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IN THE SUPREME COURT OF FLORIDA

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Case No. SC12-2075

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WILLIAM P. AUBIN,

Petitioner,

v.

UNION CARBIDE CORPORATION,

Respondent.

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On Review from District Court of Appeal,
Third District, Florida
(Case No. 3D10-1982)

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# BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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## IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation's (PLF) Free Enterprise Project was developed to protect the free enterprise system from abusive regulation, the unwarranted expansion of claims and remedies in tort law, and barriers to the freedom of contract. PLF has participated in cases across the country on matters affecting the expansion of product liability, including cases that involve asbestos liability and the component parts doctrine, *see, e.g.*, *O'Neil v. Crane Co.*, 266 P.3d 987 (Cal. 2012); *Macias v. Saberhagen Holdings, Inc.*, 282 P.3d 1069 (Wash. 2012), and the benefits to be derived from the Restatement (Third) of Torts: Prod. Liab. (Third Restatement). *Tincher v. Omega Flex, Inc.*, Penn. S. Ct. docket no. 17 MAP 2013 (pending).

## INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should adopt the component parts doctrine, as articulated by Third Restatement, that a manufacturer or supplier of a component part is not liable for harm caused by a product that included the part unless the part itself was defective and the defect caused the harm. Third Restatement § 5.[1] The doctrine is fair, efficient, and places legal responsibility with the party best suited to prevent the harm. The overwhelming majority of jurisdictions that have considered the

[1] An exception to the rule applies when a component part supplier helps design the final product and that contribution causes the product to become defective and causes the injury. Third Restatement § 5 at (b). That exception does not apply here.

component parts doctrine have adopted it, and the doctrine's rationale is consistent with other analogous legal theories that limit liability in Florida.

Aubin proposes a radical new interpretation of design defect liability that would, contrary to existing law, render a component supplier liable for failure to warn if the supplier warned the intermediaries, but somehow is deemed to "know" that the intermediaries will fail to convey the warning to end-users. *See* Pet. Initial Brief at 49. Such a rule would create a tremendous, unjustified burden on a broad array of industries by increasing the difficulty and expense of countless transactions. It would shift the costs of injuries resulting from product use to parties that have little or no power to prevent the harm, which would not protect consumers. The scenario Aubin alleges—one party negligently supplying a dangerous item to an irresponsible party that results in harm to a third party—is not a matter to be determined under products liability law, but by the law of negligent entrustment.

## ARGUMENT

## I

## FLORIDA SHOULD ADOPT THE THIRD RESTATEMENT'S COMPONENT PARTS DOCTRINE

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

Florida's approach to product liability law has been based largely on the policy goals of compensating victims and providing consumers with reasonably safe

products, by motivating manufactures to make better products. *Keith v. Russell T. Bundy & Assoc., Inc.*, 495 So. 2d 1223, 1228 (Fla. 5th DCA 1986). *See also Faddish v. Buffalo Pumps*, 881 F. Supp. 2d 1361, 1372-74 (S.D. Fla. 2012) (predicting Florida would adopt the component parts doctrine because it is consistent with Florida law and the policy of limiting liability to "the entities best motivated and capable of controlling the risk"); *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80, 92 (Fla. 1976). These purposes are not served when component providers are held liable for the defects in other manufacturers' products. As the Third Restatement, section 5, comment a, explains:

> If the component is not . . . defective, it would be unjust . . . to impose liability solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective. Imposing liability would require the component seller to scrutinize another's product which the component seller has no role in developing.

*Adopted in Kohler Co. v. Marcotte*, 907 So. 2d 596, 599 (Fla. 3d DCA 2005). In most cases it is impractical and inefficient to force suppliers to warn down-the-line consumers about products that they neither made, marketed, nor packaged.

The manufacturer of a component part is best positioned to generate information about its *own* product and to warn its own buyers. Richard C. Ausness, *Learned Intermediaries and Sophisticated Users: Encouraging the Use of Intermediaries to Transmit Product Safety Information*, 46 Syracuse L. Rev. 1185,

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

Without a component parts doctrine, component suppliers would have the duty to monitor and evaluate all of their manufacturing clients' products. If clients' products are used to make other products by yet other manufacturers, the component supplier would have to monitor and evaluate those products as well, because there would be no clear line as to when a supplier has the duty to bypass intermediaries to warn the ultimate users of the processed products, three or more times removed from the component supplier. The court in *McConnell v. Union Carbide Corp.*, 937 So. 2d 148, 156 (Fla. 4th DCA 2006), downplayed the seriousness of this duty, stating "[t]here is almost no burden in imposing on Carbide the duty of contractually requiring its 'learned intermediaries' (like Georgia-Pacific) to affix to the end product an indelible warning of the existence of the asbestos in it and the very serious dangers in using it without proper precautions." That recommendation is more meddlesome and less helpful than it sounds. *See Hoffman v. Houghton Chem. Corp.*, 751 N.E.2d

848, 852 (Mass. 2001) (Because intermediaries already have a duty to warn final users, imposing a duty on suppliers of "highly volatile, flammable solvents" to warn ultimate users would be "crushingly burdensome."). If the component supplier owes a duty to end users, then it is unlikely that a contractual provision between the supplier and intermediary manufacturer, by which the intermediary agrees to convey the supplier's warning, could fulfill that duty. What would the contractual provision require and how would a component supplier determine whether it was adequate? How could the supplier determine whether its users' warnings are sufficient as they relate the dangers of the many component parts, purchased from multiple suppliers? How would each supplier determine the risks of all of the finished products that use its ingredients? Who among the many suppliers, and the actual manufacturer of the retail product, decides the precise wording of the warning and who is liable if it is inadequate? What if the resulting plethora of warnings turn out, on the whole, to be ineffective due to sheer volume, conflating trivial and significant risks? *See* James A. Henderson, Jr. & Aaron D. Twerski, *The Products Liability Restatement in the Courts: An Initial Assessment*, 27 Wm. Mitchell L. Rev. 7, 16 (2000).

If a component supplier has a duty to warn end users, then there are no easy or clear answers to these questions. "[I]mposing such a duty would force the supplier to retain an expert in every finished product manufacturer's line of business and second-guess the finished product manufacturer whenever any of its employees

received any information about any potential problems." *Kealoha v. E.I. Du Pont de Nemours & Co.*, 844 F. Supp. 590, 594 (D. Haw. 1994). These experts would be less likely to determine the safest designs because "[i]n today's world it is often only the manufacturer who can fairly be said to know and understand when an article is suitably designed and safely made for its intended purpose." *Caterpillar Tractor*, 336 So. 2d at 88. The most versatile products would require the greatest management expenses, since suppliers would "be forced to retain experts in a huge variety of areas" to determine "risks associated with each potential use." *Taylor*, 171 Cal. App. 4th at 584 (quotation omitted).

During the twentieth century more than 3,000 products—including textiles, building materials, insulation, and brake linings—contained some amount of asbestos. Paul J. Riehle, *et al.*, *Products Liability for Third Party Replacement or Connected Parts: Changing Tides from the West*, 44 U.S.F. L. Rev. 33, 34 (2009). Each manufacturer of these products was and is in the best position to warn end users about the risks of the component parts. As explained in *Hoffman*, 751 N.E.2d at 855-57, it would be "crushingly" difficult and ineffective to require a component part supplier to foresee all potential dangers and warn purchasers accordingly. Moreover, it would be a superfluous duty because the intermediary "has its own independent obligation to provide adequate safety measures for its end users, an obligation on which bulk suppliers should be entitled to rely." *Id.* at 857.

A failure to shelter component suppliers could also render products less safe or effective as suppliers whose expertise is naturally only in their own field would be required to become involved in downline designs and other companies' warnings as a means to limit their own liability. Unfortunately, the possibly competing needs of the (multiple) component suppliers and the end product manufacturer could compromise the quality of the final design or warning. Requiring manufacturers to include extensive warnings on their products often leads to consumer frustration and confusion. Such warnings "invite mass consumer disregard and ultimate contempt for the warning process." *Johnson v. American Standard, Inc.*, 179 P.3d 905, 914 (Cal. 2008) (citing *Finn v. G.D. Searle & Co.*, 677 P.2d 1147 (Cal. 1984)) (quoting Aaron D. Twerski, *et al.*, *The Use and Abuse of Warnings in Products Liability-Design Defect Litigation Comes of Age*, 61 Cornell L. Rev. 495, 521 (1976)).

The plaintiff's approach would also stifle innovation because component suppliers would have to micromanage their buyers. *See* Brett W. Roubal, *Protecting Suppliers of Safe Component Parts and Raw Materials Through the Component Part Doctrine and the Sophisticated Purchaser Doctrine: In re Temporomandibular Joint (TMJ) Implants Products Liability Litigation*, 31 Creighton L. Rev. 617, 663 (1998). For example, in *Jacobs v. E.I. Du Pont de Nemours & Co.*, 67 F.3d 1219, 1241 (6th Cir. 1995), plaintiffs received Teflon-coated implants from a company called Vitek. Du Pont (Teflon's manufacturer) warned Vitek that Teflon was intended for industrial

use and likely dangerous if used in implants. But Vitek conducted its own research showing it was safe and got FDA approval. *Id.* at 1224 n.10. As it turned out, the Teflon was harmful, leading to numerous lawsuits against Vitek. Once Vitek went bankrupt, the plaintiffs went after Du Pont for compensation, however, the court refused to hold Du Pont liable, because the Teflon was not defective. *Id.* at 1241. Moreover, liability would have impeded innovation:

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

*Id.* In the case of the Teflon coated implants, the Teflon accounted for only a few cents' worth of the cost of the fifty dollar implant. *Id.* at 1225 n.14. Huge liability potential and small profit might lead component manufacturers to bar start-ups and innovative companies from purchasing their goods as component parts. Alternatively, they could acquire insurance, but even if insurance is available, it would be an enormous cost passed on to consumers. M. Stuart Madden, *Component Parts and Raw Materials Sellers: From the Titanic to the New Restatement*, 26 N. Ky. L. Rev. 535, 570 (1999). The availability of insurance, however, is not a sure thing:

> Those saddled with the task of actuarially determining a proper rate would be faced with indeterminate liability because they would not know what products would eventually be made. Delineating a rational starting point for, or cessation of potential liability, would be

> impossible. By way of contrast, an insurer for the end-use product producer can look at, and evaluate, based on history and rational projections, insurance risks of end-use products. Information on liability costs, past and projected, is crucial to carriers seeking to make coverage decisions and to set premiums. This information is available to the manufacturer of the end product, while it is normally unavailable to the supplier of raw materials potentially suited to a large number of potential end uses.

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

Such policy considerations have persuaded most courts and scholars that liability should be limited for component suppliers, particularly for raw materials. *See* Madden, 26 N. Ky. L. Rev. at 539-40; Roubal, 31 Creighton L. Rev. at 661-64 (component parts doctrine is an important defense for allowing innovation); Michelle R. Chapman, *Torts-Davis v. Komatsu America Industries Corp.: The Restatement Third's Effect on the Liability of Component Part Manufacturers*, 33 U. Mem. L. Rev. 987, 1000-01 (2003) (Tennessee adopted the Third Restatement's component parts doctrine because it protects "consumers by assigning liability to the person in the best position to bear the costs of defective products.").

## B. The Component Parts Doctrine of the Third Restatement Is Consistent with Florida Law

Florida's legal landscape has consistently recognized that product liability must be limited to the party that has actual contact with the end user. For example, Florida has adopted the learned intermediary and sophisticated user doctrines. *See, e.g.*, *Hoffmann–LaRoche Inc. v. Mason*, 27 So. 3d 75, 77 (Fla. 1st DCA 2009) (applying learned intermediary doctrine); *Alvarez v. E & A Produce Corp.*, 708 So. 2d 997, 1001 (Fla. 3d DCA 1998) (analyzing whether small business was a sophisticated user). Florida law allows a manufacturer to discharge the duty to warn consumers by adequately warning a learned intermediary like a doctor. *Felix v. Hoffmann-LaRoche, Inc.*, 540 So. 2d 102, 104-05 (Fla. 1989) ("[T]he drug manufacturer could not be penalized for the failure of the doctor to impart knowledge concerning the dangers of the drug of which the doctor [a 'learned intermediary'] had been warned and was aware."). Similarly, a manufacturer is not required to warn users of obvious risks. A product supplier "has a duty to warn those who may not fully appreciate" the likely dangers attendant to normal use of the product. *Cohen v. Gen. Motors Corp., Cadillac Div.*, 427 So. 2d 389, 390-91 (Fla. 4th DCA 1983). "However, there is no duty to warn of an obvious danger." *Id.* Accordingly, there is no duty to warn a sophisticated user who should already appreciate the product's dangers. *See id.*;

*Insua v. JD/BBJ, LLC*, 913 So. 2d 1262, 1264 (Fla. 4th DCA 2005) (no duty to warn electrician of dangers of electric wires); Ausness, 46 Syracuse L. Rev. at 1200-01.

There are "shades of difference between these rules," but "the fundamental tenet is that a manufacturer should be allowed to rely upon certain knowledgeable individuals to whom it sells a product to convey to the ultimate users warnings regarding any dangers associated with the product." *In re TMJ Implants Prods. Liab. Litig.*, 872 F. Supp. 1019, 1029 (D. Minn. 1995), *aff'd*, 97 F.3d 1050 (8th Cir. 1996). A product manufacturer has the right to rely on a knowledgeable doctor or a sophisticated user or professional to pass warnings on to patients and employees. Likewise, a component parts supplier should have the right to rely on a purchasing manufacturer to pass warnings on to consumers of their final product.

These doctrines share common policy rationales. *Compare Buckner v. Allergan Pharmaceuticals, Inc.*, 400 So. 2d 820, 822 (Fla. 5th DCA 1981) (learned intermediary in best position to warn patient since he can best "take into account the propensities of the drug, as well as the susceptibilities of his patient"), *with Portelli v. I.R. Const. Products Co., Inc.*, 554 N.W.2d 591, 596 (Mich. 1996) ("[W]here a purchaser is a 'sophisticated user' of a manufacturer's product, the purchaser is in the best position to warn the ultimate user of the dangers associated with the product."), *and Macias*, 282 P.3d at 1078-79 ("Generally speaking, there is no more suitable party to warn of the dangers inherent in using a product safely than the manufacturers

who designed the product[.]"). These rules recognize that liability can be discharged when "other parties" are "in a better position to warn." *McCormick v. Nikkel & Assocs., Inc.*, 819 N.W.2d 368, 375 (Iowa 2012). *See also*, *e.g.*, *Morgan v. Brush Wellman, Inc.*, 165 F. Supp. 2d 704, 718 (E.D. Tenn. 2001) (manufacturer of beryllium oxide did not have a duty to directly warn employees of government contractors at nuclear armament facility under sophisticated user doctrine).

Similarly, courts have limited liability in other contexts, like goods damaged by subsequent users. A manufacturer is only liable for those defects that exist when a product leaves his custody. *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1143 (Fla. 1st DCA 1981). If a product is damaged or altered by a subsequent dealer or owner, and that change causes the harm, then the original manufacturer is not liable. *See id*. It would be unfair and counterproductive to hold a manufacturer liable for failing to warn if a subsequent dealer removed or defaced an otherwise proper warning on the manufacturer's product. The Second Restatement recognizes this basic principle: "The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed." Restatement (Second) of Torts § 402A, comment g. This principle translates directly to the Third Restatement's component parts doctrine, which provides that a supplier should not be liable for a product that only becomes defective as a result of subsequent manufacturing by another party. Third Restatement at § 5. As Florida

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

## II

## MOST JURISDICTIONS HAVE ADOPTED THE COMPONENT PARTS DOCTRINE AS ARTICULATED IN THE THIRD RESTATEMENT

The Third Restatement did not invent the concepts behind the component parts doctrine. Many courts had already applied the underlying principles to component suppliers. *See*, *e.g.*, *Orion Ins. Co. v. United Tech. Corp.*, 502 F. Supp. 173, 178 (E.D. Pa. 1980); *Mayberry v. Akron Rubber Mach. Corp.*, 483 F. Supp. 407, 413 (N.D. Okla. 1979); *Woods v. Graham Eng'g Corp.*, 539 N.E.2d 316, 318-19 (Ill. App. Ct. 2d 1989). Applying a component parts doctrine, courts have exonerated suppliers in cases involving a wide range of products, including asbestos, silica, lumbar, Kevlar fibers, raw ore, standardized motors, and more. *See* Edward M. Mansfield, *Reflections on Current Limits on Component and Raw Material Supplier Liability and the Proposed Third Restatement*, 84 Ky. L.J. 221, 231 (1996). The Supreme Court of Tennessee adopted the Third Restatement's component parts doctrine in *Davis v. Komatsu*, 42 S.W.3d 34, 35 (Tenn. 2001), noting that, at the time, "every court presented with the issue has adopted the component parts doctrine." *Id.* at 38 (comprehensive citation of cases). That trend has persisted with very few exceptions.

California's highest court adopted the Third Restatement's component parts doctrine in *O'Neil*, 266 P.3d at 991, in which a retired Naval worker sued the manufacturers of valves and gaskets that were used with asbestos insulation in ships. Recognizing the sound public policy reflected in the doctrine, Utah's Supreme Court also adopted the Third Restatement's doctrine in *Gudmundson v. Del Ozone*, 232 P.3d 1059, 1074 (Utah 2010). The doctrine is good law and nearly universally accepted. *See also Buonanno v. Colmar Belting Co., Inc.*, 733 A.2d 712, 716 (R.I. 1999) (adopting Third Restatement § 5); *Scheman-Gonzalez v. Saber Mfg. Co.*, 816 So. 2d 1133, 1141 (Fla. 4th DCA 2002).

## III

## THIS COURT SHOULD APPLY THE THIRD RESTATEMENT'S COMPONENT PARTS DOCTRINE EVEN TO INHERENTLY DANGEROUS PRODUCTS

The Third Restatement's component parts doctrine contains no exception for "inherently dangerous" products such as asbestos. Nonetheless, shortly after the California Supreme Court adopted the Third Restatement's component parts doctrine in *O'Neil*, 266 P.3d 987, an appellate court devised an unusual exception in *Maxton v. W. States Metals*, 203 Cal. App. 4th 81, 94, 136 (2012), *review denied* (Apr. 18, 2012): "Raw materials generally cannot by themselves be defective unless they are contaminated. The one notable exception to this rule is raw asbestos, which as we explained ante is inherently dangerous." (Citation omitted.) The raw asbestos

exception was based on *Jenkins v. T & N PLC*, 45 Cal. App. 4th 1224, 1231 (1996) and *Arena v. Owens-Corning Fiberglas Corp.*, 63 Cal. App. 4th 1178, 1186 (1998), cases which held raw asbestos suppliers liable because the raw product carried the same injury-causing danger as the finished products. *Maxton*, 203 Cal. App. 4th at 91-92.

This interpretation is tempting if the only goal of tort law is compensating injured parties, regardless of blame. However, "[p]roducts liability does not make the manufacturer an insurer of all foreseeable accidents which involve its product. Virtually any product is capable of producing injury when put to certain uses or misuses." *Husky Indus., Inc. v. Black*, 434 So. 2d 988, 991 (Fla. 4th DCA 1983). Moreover, such asbestos-specific liability is ripe with policy problems, which becomes apparent in cases involving other dangerous products. For example, *Maxton* distinguished the asbestos cases from *Walker v. Stauffer Chem. Corp.*, 19 Cal. App. 3d 669 (1971), where the plaintiff was hurt when a drain-cleaning product containing sulfuric acid exploded. *Maxton*, 203 Cal. App. 4th at 91-94. The supplier of sulfuric acid was not liable even though its ingredient caused the explosion:

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

19 Cal. App. 3d at 674. *Also quoted in* Maxton, 203 Cal. App. 4th at 91. But the court in *Maxton* distinguished asbestos cases from sulfuric acid cases based on the presumption that "[a]sbestos itself is dangerous when handled in any form." *Maxton*, 203 Cal. App. 4th at 93. This is a false distinction. Sulfuric acid is highly dangerous but useful for a variety of products, just like asbestos. *See*, *e.g.*, *Rhodes v. Interstate Battery Sys. of Am., Inc.*, 722 F.2d 1517, 1521 (11th Cir. 1984) ("[B]atteries contain sulfuric acid, a chemical which tends to ignite or explode if exposed to fire[.]"); *Adams v. Henderson*, 45 F. Supp. 2d 968, 971 (M.D. Fla. 1999) (sulfuric acid fumes in a drain-clearing product caused plaintiff to cough up blood); *Gougler v. Sirius Products, Inc.*, 370 F. Supp. 2d 1185, 1188, 1200 (S.D. Ala. 2005) (plaintiff allegedly died from inhaling cleaner containing sulfuric acid, a product that experts testified is "insidiously hazardous" and "highly corrosive to human lungs"). *Cf.* Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 Conn. Ins. L.J. 255, 256 (2006) (Asbestos is "wonderful but harmful" having "amazing fire-retardant qualities" used in many helpful products.).

Asbestos is dangerous only when it is not handled with adequate care. *See* Pet. Initial Brief at 4 (asbestos is not dangerous when left undisturbed and is only dangerous when inhaled or ingested). As the Fifth Circuit Court of Appeals explained:

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

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

Recognizing that "dangerous" does not equal "defective," a Utah court recently applied the component parts doctrine in a case very similar to this one. In *Riggs v. Asbestos Corp. Ltd.*, 304 P.3d 61 (Utah Ct. App. 2013), a woman's family sued after she died from an asbestos-related illness, which she allegedly developed because of her time working with asbestos-containing joint compound tape. The court first held that a raw, naturally occurring substance cannot be defectively designed. *Riggs*, 304 P.3d at 69. Then it applied the component parts doctrine, holding that the supplier was only liable if it failed to adequately warn the intermediary manufacturer. The court reasoned that there were "two products—raw Calidria and tape joint

compound—and two different types of users—companies [ ] using the raw asbestos, and consumers [ ] using the tape joint compound." Distinguishing the duties accordingly, the court decided "the mere presence of a nondefective component in a final product does not impose upon the component supplier the duty to warn end users of the final product's potential dangers." *Id.*

## IV

## AUBIN'S CLAIMS IMPLICATE NEGLIGENT ENTRUSTMENT, NOT PRODUCT LIABILITY

Aubin argues that whatever utility the component parts doctrine may have in some cases, it does not apply here because Aubin alleges that Carbide knew that the intermediary was failing to effect proper warnings to end users. *See* Pet. Initial Brief at 46-47. Assuming *arguendo* that Carbide knew the intermediary would fail to convey appropriate warnings, and that this would cause end users unreasonable risks, this claim cannot be resolved in the context of product liability or design defect law, because the issue is not whether the manufacturer produced a defective product. Instead, "[w]hether the seller of a component should be subject to liability for selling its product to one who is likely to utilize it dangerously is governed by principles of negligent entrustment. *See* Restatement, Second, Torts § 390." Third Restatement at § 5, comment b (1998).

This Court considered a similar question involving negligent entrustment in *Horne v. Vic Potamkin Chevrolet, Inc.*, 533 So. 2d 261 (Fla. 1988). In *Horne*, a car salesman sold a car to a woman whom he knew to be an incompetent driver, since she was nearly in an accident while test driving the car. As the woman left the dealership, the salesman "predicted to another Potamkin employee that Newry would not drive one block without causing an accident." *Id*. at 263 (Kogan, J., dissenting). The salesman was prescient, as the woman did in fact cause an accident while driving away from the dealership, injuring a passenger. *Id*. This Court, however, decided that it would be inappropriate to hold the salesman liable for the passenger's injuries, for three reasons. First, such a duty would create burdensome litigation since it would be difficult to limit the "cause of action to instances where the seller becomes aware of the purchaser's incompetency." *Id*. at 262. This would place "a new and uncertain burden on commerce and ordinary business relationships," forcing sellers "to protect themselves from liability by inquiring into and verifying the competency of the purchaser." *Id*. This would contradict the Court's tenet that "a basic function of the law is to foster certainty in business relationships, not to create uncertainty by establishing ambivalent criteria for the construction of those relationships." *Id*. Second, expansion of liability to cover this situation would be inconsistent with a statute that courts had consistently interpreted as barring prior vehicle owners from liability. *Id*. And finally, the expansion of liability was a task better left to the

legislature. *Id.* ("[E]ven if we assume as petitioner urges that a new public policy is called for, it is highly desirable that this new policy be developed by the legislature rather than the courts."). *Id. See also Grunow v. Valor Corp. of Fla.*, 904 So. 2d 551, 557 (Fla. 4th DCA 2005) (The "legislature is better suited" to address whether negligent entrustment applies in situation involving wholesaler of firearms legally selling firearms that are later used in crime.).

As the Third Restatement directs, the long history of negligent entrustment cases are better suited to analyze whether a supplier should be held liable for selling its product to irresponsible parties. *See* Third Restatement at § 5, comment b. Thus, the Court need not carve out confusing and inconsistent exceptions in product liability law for dangerous products.

## CONCLUSION

The decision below should be affirmed.

DATED: October 21, 2013.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman 14 point and in compliance with Fla. R. App. P. 9.210(a)(2).

DATED: October 21, 2013.

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