Danger Ahead: The Changing Face of Failure To Warn Claims

By Michael Drahos, Mark Greene, Jeffrey James, and Larry Smith

Failure to warn claims are a standard part of product liability litigation, and the law governing those claims is well developed. However, plaintiffs sometimes assert creative theories about a failure to warn. This article describes three such theories: warnings involving language barriers, a pre- or post-sale duty to warn on the part of a salesperson, and one manufacturer's duty (if any) to provide warnings about a product made by another manufacturer.

Defense attorneys involved in product liability litigation are familiar with claims alleging failure to warn against a manufacturer or seller. The typical failure to warn claim is fairly straightforward: the plaintiff asserts that the defendant placed inadequate warnings of potential hazards on or with the product and the lack of proper warnings was a proximate cause of harm to the plaintiff. Not all failure to warn claims are so basic, however. Many such claims have wrinkles that do not allow the standard analysis to be used, whether it involves a unique argument for insufficiency or the targeting of an uncommon defendant. Plaintiffs try to assert these non-traditional claims in the hope of finding additional sources of recovery, even if the outlook for success may appear bleak.

In this article, the authors identify some of these potential nuances and examine what arguments may be available for a defense attorney encountering them in practice. First, this article discusses the situation of a failure to warn claim based on language-related issues (e.g. English-only instructions). Next, the article delves into the situation of pre- and post-sale duties to warn owed by salespersons. Finally, the article weighs in on whether one manufacturer can be liable for inadequate warnings relating to products made by another manufacturer.

Language-Related Issues and Adequacy of Product Warnings

The sufficiency of a warning may be attacked on the basis of negligence and strict liability in tort. To recover on a warnings claim in negligence, the plaintiff must establish that the manufacturer failed to exercise reasonable care to provide information in a reasonable manner to an appropriate person about a foreseeable risk that was significant enough to justify the costs of providing the information.[1] Meanwhile, the duty to warn in a strict liability cause of action is based on the simple notion that a product is defective if the warning is insufficient.[2] In contrast to a negligence claim, where the plaintiff must prove a duty owed by the defendant to him or her, a claim for strict liability requires only proof of defect.

Regardless of whether the theory of liability is asserted via a negligence or strict liability claim, the central issue is whether or not the warning in question was adequate. To be adequate, a warning must be communicated "by means of positioning, lettering, coloring and *language* that will convey to the typical user of average intelligence the information necessary to permit the user to avoid the risk and to use the product

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safely."[3] Ultimately, a warning must "(1) be designed so it can reasonably be expected to catch the attention of the consumer; (2) be comprehensible and give a fair indication of the specific risks involved with the product; and (3) be of an intensity justified by the magnitude of the risk."[4]

One of the first cases to address the adequacy of a warning written only in English was *Hubbard-Hall Chemical Company v. Silverman.*[5] In *Hubbard-Hall,* two migrant farm workers were killed after being exposed to elevated levels of insecticides. The workers had limited or no ability to read in English. Although evidence was presented that the subject warning label, written in English, had been approved by the Department of Agriculture, the jury ultimately determined that the defendant had not exercised reasonable care in giving adequate warning and instruction. Upon review, the First Circuit affirmed the decision, holding that the jury could have reasonably believed that the defendant should have foreseen that its admittedly dangerous product would be used by, among others, "persons like the plaintiffs who were of limited education and reading ability."[6]

The adequacy of a warning is fact-intensive and may present a jury issue when language barriers exist between the manufacturer and the most likely users of a product.

Nearly twenty years later, the Supreme Court of New Jersey faced a similar issue in *Campos v. Firestone Tire & Rubber Co.*[7] In *Campos,* the plaintiff was injured at work while assembling a truck tire. Defendant Firestone had delivered manuals describing the proper method of preparing the tire to its customers, including the plaintiff's employer. Firestone had also provided the plaintiff's employer with a chart that was to be kept on the wall that contained instructions on safety precautions. However, the plaintiff argued these actions were inadequate and did not sufficiently warn him of the danger associated with the product because he could not read or write in English. After the appellate division reversed a jury verdict in favor of the plaintiff, the Supreme Court of New Jersey granted certification. Upon review, the court determined that the written warning provided was inadequate to meet the defendant's duty to warn of dangers inherent in the use of the product in light of the "unskilled or semi-skilled nature of the work and the existence of many in the work force who [did] not read English."[8]

Several other courts have likewise determined that the necessity of foreign language warnings is a question of fact for the jury. For example, in *Stanley Industries, Inc. v. W.M. Barr & Co.,*[9] the plaintiffs asserted negligence, strict liability and breach of warranty claims against the defendants, the manufacturer and retailer. The plaintiff alleged that a fire in its facility was caused by the spontaneous combustion of rags soaked in oil that were used by plaintiff's employees to treat a cutting table. The two employees who used the oil were brothers from Nicaragua whose primary language was Spanish and who could read very little English. The defendants filed a joint motion for summary judgment against the plaintiff's failure to warn claim, arguing that the plaintiff could not establish proximate cause because its employees would not have acted differently given their inability to read the label before using the product. In response, the plaintiff submitted evidence which revealed that both the manufacturer and retailer had regularly and actively advertised in the Miami area on Hispanic television, on four different Hispanic radio stations and in a Spanish-language newspaper. The court ultimately denied the motion for summary judgment, holding that "given the advertising of the defendants' product in the Hispanic media and the pervasive presence of foreign-tongued individuals in the Miami workforce, it is for the jury to decide whether a warning, to be adequate, must contain language other than English or pictorial warning symbols."[10]

However, the Middle District of Florida specifically rejected this reasoning in *Medina v. Louisville Ladder, Inc.*[11] In *Medina,* the plaintiff alleged that a ladder manufactured by the defendant was defective because it lacked warnings and instructions in Spanish. The ladder carried a warning label in English with an English-only instruction manual. After purchasing the ladder, the plaintiff stated that he was going to try and install it himself, but noticed that the instructions were in English. As a result, he hired a local handyman to help him install it. However, the handyman also could not read English and subsequently installed the ladder contrary to the installation instructions. The defendant filed a motion for summary judgment and a motion in limine challenging the plaintiff's expert. At the hearing, plaintiff's counsel advised the court that the entire case "stands and falls on the issue of whether the defendants were legally obligated to furnish Spanish warnings and instructions." Although recognizing the *Hubbard-Hall, Campos, and Stanley* cases that came before it, the court granted the defendant's motion for summary judgment. In so holding, the court specifically declined to follow the Stanley opinion, calling it "isolated precedent" and determined that there was no indication that Florida law imposed a duty on manufacturers and sellers to provide bilingual warnings on consumer products.[12]

The plaintiff's recognition that a warning is present is sometimes enough to obtain summary judgment, even if the content of the message itself is not comprehended by the reader due to a language barrier. For example, in *Farias v. Mr. Heater, Inc.,*[13] the plaintiff asserted a negligent failure to warn claim against the manufacturers of a propane heater, arguing that the defendants should have provided bilingual warnings as to the dangers of operating the propane heater indoors. The defendants argued that they were under no such duty to do so. They further pointed to the plaintiff's own testimony that she made no effort to understand the written instructions

or read the manual despite recognizing the word "caution," which she understood to mean "danger." In support of its reasoning granting the defendants' summary judgment, the court explained that limited occasions under Florida law allow for the judge to decide the adequacy of a warning when such warnings are found to be "accurate, clear, and unambiguous."[14] Applying a "totality of the circumstances" analysis, the court determined that the warnings included not only the graphic depictions that the plaintiff testified that she relied upon, but also English written instructions that she was both unable and unwilling to read. Further, the court recognized that the plaintiff understood and was aware that the words "danger," "warning" and "stop" were all contained in the product manual, "yet she did not think it was important enough to have an English speaker explain the warnings to her."[15] "Such willful ignorance," the court explained, "is certainly akin — if not precisely the same — as refusing to read the warnings at all."[16]

A warning accompanied by an effective pictorial can also rebut the language theory altogether. For example, in *Henry v. General Motors Corp.,*[17] the court granted summary judgment in favor of the defendant despite the fact that the plaintiff was illiterate and could not read the product warning. The plaintiff, who was left a paraplegic when a truck manufactured by the defendant fell off a jack and struck his shoulders, asserted claims for negligent failure to warn and to instruct, arguing that the warnings did not sufficiently communicate how and where the jack should be connected to the truck during use. However, the plaintiff testified during his deposition that he had seen a yellow stick on the jack and knew that it signified a warning, but did not ask anyone what it said. The defendant argued that no factual dispute existed as to whether or not the "warning was communicated to the ultimate user."[18] The court agreed, holding that if the user is aware of a warning but ignores its language, the manufacturer's negligence in drafting the warning ceased as a matter of law to be a cause of the injury.[19]

In some instances courts will turn to federal agencies for guidance. In *Ramirez v. Plough, Inc.,*[20] the plaintiff minor contracted Reye's syndrome after his mother gave him an aspirin manufactured and distributed by the defendant. The plaintiff alleged the defendant was negligent because it distributed the product with warnings only in English. Recognizing the importance of uniformity, the court concluded that the rule for tort liability should conform to state and federal statutory and administrative law.[21] Specifically, the court held that because both state and federal law required warnings in English but not in any other language, a manufacturer may not be held liable in tort for failing to label a nonprescription drug with warnings in a language other than English.[22] In determining the applicable standard of care, the court leaned heavily on the Food and Drug Administration, noting its "experience with foreign-language patient package inserts for prescriptive drugs is instructive," and "the United States is too heterogeneous to enable manufacturers, at reasonable cost and with reasonable simplicity, to determine exactly where to provide alternative language inserts."[23]

A jurisdictional argument may also overcome the language issue. For example, in *Fuentes v. Shin Caterpillar Mitsubishi, Ltd.,*[24] an unpublished opinion, the court faced an unusual situation where the plaintiff was arguing that a warning was defective because it was not written in English. Specifically, the plaintiff alleged that he was injured while using a wheel loader and claimed that the incident was caused by inadequate warnings that were written only in Japanese. The defendant argued that as a Japanese manufacturer, which sold products only to Japanese buyers, it had no duty to provide warnings in English. Upon review, the court noted that the determination of whether a warning is feasible and effective involves a consideration of the language in which the warning must be given. The court reasoned that if a Japanese manufacturer places a product in the stream of commerce, and it is reasonably foreseeable that the product will be used in the United States, safety warnings regarding the risks of operation should be in English. However, it granted summary judgment in favor of the defendant because the plaintiff failed to present evidence sufficient to raise a reasonable inference that the defendant knew its product would be imported to the United States. To that end, the court noted there was no evidence that the defendant a) advertised in the United States; b) had knowledge that its direct customers sold products in markets outside of Japan; c) sold any products to a United States vendor; or d) derived any economic benefit from the importing of the product to the United States.

As the world is quickly becoming more of a global economy, product warning theories will inevitably continue to evolve, requiring manufacturers and their defense attorneys to continue to stay ahead of the curve. In order to do so, manufacturers will need to develop more effective warning and instruction labels that feature pictorials to provide the "accurate, clear, and unambiguous" warnings needed for an increasingly diverse consumer base.

A Salesperson's Duty To Warn

Plato wrote that necessity is the mother of invention. Out of necessity, claimants have attempted to carve out alternative paths to a manufacturer's liability. As the two cases below[25] demonstrate, that path may include focusing on salespersons or other employees of the manufacturer. Naming salespersons as defendants or alleging representations (or lack of them) by salespersons raise the broad question of who within the chain of distribution owes a duty to warn the end consumer of a product about potential hazards, and the scope of that duty. It is probably an overstatement to conclude that such attempts are novel; rather, they may represent a trend that practitioners should watch for.

In the first scenario discussed below, the plaintiff asserted a claim for failure to warn against an independent salesperson rather than the manufacturer of the product. In the second scenario, the plaintiff sought to avoid an alteration/misuse defense through a post-sale visit to a work site. Both are attempts at expanding traditional liability for failure to warn.

Duty Of An Independent Salesperson To Warn

In the case of pharmaceuticals and medical devices, plaintiffs often face a preemption challenge.[26] Even if the court denies preemption or delays ruling on the issue, the carefully worded language in package warnings may lead to summary judgment on the adequacy of the warning. Wary of such a disappointing outcome, plaintiffs push to enlarge the pool of possible defendants who arguably owe them a duty to warn.

Generally, the duty of a salesperson and whether he or she is considered part of the chain of distribution appear to hinge on his or her involvement in the manufacturing process and control over and/or the ability to influence compliance with safety regulations.[27] Florida courts have held that a salesperson is not in the chain of distribution when he or she is a mere conduit of information.[28] While case law provides no bright line rule, it seems clear that whether a salesperson is considered part of the chain of distribution is determined on case-by-case basis. Unfortunately, this determination is often ripe for motion practice only after significant discovery has occurred.

In one such recent case, which is still pending, the plaintiff claimed the medical device implanted into her was defective. She did not sue the manufacturer, the hospital or her doctor. Instead, she brought suit solely against the in-state independent sales representative for the product, alleging causes of action for failure to warn under negligence and strict product liability.[29] In sum, the plaintiff alleged the salesperson failed to adequately warn the doctor who implanted the medical product. The salesperson's connections to the product and to the consumer were both remote. He was simply covering for another salesman by delivering the device to the operating room, where he stood outside the "sterile zone" and handed the device over to the hospital's employee, who then handed it to the surgeon. The plaintiff was under anesthesia at that time.

Like prescription medicines, medical products that are prescribed and implanted by a doctor are subject to the learned-intermediary doctrine.[30] Plaintiffs often allege that a duty was owed to the plaintiff *and* the doctor or to the plaintiff *through* the doctor. However, Florida law does not recognize a duty owed to a plaintiff in such instances and such allegations should be met with a motion to dismiss.

Product liability cases require fact-intensive pleadings in order to properly allege a cause of action. Plaintiffs often fail to allege sufficient ultimate facts as required. Instead, the defendant is often presented with general or vague complaints backed with a promise to tie up the loose ends following discovery. Case law differentiating the various theories of product liability and describing the necessary elements and proper pleadings is well-developed and abundant.[31] However, as a practice pointer, one can hardly say too often that a deviation from the pleading requirements or a recitation of insufficient facts should also be met with a motion to dismiss.[32]

Because product liability cases are fact-intensive, as a matter of sound practice, a deviation from the pleading requirements or a recitation of insufficient facts should be met with a motion to dismiss.

With regard to a medical device or pharmaceutical product liability case, there are a number of federal and state courts which have considered the manufacturer's duty to warn, including the application of the learned-intermediary doctrine, which holds that a drug manufacturer meets its duty to warn of potentially harmful effects by informing the prescribing doctor of those effects, rather than the end-user.[33] While federal courts have found pleadings insufficient under their more liberal standard, applying Florida's ultimate fact pleading rule offers a defendant in state court incentive to insist upon clear and specific pleadings. That tactic eventually reveals the flaws in plaintiffs' attempts to use salespersons as strawmen.

A Salesperson's Post-Sale Duty to Warn

Another way in which plaintiffs assert liability against sales representatives to augment a claim against a manufacturer is alleging failure to warn following the sale of a product. There are, of course, traditional ways in which a post-sale duty to warn may arise — recalls, for example. These however are premised on the identification of a defect that is present at the time the product is sold but does not manifest itself until the product has been in the field or in use for some period of time. In those instances, a manufacturer may be required to warn consumers of the newly discovered problem.[34]

In another case currently pending, the plaintiff sued the manufacturer of a piece of metal equipment under theories of strict products liability and negligent post-sale failure to warn. The product at issue was several years old. In fact, it had been discarded, thrown into a junk pile and used by students at a vocational community school to practice their welding techniques. Two of the products were welded together and, when the practice session was over, thrown back into the junk pile behind the welding shop. A teacher at another vocational school was told that the product was available for use in a new round of classes. The new teacher assumed that the welding had been approved and the now-joined devices had been used in the same manner to which he intended to put them. He didn't know that the joined devices were the result of a welding exercise. The welding instructor who oversaw the welding and then discarded the devices did not know they would ever be shipped to another campus or put back into service for their original purpose. To him, they were junk.

While on campus to display new products, a sales representative from the product's manufacturer observed the modified item and brought it to the teacher's attention, noting that the manufacturer would not approve of the modification since the products as sold were the product of extensive design analysis and testing. He was assured by the new teacher that the welded/modified device had been used by many students. Shortly thereafter, the plaintiff's son was killed while using the modified device. The plaintiff alleged that the observation of the reconfigured product by the manufacturer's sales representative created a post-sale duty to warn on the part of the manufacturer. Further, the plaintiff claimed the court did not even need to consider whether the alteration was foreseeable because the visiting salesman — and therefore the manufacturer — had actual knowledge of the change. In effect, the plaintiff sought to make a seemingly open-and-shut case of alteration into a failure to warn case.

Under Florida law, stretching a manufacturer's duty to warn to include a duty to advise a user not to alter or modify the product or that such misuse might render the product unsafe is untenable. A manufacturer cannot warn about everything. Florida law holds that "a manufacturer is liable only when the product is used as intended."[35] While Florida courts recognize a post-sale duty to warn, there are limits to the extent and duration of that duty.[36] For example, as in the case at described above, alteration of a product further limits applicable duties of warning.[37] A manufacturer generally has no duty to warn of unforeseeable, unintended uses of its product – especially a modification by a third party.[38] As stated in the Restatement (Third) of Torts, "the burden of constantly monitoring product performance in the field is usually too burdensome to support a post-sale duty to warn."[39] Taken to its logical conclusion, the plaintiff's position would require manufacturers to have an ongoing duty to monitor and evaluate unforeseen misuse of its products downstream.

A Manufacturer's Duty to Warn of Hazards in Products It Did Not Manufacture

Yes, you read the heading correctly. Dozens of appellate decisions are currently pending nationwide addressing this potential expansion of the duty to warn in product liability cases sounding in both negligence and strict liability.

One common example of this attempted expansion is the situation where a defendant manufacturer is sued for failing to warn of potential dangers associated with products intended to be used with that defendant's product, even if the defendant did not manufacture or sell it. In such situations, a court may look at the relationship between the two products to determine how foreseeable it is for them to be used together.[40] Fortunately, the current trend among jurisdictions that have considered this issue is to hold that a party that did not manufacture or sell a product has no duty to warn of its dangers.

This is not the only set of facts where non-manufacturer liability is asserted, however. For example, in *Sharpe v. Leichus,*[41] a consumer sued the manufacturer of a name brand prescription drug alleging injuries resulting from her ingestion of a generic version of the drug manufactured by another entity. The plaintiff contended she could sue the manufacturer of the name brand drug because it misrepresented the true risks of its drug, although admittedly not the generic version she ingested. The trial court found this argument unpersuasive and granted summary judgment for the defendant, noting: "It is well-settled under Florida law that a plaintiff may only recover from the defendant who manufactured or sold the product that caused the injuries in question."[42]

This holding is further supported by the Restatement (Second) of Torts, which governs claims for strict liability in tort. Section 402A states:

> (1) O*ne who sells any product in a defective condition unreasonably dangerous to the user…is subject to liability for physical harm thereby caused to the ultimate user or consumer …if*
>
> *(a) the seller is engaged in the business of selling such a product…*[43]

The Comments to section 402A confirm this rule is applicable to *sellers of defective products.*[44] The Comments further provide the reasoning behind imposing strict liability on the sellers of products:

> [T]he justification for the strict liability has been said to be that *the seller,* by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon *the seller,* that reputable sellers will stand behind *their* goods; that *public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained;* and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it *are those who market the products.*[45]

More recently, a Florida federal district court followed this reasoning in *Faddish v. Buffalo Pumps,*[46] essentially adopting what had been referred to in other jurisdictions as the "bare metal defense."

In *Faddish*, the defendants sold their respective "bare metal" products (pumps, valves and boilers) to the United States Navy. The Navy subsequently covered those products with thermal, asbestos-containing insulation manufactured and designed by third parties.[47] There was no evidence that any asbestos dust to which the plaintiff was exposed originated from the defendants'

products. Regardless, the plaintiff argued that it was foreseeable, if not common knowledge, that asbestos insulation was used in conjunction with the defendants' products, thus requiring them to warn users of the potential harm.

In declining to expand Florida warning law on these facts, the court noted several factors: 1) the source of the specifications originated with the Navy, 2) the defendants' own products were not inherently dangerous and did not contribute substantially to causing the harm, and 3) the defendants did not participate substantially in the integration of their "bare metal" products into the end design of systems aboard the subject Navy vessel. The *Faddish* court further noted the defendants had no control over the type of insulation the Navy chose and received no revenue or proceeds from the sale of asbestos-containing products used aboard the ship. Therefore, because the defendants were not in the chain of distribution of the dangerous asbestos-containing products that caused injury to the plaintiff, they could not be charged with a duty to warn under either negligence or strict liability theories.[48]

Other jurisdictions have applied this reasoning to toxic tort-related claims as well. In *Conner v. Alfa Laval, Inc.*,[49] the plaintiffs alleged that the decedents developed mesothelioma as a result of exposure to asbestos-containing products while working on vessels operated by the U.S. Navy. The defendants manufactured turbines, pumps, boilers, condensers, steam traps and valves that were incorporated into the vessels. These products used and in some cases were originally distributed with asbestos-containing insulation, packing, gaskets and other products. Although the plaintiffs were unable to proffer evidence that the defendants manufactured or distributed the particular asbestos components to which the decedents were exposed (because of overhauls and the replacement of asbestos-containing insulation, packing, gaskets, etc.), they argued the defendants were liable for the intended and foreseeable use of asbestos replacement parts in their original products. The defendants moved for summary judgment on the ground that, as a matter of law, they could not be held liable for injuries caused by asbestos components that were incorporated into their products and used as replacement parts, but which they did not manufacture or distribute.

The *Conner* court confirmed that whether under strict liability or negligence, a plaintiff must establish causation with respect to each defendant manufacturer. After conducting an in-depth analysis of multiple state and federal court decisions, the court held that "a manufacturer is not liable for harm caused by, and owes no duty to warn of the hazards inherent in, asbestos products that the manufacturer did not manufacture or distribute."[50] Further, the court noted its decision was "consistent with the development of products-liability law based on strict liability and negligence, relevant state case law, the leading federal decisions, and important policy considerations regarding the issue."[51]

These sound decisions are supported by important and far reaching public policy consideration as well. Among the reasons various courts have cited in declining to expand warning liability:

- Foreseeability alone is not a sufficient basis to justify a wholesale expansion of the basic tenants of a manufacturer's duty to warn. If foreseeability alone set that benchmark, manufacturers of lighters could be liable for harm caused by cigarettes and bullet manufacturers for injuries caused by an accidental gun discharge.

- A company owes a duty only with respect to products they in fact manufacture, design, sell or distribute, and cannot be expected to determine the relative dangers of products they neither produce or sell.

- The manufacturer's product neither caused nor created the requisite risk of harm.

- Manufacturers are in the best position to know of the dangerous aspects of the product and to translate that knowledge into a cost of production against which liability insurance can be obtained.

Florida law does not require a manufacturer to study and analyze the products of others and to warn users of risks associated with those products unless it is in the commercial chain of distribution of the defective product. It would be manifestly unfair to hold a defendant manufacturer responsible for injuries caused by products which it did not design, manufacture or distribute and which were beyond its control. To hold otherwise would unduly burden manufacturers with knowing all the dangerous aspects of products they do not manufacture that possibly could be used in conjunction with a product for which they are actually responsible. Liability seemingly would be endless. A contrary finding by the Florida courts would have a significant and extraordinary impact on product liability law in Florida.

Conclusion

While many failure to warn claims are fairly straightforward, each one needs to be analyzed for unique characteristics. Whether it is a claim that the warning should have been in another language or it targets a defendant who seemingly has no liability for the warnings at issue, plaintiffs will continue to make new arguments and take new positions in order to maximize their chances of recovery. By being aware of the nuances in the jurisprudence of failure to warn liability, defense attorneys can be better prepared to tackle each individualized claim that arises.

1 Restatement (Second) of Torts § 388 (1965).

2 David G. Owen, *Products Liability Law*, § 9.2 (2005).

3 *Stanley Industries, Inc. v. W.M. Barr & Co., Inc.*, 784 F. Supp. 1570, 1575 (S.D. Fla. 1992) (citing *Madden, The Duty to Warn in Products Liability: Contours and Criticism*, 89 W. Va. L. Rev. 221, 234 (1987)) (emphasis in original).

4 *Pavlides v. Galveston Yacht Basin, Inc.*,

727 F.2d 330, 338 (5th Cir. 1984) (citing *Bituminous Cas. Corp. v. Black & Decker Mfg. Co.*, 518 S.W.2d 868, 872-73 (Tex. Civ. App. Dallas, 1974)).

[5] 340 F.2d 402 (1st. Cir. 1965).

[6] *Id.* at 405.

[7] 485 A.2d 305 (N.J. 1984).

[8] *Id.* at 310.

[9] 784 F. Supp. 1570 (S.D. Fla. 1992)

[10] *Id.* at 1576.

[11] 496 F. Supp. 2d 1324 (M.D. Fla. 2007).

[12] *Id.* at 1329.

[13] 757 F. Supp. 2d 1284 (S.D. Fla. 2010).

[14] *Id.* at 1292 (quoting *Felix v. Hoffmann-LaRoche, Inc.*, 540 So. 2d 102 (Fla. 1989); *Adams v. G.D. Searle & Co.*, 576 So. 2d 728 (Fla. 2d DCA 1991); *Scheman–Gonzalez v. Saber Mfg. Co.*, 816 So. 2d 1133 (Fla. 4th DCA 2002)).

[15] 757 F.Supp. 2d at 1290.

[16] *Id.*

[17] 60 F.3d 1545 (11th Cir. 1995) (applying Georgia law).

[18] *Id.* at 1548 (internal quotations omitted).

[19] *Id.*

[20] 863 P.2d 167 (Cal. 1993).

[21] *Id.* at 168.

[22] *Id.*; *see also* 21 C.F.R. §201.15(c)(1).

[23] *Id.* at 175 (internal quotations omitted).

[24] No. H023840, 2003 WL 22205665 (Cal. Ct. App. Sept. 23, 2003).

[25] The two scenarios described by the author are based on actual lawsuits in which the author represents a defendant. For confidentiality reasons, the case names and other identifying information are not provided.

[26] *See, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 321-23 (2008); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *McClelland v. Medtronic, Inc.*, No. 6:11-CV-1444-Orl-36KRS, 2012 WL 5077401 (M.D. Fla. Sept. 27, 2012); *Wolicki-Gables v. Arrow Int'l, Inc.*, 641 F.Supp. 2d 1270, 1276, 1282-1288, and 1291 (M.D. Fla. 2009), *aff'd*, 634 F.3d 1296 (11th Cir. 2011) (affirming broad application); *see also* 21 U.S.C. § 360k(a) (2006).

[27] *Rivera v. Baby Trend, Inc.*, 914 So. 2d 1102, 1104 (Fla. 4th DCA 2005).

[28] *Siemens Energy & Automation, Inc. v. Medina*, 719 So. 2d 312, 315 (Fla. 3d DCA 1998).

[29] The plaintiff's reason for suing the local salesperson rather than the manufacturer is a topic of speculation. However, avoiding a preemption defense or removal to federal court seem the likely reasons.

[30] *See, e.g., Felix v. Hoffman-LaRoche, Inc.*, 540 So. 2d 102, 104 (Fla. 1989); *see also Buckner v. Allergan Pharm., Inc.*, 400 So. 2d 820, 822 (Fla. 5th DCA 1981).

[31] *See, e.g.*, *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1145 (Fla. 1st DCA 1981); *Ferayorni v. Hyundai Motor Co.*, 711 So. 2d 1167 (Fla. 4th DCA 1998), *rev'd and remanded*, 795 So. 2d 126 (Fla. 4th DCA 2001), *decision quashed, cause remanded*, 822 So. 2d 502 (Fla. 2002); *Brown v. Glad and Grove Supply, Inc.*, 647 So. 2d 1033 (Fla. 4th DCA 1994).

[32] *Cunningham v. Gen. Motors Corp.*, 561 So. 2d 656 (Fla. 1st DCA 1990).

[33] *See Felix*, 540 So. 2d at 104; *Buckner*, 400 So. 2d at 820; *Union Carbide Corp. v. Aubin*, 97 So. 3d 886, 898-901 (Fla. 3d DCA 2012); *Rounds v. Genzyme Corp.*, 440 F. App'x 753 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1913, 182 L. Ed. 2d 772 (U.S. 2012); *Colville v. Pharmacia & Upjohn Co.* LLC, 565 F.Supp. 2d 1314, 1322 (N.D. Fla. 2008); *Beale v. Biomet, Inc.*, 492 F. Supp. 2d 1360, 1365 (S.D. Fla. 2007).

[34] Restatement (Third) of Torts: Products Liability § 10 (1998); *Sta-Rite Indus., Inc. v. Levey*, 909 So. 2d 901, 905-06 (Fla. 3d DCA 2004).

[35] *Jennings v. BIC Corp.*, 181 F.3d 1250, 1256 (11th Cir. 1999).

[36] *See, e.g., Florio v. Manitex Skycrane, LLC*, 6:07-CV-1700-ORL-28, 2010 WL 5137626 (M.D. Fla. Dec. 10, 2010) (finding no duty in Florida for successor corporations to warn of defective products designed, manufactured, and sold by the predecessor); *Siemens Energy & Automation, Inc. v. Medina*, 719 So. 2d 312 (Fla. 3d DCA 1998) (holding that where product broker acts as neither a distributor or retailer, and is at most a conduit of information, he is not a member of the distributive chain for purposes of strict liability).

[37] *High v. Westinghouse Elec. Corp.*, 610 So. 2d 1259, 1262 (Fla. 1992) (finding no duty to warn of potential danger of dismantling a product); *Rodriguez v. Nat'l Detroit, Inc.*, 857 So. 2d 199, 201 (Fla. 3d DCA 2003). *But see Martinez v. Clark Equip. Co.*, 382 So. 2d 878, 881 (Fla. 3d DCA 1980) (holding that product alteration must be substantial and must affect the claimed defective condition to negate manufacturer liability).

[38] *High*, 610 So. 2d at 1262; *Jennings*, 181 F.3d at 1255; *Veliz v. Rental Serv. Corp. USA, Inc.*, 313 F.Supp. 2d 1317, 1326 (M.D. Fla. 2003) (granting summary judgment where warnings affixed to a product specifically stated it is not intended for a specified use).

[39] Restatement (Third) of Torts: Products Liability § 10 cmt. c (1998).

[40] *Sawyer v. A.C. & S., Inc.*, 32 Misc. 3d 1237(A), 938 N.Y.S.2d 230 (Sup. Ct. 2011) ("The Court thus finds that a manufacturer's liability for third-party component parts must be determined by the degree to which injury from the component is foreseeable to the manufacturer.").

[41] No. 2004-CA-0643, 2006 WL 515532 (Fla. 2d Cir. Ct. 2006).

[42] *Id.* at 2.

[43] Restatement (Second) of Torts § 402A (1965) (emphasis added).

[44] *Id.* §402A cmt. a.

[45] *Id.* §402A cmt. c (emphasis added).

[46] *Faddis v. Buffalo Pumps*, 881 F. Supp. 2d 1361 (S.D. Fla. 2012).

[47] Navy specifications call for the use of thermal insulation in conjunction with these products.

[48] *Id.* at 1377.

[49] *Conner v Alfa Laval, Inc.*, 842 F. Supp. 2d 791 (E.D. Pa. 2012).

[50] *Id.* at 801.

[51] *Id.; see also Lindstrom v. A-C Product Liability Trust*, 424 F. 3d 488 (6th Cir. 2005), (holding manufacturer of feed pumps could not be held liable for asbestos-containing products attached to its product after production); *Surre v. Foster Wheeler LLC*, 831 F. Supp. 2d 797, 801 (S.D. N.Y. 2011) (noting a manufacturer generally has no duty to warn against defects in products manufactured by others so long as it had no control over the production of the defective product and did not place it into the stream of commerce).