products.25 This generic duty to warn traces its roots back to Roman law but underwent significant development in the 20th century.26

A. History of the Duty to Warn

In the earliest American products-liability cases involving the duty to warn, courts held sellers liable for failing to disclose defects in the goods

23. See id. at 996 (“[A]nd (iii) the manufacturer has no reason to believe that the product’s users will realize that danger.”).
that buyers purchased.27 For example, after a buyer discovered that he had purchased diseased sheep, a New York court found the seller liable for neglecting to inform the buyer of the disease.28 Other courts held sellers liable when a buyer purchased cow feed tainted with lead paint29 and when a carpenter made a stepladder from defective wood.30 These cases premised liability on a mix of false-representation and deceit theories, as the ancient Roman notion of dolus—or fraud through the concealment of a defect—still dominated judicial approaches.31 In these early products-liability cases, privity32 was a prerequisite to recovery because of courts’ fixation on the misrepresentation made by the seller to the buyer.33 It was not until Huset v. J.I. Case Threshing Machine Co.34 that parties who were not in privity could recover from manufacturers for injuries caused by defective products.35 In Huset, a laborer hired to assist his employer operate a threshing machine brought a products-liability claim against the thresher manufacturer after the machine crushed his leg.36 The manufacturer designed the thresher’s protective covering to support an adult, yet it collapsed under the plaintiff’s weight.37 The court adopted the principle that a manufacturer that supplies an imminently dangerous machine without warning about its risks is liable to anyone who sustains injury as a result of the dangerous condition of the machine, regardless of the parties’ privity or lack thereof.38

Today, the standard formulation of the duty to warn is that a manufacturer is liable for failing to warn or inadequately warning about both the hazards inherent in the intended use of its product and the risks

27. See cases cited infra notes 28–30.
30. Schubert v. J.R. Clark Co., 51 N.W. 1103 (Minn. 1892).
32. “The connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property); mutuality of interest <privity of contract>.” Privity, BLACK’S LAW DICTIONARY (11th ed. 2019), Westlaw.
35. OWEN, supra note 26, § 9.1.
36. Huset, 120 F. at 872–73.
37. Id.
38. Id.
associated with the reasonably foreseeable uses of the product it sells.\textsuperscript{39} This duty to warn encompasses two sub-duties: (1) the sub-duty to warn about the hidden dangers in a product and (2) the sub-duty to instruct buyers on how to safely use the product.\textsuperscript{40} Mandating compliance with these two sub-duties ensures that the manufacturer that knows of the risks in its product will exercise reasonable care to transmit that knowledge to the consumer, who is ignorant of the product’s risks and susceptible to serious harm as a result of such ignorance.\textsuperscript{41}

As authority for the duty to warn, some courts in the late 20th century relied on the \textit{Restatement (Second) of Torts} § 388.\textsuperscript{42} Section 388 suggests holding manufacturers liable for physical harm caused by the intended use of their products when three conditions are met: (1) the manufacturer knew or should have known that the product is dangerous in some way; (2) the manufacturer had no reason to believe that the product’s user would realize the danger inherent in the product; and (3) the manufacturer failed to exercise reasonable care to inform that user of the danger.\textsuperscript{43} Confusingly, other courts seeking to understand the duty to warn sought guidance from

\begin{quote}
\textsuperscript{39} See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 96 (5th ed. 1984). Retail sellers and product suppliers also have a duty to warn buyers of product dangers. See Ford Motor Co. v. Rushford, 868 N.E.2d 806 (Ind. 2007). This Comment focuses exclusively on the duty to warn with respect to manufacturers, not sellers or suppliers.

\textsuperscript{40} OWEN, \textit{supra} note 26, § 9.1.

\textsuperscript{41} Id.

\textsuperscript{42} RESTATEMENT (SECOND) OF TORTS § 388 (AM. LAW INST. 1965); see, e.g., Hubbard-Hall Chem. Co. v. Silverman, 340 F.2d 402 (1st Cir. 1965) (quoting § 388 in jury instructions in the context of a failure-to-warn claim).

\textit{Restatement} § 388 reads as follows:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

\textit{Restatement (Second) of Torts} § 388 (AM. LAW INST. 1965).

\textsuperscript{43} \textit{Restatement (Second) of Torts} § 388 (AM. LAW INST. 1965).
a different section of the same Restatement—§ 402A.44 Section 402A recommends imposing liability on manufacturers for selling defective products that are unreasonably dangerous to the user or consumer, regardless of the level of care and precaution taken in the manufacturing of the product.45

The inconsistency between these two sections exists because they both appear in the “Negligence” division of the Restatement (Second) of Torts, but § 402A really creates strict liability and falls under the “Strict Liability” heading of the section, thereby creating ambiguity as to whether a breach of the duty to warn falls under negligence, strict liability, or both.46 Modern products-liability litigation reflects this discrepancy, as plaintiffs can allege either negligence or strict liability as two different causes of action that each independently support their failure-to-warn claims.47 Restatement § 388’s language links the duty to warn to the typical

44. Id. at § 402A. Restatement § 402A provides as follows:
   (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
      (a) the seller is engaged in the business of selling such a product, and
      (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
   (2) The rule stated in Subsection (1) applies although
      (a) the seller has exercised all possible care in the preparation and sale of his product, and
      (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

45. Id.

46. Id. at §§ 388, 402A. Strict liability differs from negligence in that it is a form of liability without fault, such that in a strict-liability analysis the only issue is whether the product poses an unreasonable risk of harm, whereas plaintiffs in negligence actions must prove a failure to exercise reasonable care. FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW § 14.01 (perm. Ed., rev. vol. 2013). Part 2(a) of § 402A of the Restatement (Second) of Torts reflects this difference, as a manufacturer might still be liable despite exercising all possible care. RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW. INST. 1965).

47. OWEN, supra note 26, § 9.2; see, e.g., Larkin v. Pfizer, Inc., 153 S.W.3d 758 (Ky. 2004) (pleading negligence, breach of warranty, and strict liability in failure-to-warn contexts). Breach of the implied warranty of merchantability is another suitable cause of action underlying warning-defect claims, but plaintiffs assert it less often than negligence or strict liability. OWEN, supra note 26, § 9.2.
tort law standard of negligence. After the promulgation of § 402A in 1962, however, courts across the country began adopting strict liability for harms caused by defective products. One way a product qualifies as defective is through inadequate or non-existent warnings. The liability is strict because manufacturers are held liable even if they neither knew nor should have known of the risk at issue, provided their product was defective or unreasonably dangerous. Thus, either approach, negligence or strict liability, could apply to a failure-to-warn claim because a manufacturer that fails to warn of a product’s hazards both breaches its duty to exercise reasonable care and creates a defective product.

Despite the discrepancy between the theories of recovery available to a plaintiff injured as the result of a warning defect, courts analyze failure-to-warn claims based in negligence or strict liability nearly identically. As the Ohio Supreme Court explained, “Commentators and courts have long recognized that both approaches deal with the same question of foreseeability of harm, and are therefore ‘two sides of the same standard.’” The convergence of negligence and strict liability in the context of the duty to warn is the result of courts importing the typical negligence concepts of foreseeability and reasonableness into the strict-liability inquiry of whether or not a product was defective. In other words, courts concluded that a product is not defective unless the

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49. See William L. Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 793–94 (1966) (characterizing the adoption of strict liability as “the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts”).
52. See id.
55. Owen, supra note 51, at 981–82.
manufacturer fails to warn against *foreseeable* risks only, rather than all risks regardless of the manufacturer’s awareness of them. Consequently, the defectiveness inquiry—a relic of the strict liability standard under § 402A—proved to be a negligence standard disguised under another moniker.57

The *Restatement (Third) of Torts: Products Liability* continued the trend of converging negligence and strict liability by situating the negligence principles of foreseeability and reasonableness in a standard that uses the strict liability language of defectiveness:

A product:

(c) *is defective* because of inadequate instructions or warnings when the *foreseeable* risks of harm posed by the product could have been reduced or avoided by the provision of *reasonable* instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product *not reasonably safe.*58

When applying this provision, courts continue to use the language of strict liability in failure-to-warn contexts.59 Some even insist that liability for failure to warn is still strict, despite engaging in a negligence analysis before determining liability.60 Notwithstanding the label of strict liability, failure-to-warn claims are really negligence claims, with a focus on the foreseeability of the product’s risks.61

The heart of the negligence analysis for failure-to-warn claims is the notion of an adequate warning.62 An adequate warning is one that provides in a reasonable manner to the appropriate individuals information sufficient to warn about foreseeable risks that are significant enough to

60. See *id*.
62. See *supra* note 26, § 9.2–3.
justify the costs of providing the warning information.63 Faced with this formulation of the duty to warn, one question that courts encounter is whether the risks at issue include only those presented by a manufacturer’s own products or, in addition, those associated with a third-party product that is incorporated into or used in conjunction with the manufacturer’s product.64 In other words, courts must decide whether manufacturers have a third-party duty to warn alongside the generic first-party duty to warn about their own products.65

B. The Third-Party Duty to Warn

Whether a manufacturer has a first-party duty to warn about a given risk turns on the foreseeability of that risk.66 For instance, if Manufacturer A distributes a product that, when paired with Manufacturer B’s product, creates a risk that is foreseeable to A, then A has a duty to warn against that risk.67 The conclusion that A must warn against the risk, however, depends upon the assumption that it is A’s product—not B’s—that contains the risk. Without this assumption, A has no responsibility to warn against this risk.68 If, alternatively, the risk inheres in Manufacturer B’s product, then Manufacturer B ought to carry the burden of warning.69 Thus, the manufacturer that creates the product that poses a risk to consumers must warn about that risk.70 This line of reasoning comports with the well-recognized principle that a manufacturer’s duty to warn ushers only from the characteristics of its own products, not from other manufacturers’ products.71

63. See id. As noted in Part II of this Comment, this commonplace approach to the duty to warn is known as the “foreseeability approach.” See discussion infra Part II.


65. See, e.g., id.

66. See OWEN, supra note 26, § 9.2–.3.

67. See KEETON ET AL., supra note 39, § 96.

68. See RICHARD E. KAYE, AM. L. PROD. LIAB. 3D § 32:9 (August 2019), Westlaw.

69. See id.


71. See KAYE, supra note 68, § 32:9; In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig., 856 F. Supp. 2d 904, 908 (N.D. Ky. 2012). Courts justify this denial of a third-party duty to warn in a number of different ways. See In re Asbestos Products Liab. Litig. (No. VI), 873 F.3d 232, 236 (3d Cir. 2017) (speaking in terms of the “bare metal defense,” which provides that
Despite the frequency with which courts invoke the principle that a manufacturer’s duty to warn depends only upon its own product’s characteristics, there are a number of contexts in which courts address the question of whether a manufacturer is liable for failing to warn about a third-party product’s risks. Some common contexts in which these cases arise include: (1) when completed products are used in conjunction with one another; (2) when a third-party manufacturer outfits an incomplete product with component parts post-sale; (3) when new parts replace old ones; and (4) when a manufacturer creates a “bare-metal” product, which is one without necessary insulation or packing that is added on at a later time, either by the bare-metal manufacturer itself or a third-party such as another manufacturer or buyer.

1. Products Used in Conjunction With One Another

The question of the third-party duty to warn commonly arises in cases where one completed product is integrated with or used alongside another finished product. For example, in Rastelli v. Goodyear Tire & Rubber Co., the plaintiff’s husband was inflating a tire manufactured by Goodyear Tire & Rubber Company (“Goodyear”). The tire was mounted on a multipiece tire rim manufactured by Kelsey-Hayes when the rim exploded from the tire, striking the plaintiff’s husband in the head and killing him instantly. The plaintiff sued Goodyear, among other manufacturers, alleging that the tire was designed for installation on a multipiece rim, that

manufacturers who make bare products without insulation or other materials are immune from liability for the dangers of that material which is added to the product post-sale). One common justification for the defense centers on the causation element of a negligence claim, because arguably if a third-party manufacturer’s product creates the risk in question, then the plaintiff will be unable to prove that the defendant-manufacturer’s product caused her injuries. See id. Other courts insist that a manufacturer’s duty only encompasses warnings about the risks associated with its own products, and so the analysis ends before causation becomes relevant. Id.

72. See OWEN, supra note 26, § 10:9; see also id. § 10:9 n.151; KAYE, supra note 68, § 32:9.
73. See discussion infra Part I.B.1.
74. See discussion infra Part I.B.2.
75. See discussion infra Part I.B.3.
76. See discussion infra Part I.B.4.
77. See cases cited infra notes 78, 86, 94, 98.
79. Id.
Goodyear was aware of the inherent dangers of using the tire in conjunction with such rims, and that Goodyear failed to warn of the dangers of using the tire in its intended way. \(^80\) The Goodyear tire model in question was compatible for use on some, but not all, multipiece rim assemblies. \(^81\) The plaintiff conceded that the rim contained the defect that caused the explosion and that the tire was not defective in any way besides failing to display a warning of the dangers of its use alongside multipiece rims. \(^82\) Thus, the issue before the court was whether one manufacturer, Goodyear, was liable for failing to warn when its product was compatible for use with a defective product made by another manufacturer, Kelsey-Hayes. \(^83\) The New York Court of Appeals held that the manufacturer of a sound product has no duty to warn about a defective product that someone else manufactured and that is compatible for use with the sound product because the former manufacturer had no control over the production of the defective product, played no part in placing that product into the stream of commerce, and derived no benefit from its sale. \(^84\)

The Rastelli court distinguished the case from instances where combining one sound product with another sound product creates a dangerous condition about which the manufacturer of each product has a duty to warn, as in *Ilosky v. Michelin Tire Corp.* \(^85\) Karen M. Ilosky had her car outfitted with a set of radial tires on the front axle from Michelin Tire Corporation ("Michelin") and a set of snow tires on the rear axle from Ferguson Tire Service Company. \(^86\) The industry consensus recommended against using two different types of tires at the same time. \(^87\) The mixing of different tire types allegedly resulted in oversteering, causing the plaintiff’s car to spin out of control when navigating a curve in the highway and crash into a utility pole. \(^88\) Ilosky sustained severe injuries and subsequently filed suit against Michelin for failing to warn about the

\(^{80}\) *Id.* at 225. The spouse of the decedent brought suit on his behalf. *Id.*

\(^{81}\) *Id.* at 223.

\(^{82}\) *Id.* at 226.

\(^{83}\) *Id.* Besides Goodyear, the plaintiff sued the three manufacturers of almost all multipiece tire rims produced in the United States: Firestone Tire and Rubber Company, Kelsey-Hayes Company, and the Budd Company. *Id.* at 223. Kelsey-Hayes’ initials appeared on the rim base of the wheel that killed the plaintiff’s husband. *Id.*

\(^{84}\) *Id.* at 226.


\(^{86}\) *Ilosky*, 307 S.E.2d. at 607.

\(^{87}\) *Id.*

\(^{88}\) *Id.*
dangers of using different types of tires on one vehicle. Ilosky’s allegations were that it was foreseeable that radial tires and snow tires would be dangerous when paired together and that both manufacturers, therefore, should have warned against using the tires together. Unlike in Rastelli, the West Virginia court held that the jury was entitled to find that Michelin had breached its duty to warn of the dangers of mixing its own tires with tires made by other manufacturers in the manner done in the case, because such mixing was foreseeable given the industry practice of advising against mixing radial and conventional tires.

In light of the holdings from Rastelli and Ilosky, the well-cited principle that a manufacturer’s duty to warn depends solely upon its own product’s characteristics appears oversimplified. Michelin’s duty to warn against the dangers of mixing its tires with others depended at least in part on the qualities of third-party products, because the other, non-Michelin tires must have also been incompatible with Michelin’s tires to trigger the duty to warn. Furthermore, the Rastelli court’s reasoning implies that if a manufacturer had sufficient control over the third-party product at issue, played a role in placing the product in the stream of commerce, and derived a benefit from its sale, then a duty to warn against that third-party product’s risks might arise. Thus, the principle that manufacturers considering their obligations to warn need look only to their own products in a vacuum conflicts with the holdings in cases like Rastelli and Ilosky, among others.

Admittedly, these two cases acknowledge a very limited third-party duty to warn. Ilosky involved a situation in which two products interacted synergistically to produce a risk that neither posed on its own, and Rastelli implied, as a prerequisite to the third-party duty to warn, a high degree of

89. Id. The court acknowledged that the plaintiff could have brought the same warning claim against the manufacturer of the conventional tires. Id.

90. Id. at 609. While the conventional snow tires were not a sufficient condition of the defect, neither were Michelin’s radial tires, and therefore it is fair to characterize the risk as partly created by a third-party product from Michelin’s point of view. Id.

91. Id. at 610–12.

92. See Keeton et al., supra note 39, § 96; see also Rastelli v. Goodyear Tire & Rubber Co., 591 N.E.2d 222 (N.Y. 1992); Ilosky, 307 S.E.2d 603.

93. Ilosky, 307 S.E.2d at 612.

94. Rastelli, 591 N.E.2d at 226.


96. See Rastelli, 591 N.E.2d 222; Ilosky, 307 S.E.2d 603.
control over another manufacturer’s product.97 A more prevalent third-party duty to warn would arise in cases where one product poses a risk independently of the other product and where neither manufacturer exercises any control over the other—their products intersect through market forces, for example.

*Rogers v. Sears, Roebuck & Co.* is such a case.98 A man changing out propane gas tanks on a barbecue grill died in an explosion as a result of a defect in one of the tanks, and the decedent’s survivors sued the grill manufacturer, among other companies.99 The question before the New York Supreme Court was whether the grill manufacturer’s warning to use the grill outdoors or in well-ventilated areas was adequate to warn against the dangers presented by defects in the gas tanks.100 The court held that the grill manufacturer had a duty to warn against the defect of gas tanks because the grill could not be used without such tanks and its own warnings to use the product outdoors acknowledged the dangers of gas emission.101

Notably, in contrast to the *Rastelli* court’s reasoning that one manufacturer cannot be responsible for another manufacturer’s product without some control by the former over the latter, the *Rogers* court ignored the business relationship between the grill and propane manufacturers.102 Instead, the court focused on an attribute of the grill itself—the product that on its own posed no threat of explosion to the decedent.103 The relevant attribute was the grill’s inability to function without the propane gas tank—the defective product that presented the risk of explosion on its own.104 Thus, rather than decide the issue of the third-party duty to warn based on which manufacturer is more responsible for the risk that befell the decedent—undoubtedly, the propane tank manufacturer—the *Rogers* court found dispositive the grill manufacturer’s

97. *Illosky*, 307 S.E.2d 603; *Rastelli*, 591 N.E.2d 222. For more examples of cases in which two products used together create a risk that neither poses alone, 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, 600 n.21 (2008).


99. *Id.*

100. *Id.* at 360.

101. *Id.*

102. See *Rastelli*, 591 N.E.2d at 226; *Rogers*, 701 N.Y.S.2d at 360.

103. See *Rogers*, 701 N.Y.S.2d at 360.

104. See *id.*
knowledge of the “danger of gas emission” and its product’s inevitable use alongside that danger.105

The above examples are only a handful of the many cases that raise the question of a third-party duty to warn in the context of products used together.106 Other notable examples include whether the airplane manufacturer Boeing had a duty to warn about the risks of developing deep vein thrombosis from using seats made by a third-party and installed in their aircrafts post-sale107 and whether an above-ground swimming pool manufacturer could be liable for failing to warn about the dangers of a defective ladder made by another company and used to enter and exit the pool.108 These cases present instances of different products used in conjunction with one another, one of several contexts in which courts often encounter the issue of the third-party duty to warn.109

2. Component Parts

The question of whether a manufacturer has a duty to warn about risks posed by third-party products arises in another subset of products liability

105. Id.
109. See cases cited supra notes 78, 86, 98.
cases, namely, those involving manufacturers of component parts.\textsuperscript{110} For example, in \textit{Walton v. Avco Corp.}, the dispute before the Pennsylvania Supreme Court concerned a defective engine in the helicopter in which Dennis McCracken and Billy Tincher were riding.\textsuperscript{111} The engine seized mid-flight, causing the aircraft to crash and kill both individuals.\textsuperscript{112} The decedents’ administrators sued the engine manufacturer for selling a defective product, but they also sued the helicopter manufacturer for failing to warn of the dangers of the engine.\textsuperscript{113} The court found that the helicopter manufacturer had a duty to warn that derived from its knowledge of the defect in the engine, as the engine manufacturer had published several service instructions and bulletins that announced the engine defect and recommended modifications to fix it.\textsuperscript{114}

By contrast, in \textit{Mitchell v. Sky Climber, Inc.}, a Massachusetts court considered the question of the third-party duty to warn from the perspective of a distributor of component parts.\textsuperscript{115} Specifically, the question before the court was whether the manufacturer of a motor lift that gets incorporated into scaffolding equipment has a duty to warn about the dangers of improperly rigging the scaffolding.\textsuperscript{116} The court held that the manufacturer of the motor lift had no duty to warn of a risk that a third-

\textsuperscript{110} See generally \textit{MacPherson v. Buick Motor Co.}, 111 N.E. 1050 (N.Y. 1916); \textit{Restatement (Third) of Torts: Products Liability \S 5 (Am. Law Inst. 1998)} (“Liability of Commercial Seller or Distributor of Product Components for Harm Caused by Products Into Which Components Are Integrated”). This section of the \textit{Restatement} sets out what is known as the “component parts doctrine,” which provides that a component parts manufacturer is liable for harm caused by the product into which the component is integrated if the component itself is defective and the defect causes the harm, or if the component manufacturer substantially participates in the integration of the component into the design of the product, the integration causes the product to be defective, and the defect causes the harm. \textit{Restatement (Third) of Torts: Products Liability \S 5 (Am. Law Inst. 1998)}. From the perspective of the component manufacturer, then, there is no third-party duty to warn unless that manufacturer plays a substantial enough role in overseeing the integration of its components with the third-party product. From the \textit{product} manufacturer’s perspective, see E.L. Kellett, Annotation, \textit{Products Liability: Manufacturer’s responsibility for defective component supplied by another and incorporated in product}, 3 A.L.R. 3d 1016 (1965).


\textsuperscript{112} \textit{Id.}

\textsuperscript{113} \textit{Id.} at 457.

\textsuperscript{114} \textit{Id.} at 459–60.


\textsuperscript{116} \textit{Id.} at 1375.
party created and that no one associated with a foreseeable use or misuse of the manufacturer’s own product. In a more recent case, Pantazis v. Mack Trucks, Inc., a Massachusetts appellate court reaffirmed Mitchell by holding that a manufacturer of a component part has no duty to warn of risks presented by an assembled product when those risks arise from something besides the component itself.

The holdings in Walton and Mitchell demonstrate that courts treat component parts manufacturers and assembled product manufacturers differently with respect to the third-party duty to warn. A component part might be used with any number of products, and the law generally does not require a manufacturer to understand the risks of products made by others and warn against those risks. A manufacturer that incorporates into its product a component made by another company, however, usually has a responsibility to test and inspect that component. Thus, cases involving component parts often implicate the third-party duty to warn and highlight the importance of the manufacturer’s level of expertise and knowledge in the determination of liability.

### 3. Replacement Parts

Questions regarding the third-party duty to warn appear in yet another subsection of products liability law: cases involving replacement parts. For example, in Bich v. General Electric Co., an explosion badly burned the plaintiff while he was replacing the fuses in a malfunctioning General Electric (GE) transformer. The plaintiff replaced the GE fuses with Westinghouse fuses manufactured three years after GE installed the transformer at issue. Besides being slightly larger in diameter and manufactured at a later time, the Westinghouse fuses were identical to their GE counterparts. In response to GE’s summary judgment motion,

119. See Walton, 610 A.2d at 459–60; Mitchell, 487 N.E.2d at 1375.
120. See KAYE, supra note 68, § 32:9.
121. See Kellett, supra note 110, at 1016.
122. See KAYE, supra note 68, § 32:9.
125. Id.
126. Id. at 1325–28.
a Washington appellate court considered whether the transformer was unreasonably dangerous as a result of GE’s failure to warn against the risks of replacing its fuses with third-party fuses.\textsuperscript{127} The court found that whether the transformer was unreasonably dangerous as a result of inadequate warnings was a question for the jury, as GE may have had a duty to warn against the dangers of substituting other fuses with its own, even if it had no duty to warn of the Westinghouse fuses in particular.\textsuperscript{128}

By contrast, in \textit{Baughman v. General Motors Corp.}, the United States Court of Appeals for the Fourth Circuit held that General Motors (GM) had no duty to warn against the dangers of using a multi-piece wheel that replaced the original type of wheel that GM designed for one model of its trucks.\textsuperscript{129} During his work as a mechanic, the plaintiff mounted a tire on the third-party multipiece wheel, and a defect in the product caused the tire to explode, severely injuring the plaintiff.\textsuperscript{130} The court explained that unlike the manufacturer that incorporates a defective component into its finished product, GM had no opportunity to test and inspect the replacement part that injured the plaintiff.\textsuperscript{131} To hold GM accountable for a defective replacement part would effectively punish a manufacturer for failing to test the safety of all possible replacement parts for warning purposes.\textsuperscript{132} Thus, the third-party duty to warn creates an excessive burden for manufacturers, and the appropriate duty rests on the manufacturer of the replacement component part.\textsuperscript{133}

The reasoning behind the disparate holdings from \textit{Bich} and \textit{Baughman} illustrates that courts diverge on what exactly a third-party duty to warn entails for manufacturers.\textsuperscript{134} On the one hand is the \textit{Bich} court’s idea that a manufacturer could warn against third-party replacement parts in a general way, without the need to address every possible replacement option in particular.\textsuperscript{135} On the other hand is the \textit{Baughman} court’s point that a manufacturer cannot sufficiently warn against a risk without understanding it to some extent through testing.\textsuperscript{136} Clearly, cases involving

\begin{itemize}
\item \textsuperscript{127} Id. at 1328. GE argued that it could not have foreseen that a similar fuse manufactured by another company three years later might have different characteristics for which it should have warned. Id.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} Baughman v. Gen. Motors Corp., 780 F.2d 1131, 1133 (4th Cir. 1986).
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id.
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Id.
\item \textsuperscript{135} See \textit{Bich}, 614 P.2d at 1328.
\item \textsuperscript{136} See \textit{Baughman}, 780 F.2d at 1133.
\end{itemize}
replacement parts serve as fertile ground for raising the question of the third-party duty to warn.137

4. Bare-Metal Products

Finally, the most common products liability context that implicates the question of a third-party duty to warn is the group of cases involving bare-metal products, or products that are made without insulation, packing, or other material that must be added at a later time to operate properly, and such material usually contains asbestos.138 Cases involving these bare-metal products naturally lend themselves to questions concerning the duty to warn against risks associated with third-party products because the bare-metal manufacturers create products that are paired with a dangerous material like asbestos, and plaintiffs seek to hold the bare-metal manufacturers liable for failing to warn of the dangers of inhaling asbestos fibers.139 Of course, plaintiffs also seek to hold the asbestos manufacturers liable, but decades of lawsuits have left nearly all asbestos manufacturers bankrupt.140 Consequently, injured plaintiffs look for recovery from third-party manufacturers whose products played some role in the exposure to asbestos fibers.141

For example, in Macias v. Saberhagen Holdings, Inc., the plaintiff worked in a shipyard cleaning supplies and equipment, including respirator masks manufactured by the defendants and used by other workers in the yard.142 Through prolonged use, the respirators accumulated asbestos fibers that the plaintiff inhaled over a period of time while cleaning the masks, causing him to develop mesothelioma and die.143 The survivors sought recovery from the respirator manufacturers

138. See Mark A. Behrens & Margaret Horn, Liability for Asbestos-Containing Connected or Replacement Parts Made by Third-Parties: Courts are Properly Rejecting This Form of Guilt by Association, 37 AM. J. TRIAL ADVOC. 489 (2014). Many of the asbestos cases that involve warning defects are maritime cases because of the prevalence of asbestos-containing equipment on large ships. See Taylor v. Elliott Turbomachinery Co., 90 Cal. Rptr. 3d 414 (Ct. App. 2009).
141. Id.
143. Id.
for failing to warn of the dangers of the third-party asbestos. The respirator manufacturers filed a motion for summary judgment, alleging that the plaintiff only had a claim against the asbestos manufacturer, as the asbestos caused the injury, not the respirators. The Washington Supreme Court denied the motion because the respirators inherently involved the danger of exposure to asbestos when used as intended.

In another asbestos case, Taylor v. Elliott Turbomachinery Co., the plaintiff was a member of the U.S. Navy who worked on an aircraft carrier repairing equipment, like valves and pumps, that the manufacturers outfitted with gaskets, packing, or insulation containing asbestos. The valve and pump manufacturers wrapped them in their own asbestos material before the time of sale, but by the time the plaintiff interacted with the equipment, workers had replaced the original asbestos with third-party-manufactured asbestos. After developing mesothelioma, the plaintiff filed suit and asserted that the valve and pump manufacturers had a duty to warn of the hazards of repairing equipment laced with asbestos like theirs. The defendants countered that the harm that plaintiff allegedly suffered was the result of the third-party asbestos manufacturer’s product, not their pumps, valves, or original asbestos material. A California appellate court found in favor of the equipment manufacturers, holding that the third-party duty to warn only arises when the manufacturer’s own product causes or creates the risk of harm when used in combination with a third-party product. In other words, the asbestos endangered the plaintiff, not the valves or pumps, and therefore the asbestos manufacturer should bear the burden of warning about its own product’s risks when used in combination with others. The Taylor court’s reasoning illustrates one view of what it means for a product to present a risk to consumers—a view that is more restrictive than the Macias court’s view, as that court determined that respirators intended for

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144. Id.
145. Id. at 1079.
146. Id. at 1080.
148. Id.
149. Id. at 419.
150. Id. at 419–20.
151. Id. at 425–26. For an instance where two products combine to each create a risk such that both manufacturers have a duty to warn, see Ilosky v. Michelin Tire Corp., 307 S.E.2d 603 (W.Va. 1983).
use in environments with asbestos presented a risk of exposure. The Taylor court, by contrast, effectively held that a product does not present a risk unless it has the physical capacity to cause the injury underlying that risk, as only the asbestos does in bare-metal cases.

Many asbestos cases that implicate the third-party duty to warn involve products that originally contain no asbestos but that another manufacturer uses with its own asbestos-containing product. One such case is Shields v. Hennessy Industries, Inc. In Shields, the plaintiff worked as a mechanic using the defendant-manufacturer’s brake arcing machine for grinding brake linings that contained asbestos. The court considered whether the machine manufacturer should be held liable for failing to warn about the dangers of using its product with third-party brakeshoe linings. Given that the brake arcing machine’s only purpose was to grind brakeshoe linings that at all relevant times contained asbestos, the court found that the machine itself contributed substantially to the asbestos-related harm suffered by the plaintiff and dismissed the defendant’s motion for summary judgment.

C. State Statutes and the Third-Party Duty to Warn

The third-party duty to warn arises in a variety of products liability contexts, including cases involving conjoined or integrated products, component parts, replacement parts, and bare-metal products. In cases implicating the third-party duty to warn, courts must proceed in light of both their own precedent and state statutes governing products liability claims. These state statutes concerning products liability, however,

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156. Id.
157. Id. at 269–70. The purpose of the machine was to grind brake shoes to match the arc within the brake drums.
159. Shields, 140 Cal. Rptr. 3d at 281.
typically fail to address the third-party duty to warn issue in a sufficiently direct manner to obviate the need for independent judicial analysis.\footnote{See generally Products Liability: 50 State Statutory Surveys: Civil Laws: Torts, 0020 SURVEYS 29 (West 2019).}

For example, a Louisiana state court considering a third-party duty to warn case would look to the Louisiana Products Liability Act (LPLA) for guidance.\footnote{LA. REV. STAT. § 9:2800.51–60 (2019).} One relevant portion of the LPLA provides that the “characteristic of the product that renders it unreasonably dangerous . . . must exist at the time the product left control of its manufacturer or result from a reasonably anticipated alteration or modification of the product.”\footnote{Id. § 9:2800.54(C).} The problem is that both proponents and opponents of the third-party duty to warn could make a colorable argument for their side based on this statutory language.\footnote{See generally Tarver v. Wyeth, No. 3-04-2036, 2005 WL 4052382 (W.D. La. June 27, 2005).} On the one hand, for example, if a bare-metal manufacturer reasonably anticipated that another manufacturer or vendor would modify its product by adding asbestos, then arguably the above LPLA provision applies to that bare-metal product, thereby triggering the third-party duty to warn.\footnote{See generally Roberts v. Bioplasty, Inc., No. 93-2967, 2000 WL 34487072 (E.D. La. Feb. 11, 2000).} On the other hand, the asbestos poses the danger to consumers, not the bare-metal product, and therefore “the product” referred to by the statute—the pump or valve—is not unreasonably dangerous.\footnote{See generally Fricke v. Owens-Corning Fiberglas Corp., 618 So. 2d 473 (La. Ct. App. 4th Cir. 1993).} It is not as if a third-party manufacturer is altering or modifying the valves such that they become prone to bursting and injuring users, for instance.\footnote{See, e.g., Kirschenbaum v. Spraggins, No. 08-4569, 2010 WL 2291455, at *9 (E.D. La. June 3, 2010).} Hence, the LPLA fails to resolve the third-party duty to warn issue; such failure is common to other states’ statutes on products liability, too.\footnote{See, e.g., In re Asbestos Litig., C.A. No. N10C–08–258 ASB, 2012 WL 1415706 (Del. Super. Ct. Feb. 28, 2012); McKenzie v. A.W. Chesterson Co., 378 P.3d 150 (Or. Ct. App. 2016); Coffman v. Armstrong Int’l, Inc., No. E2017-01985-COA-R3-CV, 2019 WL 3287067, at *13–20 (Tenn. Ct. App. July 22, 2019).} As a result, it is up to the courts to address the issue.\footnote{See generally Coffman, 2019 WL 3287067, at *18 (using a jurisprudential test despite the presence of a Tennessee products-liability statute).}
As the cases involving conjoined use, component parts, replacement parts, and bare-metal products demonstrate, various factors motivate courts to decide one way or another on a manufacturer’s duty to warn against the risks of another manufacturer’s product, such as the nature of the product at issue, the relationship between the two manufacturers, and their relationship with the end user or consumer.\(^{171}\) Courts, however, treat these factors inconsistently, such that no one uniform approach to the third-party duty to warn has emerged.\(^{172}\)

II. THREE DIFFERENT APPROACHES TO THE THIRD-PARTY DUTY TO WARN

As courts across the country have grappled with the question of whether and when a manufacturer is legally obligated to warn about the risks associated with another party’s products, three main approaches stand out as the most prevalent: the bare-metal option, the foreseeability standard, and the middle-ground approach between the two.\(^{173}\) Each of these positions has its own justifications that are worth understanding in turn.\(^{174}\)

A. The Bare-Metal Approach: No Third-Party Duty to Warn

In the face of plaintiffs alleging a third-party duty to warn, some courts have adopted the “bare-metal defense,” which provides that manufacturers are only liable for the harms that their own products cause.\(^{175}\) According to the bare-metal defense, if a manufacturer did not itself make, sell, or distribute a product or incorporate a part into its product, then that manufacturer is not liable for any harm that the product causes.\(^{176}\) The case cited most often as authority for the bare-metal defense is *Lindstrom v. A-

\(^{171}\) See discussion *supra* Part I.B.1–4.


\(^{174}\) See discussion *infra* Part II.A–C.


\(^{176}\) See, e.g., *Lindstrom*, 424 F.3d 488; *Evans*, 230 F. Supp. 3d at 403–05; *Cabasug*, 989 F. Supp. 2d at 1041.
During Rolf Lindstrom’s decades of work as a merchant seaman on a number of vessels, he worked on various pieces of equipment that contained asbestos. After developing mesothelioma, he filed suit against a host of manufacturers whose equipment he had worked on. The United States Court of Appeals for the Sixth Circuit dismissed the bare-metal manufacturers, Coffin Turbo Pump, Inc. and Ingersoll Rand, on summary judgment because neither company manufactured the asbestos that allegedly injured Lindstrom. The court reasoned that the plaintiff could not prove the cause-in-fact element of his claim against these manufacturers in light of the fact that another company incorporated the asbestos material into their products. The justification for this claim was that Lindstrom could not prove that either manufacturer’s product was a “substantial factor” in his illness, which is a prerequisite to proving the element of causation under negligence and strict liability theories. It is impossible, according to the court, for a product devoid of asbestos to cause an asbestos-related injury like mesothelioma.

The next significant endorsement of the bare-metal defense came from the California Supreme Court in O’Neil v. Crane Co. A sailor in the U.S. Navy who worked in engine and boiler rooms developed mesothelioma and afterwards sued two valve and pump manufacturers for failing to warn of the dangers of asbestos. Third-party manufacturers were responsible for adding post-sale the asbestos-containing insulation and gaskets that allegedly caused the sailor’s illness. The court rejected the plaintiff’s claim that manufacturers may be held strictly liable when it is foreseeable that another party will use their products in conjunction with defective

177. Lindstrom, 424 F.3d at 491.
179. Lindstrom, 424 F.3d at 491.
180. Id.
181. Id. at 496–97.
182. Id. at 497.
183. Id. at 492.
186. Id.
187. Id. Granted, the manufacturers’ products originally came with asbestos-containing gaskets and packing, but by the time the plaintiff was exposed to those products, the original asbestos parts had been replaced with equivalent third-party ones. Id. at 998.
products or replacement parts made by a third-party. The court explained that foreseeability alone is not a sufficient basis for potential liability, and proving that the defendant manufactured the injury-inducing product is a separate threshold requirement for liability.

In addition to such legal rationales, the court also acknowledged that policy considerations largely influenced its decision to reject the strict liability theory of recovery for breach of the third-party duty to warn. Given that one of the policy goals behind the strict liability standard is to place the costs of injury and deterrence on parties most financially able to bear them, the court reasoned that imposing liability in this case would effectively burden one set of manufacturers with the costs of warning about the risks created by a different set of manufacturers. Furthermore, liability for third-party products would have the effect of forcing manufacturers to investigate the potential risks of all other products that others might foreseeably use with their own, which in turn translates to higher costs for consumers when the manufacturers inevitably have to cover the expenses of their new research and development focused on third-party parties.

Concerning the plaintiff’s failure-to-warn claim based in negligence, the court addressed the question of whether the scope of a manufacturer’s duty to warn included the risks posed by third-party asbestos products. The court analyzed the following factors relevant to the determination of the existence and scope of a duty to warn: (1) the foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the connection between the defendant’s conduct and the plaintiff’s injury; (4) the morality behind the defendant’s conduct; (5) the goal of deterring future harm; (6) the weight of the burden to the defendant and the impact on the community of imposing a duty to exercise care; and (7) the availability, cost, and prevalence of insurance for the risk involved. The court concluded that these factors did not support a third-party duty to warn because imposing such a duty would seldom prevent future harm, as the original manufacturer has no control over subsequent

188. Id. at 990. Under the standard of strict liability, the court explained, foreseeability is relevant only to determining whether injury is likely to result from a potential use or misuse of a product. Id. at 1005.
189. Id.
190. Id. at 1005–07.
191. Id. at 1005–06.
192. Id.
193. Id. at 1006.
194. Id. (citing Rowland v. Christian, 443 P.2d 561 (Cal. 1968)).
manufacturers’ actions. The court also reasoned that the third-party duty to warn could lead to an overabundance of warnings, as more manufacturers than otherwise would include warnings on products in the face of a third-party duty to warn.

The bare-metal approach essentially denies the existence of the third-party duty to warn altogether. The Lindstrom decision justified this approach without regard to policy considerations, finding that a plaintiff who asserts a failure to warn claim against Manufacturer A to recover for injuries caused by Manufacturer B’s product would be unable to prove the necessary causation element in his claim against A. O’Neil, on the other hand, substantiated the bare-metal approach with policy considerations relevant to the strict liability standard and with duty-based concerns under the negligence standard. Not all courts agree, however, that considerations of causation, duty, or policy weigh in favor of the bare-metal defense’s denial of the third-party duty to warn.

B. The Foreseeability Approach: The Third-Party Duty to Warn Subsumed by the Generic Duty to Warn

Another approach to the question of whether a manufacturer can be liable for failing to warn against the dangers presented by third-party products treats the third-party duty to warn like the generic duty to warn against dangers latent in the foreseeable uses of one’s own product. This approach mirrors that of the general foreseeability standard that courts apply in first-party duty to warn cases. Recently, the United States Court of Appeals for the Third Circuit championed this approach, holding that manufacturers of bare-metal products are liable for warning defects when the facts show that the plaintiff’s injuries were a reasonably foreseeable

196. Id.
197. See cases cited supra note 175.
200. See discussion infra Part II.B–C.
result of the manufacturer’s failure to warn. The court justified its holding by exploring the doctrinal roots of the bare-metal defense. The court found that some authorities understand the defense in terms of the causation element of negligence or strict liability theories, as in *Lindstrom*, while other courts think in terms of the question of duty and its scope, as in *O’Neil*. The Third Circuit reconciled these perspectives in its determination that the heart of the bare-metal defense is foreseeability. In other words, a reasonable interpretation of the bare-metal defense is that the defense serves as a bright-line rule in which injuries caused by third-party products are presumably unforeseeable to another manufacturer, while the foreseeability approach views such injuries as sometimes foreseeable and sometimes not, depending on the facts at hand. In an attempt to articulate a standard applicable to bare-metal cases, the Third Circuit held that the foreseeability requirement is met if a bare-metal manufacturer knew or reasonably should have known, at the time it placed its product into the stream of commerce, that

(1) asbestos is hazardous, and
(2) its product will be used with an asbestos-containing part, because
(a) the product was originally equipped with an asbestos containing part that could reasonably be expected to be replaced over the product’s lifetime,
(b) the manufacturer specifically directed that the product be used with an asbestos-containing part, or
(c) the product required an asbestos-containing part to function properly.

The Third Circuit identified three sufficient conditions—(a), (b), and (c)—for the third-party duty to warn, because under each of those conditions, it would be foreseeable that a plaintiff might suffer asbestos-related injury as a result of the manufacturer’s failure to warn. Given the fact-specific nature of the foreseeability approach, however, these above three conditions are not the only ones from which liability might arise, and

203. *In re Asbestos Products Liab. Litig. (No. VI)*, 873 F.3d at 241.
204. *Id.* at 236.
205. *Id.*; see also text accompanying note 71.
206. *Id.* Insofar as foreseeability relates to both duty and proximate cause, the court found merit in both competing views. *Id.*
207. *Id.* at 236–37.
208. *Id.* at 240.
209. *Id.*
therefore the answer to the question of whether a manufacturer has a third-party duty to warn varies on a case-by-case basis.\textsuperscript{210}  

\textit{Kochera v. Foster Wheeler, LLC} provides a good illustration of how the foreseeability approach might work in an asbestos context.\textsuperscript{211}  \textit{Kochera} involved a sailor who contracted asbestosis after sweeping the dusty floors around GE turbines located in the engine room on a U.S. Navy ship.\textsuperscript{212}  When the turbines left GE’s control, they did not have any heat insulation materials installed, and GE was uninvolved in the subsequent process of supplying and installing asbestos-containing heat insulation materials.\textsuperscript{213}  The plaintiff countered that GE was aware of its turbines’ use in high-heat environments like engine rooms, meaning it knew the machines needed some kind of heat insulation material.\textsuperscript{214}  Indeed, the blueprints for the turbines called for insulation and packing.\textsuperscript{215}  The court denied GE’s motion for summary judgment because it was foreseeable that the turbines would subject those working around them to the risks of asbestos exposure.\textsuperscript{216}  

\textit{Kochera} underscores the fact-specific, case-by-case nature of the foreseeability approach because arguably none of the three conditions developed by the Third Circuit would have been met in the case, and yet the court still upheld the possibility of liability.\textsuperscript{217}  That is, GE did not equip its machines with asbestos to begin with, it directed the use of some kind of heat insulation material but not necessarily asbestos-laden material, and the machines did not require insulation containing asbestos to function so long as other insulation devoid of asbestos was available.\textsuperscript{218}  Despite the absence of these factors, the court determined that the risk of exposure to asbestos was still foreseeable, presumably because asbestos was the go-to material in such industrial settings.

\textsuperscript{210} Id. The difference between this foreseeability approach and the conditional-duty approach discussed infra Part II.C is subtle. See Dandridge v. Crane Co., No. 2:12-cv-00484-DCN, 2016 WL 319938 (D. S.C. Jan. 27, 2016).


\textsuperscript{212} Id. at *1.

\textsuperscript{213} Id.

\textsuperscript{214} Id. at *4.

\textsuperscript{215} Id.

\textsuperscript{216} Id.

\textsuperscript{217} Id. at *1; \textit{In re Asbestos Products Liab. Litig. (No. VI)}, 873 F.3d 232, 240 (3d Cir. 2017). As previously stated, (a), (b), and (c) mentioned by the Third Circuit were just three sufficient conditions of foreseeability, not necessary conditions. \textit{In re Asbestos Products Liab. Litig. (No. VI)}, 873 F.3d at 240.

\textsuperscript{218} Kochera, 2015 WL 5584749, at *1.
Thus, the foreseeability standard and the bare-metal defense sit on opposite ends of the spectrum of judicial approaches to the third-party duty to warn.\textsuperscript{219} The main difference between these approaches centers around how the bare-metal defense limits the universe of risks that must be warned against to only those risks arising from the foreseeable uses of a manufacturer’s own product, not the products of third-parties.\textsuperscript{220} By contrast, the foreseeability approach expands that universe to include foreseeable hazards posed by third-party products used in conjunction with one’s own product.\textsuperscript{221} There is, however, another view of the third-party duty to warn that defines a group of risks as potential triggers of the duty to warn that is larger than the bare-metal defense’s definition but smaller than the foreseeability approach’s counterpart.\textsuperscript{222}

\section*{C. The Middle-Ground Approach: A Conditional Duty to Warn about Third-Party Products}

1. DeVries and the Maritime Context

In its recent decision \textit{Air and Liquid Systems Corp. v. DeVries}, the United States Supreme Court endorsed a middle-ground approach to the third-party duty to warn in the maritime context, leaving unresolved the question of the proper approach in non-maritime settings.\textsuperscript{223} Kenneth McAfee and John DeVries were two members of the U.S. Navy, who

\footnotesize{\begin{itemize}
\item \textsuperscript{219} See discussion supra Part II.A–B.
\item \textsuperscript{220} See, e.g., Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 993 (2019).
\item \textsuperscript{221} See, e.g., id.
\item \textsuperscript{222} See discussion infra Part II.C. Other courts have offered similar middle-ground approaches before DeVries. See Quirin v. Lorillard Tobacco Co., 17 F. Supp. 3d 760, 769–70 (N.D. Ill. 2014); In re N.Y.C. Asbestos Litig., 59 N.E.3d 458, 474 (N.Y. 2016). In \textit{Quirin}, for example, the court endorsed a rule that imposed a third-party duty to warn where the use of asbestos-containing materials was specified by a defendant, was essential to the proper functioning of the defendant’s product, or was for some other reason so inevitable that by supplying the product, the defendant was responsible for introducing asbestos into the environment at issue. Quirin, 17 F. Supp. 3d at 769–70; see also Dandridge v. Crane Co., No. 2:12-cv-00484-DCN, 2016 WL 319938 (D. S.C. Jan. 27, 2016). Similarly, in \textit{In re N.Y.C. Asbestos Litigation}, the court held that the manufacturer of a product has a duty to warn of the risks arising from the known and reasonably foreseeable uses of its products in combination with a third-party product which is necessary to enable the manufacturer’s product to function as intended as a matter of design, mechanics, or economic necessity. In re N.Y.C. Asbestos Litig., 59 N.E.3d at 474.
\item \textsuperscript{223} Air & Liquid Sys. Corp., 139 S. Ct. at 991.
\end{itemize}}
worked on ships outfitted with pumps, blowers, and turbines requiring asbestos insulation or asbestos parts to properly function.224 The manufacturers of the pumps and blowers did not always add the asbestos parts to their own products.225 Instead, they delivered the equipment “bare-metal” such that a third-party manufacturer had to outfit the equipment with asbestos to function as intended.226 The Navy later incorporated third-party asbestos parts into the bare-metal manufacturer’s products.227

McAfee and DeVries claimed that they ingested asbestos because the manufacturer’s equipment caused asbestos fibers to disperse through the air they inhaled on the Navy ships, allegedly causing the plaintiffs to develop cancer and later die during the course of the litigation.228 The plaintiffs chose to sue the bare-metal manufacturers in particular because the Navy was immune from liability under Feres v. United States,229 and the manufacturers of the asbestos parts were bankrupt.230 The plaintiffs argued that the bare-metal manufacturers were negligent in failing to warn of the dangers of the asbestos that they knew would be incorporated into their products.231 After the plaintiffs sued in the Court of Common Pleas of Philadelphia, the defendant-manufacturers removed the case to the United States District Court for the Eastern District of Pennsylvania under federal maritime jurisdiction.232

The district court granted the manufacturers’ motions for summary judgment based on the bare-metal defense, as the defendant-manufacturers did not make the asbestos that allegedly injured McAfee and DeVries, only the pumps and valves to which the injurious asbestos attached.233 On appeal, the Third Circuit rejected the district court’s application of the bare-metal defense, applying instead the foreseeable approach discussed.

224. Id. After Kenneth and John’s deaths, their widows Roberta G. DeVries and Shirley McAfee became plaintiffs. Id. See also Asbestos Exposure and Cancer Risk, supra note 139.
226. Id.
227. Id.
228. Id. at 991–92.
229. Feres v. United States, 340 U.S. 135 (1950). Feres created a sovereign-immunity protection that prevents active-duty servicemembers from asserting tort claims against the United States for injuries arising out of military service. Id. at 146.
231. Id.
232. Id.
The Third Circuit remanded the case for further proceedings consistent with its opinion, prompting the manufacturers to appeal. The Supreme Court rejected both the district court’s bare-metal defense approach and the Third Circuit’s foreseeability approach, opting instead for a maritime-specific rule that provides as follows:

- a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product’s users will realize that danger.

Justice Kavanaugh, writing for the majority, marshalled a number of policy considerations in support of this new approach. First, the product manufacturer will usually be in a better position than the parts manufacturer to warn of the danger of an integrated product, as manufacturers might use a part in any number of ways with a variety of products, whereas companies usually design a product with a specific use in mind. Second, manufacturers already have a duty to warn about their own products, so adding a small number of additional warnings should not meaningfully increase the burden on a select few manufacturers. Finally, the special solicitude for sailors that motivated the Third Circuit also reinforced the Supreme Court’s middle-ground approach.

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236. Id. at 996. Some commentators are calling this the “required incorporation standard.”
238. Id. at 994–96.
239. Id. at 995.
240. Id. As one authority puts it, “Seamen are wards of admiralty whose rights federal courts are duty-bound to jealously protect. In view of the nature of their services and its accompanying dangers, and the special circumstances attending their calling, seamen occupy a position as wards or favorites of admiralty.” 78A C.J.S. Seamen § 9 (2020), Westlaw. Despite the persuasive weight afforded to the solicitude to sailors in DeVries, the same Court held in another case that the solicitude doctrine has “only a small role to play in contemporary maritime law.” Dutra Grp. v. Batterton, 139 S. Ct. 2275, 2287 (2019).
Joined by Justices Alito and Thomas, Justice Gorsuch authored a spirited dissent, which claimed that expecting one manufacturer to warn about another manufacturer’s risks dilutes the incentives behind the duty to warn.\(^{241}\) Justice Gorsuch also praised the simplicity and clarity of the bare-metal defense, along with its resonance with consumer expectations, as people do not expect, for example, to read warnings about the dangers of undercooked meat when buying a new set of kitchen knives.\(^{242}\) Finally, Justice Gorsuch concluded with a silver lining: Justice Kavanaugh cabined the \textit{DeVries} standard to maritime contexts only, and thus courts operating outside that context are free to adopt the more sensible bare-metal defense going forward.\(^{243}\)

2. Non-Maritime Contexts

Although \textit{DeVries} resolved the issue of the proper judicial approach to the third-party duty to warn in maritime contexts, in non-maritime areas the decision merely recommended a third option for courts to consider, apart from the bare-metal defense and foreseeability approach.\(^{244}\) Unlike the bare-metal defense that precludes all liability for Manufacturer A failing to warn against Manufacturer B’s product, the rule outlined in \textit{DeVries} allows for Manufacturer A to be liable for failing to warn against Manufacturer B’s product under certain circumstances.\(^{245}\) In contrast to the foreseeability standard, however, \textit{DeVries} establishes a threshold requirement for breach of the third-party duty to warn that demands more than foreseeability alone.\(^{246}\) Thus, the \textit{DeVries} standard is a middle-ground approach, as it envisions more recovery than the bare-metal defense but less than the foreseeability alternative.\(^{247}\)

Therefore, courts faced with non-maritime cases in which a plaintiff seeks recovery from one manufacturer for failing to warn against the dangers of another manufacturer’s product have at least three viable options to choose from—the bare-metal defense, the foreseeability approach, or a middle-ground alternative.\(^{248}\) Although there is

\(^{241}\) \textit{Air & Liquid Sys. Corp.}, 139 S. Ct. at 996–97 (Gorsuch, J., dissenting).

\(^{242}\) \textit{Id.} at 998 (Gorsuch, J., dissenting).

\(^{243}\) \textit{Id.} at 1000 (Gorsuch, J., dissenting).


\(^{245}\) \textit{See Air & Liquid Sys. Corp.}, 139 S. Ct. at 994.

\(^{246}\) \textit{See id.}

\(^{247}\) \textit{See id.}

considerable authority behind each option, a careful consideration of the merits and demerits of each approach singles one out as ideal.\textsuperscript{249}

III. COURTS SHOULD ADOPT A CONDITIONAL THIRD-PARTY DUTY TO WARN

Courts in non-maritime contexts ought to adopt a conditional duty\textsuperscript{250} approach, similar to the one endorsed in \textit{DeVries}.\textsuperscript{251} The conditional duty approach avoids the downsides of the other approaches yet also retains many of their benefits.\textsuperscript{252} The bare-metal and foreseeability approaches both produce unfair, inefficient results in certain circumstances, and fair, efficient outcomes in others.\textsuperscript{253}

\textbf{A. The Bare-Metal Defense: Less Than Bare-Minimum Relief}

The bare-metal defense overlooks the essential similarity between the manufacturer that releases a product that is itself dangerous and the manufacturer that creates either a safe, unfinished product that will be dangerous in its finished form or a product that consumers will inevitably use with a dangerous one.\textsuperscript{254} Consider, for example, the bare-metal products at issue in \textit{DeVries} or the brake arcing machine from \textit{Shields}.\textsuperscript{255} The pumps and valves manufactured by Air and Liquid Systems Corporation in \textit{DeVries} required asbestos materials like insulation to function as intended, and therefore the company essentially created an incomplete product that would inevitably become dangerous in its finished state.\textsuperscript{256} Therefore, Air and Liquid Systems is arguably just as responsible for introducing the asbestos into plaintiff’s environment as the third-party asbestos manufacturer.\textsuperscript{257} The bare-metal defense would shield Air and

\begin{itemize}
\item \textsuperscript{249} See discussion infra Part III.
\item \textsuperscript{250} A conditional duty is “[a] duty that is conditioned on the occurrence of an event other than the lapse of time.” \textit{Duty}, BLACK’S LAW DICTIONARY (11th ed. 2019), Westlaw.
\item \textsuperscript{251} See \textit{Air & Liquid Sys. Corp.}, 139 S. Ct. at 995.
\item \textsuperscript{252} See generally Chesher v. 3M Co., 234 F. Supp. 3d 693, 708 (D. S.C. 2017) (finding that policy considerations stack up most favorably behind a middle-ground approach such as the standard developed in \textit{Quirin v. Lorillard Tobacco Co.}).
\item \textsuperscript{253} See \textit{Air & Liquid Sys. Corp.}, 139 S. Ct. at 994.
\item \textsuperscript{254} See \textit{id.}
\item \textsuperscript{255} See \textit{id.} at 991; Shields v. Hennessy Indus., Inc., 140 Cal. Rptr. 3d 268 (Ct. App. 2012).
\item \textsuperscript{256} See \textit{Air & Liquid Sys. Corp.}, 139 S. Ct. at 991.
\item \textsuperscript{257} See \textit{id.} at 994.
\end{itemize}
Liquid Systems from liability simply because the company did not integrate its product with the necessary asbestos parts, despite its knowledge that, based on the nature of its product, some third-party would perform the integration anyway.\(^{258}\)

Similarly, the bare-metal defense as applied in the *Shields* case would preclude liability for the manufacturer of the brake arcing machine that is specifically designed for use with asbestos-filled brakes because the asbestos, not the machine, causes injury to the machine’s users.\(^{259}\) The manufacturer of such a machine, however, occupies an analogous position as the manufacturer of the asbestos-filled brakes, as both manufacturers know that the use of their products involves a risk of harm from asbestos.\(^{260}\) This risk accompanies the use of the product regardless of the source.\(^{261}\) Given that the source of the risk is dispositive of liability under the bare-metal defense, however, courts that have adopted the defense treat the manufacturers differently despite their analogous positions.\(^{262}\)

In addition to being unfair, the bare-metal defense clashes with the well-established principle of products liability that a manufacturer is responsible for incorporating a defective part into its own product.\(^{263}\) Under some circumstances it makes no difference for liability purposes that the source of the harm to the product’s user is a part created by a third-party manufacturer, as *Walton*—where the helicopter manufacturer incorporated a defective engine into its product—illustrates.\(^{264}\) Granted, bare-metal advocates might distinguish cases like *Walton* on the ground that there the manufacturer that failed to warn also integrated the defective part into its product, unlike in *DeVries*.\(^{265}\) Nevertheless, it is intolerable for a manufacturer to create a product that requires incorporation before use and then escape liability when someone else does the incorporation.\(^{266}\) Rather than fixate on the actor who accomplishes the integration,


\(^{259}\) See *Shields*, 140 Cal. Rptr. 3d 268.


\(^{261}\) See *Air & Liquid Sys. Corp.*, 139 S. Ct. at 991; *Shields*, 140 Cal. Rptr. 3d 268.

\(^{262}\) See *Air & Liquid Sys. Corp.*, 139 S. Ct. at 994.


\(^{264}\) See *Walton*, 610 A.2d at 458.


\(^{266}\) See id.
conjunction, or replacement, courts ought to hitch the possibility of liability to the parties responsible for exposing consumers to the risk of injury.\textsuperscript{267} In the context of bare-metal cases like \textit{DeVries}, for instance, responsibility for injury no doubt rests, in part, with the asbestos makers.\textsuperscript{268} Arguably, however, responsibility also lies with the bare-metal manufacturers, as many of those companies created an opportunity for the conjoined use of their pumps and valves that only asbestos manufacturers could take advantage of.\textsuperscript{269}

Moreover, from a public policy standpoint, the arguments marshalled in favor of the bare-metal defense do not withstand scrutiny.\textsuperscript{270} For instance, one argument allegedly favoring the bare-metal defense is that without it, the third-party duty to warn forces manufacturers to incur costs studying the risks of other manufacturers’ products in an effort to warn against them, and manufacturers would pass those higher costs on to consumers as companies increase their prices to shoulder the new burden.\textsuperscript{271} The extra liability that manufacturers face as a result of a third-party duty to warn promises to drive up prices even further as manufacturers try to recoup the added costs of more warnings and litigation.\textsuperscript{272} The worry is that the higher cost of products outprices a greater proportion of consumers, leading to fewer sales overall, which means fewer manufacturers stay afloat in the tighter market, and as a result, there is less innovation on the whole from manufacturers.\textsuperscript{273} As Justice Gorsuch noted in \textit{DeVries}, “[W]hen we effectively require manufacturers of safe products to subsidize those who make more dangerous items, we promise to raise the price and restrict the output of socially productive products.”\textsuperscript{274}

\textsuperscript{267.} See generally Quirin v. Lorillard Tobacco Co., 17 F. Supp. 3d 760, 769 (N.D. Ill. 2014) (couching the middle-ground approach to the third-party duty to warn in terms of whether the defendant was responsible for introducing asbestos into the environment).

\textsuperscript{268.} Air & Liquid Sys. Corp., 139 S. Ct. at 1000 n.5 (Gorsuch, J., dissenting).

\textsuperscript{269.} See generally Golanski, supra note 24, at 81 (noting that manufacturers in bare-metal cases usually know that the type of insulation that is most likely to be used alongside their products contained asbestos).


\textsuperscript{271.} See id.


\textsuperscript{273.} See id.; see also Air & Liquid Sys. Corp., 139 S. Ct. at 999 (Gorsuch, J., dissenting).

\textsuperscript{274.} Air & Liquid Sys. Corp., 139 S. Ct. at 999 (Gorsuch, J., dissenting).
This argument fails to appreciate that the decrease in accidents and injuries as a result of the third-party duty to warn has the potential to offset the increased costs of goods that consumers face. While a third-party duty to warn would increase prices in certain cases, the absence of a third-party duty to warn means that accident costs are higher in some cases too. Consider, for example, the plaintiffs from DeVries. Without a third-party duty to warn, McAfee, DeVries, and their survivors had no chance at recovery, since the asbestos manufacturer in question was bankrupt and the Navy was immune from liability under Supreme Court precedent. With no hope of recovery, the sailors and their families would bear the brunt of the pecuniary damages of medical expenses, lost wages, and income diminution, not to mention the nonpecuniary losses. Such crippling costs on tort victims are likely to have a deterrent effect on innovation and safety that is similar to the effect of increased prices from extra warnings, as uncompensated consumers have less money to spend on goods that keep manufacturers in business than compensated ones. Even uninjured consumers, especially the risk-averse ones, may choose to forego the purchase of a product here or there out of fear of injury for which there is no recovery. While it is hard to say without empirical data whether one set of costs—either from increased warnings or from the absence of recovery for certain victims—outweighs the other, it is clear that the advantages manufacturers stand to gain under the bare-metal approach are not without their downside.

Another questionable argument in support of the bare-metal defense is that requiring one manufacturer to warn against another manufacturer’s products runs afoul of the well-known principle that tort liability should fall on the party who is able to prevent accidents at the least cost, a party

276. See generally id. (noting that one of the most important effects of products liability law is the provision of compensation to injured individuals).
278. See id. at 992.
279. First-party insurance may cover some of the pecuniary costs of accidents on injured victims, but there is no guarantee that the majority of victims have such first-party insurance or that the payments adequately compensate injured individuals. See Goldberg & Zipursky, supra note 275, at 1935.
280. See id.
281. See id.
known as the “cheapest cost avoider.” The reason a third-party duty to warn might violate this principle is that manufacturers with superior knowledge of their own products face minimal information costs associated with product warnings, whereas no such knowledge exists as to third-party products. By virtue of the expertise over its own product, a manufacturer naturally stands in the best position to decide whether the risks that its product poses to the public cost more or less than the price of warning against them. By contrast, the third-party duty to warn asks manufacturers to make such a calculation about other company’s products with which they may have no familiarity. The information costs associated with learning enough about a third-party product to adequately warn against its risks are bound to be higher than the costs of doing so for one’s own products, and as a result, it is unlikely that one manufacturer is the cheapest cost avoider as to the accidents caused by another manufacturer’s products. Instead, each manufacturer most cheaply minimizes accident costs from injuries caused by its own products, not third-party products. Therefore, insofar as the bare-metal defense allows manufacturers to ignore the accident costs of other products for warning purposes, the defense avoids a liability scheme under the third-party duty to warn that ineffectively allocates liability.

The problem with this policy-oriented defense of the bare-metal rule is that in many cases a manufacturer need not incur any extra information costs to learn about the risks of a third-party product because it is clear from the nature of its own product or from other circumstances that those risks will be present. For example, in DeVries or Shields, the manufacturers had no doubt that their products would be used in conjunction with asbestos products, and thus the risks associated with such conjoined use were not hidden such that the manufacturers had to expend

284. See Golanski, supra note 24, at 90.
285. See id.
288. See Golanski, supra note 24, at 91.
costs to discover them. In cases where there is a close connection between the products, each manufacturer will likely possess similar levels of knowledge and expertise about the products, meaning there is no significant disparity in information costs incurred as a result of a third-party duty to warn.

One such connection is when Manufacturer A creates a product that cannot function without Manufacturer B’s product, as in that case the profitability of A’s product is directly tied to B’s. This financial connection between the products incentivizes A to understand B’s product well enough to make reasonable decisions such as whether to alter its product so as to no longer require B’s to function. Given this increased knowledge of B’s product, A has naturally minimized the information costs associated with warning against B’s product, and hence the two manufacturers are similarly-situated cost avoiders. Furthermore, manufacturers like A receive an economic benefit from the sale of third-party products because their own products could not function without the third-party products. As a result, it is not altogether unfair to hold one manufacturer liable for failing to warn against the risks of another manufacturer’s product.

From both fairness and policy perspectives, the bare-metal defense is deficient. It is unfair to distinguish between the manufacturer that releases a product that is itself dangerous and the manufacturer that creates a safe, unfinished product that will be dangerous in its finished form. Similarly, there is little daylight between a product that is dangerous on its own and a product that consumers will inevitably use with a dangerous

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290. See Golanski, supra note 24, at 91.
291. See Polinsky & Shavell, supra note 272, at 1443–44.
292. See generally id. (listing examples of businesses that suffered substantial market losses as a result of the public learning of dangers associated with their products). Such a decision might be reasonable in light of trends forcing B’s product out of the market, for instance.
293. See generally In re N.Y.C. Asbestos Litig., 59 N.E.3d 458, 474 (N.Y. 2016) (observing that when a manufacturer produces a product that requires another product to function, that manufacturer creates a market for that third-party part or product).
one given its nature or the present market circumstances. Despite the essential similarity between such manufacturers and products, the bare-metal defense differentiates between them. The defense also inefficiently allocates liability because it precludes recovery in circumstances in which there would be no added information costs for one manufacturer to be potentially liable for failing to warn against the risks of a third-party manufacturer’s product. Therefore, the ideal standard for the third-party duty to warn in non-maritime contexts lies in an alternative approach, either the foreseeability or conditional duty options.

B. The Foreseeability Approach: Visibly Excessive

The foreseeability approach exhibits downsides just as the bare-metal defense does but for a different reason. That is, the approach produces unfair results and inefficiently allocates liability in many cases, but not because it is too conservative with the possibility of liability like the bare-metal defense. Instead, the foreseeability approach is too liberal with liability. One way to see why the approach allows too many opportunities for recovery from manufacturers is to compare it to the principle of products liability known as the “components parts doctrine.” This doctrine states that manufacturers of component parts are not liable for harms caused by the products into which their components are integrated unless either the component itself is defective and its defect causes the harm, or the component manufacturer substantially participates in the

296. See id. Arguably the latter manufacturer mentioned above creates a dangerous product also, only the product is not yet dangerous when it leaves the manufacturer’s hands but will become so in use.
297. See Golanski, supra note 24, at 91.
298. See discussion supra Part II.B&C. Of course, courts are free to adopt an approach besides the three general options considered here. See Coffman v. Armstrong Int’l, Inc., No. E2017-01985-COA-R3-CV, 2019 WL 3287067, at *19 (Tenn. Ct. App. July 22, 2019) (rejecting the bare-metal defense, the foreseeability approach, and the standard outlined in DeVries). Given the prevalence of the three considered here, however, it is reasonable to expect courts to prioritize them for consideration and only favor an alternative in the event all three are unacceptable for whatever reason. See id.
299. See generally Air & Liquid Sys. Corp., 139 S. Ct. at 994 (characterizing the downsides to the foreseeability approach).
300. See generally Henderson, supra note 97, at 613–18 (comparing a foreseeability approach to enterprise liability).
integration of the component into the finished product that causes the harm.\textsuperscript{302} As the \textit{Restatement (Third)} explains, it would be “unjust and inefficient” to impose liability on the component parts manufacturer solely because the manufacturer of the integrated product used the component in such a way as to render the finished product dangerous.\textsuperscript{303}

Any number of manufacturers might utilize a component part in various ways and for different purposes, and therefore liability for the component manufacturers would be unjust because they would bear the impossible burden of effectively warning against every foreseeably risky way their parts might be utilized.\textsuperscript{304} Without the component parts doctrine, a part might need to come with 20 different warnings to cover the 20 unique contexts in which it might function, even though any particular user would only benefit from just one of those warnings. Liability for component parts manufacturers would also be inefficient because such manufacturers would have to investigate how other manufacturers plan to use their components in integrated products, even though the law already charges the manufacturer of the finished product with responsibility to the end user.\textsuperscript{305} Thus, the components parts doctrine protects parts manufacturers from unjust and inefficient liability.\textsuperscript{306}

These same arguments that weigh in favor of the component parts doctrine based on the desirability of a fair and efficient liability scheme militate against the foreseeability approach.\textsuperscript{307} Just as manufacturers or consumers might utilize component parts in various ways and in connection with a diverse group of products, a finished product might foreseeably be used alongside multifarious third-party products.\textsuperscript{308} One of the reasons component parts manufacturers stand in a less-than-ideal position to warn about a finished product is because parts are usually versatile enough to function in more settings than the manufacturer could feasibly warn against.\textsuperscript{309} The same will hold true for finished products as well because of their compatibility with either a wide variety of different

\begin{thebibliography}{9}
\bibitem{302} See \textit{Restatement (Third) of Torts: Products Liability} § 5 (Am. Law Inst. 1998); \textit{Tellez-Cordova}, 28 Cal. Rptr. 3d at 746.
\bibitem{303} \textit{Restatement (Third) of Torts: Products Liability} § 5 cmt. a (Am. Law Inst. 1998).
\bibitem{304} \textit{Id.} § 5 cmt. d.
\bibitem{305} \textit{Id.} § 5 cmt. a.
\bibitem{306} See \textit{Id.} § 5 cmt. a, d.
\bibitem{307} See generally Henderson, \textit{supra} note 97, at 612–13 (marshalling the components-parts doctrine to argue against a third-party duty to warn).
\bibitem{308} \textit{Restatement (Third) of Torts: Products Liability} § 5 cmt. a (Am. Law Inst. 1998).
\bibitem{309} \textit{Id.}
products or a range of different types of the same product. The Goodyear tire at issue in *Rastelli*, for instance, was compatible with 24 different models of multipiece rims, and therefore the foreseeability approach could require 24 different warnings on one type of tire in order to address every foreseeable risk. Similar to the component parts context, Goodyear’s liability for failure to meet such a stringent duty to warn is both unjust because of the infeasibility of warning against manifold risks and inefficient because of the extra expenses incurred from learning enough about various third-party products to adequately warn against them. The law spares manufacturers of component parts from an onerous liability scheme in failure-to-warn cases, but the foreseeability approach would saddle product manufacturers with such an unjust, inefficient scheme.

Furthermore, the warnings that the foreseeability approach would mandate may do more harm than good in certain instances. For example, under the foreseeability approach, the foreseeable danger of Manufacturer B’s product that is used merely occasionally with Manufacturer A’s product imposes a third-party duty to warn on A, regardless of the overwhelming amount of alternative, perfectly safe contexts in which A’s product might function in combination with others. The result is that A’s product would require a warning that is irrelevant in more settings than not—a result that reveals the prospect of wasted resources under the foreseeability approach. Additionally, B must still warn of its own products, and as a result consumers using A and B’s products together would encounter two warnings as to the same risk, leading to concerns with consistency and overwarning. Knowing less than B about its own

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310. *See generally* Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 994 (2019) (acknowledging that lots of products can be used in various ways with lots of other products and parts).


312. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. a, d (AM. LAW INST. 1998).

313. *See generally* Air & Liquid Sys. Corp., 139 S. Ct. at 994 (rejecting the foreseeability approach because of its alleged uncertainty and unfairness).

314. *See generally* Henderson, *supra* note 97, at 615–16 (warning of the slippery slope of requiring warnings in all cases where the risk of the third-party product is merely foreseeable).


product, A may create a warning that contradicts B’s warning, leaving consumers more confused than protected. Risk-averse consumers may incorrectly assume that A’s product is unsafe based on its warning, and when faced with A and B’s products in combination, those same consumers may glaze over the warnings altogether. Too many warnings that may be inconsistent with one another make consumers less safe, and therefore in many cases the foreseeability approach will fail to increase overall product safety.

Additionally, the foreseeability approach unfairly allocates liability in many cases. It fails to distinguish between a manufacturer like Goodyear, which created a tire compatible with 24 multipiece rims, and a manufacturer like Air and Liquid Systems, which produced bare-metal products compatible with only one third-party product, asbestos insulation. Under the foreseeability approach, Air and Liquid Systems would certainly have a third-party duty to warn, as the nature of its own product makes the risk of asbestos exposure inevitable, much less foreseeable. Assuming the risks associated with the compatible multipiece rims are sufficiently well-known, Goodyear would also owe a third-party duty to warn to consumers according to the foreseeability approach. Goodyear, however, is arguably less responsible than Air and Liquid Systems for subjecting consumers to the dangers of a third-party product because the vast majority of rims that were compatible with Goodyear’s tires were perfectly safe, whereas asbestos was the only product compatible with Air and Liquid Systems’s pumps. Rather than creating an opportunity for the conjoined use of two products that only manufacturers of dangerous products could capitalize on—as Air and Liquid Systems did—Goodyear made opportunities available to a range of manufacturers, only some of which created defective products. Fairness

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317. See generally id. (expressing concern over the possibility of overwarning under the foreseeability approach).

318. See generally Henderson, supra note 97, at 616–17 (arguing that users and consumers of safe products end up subsidizing dangerous products under a liability scheme premised on the third-party duty to warn).

319. See id. at 613.


321. See generally Air & Liquid Sys. Corp., 139 S. Ct. at 995–96 (holding that a product per se requires incorporation of a part when one of a number of conditions are met, including when the product would be useless without the part).

322. See Rastelli, 591 N.E.2d 222.

323. See generally In re N.Y.C. Asbestos Litig., 59 N.E.3d 458, 474 (N.Y. 2016) (observing that when a manufacturer makes a product that requires another
dictates that courts distinguish between these two types of cases, but the foreseeability approach treats them similarly.

One might object that it is inconsistent to characterize a bare-metal manufacturer like Air and Liquid Systems as partly responsible for introducing the risk of third-party asbestos to its consumers and yet to reject such a characterization of Goodyear with respect to the dangers of multipiece rim defects. Such a distinction, however, is not inconsistent because it is inevitable that a consumer would use Air and Liquid Systems’ product in conjunction with a dangerous third-party product, whereas it is possible but not guaranteed that users would pair Goodyear’s tires with a defective rim. The inevitability of the conjunction of the two products ensures that Air and Liquid Systems knew of the risk of asbestos exposure and therefore stood in an analogous position as the manufacturer of the hazardous product with respect to the ability to warn. By contrast, Goodyear may not have known of the particular defect in question, but the foreseeability standard nevertheless treats the two manufacturers as potentially liable, despite their disparate levels of familiarity with the risks posed by the relevant third-party products.

Moreover, the foreseeability approach fails to further the policy goal of imposing liability on the cheapest cost avoider when dealing with manufacturers that create products compatible for use with a variety of third-party products, such as Goodyear in the Rastelli case. For example, the information costs Goodyear would incur to be capable of adequately warning against multipiece rim defects are high, yet the foreseeability approach demands Goodyear incur those costs to protect itself from failure-to-warn liability. When the risks of a third-party product necessarily accompany the use of a manufacturer’s product, however, the information costs of a third-party warning lessen accordingly, as the manufacturer is more than likely familiar with products.

324. See generally Golanski, supra note 24, at 80.
326. See generally In re N.Y.C. Asbestos Litig., 59 N.E.3d at 471 (considering whether a manufacturer is in a superior position to know of and warn against hazards as relevant to the question of a third-party duty to warn).
329. See generally Behrens & Horn, supra note 138, at 511.
that must be used with its own.\textsuperscript{330} Furthermore, a manufacturer like Goodyear likely derived little economic benefit from the sale of defective multipiece rims, as there were 24 compatible types of rims available, only some of which were defective.\textsuperscript{331} Unlike Hennessy or Air and Liquid Systems that effectively had to patronize the market around a dangerous third-party product by creating products that could not function without that market, Goodyear may have believed it was patronizing a safe corner of the market of multipiece rims despite the foreseeable defects in other corners of that same market.\textsuperscript{332}

These downsides to the foreseeability approach indicate that the ideal trigger for the third-party duty to warn requires a closer connection than mere compatibility between products.\textsuperscript{333} The manufacturer of a product that could function alongside a variety of third-party products is akin to the component manufacturer that creates a part that could work in a host of finished products.\textsuperscript{334} Accordingly, the component parts doctrine recognizes that component manufacturers share too tenuous of a connection with product manufacturers to be responsible for the risks of their finished products, but the foreseeability approach overlooks this key insight.\textsuperscript{335} Thus, the ideal standard for a third-party duty to warn is one that will incorporate the rationale at the heart of the component parts doctrine and require some closer connection between products than mere compatibility.\textsuperscript{336}

\textbf{C. The Inevitability Standard: Bound to Be Right}

Given that the downsides to the foreseeability approach weigh in favor of a rule limiting liability in cases involving the third-party duty to warn and that the downsides to the bare-metal defense weigh in favor of a rule

\textsuperscript{330.} See generally Calabresi, supra note 282, at 311–18; Calabresi & Hirschoff, supra note 282.

\textsuperscript{331.} See Rastelli, 591 N.E.2d at 223 n.1.

\textsuperscript{332.} See generally Henderson, supra note 97, at 615–18.


\textsuperscript{334.} See generally \textit{Restatement (Third) of Torts: Products Liability} § 5 cmt. a, d (AM. LAW INST. 1998).


\textsuperscript{336.} See infra Part III.C.
allowing liability in such cases, the ideal approach is one along the lines of the middle-ground standard set forth in *DeVries*.\(^{337}\) More specifically, courts ought to define a manufacturer’s duty to warn against the risks of third-party products in non-maritime contexts as follows:

A product manufacturer has a duty to warn when (1) its product will inevitably be used together with a third-party part or product such that the conjoined use cannot be avoided as a result of the product’s design, the manufacturer’s instructions, or the absence of economically feasible alternative means of enabling the product to function as intended; (2) the product manufacturer knows or should know that the intended combined use of the products is likely to be dangerous; and (3) the product manufacturer knows or should know that the product’s users will not anticipate that danger.\(^ {338}\)

This particular conditional duty approach departs from the “required incorporation” standard of *DeVries* in significant ways and is appropriately titled the “inevitability standard.”\(^ {339}\)

1. **Condition 1: Inevitability**

Under the above standard, inevitability arises in three different ways.\(^ {340}\) First, for example, if the defective multipiece rim used with Goodyear’s tire in *Rastelli* was the only economically feasible option of the 24 compatible rims, then it would be inevitable that consumers would use the tire and defective rim together as a result of businesses acting rationally in the face of market forces, and accordingly Goodyear would satisfy the first condition above.\(^ {341}\) Second, if Goodyear were to instruct consumers to use its tires with the particular defective multipiece rim at issue in the case, then it is reasonable to assume that users will heed such

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337. See *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986, 995 (2019). The duty is conditional because it only exists if a manufacturer’s product requires incorporation of a part, the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and the manufacturer has no reason to believe that the product’s users will realize that danger.


340. See generally *In re N.Y.C. Asbestos Litig.*, 59 N.E.3d at 474.

341. See generally id.
instructions, and the conjoined use of the products would be inevitable.\textsuperscript{342} Finally, if Goodyear designed its tires such that they could not be used without the defective rim at issue, then such conjoined use is inevitable.\textsuperscript{343}

The condition of inevitability ensures that the standard furthers the goals of fairness and efficient allocation of liability in ways that the bare-metal and foreseeability approaches could not.\textsuperscript{344} For instance, unlike the bare-metal defense, the inevitability standard appropriately recognizes the essential equivalence between manufacturers that create a product that is dangerous in itself and manufacturers that create either an unfinished product that will inevitably become dangerous when finished or a product that cannot be used without a defective one.\textsuperscript{345} Under the inevitability standard, the latter two types of manufacturers cannot circumvent liability just because either their own products do not physically cause injury, or they do not incorporate the dangerous third-party product into their own.\textsuperscript{346} Unlike the bare-metal defense, the inevitability standard aptly holds manufacturers accountable when they create products that unavoidably accompany dangerous third-party products.

By the same token, the inevitability requirement ensures that the pendulum of liability does not swing too far in the other direction like the foreseeability approach.\textsuperscript{347} The requirement of inevitability precludes liability for breach of the third-party duty to warn in cases where a manufacturer creates a product that is merely compatible for use with a host of third-party products, as it is only possible—but not inevitable—that the products might function together.\textsuperscript{348} Granted, in \textit{Rastelli}, for example, it may seem inevitable that a consumer would choose to use a

\textsuperscript{342} See 2 OWEN & DAVIS, supra note 5, at § 11:20 n.28.

\textsuperscript{343} See generally Kochera v. Foster Wheeler, LLC, Case No. 14-CV-29-SMY-SCW, 2015 WL 5584749, at *4 (S.D. Ill. Sept. 23, 2015) (acknowledging that a manufacturer should not necessarily escape liability when it designs a product that must function alongside asbestos-containing materials).


defective multipiece rim with Goodyear’s tire, even though both products were merely compatible with one another. The apparent inevitability of the combination of the two products is a byproduct of the benefit of hindsight. At the moment Goodyear released its tire into the stream of commerce, there was no guarantee it would be utilized alongside the particular multipiece rim in question, and therefore it was not inevitable that the two products would be used together under the above standard.

In between the inevitable use of two products and the mere foreseeable use of them there exists a range of probabilities—everything from highly unlikely though still foreseeable, to highly likely but not necessarily inevitable. The inevitability standard errs on the side of caution in rejecting as a trigger for the third-party duty to warn anything less than the clear certitude of inevitability from the perspective of the manufacturer at the time its product enters the stream of commerce. This choice has the advantage of avoiding an unclear liability scheme for manufacturers that leaves them uncertain of whether their products are sufficiently likely to be used with a third-party product as to generate a third-party duty to warn. Under the foreseeability standard, that likelihood may be so unclear that most manufacturers play it safe and provide third-party warnings where they are not necessary, leading to instances of waste, inconsistency, and overwarning.

The next advantage of an inevitability requirement is that in all three of the situations in which the conjoined use of the products is inevitable, it is reasonable to expect that both manufacturers are efficient cost

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349. See id.

350. Of course, if causal determinists are right that “every event is necessitated by antecedent events and conditions together with the laws of nature,” then every conjunction of products is inevitable because everything is inevitable. See Carl Hoefer, Causal Determinism, STAN. ENCYCLOPEDIA OF PHIL., https://plato.stanford.edu/archives/spr2016/entries/determinism-causal/ (last updated Jan. 21, 2016) [https://perma.cc/L5JF-4VFK]. Insofar as the inevitability standard looks from the perspective of the manufacturer at the moment it releases its product into the stream of commerce; however, it remains agnostic as to whether causal determinism is true.


353. See Henderson, supra note 97, at 615–16.

avoiders, as they both know their products will be used together and therefore possess similar levels of knowledge about the products.355 Even if some manufacturers must incur information costs to familiarize themselves with the intricacies of another product’s risks, those costs are bound to be significantly lower under the inevitability standard than under the foreseeability standard, given the fewer number of products that will inevitably be used together compared to those that could foreseeably be used together.356

Additionally, a standard of inevitability is less ambiguous than the first “required” condition of DeVries.357 It is unclear when exactly a third-party product is required for incorporation.358 For instance, even if a third-party product is the only economically feasible option to be used alongside another product, then arguably that third-party product is not required for incorporation because other options, though not economically feasible, do exist. Similarly, if a manufacturer recommends a product for use alongside its own but alternatives exist, then the recommended product is not strictly speaking required.359 By contrast, the inevitability requirement avoids such ambiguity because if no economically feasible alternatives exist or if one product is recommended, then from the perspective of the manufacturer the conjoined use is virtually guaranteed, or inevitable.

2. Condition 2: Actual or Presumed Knowledge of Danger

The second condition of the inevitability standard mirrors the DeVries standard, but it better accords with the first condition of inevitability than with the requirement condition of DeVries.360 In cases where it is inevitable that two products will be used together, it is reasonable to expect a manufacturer to know of the other product and be appropriately attentive

355. See Golanski, supra note 24, at 91.
357. See Air & Liquid Sys. Corp., 139 S. Ct. at 996 (“(i) its product requires incorporation of a part . . .”).
358. See generally id. at 998 (Gorsuch, J., dissenting) (raising concerns over the meaning of “required” in the majority’s standard).
360. See Air & Liquid Sys. Corp., 139 S. Ct. at 996 (“(i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses . . .”).
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2020] to its features, as the profit prospects of its own product are tied to that third-party product.\(^\text{361}\) For example, if the third-party manufacturer becomes embroiled in headline-inducing products liability litigation, then the manufacturer whose product is inevitably used in conjunction with the third-party’s is likely to feel the effects of the expected drop in sales.\(^\text{362}\) Under the DeVries standard, however, there are likely to be cases where a manufacturer certainly knows of the danger of a third-party product used in concert with its own, but that third-party product is not required, and therefore the third-party duty to warn is not triggered.\(^\text{363}\) If the knowledge of the third-party product’s risk is significant, as both the DeVries and inevitability standards suggest, then one would expect more situations in which such knowledge is present to satisfy the other conditions of the standard as well.\(^\text{364}\)

3. Condition 3: Actual or Presumed Knowledge of Anticipation of Danger

Finally, the third condition of the inevitability standard departs from DeVries by triggering the third-party duty to warn when the manufacturer knows or should have known that the intended users of the products will not anticipate the danger of the conjoined use of the products, rather than conditioning the duty on the manufacturer’s lack of any reason to believe that the users would realize that danger.\(^\text{365}\) A requirement of actual or presumed knowledge is ideal because it allows courts to consider which


\(^{362}\) See, e.g., Polinsky & Shavell, supra note 272, at 1443 n.13.

\(^{363}\) See, e.g., Shields v. Hennessy Indus., Inc., 140 Cal. Rptr. 3d 268 (Dist. Ct. App. 2012). Arguably, the brake arcing machine from Shields could have worked with brake linings that did not contain asbestos, but all of the linings in operation at the time when retailers sold the arcing machine had asbestos in them.

\(^{364}\) Granted, there may be instances under the inevitability standard when a manufacturer knows of some risk from conjoined use of its products with another manufacturer’s but such use is not inevitable, meaning the third-party duty to warn is not triggered.

\(^{365}\) See Air & Liquid Sys. Corp., 139 S. Ct. at 995 (“(i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product’s users will realize that danger.”).
manufacturer stood in the better position to warn and whether one manufacturer should have known of the ineffectiveness of another manufacturer’s warning. 366 For instance, when one manufacturer’s product is a durable item that will withstand wear and tear over long periods of time—in contrast to, for instance, an asbestos manufacturer whose product deteriorates relatively quickly and must be replaced—the former manufacturer stands in a better position to warn than the latter. 367

The asbestos manufacturer’s warning is likely to wear away over time, and when users repair or interact with the pumps or valves that contain asbestos, they are more likely to look for warnings in the instruction manuals that accompany the bare-metal products than anywhere else. 368 Thus, under the inevitability standard, an ineffective warning from an asbestos manufacturer does not let a manufacturer like Air and Liquid Systems off the hook for liability, as the latter manufacturer would not know or have reason to know that users of its pumps or valves would anticipate the danger of asbestos exposure in that case. 369 In fact, if the asbestos warning is likely to function ineffectively because of deterioration or misplacement, then the bare-metal manufacturer has reason to know that the users would not anticipate any danger, and accordingly the third-party duty to warn arises.

Under the DeVries standard, however, a bare-metal manufacturer like Air and Liquid Systems could use an asbestos manufacturer’s warning as justification for its belief that the users of the pumps and valves would realize the danger of asbestos exposure. 370 In that case, the manufacturer would have some reason, albeit a very weak one, to “believe that the product’s users will realize” the hazards of inhaling asbestos fibers, and therefore the third-party duty to warn would not arise. 371 This result reveals the problem with conditioning the third-party duty to warn on the absence of any reason to believe that users will anticipate the danger in question as Justice Kavanaugh did. 372 Given the first-party duty of manufacturers to warn about the risks of their own products, every manufacturer will always

366. See In re N.Y.C. Asbestos Litig., 59 N.E.3d 458, 472 (N.Y. 2016) (considering whether a manufacturer is in a superior position to know of and warn against hazards as relevant to the question of a third-party duty to warn).
367. See id.
369. See In re N.Y.C. Asbestos Litig., 59 N.E.3d at 472.
371. See generally id.
372. See generally id.
have at least one reason to believe that users will realize the danger of using another product with their own—namely, the other manufacturer’s warning as to its own product.373 Under this interpretation, Justice Kavanaugh’s third condition would effectively undercut the entire DeVries standard, meaning there must be more to the question of whether a manufacturer has “no reason” or some reason to believe that the product’s users will realize the danger in question.374 Nevertheless, it remains unclear what exactly is missing.375

Rather than speculate as to what constitutes no reason or some reason, the inevitability standard improves upon DeVries’s third condition by using the typical negligence language of “knew or should have known” with respect to whether users would anticipate a danger in the product.376 This affords manufacturers and courts alike with the benefit of certainty, as both understand such language to impose the same standard of reasonable care that applies to the duty to warn about one’s own products.377 If, as DeVries implies, a reason to believe that users will realize a product’s danger precludes a third-party duty to warn, then manufacturers may justifiably wonder whether that reason must be a convincing one or not.378 The inevitability standard avoids such confusion by trafficking in the familiar standard of reasonable care.

The requirement of reasonable care in the third condition of the inevitability standard also incentivizes manufacturers to consider whether they stand in a better position than another manufacturer when it comes to warning about the risks of a third-party product that will inevitably be used with their own.379 Some manufacturers, like the asbestos maker discussed above, face practical difficulties with warning because of the nature of their product.380 In that case, the bare-metal manufacturer likely knows that the asbestos material is not conducive to conveying an effective warning to workers.381 Instead of hiding behind another manufacturer’s

373. See generally id. at 999 (Gorsuch, J., dissenting) (questioning whether a manufacturer’s expectation that another manufacturer will comply with its own duty to warn is sufficient reason to believe that users will realize the danger).

374. See generally id. (Gorsuch, J., dissenting).

375. See generally id. (Gorsuch, J., dissenting).

376. See MARAIST & GALLIGAN, supra note 46, at § 1.03.

377. See, e.g., RESTATEMENT (SECOND) OF TORTS at § 388 (AM. LAW INST. 1965) (“(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied . . .”).


380. See generally Schwartz & Appel, supra note 368, at 37.

381. See generally In re N.Y.C. Asbestos Litig., 59 N.E.3d at 472.
warning as Justice Kavanaugh’s standard allows, manufacturers faced with the above third condition must determine whether a court is likely to find that they had enough information to know that another manufacturer’s warning would be ineffective, leaving end users unaware of the danger at hand. Thus, the inevitability standard ensures that the manufacturer in the better position to issue the third-party warning does so.382

**CONCLUSION**

*DeVries* brought the issue of the third-party duty to warn to the fore, spurring courts to speculate as to the proper non-maritime tort rule regarding a manufacturer’s duty to warn about the dangers of a third-party product.383 In fashioning such a rule, courts have a complex, often contradictory body of case law to draw from, as well as a host of competing policy considerations that can be difficult to reconcile with one another.384 More importantly, the stakes are high, as tort rules can have significant impacts on the prices of goods that consumers purchase on a daily basis.385

The inevitability standard yields consistently fair, efficient results for both manufacturers and injured consumers alike. Unlike the bare-metal defense, the inevitability standard properly treats as equals manufacturers who create inherently dangerous products and those that create unfinished products that will become dangerous when finished. Furthermore, unlike the foreseeability approach, the inevitability standard protects manufacturers from liability for hazards that they are not responsible for introducing into the stream of commerce and that they cannot efficiently protect against.386 When faced with the competing jurisprudential and policy considerations that attend the third-party duty to warn, courts ought to adopt the inevitability standard.

382. *See generally id.*

383. *See Yaw v. Air & Liquid Sys. Corp., CASE NO. C18-5405 BHS, 2019 WL 1755299, at *4 (W.D. Wash. Apr. 18, 2019) (deferring consideration of defendant-manufacturers’ motions for summary judgment until after filing supplemental briefing on how *DeVries* may impact causation and the failure-to-warn analysis); Bradley, *supra* note 15 (“But the reasoning underlying the [*DeVries*] decision is persuasive for cases that are land-based as well.”).*

384. *See cases cited supra notes 12–14.*


386. *See discussion supra Part III.C.*