

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ALBERT L. GRAY, ADMINISTRATOR, ET AL. :
PLAINTIFFS :

vs. :

C.A. NO. 04-312L

JEFFREY DERDERIAN, ET AL. :
DEFENDANTS :

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' OBJECTION TO
THE MOTION TO DISMISS FILED BY DEFENDANTS LEGGETT & PLATT,
INCORPORATED AND L&P FINANCIAL SERVICES CO.**

Plaintiffs file this memorandum in support of their objection to motions to dismiss filed by Defendants Leggett & Platt, Incorporated and L&P Financial Services Co. (hereinafter collectively referred to as "Leggett & Platt" unless otherwise specified). Defendants' motions should be dismissed as being premature and otherwise without merit for the following reasons:

1. Defendant Leggett & Platt had a legal duty to exercise reasonable care in the manufacture, design, marketing, distribution and sales of the highly dangerous polyurethane foam it produced and sold;
2. Defendant Leggett & Platt had a legal duty not to manufacture and market polyurethane foam in a defective and unreasonably dangerous condition;
3. Defendant Leggett & Platt breached its legal duty by manufacturing and marketing an unreasonably dangerous and defective product;
4. Defendant Leggett & Platt had sufficient knowledge and information to reasonably foresee the catastrophic potential created by its breach of duty;
5. Defendant Leggett & Platt was not a "bulk supplier" of any component part, but was instead the manufacturer of a defective end-product; and
6. At the very least, at this very early stage of litigation, numerous genuine issues of material fact exist. Also, Defendants cannot prove that it is beyond any doubt that reasonable minds would all come to the same result on the issues addressed herein.

I. INTRODUCTION

A. FACTS

In June of 2000 Leggett & Platt Corporation, doing business as Crest-Hood Foam¹ made two shipments of polyurethane foam plastic to American Foam Corporation (hereinafter American Foam), a Johnston, Rhode Island foam fabricator/distributor.² The foam plastic delivered to American Foam was untreated, non-flame retardant polyurethane foam. As manufactured, sold and applied this foam was one of the most dangerous, flammable and toxic products placed on the open market by any manufacturer, anywhere.

Despite unequivocal knowledge of the profound dangers posed by its foam, Defendant Leggett & Platt provided absolutely no warnings or instructions concerning the end-use/final application of the foam. Also, Leggett & Platt provided inadequate warnings concerning the foams exceptionally fast rate of burn and of the lethal toxicity of its products of combustion. Finally, Defendant Leggett & Platt exercised no "stewardship" of its product, making no recommendations to American Foam as to how the foam should be used, to whom it should be sold and where and how it should be applied.

Jeffrey and Michael Derderian and their management company Derco, Ltd. (the operators of the Station Nightclub) purchased the untreated polyurethane foam from American Foam in June 2000 for use as acoustical insulation. This foam was applied by the Derderians, open and exposed, on the interior walls of the nightclub near the stage and drummers alcove. It was this highly flammable and toxic foam which ignited and served as the primary fuel load for the fire which consumed the Station Nightclub on February 20, 2003.³

¹ Crest-Hood Foam had previously merged with Leggett & Platt effective December 31, 1999.

² Shipment 1: Purchase on May 26, 2000; Shipment on June 1, 2000. Shipment 2: Purchase on June 13, 2000; Shipment on June 14, 2000.

³ For purposes of this motion, Leggett & Platt does not contest that it manufactured, sold and distributed the foam in question.

The nature of the defects alleged include the foam's extreme flammability and ease of ignition, its high rate of burn once ignited, the unduly toxic nature of its combustion by-products and the inadequate warnings that accompanied its sale and distribution. Plaintiffs also sue due to Defendants' negligence in its marketing, stewardship and distribution of the foam.

II. LAW

A. CHOICE OF LAW

Plaintiffs agree with Defendants that Rhode Island law should apply.

B. STANDARD OF REVIEW

Plaintiffs' Complaint should not be dismissed for failure to state a claim under Rule 12(b)(6) unless it appears *beyond doubt* that they can provide no set of facts in support of their claim which would entitle them to relief. (emphasis added); See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Dismissal pursuant to Rule 12(b)(6) should be denied unless it is an absolute certainty that the Plaintiff cannot recover on any viable theory. See Garita Hotel Ltd. Partn. v. Ponce Fed. Bank, 958 F.2d 15 (1st Cir. 1992); Rhode Island Bhd. of Correctional Officers v. State of Rhode Island, 264 F. Supp. 2d 87 (D.R.I. 2003); Greene v. State of Rhode Island, 289 F. Supp. 2d 5 (D.R.I. 2003) (citing Roma Const. Co. v. aRusso, 96 F.3d 566, 569 (1st Cir. 1996) ("A court should not grant a motion to dismiss pursuant to Rule 12(b)(6) unless it appears to a certainty that plaintiff would be unable to recover under any set of facts.")) (underline added).

Plaintiffs are entitled to the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of their Complaint, and those allegations must be accepted as true. See Retail Clerks Intern. Ass'n, Local 1625, AFL-CIO v. Schermerhorn, 373 U.S. 746, 753 n. 6 (1963); See also Cruz v. Beto, 405 U.S. 319, 322 (1972). Garita Hotel, 958 F.2d at 17 ("Thus we take the factual averments contained in the complaint as true, indulging every reasonable inference helpful to the plaintiff's cause") (underline added).

Also, as Judge Selya stated in the Garita Hotel case:

“Great specificity is ordinarily not required to survive a Rule 12(b)(6) motion apart from certain specialized areas not implicated here, it is enough for a plaintiff to sketch an actionable claim by means of a generalized statement of facts from which the defendant will be able to frame a responsive pleading.” Garita Hotel, 958 F.2d at 17 (underline added). To survive a motion to dismiss, plaintiffs need only satisfy simple requirements of Rule 8 (a). See also Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 513 (2002).

The issue before the court on a Rule 12(b)(6) motion is not what the plaintiff is required ultimately to prove in order to prevail on his claim, but rather what he is required to plead in order to be permitted to develop his case for eventual adjudication on the merits.

At this very early stage of litigation, those “well-pleaded” allegations clearly rebut Defendants’ claims that Plaintiffs have failed as a matter of law to establish essential elements for their claims against Leggett & Platt. Contrary to Defendants’ argument, the Plaintiffs’ Complaint and affidavits establish the legal sufficiency of their claims.

III. LEGAL ARGUMENT

A. LEGGETT & PLATT AND LEGAL DUTY

Defendant Leggett & Platt claims it had no legal duty to the Plaintiffs to exercise due care in the manufacture of its polyurethane foam, no legal duty to warn of the foam’s dangerous propensities, no legal duty to warn of prohibited end-use applications for the foam and no legal duty to properly steward its product. On the facts of this case, considering this product, this manufacture, this marketing and this fire, Defendants’ contention is as unfair as it is wrong.

B. RISK DEFINES DUTY

The Rhode Island Supreme Court has very clearly recognized the significance that “foreseeable risk” has in determining if a legal duty exists in any given factual situation. The Court has affirmed the importance of risk on a number of occasions. Specifically, in Volpe v. Gallagher, the court noted that:

“The risk reasonably to be perceived defines the duty to be obeyed and risk imports relation; it is risk to another or to others within the range of apprehension.” Volpe v. Gallagher, 821 A.2d 699 (R.I. 2003); Hennessey v. Pyne, 694 A.2d 691 (R.I. 1997);

Banks v. Bowen's Landing Corp., 522 A.2d 1222 (R.I. 1987); Radigan v. W.J. Halloran Co., 196 A.2d 160 (R.I. 1963).

The risk reasonably to be perceived should define the duty to be obeyed. That is a just principle, makes sense and is capable of definition. There is unquestionably great risk to human life and health when a highly dangerous product is made without any built-in manufacturing protection (flame retardancy) and at the same time is sold without even minimally adequate warnings concerning such known dangers. Appropriate warnings should include a clear description of the dangers of the foam, how and where the foam should be used and should not be used, what potential sources of ignition should be taken into consideration and avoided when deciding where to apply the foam, how easily the foam ignites, how unsuspectingly fast it burns and spreads after ignition and finally how immediately lethal its toxic by-products of combustion are with only one or two breaths.

The greater the risk created by a Defendant such as Leggett & Platt the more likely a concomitant duty exists to prevent or lessen harm. See Volpe, 821 A.2d at 712 (citing Reida v. Lund, 18 Cal. App. 3d 698 (1971)).

In affidavits that will be more fully analyzed below, Plaintiffs' experts Gordon Damant, David Demers and Carl Duncan describe the very real and active dangers inherent in untreated polyurethane foam plastic and the foreseeable risk of fire that accompanies its use. Gordon Damant was employed for 30 years by the State of California, Department of Consumer Affairs, Bureau of Home Furnishings and Thermal Insulation.⁴ During that time he served as the State's head of Flammability Research from 1968-1978, with responsibility for developing all of California's flammability standards, including for foam based products.⁵ While in that capacity, he was in charge of the regulation of the polyurethane foam industry in California.⁶ David Demers is a professional fire protection engineer with a Masters of

⁴ Damant aff. at ¶2

⁵ Damant aff. at ¶3

⁶ Damant aff. at ¶6

Science Degree in Fire Protection Engineering from Worcester Polytechnic Institute.⁷ He has worked as a Fire Analysis Specialist and Manager of the Fire Investigations Department for the National Fire Protection Association.⁸ He has investigated and analyzed numerous multiple fatality fires in which the total number of deaths exceeds 1,500 people.⁹ A high percentage of these fire fatalities resulted from rapid fire growth due to burning foam plastic.¹⁰ Carl Duncan has been involved in fire fighting, fire investigation and fire analysis for 36 years.¹¹ He has coordinated investigations into a significant number of catastrophic fires.¹²

As to the flammability hazards of flexible polyurethane foam, Mr. Damant cautions that:

“Flexible polyurethane foam of the type used in the Station Night Club, without fire retardants, is a highly combustible material that has been known for decades to be extremely flammable, and which ignites very easily – typically in one second or less from a small open-flame ignition source such as a match. Once ignited polyurethane burns very rapidly, with great energy, and a high rate of heat release, and liberates large quantities of smoke and toxic combustion products while burning. This combination of heat smoke and toxic gases is often incapacitating in a matter of seconds, and is often fatal.”¹³

Because untreated polyurethane foam burns with a high heat release rate it burns with enormous energy.¹⁴ This burning energy rapidly creates “flashover” conditions in a setting like the Station nightclub.¹⁵ Due to the untreated polyurethane foam’s deadly combination of easy ignition and rapid burn development, life threatening conditions are created rapidly¹⁶ with very little hope of extinguishing or controlling an untreated polyurethane foam-based fire.¹⁷ The highly toxic, black smoke produced by

⁷ Demers aff. at ¶1

⁸ Demers aff. at ¶2

⁹ Demers aff. at ¶3

¹⁰ Id.

¹¹ Duncan aff. at ¶1-5

¹² Duncan aff. at ¶6

¹³ Damant aff. at ¶14

¹⁴ Damant aff. at ¶15

¹⁵ Id.

¹⁶ Id.

¹⁷ Damant aff. at ¶9

burning foam causes a major safety hazard. It obscures visibility, causes people to choke, to become disorientated and physically incapacitated, likely preventing escape.¹⁸

Mr. Demers also describes the extreme hazards of untreated polyurethane foam in his affidavit as follows:

“The foam involved in the Station Night Club fire was non-flame retardant, easily ignited, burned vigorously with an extremely high heat release rate, melted and dripped creating burning flammable liquid and produced copious amounts of heavy, thick, black smoke and toxic products of combustion, especially carbon monoxide. In addition to the production of carbon monoxide, oxygen was depleted, the concentration of carbon dioxide increased, and room temperatures rapidly escalated.”¹⁹

In his affidavit, Mr. Duncan speaks to the dangers of polyurethane foam as follows:²⁰

“In the fire prevention and product safety community, flexible polyurethane foam has often been referred to as “solid gasoline” because of its extremely hazardous fire performance characteristics...”

Defendant Leggett & Platt as a manufacturer of polyurethane foam plastic of many years clearly was aware of these hazards and of the reasonably foreseeable risks of harm.²¹ Mr. Damant describes this knowledge possessed by Leggett & Platt and by the foam plastic industry generally as follows:

“The polyurethane foam industry, and particularly sophisticated manufacturers such as Leggett & Platt, have for decades had specialized knowledge of the extreme flammability hazard of the type of polyurethane foam present in the Station at the time of the fire...”²²

This knowledge of hazard and foreseeable risk has existed since the inception of the use of polyurethane foams.²³

Mr. Demers also comments on this wide-spread industry knowledge in his affidavit as follows:

“There have been thousands of fires, hundreds of casualties and millions of dollars of property lost in which untreated polyurethane foam has been the primary fuel involved. The hazards of rapid fire growth, high rates of heat release, heavy dense black smoke and toxic products of combustion have been known to the foam plastics industry since the 1960's. Leggett & Platt has been part of that industry for many years. The extreme

¹⁸ Damant aff. at ¶20

¹⁹ Demers aff. at ¶6

²⁰ Duncan aff. at ¶10

²¹ Damant aff. at ¶10-13, 18, 22-23, 32

²² Damant aff. at ¶32

²³ Damant aff. at ¶7

hazards associated with foam plastic and its potential misuse was foreseeable and known or should have been known by the plastics industry.”²⁴

Risk should import relation because a duty of care will and should arise when a manufacturer’s actions/inactions foreseeably can and do cause harm. A duty arises so that those who cause harm will have some legal relationship to those harmed. The duty is to exercise the care necessary to lessen or prevent the risk of harm. It is a duty owed by a manufacturer who has created a risk to those individuals placed at risk - to those individuals “within the range of apprehension.”

Leggett & Platt had knowledge of the dangers posed by its foam product and by the reasonably foreseeable misapplication of the foam which resulted from the Defendant’s conduct and its defective product. As a manufacturer of a dangerous product, it had the obligation to exercise foresight as to what reasonably could be expected to happen if it did not fulfill its legal duty to act with reason and care. It would only have taken minimal foresight for Leggett & Platt to have foreseen that harm would occur because of its product and its conduct.

C. FACTORS WHICH DEFINE DUTY AND RISK

The Rhode Island Supreme Court has long-held that:

“No clear-cut rule exists to determine whether a duty is in fact present in a particular case.” Banks, 522 A.2d at 1225. See also Volpe, 821 A.2d at 705.

An ad hoc case by case approach must be used in determining if a legal duty exists. The factors to be considered are as follows:

(1) the foreseeability of harm to the Plaintiff; (2) the degree of certainty that the Plaintiff suffered an injury; (3) the closeness of the connection between the Defendants’ conduct and the injury suffered; (4) the policy of preventing future harm; and (5) the extent of the burden to the Defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach. Banks, 522 A.2d at 1225.

Looking at each factor, separately and as a whole, there is little question but that Defendant, Leggett & Platt, owed a legal duty to the Plaintiffs.²⁵

²⁴ Demers aff. at ¶11, 14-15; See also Duncan aff. at ¶8

D. REASONABLE FORESEEABILITY

The standard of “reasonable foreseeability” is not as narrow, rigid or limited as Defendant Leggett & Platt would have the court believe. To satisfy Defendant’s definition of foreseeability Plaintiffs would have to establish that Defendant should reasonably have foreseen the specifics of the precise wrongful conduct by precisely predictably intervening actors causing precisely predictably harm. That is not the law.

Neither the particular kind of injury nor the precise method in which the harm would occur needs to be foreseeable. As the Rhode Island Supreme Court has stated in the Hueston case:

...we believe that Defendant misunderstands the essence of foreseeability. Foreseeability relates to the natural and probable consequences of an act. One need only reasonably foresee that an injury may result from a dangerous condition on the premises. The particular kind of injury need not have been foreseen.²⁶

Hueston v. Narragansett Tennis Club, Inc., 502 A.2d 827, 830 (R.I. 1986) (underline added).

It is also clear that Plaintiffs need not show that the precise conduct of precisely identifiable intervening actors was foreseeable. It is a widely accepted rule of law that what is required to be foreseeable is the general character of the event or harm - not its precise nature or manner of occurrence. Bigbee v. Pacific Telephone & Telegraph Co. et al, 665 P.2d 947 (Cal. 1983); See also Taylor v. Oakland Scavenger Co., 110 P.2d 1044 (Cal. 1941); Independent School Dist. NO. 14 v. Ampro Corp., 361 N.W.2d 138 (Minn. App. 1985) (“...the specific conduct need not have been reasonably foreseeable if the unreasonable risk of harm was reasonably foreseeable”). The law does not condition liability on a Defendant foreseeing the particular or exact manner in which the injury occurred but only that the

²⁵ Surely, reasonable minds could differ on these five factors and on the predicate facts that trigger the presence of legal duty. “However, it is still the function of the jury to determine the existence of those predicate facts that trigger the presence of the legal duty.” Volpe, 821 A.2d at 705. Kuzinar v. Keoch, 709 A.2d 1050 (1998); (Trial justice may require assistance from the trier of fact if the duty-triggering facts are disputed and the evidence shows that a reasonable jury could reach different conclusions on these issues.)

²⁶ A court’s task in determining foreseeability “is not to decide whether a *particular* plaintiff’s injury was reasonably foreseeable in light of a *particular* defendant’s conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.” Banks, 522 A.2d at 1226-27 (underlining added) (citing Ballard v. Uribe, 715 P.2d 624, 628 n. 6 (Cal. 1986)).

Defendant foresee that an injury could have occurred from the consequences of the Defendant's action. See Banks, 522 A.2d 1222 (R.I. 1987). The details of the intervening act need not be foreseeable. Derdiarian v. Felix Contracting Corp., 414 N.E.2d 666 (N.Y. 1980) (Precise manner of the event need not be anticipated.); Price v. Blaine Kern Artista, Inc., 893 P.2d 367, 369-70 n.1 (Nev. 1995); Hairston v. Alexander Tank & Equip Co., 311 S.E. 2d 559, 565 (N.C. 1984).

Leggett & Platt is liable despite intervention of a negligent or even an intentional tortfeasor when the harm that occurred was arguably within the scope of the risk. d'Hedouville v. Pioneer Hotel Co., 552 F.2d 886 (9th Cir. 1977) (liability of carpet-manufacturer for highly flammable and defective product ignited by an arsonist); Mozer v. Semenza, 177 S.2d 880 (Fla. Dist. App. 1965) ("Viewed from this standpoint, it is not important to liability of the appellant whether the fire started in one way or another."); Concord Fla, Inc. v. Lewin, 341 S.2d 242, 245 (Fla. Dist. App. 1976); Hodge v. Nor-Cen, Inc., 527 N.E.2d 1157 (Ind. App. 1988); Addis v. Steele, 648 N.E.2d 773, 776-77 (Mass. App. 1995); Kilventon v. Utd. Mo. Bank, 865 S.W.2d 741 (Mo. App. 1993); Ohio Fair Plan Underwriting Ass'n v. Arcara, 417 N.E.2d 115 (Ohio App. 1979); Price v. Blaine Kern Artista, Inc., 893 P.2d at 371 (In strict products liability claim, despite intervening intentional actor, if injury suffered by Plaintiff was "within the ambit of risk" that the Defendant should have anticipated then liability will be imposed.). For example, Plaintiffs need not prove that it was reasonably foreseeable to Defendant Leggett & Platt that Daniel Biechele would ignite the foam by illegally setting off pyrotechnics. Plaintiffs need only show it was reasonably foreseeable to Defendant that the foam would be located where a source of ignition, any source of ignition, could reasonably be expected to be present.

The importance of these judicial observations cannot be overstated. Defendant, Leggett & Platt has asserted that for a legal duty to exist, Plaintiffs have to prove that this particular fire with these particular harms was reasonably foreseeable. Even though Plaintiffs can meet that burden, Defendants recitation of the law is not the proper standard.

Juxtaposed against these principles is the requirement that a manufacturer, in designing, manufacturing and marketing a product, must anticipate the environment in which that product will be used. It is clear from the expert affidavits attached hereto, as will be explained below, that such anticipation and foresight would easily have foreseen the results herein.

As a result of Defendants manufacture of a defective, highly dangerous foam product with inadequate warnings and inadequate product stewardship, it was reasonably foreseeable that the foam in question would be misapplied (left exposed in an architectural application), would be used for an inappropriate purpose (acoustical insulation)²⁷ in a place of public attendance (a nightclub) where many varied potential sources of ignition were known to exist.²⁸ Under these facts, it is not only reasonably foreseeable but reasonably inevitable that a fire would occur.²⁹

Foreseeability, although not conclusive, is the linchpin in determining the existence of any duty owed. It was and should have been reasonably foreseeable to Defendants that the natural and probable consequences of its conduct would be a fire with its attendant harm.

²⁷ The foam product in question was used as a sound dampener. Nightclubs that present live music are characteristically loud and can, and do, create disturbance in the surrounding area. If adjacent to a residential area, as in the case of the Station, sound containment becomes more important. It is alleged that the owners of the nightclub purchased the foam in question from American Foam for this very purpose. See "*Purchase of foam at club is traced*", Boston Globe, March 6, 2003.

²⁸ In a nightclub setting like the Station, there is a foreseeable risk of fire from a number of sources. Patrons come to a nightclub for the primary purpose of enjoyment that, depending upon the individual, can include listening to live music, dancing, and socializing with friends and acquaintances. However, this is frequently done in a crowded, poorly illuminated environment. Along with this comes alcohol consumption, and frequent cigarette smoking that requires use of lit matches or lighters. If a nightclub presents live music like the Station, high-powered amplifiers, musical instruments and related equipment requiring a substantial electrical power source are common. Inevitably, stage lighting is used as well, not only requiring additional power sources but generating significant heat as well. In the case of the Station, which would periodically present musical acts with a national reputation, the risk of fire is even greater as such performers, like Great White, may produce and present stage shows that are more elaborate, employing props including pyrotechnics. (See "*Band's pyrotechnics use varied on tour*", Providence Journal, March 3, 2003).

²⁹ On this question, the focus of inquiry should be on the risk created by the burning of the volatile foam used on the walls of the Station nightclub and the injuries that resulted from it, not upon who started the fire. These risks include, as set out below, the foam's extreme flammability and propensity to ignite "very easily", its rapid burning rate, its high rate of heat release, and the production of toxic smoke, all of which the Plaintiff alleges were a cause of their injuries and death. Damont aff. ¶14.

E. THE CERTAINTY OF HARM TO THE PLAINTIFFS

There is not just a degree of certainty, but an absolute certainty that Plaintiffs have suffered injury. One hundred people are dead. Hundreds of others are injured. Fifty-six children are left without a parent.

F. THE CONNECTION BETWEEN DEFENDANTS' CONDUCT AND THE HARM

The connection between untreated, dangerously flammable polyurethane foam and catastrophic fire is very close. This is especially true where, as here, there were inadequate warnings and no product stewardship. Without the precautions of proper warning and stewardship, untreated foam is frequently misapplied and left exposed in architectural applications in public places where many different sources of ignition are present. But for Defendant, Leggett & Platt's wrongful conduct and defective product, this fire would never have occurred.

G. THE POLICY OF PREVENTING FUTURE HARM - THE NEED FOR PROPER WARNINGS

There is a strong public policy to require proper warnings, especially when dealing with the manufacture of a highly dangerous product whose only arguably redeeming societal value is that it is cheaper to buy. This policy becomes even stronger when reference is made to a Supreme Court of Pennsylvania decision published 15 years ago that warnings by another leading foam manufacturer, General Foam Corporation (also a defendant in the present case), were defective and inadequate. Remy v. Michael D.'s Carpet Outlets, 571 A.2d 446, 450 (Pa. Super. 1990). The event that gave rise to that case was a fire that began in the basement of Michael D's Carpet Outlet. A short time before the fire, Defendant Michael D's received a shipment of polyurethane foam carpet padding from General Foam. Id. The padding was stacked in the basement of the store from floor to ceiling, very close to the lights. Id. At trial, the Plaintiff was able to demonstrate that the foam padding had been stored too close to the ceiling light bulbs, and this was what caused the fire. A jury also found that:

General Foam had failed to warn of the capacity of the foam padding for rapid and uncontrollable spread of fire after ignition.” Id. at 441, 449.

In answers to special interrogatories, the jury found that General Foam had been negligent in failing to provide an adequate warning, and as a result, the product was “defective.” Id. at 441. General Foam did not dispute the claim that no such warning was given. Id. at 441, 449.

The Remy case is important not solely for its findings against General Foam but also for the notice General Foam and the foam industry as a whole received of its failure to adequately warn. Specifically, General Foam did not warn of “the capacity of the foam padding for rapid and uncontrollable spread of fire after ignition.” Id. Almost 15 years have passed since General Foam was found liable for the very failure that once again is claimed to have caused deadly harm.

Defendant Leggett & Platt surely had knowledge of the extreme hazards posed by its foam product. Defendant Leggett & Platt also knew of the need to warn as to proper use and application of the foam. Defendant knew and should have known that without proper warnings misapplication was not only reasonably foreseeable but reasonably certain to occur. Damant aff. ¶¶ 22, 25, 27, 29-33; Demers aff. ¶¶ 9-12, 16-20.

Rhode Island has long recognized a cause of action in tort against a manufacturer of goods if that manufacturer fails to:

“warn purchasers of a dangerous defect in the product if the seller knows or has reason to know that the product poses a danger to consumers.” DiPalma v. Westinghouse Electric Company, 983 F.2d 1463, 1466-67 (1st Cir. 1991) (quoting Sciattarelli v. Prov. Gas Co., 415 A.2d 1040, 1043 (R.I. 1980)).

The duty to warn applies in both negligence and strict product liability claims. The warning standard is the same in both. DiPalma, 983 F.2d at 1466 (“It is clear under Rhode Island law that the duty to warn, the violation of which is actionable by means of the so-called strict liability cause of action, is measured...by the same standard as the duty to warn that is enforceable in a negligence cause of action.”) Id. (citing Thomas v. Amway Corp., 488 A.2d 716, 722 (R.I. 1985)).

The duty to warn exists with respect to dangers that are reasonably foreseeable at the time of marketing. Thomas, 488 A.2d at 722; Guibeault v. R.J. Reynolds Tobacco Company, 84 F.Supp.2d 263 (D.R.I. 2000). A manufacturer such as Defendant Leggett & Platt must exercise foresight as to the various uses and applications its product may encounter and the dangers accompanying such uses and applications and warn about them. DiPalma, 983 F.2d at 1467 (citing Borel v. Fiberboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974)).

Based on its knowledge of product hazard and of the importance of end-use and application, Defendant Leggett & Platt was required to provide, among other warnings, to customers and potential users clear or unequivocal notice that untreated polyurethane foam:

“(s)hould not be used in any application where a known fire hazard exists, or where fire is of the slightest concern...non-flame retardant flexible polyurethane foam not be used in any application where the slightest danger of fire exists.” Damant aff. at ¶ 16; See also Demers aff. ¶ 9; ¶ 18; ¶ 20; Duncan aff. ¶ 12.

Defendant did not provide any such warning.

Defendant’s overriding concern should have been fire. The Defendant’s warning should have been of fire. The risk reasonably to be perceived was fire.

H. THE POLICY OF PREVENTING FUTURE HARM - THE NEED FOR PRODUCT STEWARDSHIP

Defendant Leggett & Platt was also required to carefully provide stewardship of its dangerous product. Product stewardship has for decades been a well-recognized and practiced safety tool in many industries. Indeed, many industries and manufacturers promulgate standards for monitoring and/or controlling the distribution and after-sale use of their products. The necessity of product stewardship often arises because of unique product characteristics, or because of foreseeable misapplication or use of the particular product, such that the only effective way to prevent injuries from potentially dangerous products is by a manufacturer’s program of safety measures that, to a greater or lesser extent depending on the product, shepards the product as it makes its way through the marketplace. Product stewardship

is a practice especially used with extremely dangerous materials/products. Plaintiff's expert David Demers addresses this important issue as follows:

"There was a need for the foam industry, and Leggett & Platt, to follow "product stewardship" practices in order to insure that hazardous products would not be used in an environment that would be a high risk to the public. Product stewardship is a widely used practice that follows the use of raw materials, intermediate products and final goods through the design, manufacture, marketing, distribution, use and disposal to insure proper application and use in order to protect the public. Leggett & Platt had to be satisfied that its foam plastic product was going to be used for safe use and application before it sold it."

Demers aff. ¶ 19

Defendant Leggett & Platt concedes little or no knowledge of or involvement in the end-use of its product by customers of American Foam Corporation. See Aff. Brian French ¶¶ 7, 2 (Sep. 29, 2004) ("It is my understanding L&P does not participate in, and is not involved with, the sale of any of AFC's products."). Defendant's failure to either provide adequate warnings and/or otherwise shepherd its product into only safe uses led directly to the foreseeable result that the foam in question was misapplied and left exposed on the walls of a place of public gathering where eventually, inevitably, a source of ignition unleashed the active danger present in the form of untreated polyurethane foam.

I. THE BURDEN ON THE DEFENDANT VS. THE CONSEQUENCES TO THE COMMUNITY

There is a comparatively small burden placed on Defendant Leggett & Platt to ask that it warn accurately and adequately when it sells untreated foam, and that it shepherd its highly dangerous product to a safe use only. The consequences to our community of not imposing a duty of reasonable care on Defendant Leggett & Platt are unthinkable for all concerned.

The Carroll v. Yeaw decision, 850 A.2d 90 (R.I. 2004), cited by Leggett & Platt in its brief, pp. 22-24, is distinguishable. The foundation of the Carroll court's opinion was that there was virtually no causal link between the Plaintiffs' injuries and the Defendant registered contractors' lending his name and registration number to a colleague so that the colleague could obtain a building permit to build a

public stairway. The court found a lack of causation because there was no requirement for a building permit in the first place. The lending of the name and registration number had no causal effect. The negligent contractor could have built the stairway in question with or without the borrowed name or registration. In their memo, Defendants fail to make note of the above finding by the court in Carroll.

In the instant case, the connection between the Defendants' careless wrongdoing and defective product and the Plaintiffs' deaths and injuries is far stronger than the causal connection discussed in Carroll.³⁰

J. PROXIMATE CAUSE AND LEGGETT & PLATT

Defendant Leggett & Platt produced a dangerously flammable and toxic foam product which burst into flames and consumed the Station Nightclub on February 20, 2003. Defendant's manufacture, marketing, production and sale of this product was a proximate cause of this fire. But for Defendant, Leggett & Platt's wrongdoing the defective foam it manufactured would never have been inside the Station nightclub on February 20, 2003. But for the Defendant's wrongdoing and the defectiveness of its product this fire would never have occurred, spread so fast or cost so many lives and injuries. See English v. Green, 787 A.2d 1146 (R.I. 2001) ("proximate cause is established by showing that but for the negligence of the tortfeasor injury to the Plaintiff would not have occurred").

Plaintiffs can and will demonstrate that Defendant Leggett & Platts' product and conduct were a proximate cause of this fire and the deaths and injuries that resulted. Plaintiffs need not prove that the Defendants' product and conduct were the sole and only cause of the fire and resulting harm. Plaintiffs need not prove that Defendant Leggett & Platt was the last or latter cause. The Rhode Island Supreme Court has stated:

"It is fundamental that there may be concurring proximate causes which contribute to a Plaintiff's injury and that a Defendant's negligence is not always rendered remote in the causal sense merely because a second cause intervenes." Hueston, 502 A.2d at 830

³⁰ As will be discussed below, any intervening acts were or should have been reasonably foreseeable to Defendant. For that reason and others, the Castrignano case cited by Defendant cannot be used for the proposition Defendant advances. The dangers in question were well known to this Defendant.

(quoting S.M.S. Sales Co. v. New England Motor Freight, Inc., 115 R.I. 43, 47 (1975)); Reek v. Lutz, 90 R.I. 340 (1960); Gillogly v. N.E. Transp. Co., 73 R.I. 456 (1948).

Defendant Leggett & Platt created a danger, failed to warn adequately about it, and allowed its profoundly hazardous foam product to be sold with absolutely no restrictions on its use or application. Defendant knew or should have known its untreated polyurethane foam could reasonably be expected to end up precisely where it did – exposed on the walls of a local roadhouse where exposure to sources of ignition and an unsuspecting public were inevitable.

K. LEGGETT & PLATT AND THE CONDUCT OF OTHER TORTFEASORS

Defendant cites the conduct of the owners and operators of the club, the band and its road manager, the Town of West Warwick and State of Rhode Island and their fire inspector as alleged intervening, superseding actors. Defendant Leggett & Platt cannot meet the requisite proof necessary to negate its causal role.

Rhode Island law is clear that for an independent, intervening cause to replace a Defendant's original negligence as the proximate cause of an accident, the original conduct must have become totally inoperative as a cause of the injury. Hueston, 502 A.2d at 830 (citing Roberts v. Kettelle, 116 R.I. 283 (1976)).³¹

Defendant has not and cannot offer such a proof here. Defendant created a danger and not only failed to warn of it but also allowed a totally unfettered distribution of the danger. Defendant knew misapplications of foam plastics occur and are reasonably foreseeable.

L. THE REASONABLE FORESEEABILITY OF HARM

As was true with the issue of legal duty, a key determinant on the issue of superseding causation is foreseeability, that is, was it or should it have been reasonably foreseeable to a manufacturer that its

³¹ See Davis v. Brooks, 655 A.2d 927, 930 (N.J. Super. App. Div. 1993) A superseding intervening cause is "one that so entirely supersedes the operation of the first tortfeasor's negligence that it alone caused the injury, without the first tortfeasor's negligence contributing thereto in any material way." (emphasis added)

alleged negligent conduct and highly defective product created a hazard that could be expected to lead to harm.³² This court has noted that:

“Determinations of foreseeability, and specifically of whether a Plaintiff’s injury was proximately caused by a Defendant’s negligent acts, or instead by the intervening act of a responsible third person, are ordinarily issues of fact, and are therefore usually not determined by summary judgment.” Travelers Insurance Co. v. Priority Business Forms, Inc., 11 F.Supp.2d 194, 199 (D.R.I. 1998) (citing Pantalone v. Advanced Energy Delivery Systems, Inc. 694 A.2d 1213, 1216 (R.I. 1997); Splendorio v. Bilray Demolition Co., Inc. 682 A.2d 461, 467 (R.I. 1996)).

One very instructive judicial effort to define foreseeability is found in Bigbee v. Pac. Telephone & Telegraph Co., 665 P.2d 947 (Cal. 1983). The Plaintiff therein was seriously injured when the telephone booth in which he was standing was struck by a motorist that left the roadway. The booth was located in close proximity to a major thoroughfare. When he saw the motorist approaching, the Plaintiff attempted to exit the telephone booth but the door jammed. The Plaintiff brought suit against several parties including the companies that designed, located, installed and maintained the telephone booth asserting that it was negligently designed in that if the door had opened freely, he would have escaped injury; and that it was situated too close to the road where drivers often speeded thereby “creating an unreasonable risk of harm to anyone who used the telephone booth.” Id. at 948. The Defendants argued they had no duty to protect anyone who used the telephone booth from cars colliding with it as the risk was unforeseeable. They also claimed the negligence of the driver that hit the booth was a superseding cause of the Plaintiff’s injuries.

When addressing the ultimate issue in the case, that is, whether there was “room for a reasonable difference of opinion” as to the foreseeability of the risk a car might hit the telephone booth and injure the Plaintiff, the Bigbee court first laid out its definition of foreseeability:

³² If the independent or intervening cause is reasonably foreseeable, the causal connection remains unbroken. S.M.S. Sales Co., 115 R.I. at 47 (citing Aldcroft v. Fidelity & Gas Co., 259 A.2d 408 (R.I. 1969); Denisevich v. Pappas, 198 A.2d 144 (R.I. 1964)).

It is well to remember that foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.

Id. at 952 (citing 2 Harper & James, Law of Torts, (1956), § 18.2, p. 1020).

One may be held accountable for creating even “*the risk of a slight possibility of injury if a reasonably prudent [person] would not do so.*” Bigbee 665 P.2d at 952 (citing Ewart v. Southern Cal. Gas Co., 46 Cal. Rptr. 631 (1965) quoting from Vasquez v. Alameda, 321 P.2d 1 (Traynor, J.) (Cal. 1958) dissenting opinion (in italics)) (emphasis added).

Finally, the Bigbee court went on to say that:

“what is required to be foreseeable is the general character of the event or harm...not its precise nature or manner of occurrence.” Bigbee, 665 P.2d at 952. See also Hueston, 502 A.2d 827 (R.I. 1986).

Whether or not an intervening act constitutes a superseding cause:

“...must be determined in light of the nature and extent of the injury attributable to the product defect, thus focusing on whether the harm is of a kind and degree that is so far beyond the risk foreseeable to the manufacturer that the law would deem it unfair to hold the manufacturer of the product responsible.” (emphasis added) Price v. Blaine Kern Artista, Inc., 893 P.2d 367, 371 (Nev. 1995).

The foam on the walls of the Station nightclub was a substantial cause of the injuries and deaths that resulted on February 20, 2003. It is without question that the foam was dangerous due to its flammability and due to its toxic byproducts when burning. The risk of fire in a nightclub, and elsewhere, can come in many forms, only one of which includes the use of a pyrotechnic display by a rock and roll band. It was the foam’s propensity to easily ignite and rapidly burn that created the inferno that injured and killed the patrons of the Station. In no way was the harm here of a kind and degree so far beyond the risk foreseeable to the manufacturer that it would be unfair to hold Defendant Leggett & Platt responsible.

M. ANY DETERMINATION OF FORESEEABILITY REQUIRES A FACT INTENSIVE CASE SPECIFIC REVIEW

Any analysis of reasonable foreseeability must involve a case specific fact intensive review. Those cases cited by Defendants where courts have determined intervening acts were indeed superseding causes did so on the basis of the facts in the record before the court.

In 1998, this court dealt with issues of proximate cause and foreseeability in Travelers Ins. Co. v. Priority Bus. Forms, Inc., 11 F.Supp.2d 194 (D.R.I. 1998). The Plaintiff in Travelers, an insurance carrier, sought reimbursement of casualty insurance benefits paid to the building owner it insured for damages to the property caused by an arson fire. The Plaintiff claimed the building tenant negligently discontinued the building's alarm (more than four years before the fire) and failed to notify the owner. Thereafter, the building was burglarized and set afire causing significant damage to the property. The Plaintiff also claimed the Defendant created a "fire trap" by negligently storing flammable chemicals and large amounts of paper on the premises allowing the arsonists to "literally add fuel to the fire" and failing to provide the Plaintiff with any warning whatsoever. Id. at 196, 200. After a review and analysis of the law in Rhode Island, in a decision driven by the facts of the case, this court concluded that the conduct of the Defendant tenant was not the proximate cause of the fire damage to the real estate.

In refuting the Plaintiff's arguments the court said:

"the post-arson identification of unhappy employees, **without more specific evidence** that their intention to destroy the property was or should have been known by Priority *prior* to the arson, will not suffice..." Id. at 200 (emphasis added)

"the only facts alleged which, taken in the light most favorable to Travelers, could be read to indicate that Priority should have reasonably foreseen that the Premises had become a "fire trap" are that Priority kept large amounts of paper and unsecured flammable chemicals on the Premises, and that Priority's insurance carrier expressed concerns about these practices. **These allegations are insufficient** as a matter of law to bring this case within the "fire trap" cases or the Hennessey rule." Id. at 201 (emphasis added).

Also, interestingly, when addressing the Plaintiff's failure to warn claim in Travelers, this court pointed out that the Plaintiff had cited cases where tenants had been held liable for damage to leased property caused by fire, no matter what the cause, where the tenant had allowed the premises to become a "fire trap." Id. at 200. The court did not accept the Plaintiff's factual assertion that the presence of flammable chemicals and paper on the premise created a "fire trap," concluding the facts in Travelers did not fall within the purview of the opinions cited by the Plaintiff, or the Rhode Island case of Hennessey v. Suhl. Id. at 201 (citing Hennessey v. Suhl, 333 A.2d 151 (R.I. 1975)). Importantly, this court concluded that

"[m]ore fundamentally, the "fire trap" cases and the Hennessey rule deal with settings in which the risk of danger is extraordinarily high ... [The Plaintiff's] allegations do not amount to a colorable claim that [the Defendant], in storing flammable chemicals and paper for use in its indisputably legitimate business activities, kept the premises in such a state of impending calamity." Travelers, 11 F.Supp. at 201 (emphasis added) (citing Orfanos v. Athenian, Inc., 505 A.2d 131 (Md. Spec. App. 1986)).

It is precisely this extraordinarily high level of danger the court is confronted with in the within matter when passing on Defendants' motions.

N. FACT REVIEW AND EXPERT AFFIDAVITS

Even though Plaintiffs are not required specifically to rebut each of Defendants' claims of lack of foreseeability, Plaintiffs can and will do so. Defendant Leggett & Platt refers to seven alleged specific superseding acts. They are as follows:

1. "American Foam knowingly sold non-fire retardant foam to Jeffrey and Michael Derderian who used it improperly as soundproofing for walls and ceilings."

American Foam's sale is a clearly foreseeable and direct result of Defendant Leggett & Platt's lack of warning and product stewardship. Defendant Leggett & Platt itself acknowledges American Foam's more limited knowledge in footnote 11 on Page 20 of Defendant's memo which quotes the President of American Foam as follows: "It's good packaging material. You just can't light it on fire." This statement clearly reveals that Leggett & Platt had greater product knowledge than American Foam.

2. "The Derderians purchased non-fire retardant foam and applied it to the walls and ceilings of The Station, in violation of applicable Rhode Island fire and building codes."

Without any warnings by Defendant and/or product stewardship, this misapplication resulted. Misapplications of untreated polyurethane foam are unfortunately, yet reasonably foreseeably, common. David Demers addresses this problem in Paragraphs 16 and 17 on Pages 4 – 5 of his affidavit as follows:

Paragraph 16: “The use and misuse of foam plastic as an interior finish is a foreseeable hazard that Leggett & Platt should have taken steps to prevent. There have been previous major fire incidents involving the misuse of foam plastics that have been documented as follows:

10/31/1970 St. Laurent du Pont, France: A fire in the Cinq-Sept. Night Club resulted in the deaths of 144 people as a direct result of the rapid fire development on polyurethane foam interior finish. According to a report published by the National Fire Protection Association:³³ The Cinq-Sept. had been built by its three owners, with a minimum of professional aid, to resemble a white grotto. To that end the owners had personally sprayed on ceilings, walls, and loges a white foamed plastic material to represent the rough appearance inside a cave...

The owners made their own plastic foam, using polyurethane pellets as the base material. The foaming agent is not known. The owners knew that the foam was cheap, and the patrons were later to discover it to be highly combustible...

5/6/1974 West Hollywood, CA: A fire that ignited a television studio set for the children’s show, Sigmund and the Sea Monster, at the Samuel Goldwyn Studios resulted in injuries to three people and property loss of over \$3 million. The fuel for the fire was non-fire retardant treated polyurethane foam. The flame front expanded with such speed that the pressure of the fire bases pushed out one of the exterior walls of the building. The foam plastic, which was intended to be used as roof and cold storage insulation in industrial buildings, was used by technicians to create the interior of the television set and was poured or sprayed on forms made in the studio.

12/31/1986 San Juan, Puerto Rico: A fire was intentionally set in a ballroom being used to store furniture in the Dupont Plaza Hotel. The fire spread to an “Air Wall”, which was a portable partition used to sub-divide the ballroom. The partition was manufactured using polystyrene foam plastic which was a significant contributor to the fire growth and development and heavy black toxic smoke. The foam plastic was intended to be used as insulation on the exterior of buildings. There were 97 fatalities and nearly 150 injured, many seriously, as a result of this fire.

Paragraph 17: “Leggett & Platt should have taken every possible step to insure that the inherently dangerous material produced by them was not misused. The hazards of foam plastic are not obvious to the general public and special notice must be given.”

Gordon Damant has also addressed this issue of foreseeable misapplication as follows in Paragraph 33, Page 11:

³³ National Fire Protection Association, “White Grotto Becomes Black Tomb,” Fire Journal, May 1971. This fire was also referenced in “American Burning, The Report of the National Commission on Fire Prevention and Control”, U.S. Govt. Printing Office, 1973, p. 61.

