Toxic Torts Alert: Liability for Products Manufactured and Sold by Others (the "Bare Metal" Defense)

In the last few years, several courts have addressed whether liability should be imposed on equipment manufacturers for products manufactured and sold by third parties, which were used with the defendant's equipment. Most of the cases consider the question in terms of whether there is a duty to warn, but a few courts have utilized a causation analysis. The issue of whether a product manufacturer has liability under maritime law for injuries caused by another manufacturer's product is now before the United States Supreme Court, which granted *certiorari* in May 2018, following a ruling by the Third Circuit Court of Appeals finding that liability may exist, at least in negligence. See *In Re: Asbestos Products Liability Litigation (No. VI) (DeVries v. Air & Liquid Systems Corp., et al./McAfee v. Ingersoll Rand Co.)*, 873 F.3d 232 (3d Cir. 2017). Some of the more recent cases addressing the issue of liability for products made and sold by others are discussed below:

***In Re: Asbestos Products Liability Litigation (No. VI) (DeVries v. Air & Liquid Systems Corp., et al./McAfee v. Ingersoll Rand Co.)*, 873 F.3d 232 (3d Cir. 2017):** In Plaintiffs' consolidated appeal of U.S. District Court for the Eastern District of Pennsylvania Judge Eduardo C. Robreno's orders granting summary judgment in the DeVries and McAfee cases, both involving allegations of exposure to asbestos from Navy equipment, the Third Circuit Court of Appeals concluded that Defendants may be liable under a negligence theory for injuries caused by others' products under certain circumstances. Although the Third Circuit ultimately affirmed the grant of summary judgment as to Plaintiffs' strict liability claims, it held that it "need not fully the contours of the [bare metal] defense's distinctions in strict liability" because Plaintiffs had waived that issue by focusing their opening brief only on negligence.

In adopting a "standard-based approach," the Court held that "foreseeability is the touchstone of the bare-metal defense." Thus, in federal cases within the Third Circuit where maritime law is applicable, "a manufacturer of a bare-metal product may be held liable for a plaintiff's injuries suffered from later-added asbestos containing materials if the facts show the plaintiff's injuries were a reasonably foreseeable result of the manufacturer's failure to provide a reasonable and adequate warning." Although the Court noted that the analysis will "necessarily be fact-specific," it stated that several cases decided by district courts in other circuits (namely, *Quirin v. Lorillard Tobacco Co.*, 17 F.Supp.3d 760 (N.D. Ill. 2014), *Bell v. Foster Wheeler Energy Corp.*, No. 15-6394, 2017 WL 889083 (E.D. La. Mar. 6, 2017) and *Chesher v. 3M Company*, 234 F.Supp.3d 693 (D. S.C. 2017)) have already provided some examples of when a manufacturer could be subject to liability: "if it reasonably could have known, at the time it placed its product in to the stream of commerce, that (1) asbestos is hazardous, and (2) its product will be used with an asbestos-containing part because (a) the product was originally equipped with an asbestos containing part that could reasonably be expected to be replaced over the product's lifetime, (b) the manufacturer specifically directed that the product be used with an asbestos-containing part, *or* (c) the product required an asbestos-containing part to function properly."

While the court recognized that there are trade-offs to each approach, it ultimately determined that the "fact-specific standard" was appropriate given its determination that the "foremost" principle historically underlying maritime law is "the protection of sailors." In the Court's view, adopting a bright-line rule would lead to "under-inclusion" and would necessarily result in "some deserving sailor-plaintiffs . . . not receiv[ing] their due." Although the Court also enumerated three other maritime law principles implicated here—(1) traditions of simplicity and practicality, (2) protection of maritime commerce, and (3) uniformity of rules governing conduct and liability—it ultimately discounted those factors as being neutral and not weighing more heavily in favor of one side or the other.

Following the Third Circuit's decision, several defendants filed a writ of *certiorari* to the United States Supreme Court. On May 14, 2018, the United States Supreme Court granted *certiorari* and the case has been listed on the 2018 October term list for argument. The petitioners seek to have the Supreme Court resolve the question of whether "products-liability

defendants can be held liable under maritime law for injuries caused by products that they did not make, sell, or distribute." The petitioners argue that there is a circuit split on the issue, and that this split undermines maritime law's interest in uniformity. Finally, the petitioners argue that the Third Circuit erred in adopting a foreseeability test, and that they are entitled to summary judgment.

***Stearns v. Metropolitan Life Ins. Co.*, — F.Supp.3d —, 2018 WL 1610539 at *12 (D. Mass., Mar. 30, 2018):** Applying maritime law, allowing a steam turbine generator manufacturer defendant's motion for summary judgment as to plaintiff's claims of naval/shipyard exposure. The court cited the Sixth Circuit's *Lindstrom* decision for the proposition that maritime law "does not extend liability for component parts not manufactured or distributed by defendants," and held that, because there was no allegation that Defendant ever manufactured or distributed asbestos-containing components, it was entitled to summary judgment as to such claims.

***Woo v. General Electric Co.*, No. 74458-5-I, slip op. (Wash. Ct. App. Apr. 3, 2017):** In pertinent part, reversing a trial court's order that granted summary judgment for the defendant steam turbine manufacturer, Division One of the Washington intermediate appellate court held that material issues of fact remain for trial as to whether the defendant had a duty to warn of the hazards associated with asbestos-containing products manufactured by others. Defendant's summary judgment motion argued, *inter alia*, that because there was no evidence that it supplied or installed the allegedly injurious asbestos-containing products used in conjunction with its equipment and allegedly encountered by Decedent during his shipboard service in the 1940s and 1950s, it did not have a duty to warn about the hazards of those products under two Washington Supreme Court decisions—*Simonetta v. Viad Corp.* and *Braaten v. Saberhagen Holdings*. In contrast, Plaintiffs argued that the exception set forth in the Washington Supreme Court's *Macias v. Saberhagen Holdings* decision imposed a duty to warn about the hazards of asbestos-containing products that had to be used with Defendant's equipment. In setting forth the specific rationales in those three precedents, the Court explained that, although *Simonetta* and *Braaten* espoused the general rule that a manufacturer need not warn about the hazards of others' products, *Macias* and *Braaten* both noted that there were exceptions to the general rule—i.e. where the manufacturer's product required the use of asbestos or the manufacturer specifically designed its product to be used with asbestos. The Court went on to describe the various types of evidence put forth by Plaintiffs (including a 1989 Technical Information Letter) that it concluded gave rise to reasonable inference "that [Defendant] knew only asbestos-containing thermal insulation, gaskets, and packing were available in the 1940s and 1950s and were necessary for the proper functioning of the steam turbines." The Court also found that there was evidence that Decedent worked on the Navy ship at issue when it was first commissioned, which gave rise to a reasonable inference of exposure to originally-supplied packing and gaskets in the steam turbine.

***Chesher v. 3M Company*, 234 F.Supp.3d 693 (D. S.C. 2017):** In a case involving a Navy machinist's mate, denying valve manufacturer's motion for summary judgment, the court found that Plaintiff's failure-to-warn claims were not foreclosed by maritime law's "bare metal defense." In its decision, the court explicitly adopted the approach used by the court in *Quirin v. Lorillard Tobacco Co*, 17 F.Supp.3d 760 (N.D.Ill. 2014), and held that "in order to bring a failure-to-warn claim under *Quirin*, a plaintiff must show: (1) the defendant actually incorporated asbestos-containing components into its original product, and (2) (a) the defendant "specified" the use of asbestos-containing components, or (b) such components were "essential to the proper functioning" of the defendant's product." The court found that the defendant's engineering drawings showed that the valve company incorporated asbestos gaskets and packing into their valves. Further, it found that the testimony of expert Captain Arnold Moore interpreting the valve manufacturer's drawing found that the drawing specified asbestos-containing gaskets and packing.

***In the Matter of N.Y. Asbestos Litig. (Dummitt and Suttner)*, 59 N.E.3d 458 (N.Y. 2016):** In a consolidated appeal, affirming underlying decisions of the First and Fourth Judicial Dept. of the Appellate Division, the New York Court of Appeals disagreed that a valve manufacturer's contention that it did not owe a duty to warn about potential hazards associated with asbestos-containing gaskets, packing and insulation manufactured and sold by others. The Court held that "the manufacturer of a product has a duty to warn of the danger arising from the known and reasonably foreseeable use of its

product in combination with a third-party product which, as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended." The Court found that a manufacturer of a "durable" product (such as equipment) has superior knowledge and is in the best position to issue a warning about potential harm caused by a "wear item" used with that durable product because "the end user is more likely to interact with the durable product over an extended period of time, and hence he or she is more likely to inspect warnings on that item or in associated documentation, than to review warnings supplied by the maker of the "wear item." The Court also found that requiring the durable product manufacturer to issue the warning about wear parts it did not manufacture or supply "will likely have a balanced and manageable economic impact," because it would be a relatively modest additional cost to that manufacturer who already has to issue warnings relating to the dangers of its own product. In its analysis, the Court explained that, unlike in states like California and Washington, New York's failure-to-warn doctrine has long been "a doctrine of reasonableness and negligence rather than absolute strict liability."

***Bell v. Foster Wheeler Energy Corp.,* No. 15-6394, 2017 WL 889083 (E.D. La. Mar. 6, 2017) and *Bell v. Foster Wheeler Energy Corp.,* No. 15-6394, 2016 WL 5780104 (E.D. La. Oct. 4, 2016):** Denying the summary judgment motions filed by 8 out of 10 equipment manufacturer defendants, the District Court for the Eastern District of Louisiana relied, in part, upon a new "liability scheme" which "disagrees with the Sixth Circuit's approach and . . . concludes that the bare metal defense should immunize only a narrower range of conduct." The court ultimately adopted what it described as a "third view" that is "somewhat unique." Of note, the court rejected the view employed by some courts that a duty to warn adheres merely because the use of asbestos with a defendant's equipment is foreseeable. However, under the court's "third view," "if the . . . manufacturer recommends that asbestos be used in conjunction with its bare metal part, the . . . manufacturer may be held liable where the recommendation 'negligently gives false information to another,' and 'harm results' to either (1) the recipient of the information or (2) 'third persons' that the . . . manufacturer 'should expect to be put in peril by the' negligent recommendation."

***Grant v. Foster Wheeler, LLC,* 140 A.3d 1242 (Me. 2016):** In pertinent part, affirming the orders that granted summary judgment for three equipment manufacturers, the Supreme Judicial Court of Maine held that Plaintiff's evidence as to product nexus did not rise above speculation and was not sufficient to create a prima facie case for causation or liability, even under the less demanding causation standard utilized by the trial court. The Court also held in a brief footnote that, "[s]imilarly, any claim of a duty to warn on the part of any of the defendants would fail." In reciting the evidence, the Court noted that it was "undisputed that products—pumps, boilers, turbines, etc.—manufactured by [the equipment defendants] were present on naval ships constructed or converted at Bath Iron Works during the period when [Decedent] worked [there]." Notably, the Court explained that its analysis involved "examin[ing] what evidence [Plaintiff] offered to demonstrate that these products [i.e. pumps, boilers, turbines, etc.] contained asbestos *originating with the defendants* . . . ." (Emphasis added). The Court found that, although "Bath Iron Works employees covered the products with asbestos, . . . that covering was not asbestos that originated with [the equipment manufacturers]." As a result, even though Plaintiff also alleged exposure from external insulation used with Defendants' equipment, the Court stated that its "analysis [under Maine's strict liability statute] is confined to the evidence regarding [Decedent's] potential exposure only to the asbestos contained in the products' *original gaskets and packing*." (Emphasis added).

***McIndoe v. Huntington Ingalls, Inc.,* 817 F.3d 1170 (9th Cir. 2016):** affirming grant of summary judgment to shipbuilders in products liability and negligence claim. Citing *Lindstrom v. A-C Prod. Liab. Tr.,* 424 F.3d 488 (6th Cir. 2005), the court noted that McIndoe's heirs had the burden of showing that he was "actually exposed to asbestos-containing materials that were installed by the shipbuilders and that such exposure was a substantial contributing factor in causing his injuries." The court noted that in this negligence case against the shipbuilders, Plaintiffs "must show exposure to asbestos from materials that were *originally* installed aboard the ships." (emphasis original) While the court found that a jury could potentially determine that McIndoe was exposed to originally installed asbestos, the court found that Plaintiffs could only speculate as to the actual extent of his exposure to asbestos from originally installed insulation, and therefore, Plaintiffs could not prove that such original asbestos insulation was a substantial contributing factor in causing McIndoe's mesothelioma.

***McKenzie v. A.W. Chesterton Co.*, 277 Or. App. 728 (Or. Ct. App. 2016),** review denied, 360 Or. 400 (2016): Reversing a trial court's order granting summary judgment for the defendant pump manufacturer, the Oregon Court of Appeal disagreed with the defendant's assertion that it did not owe a duty in strict liability or negligence to warn about potential hazards associated with asbestos-containing gaskets, packing, and insulation manufactured and sold by others. After stating that the "identification of the products at issue" was its "threshold inquiry," the Court agreed with Plaintiff that it should view the "final products" for purpose of a product liability analysis as being "the pumps as delivered to the Navy," not the "asbestos-containing gaskets, packing, and insulation that others had manufactured and sold to the Navy and that [Plaintiff] encountered." The Court went on to hold that an equipment manufacturer may be strictly liable if a plaintiff encountered equipment that was in substantially the same condition as when originally sold (i.e. the asbestos-containing replacement parts made and sold by others were similar to those originally installed in the equipment), *and* the defendant "expected" that the replacement parts would contain asbestos. The Court also held that an equipment manufacturer may be liable in negligence if it was foreseeable to the defendant that the asbestos-containing replacement parts would be used in or on its equipment.

***May v. Air & Liquid Systems Corp.*, 129 A.3d 984 (Md. 2015):** In reversing an award of summary judgment to pump defendants, the Maryland high court found that a manufacturer has, under limited circumstances, a duty to warn of asbestos-containing replacement components parts it has not placed into the stream of commerce. Philip May was a Navy machinist's mate, who alleged exposure to asbestos from gaskets and packing from pumps installed aboard Navy ships. Defendants moved for summary judgment on the "bare metal" defense.

The Court of Appeals of Maryland noted that "in negligence cases involving personal injury, the principal determinant of duty is foreseeability." The court noted that the foreseeability of harm to workers servicing pumps with asbestos gaskets and packing is "especially strong" where the manufacturer knows or should know that these components are necessary to the proper functioning of the product and must be replaced periodically. Taking these factors into account, the court held that a duty to warn will exist in negligence cases where "(1) a manufacturer's product contains asbestos components, and no safer material is available; (2) asbestos is a critical part of the pump sold by the manufacturer; (3) periodic maintenance involving handling asbestos gaskets and packing is required; and (4) the manufacturer knows or should know of the risks from exposure to asbestos."

Turning to the strict liability claim, defendants argued that they were not liable under a strict liability theory because they did not derive an economic benefit from the sale of asbestos components placed into the stream of commerce by third parties, which the court seemingly rejected by noting that there was an economic benefit from the sale of the pump itself. The court rejected defendants' argument that the replacement asbestos components were the "product" from a strict liability analysis, and rather found that the pump itself was the "product" sold to the Navy. The court noted that under Maryland law the "framework for analysis in negligent failure to warn cases…substantially mirrors that of a strict liability action," and "because of the intersections between strict liability and negligent failure to warn claims," and therefore, adopted the same four-part test for strict liability claims as it had announced for negligence claims. The Court of Appeals concluded its opinion noting that a manufacturer is "generally not strictly liable for products it has not manufactured or placed into the stream of commerce," and declined to "extend the duty to warn to all instances when a manufacturer can foresee that a defective component may be used with its product." Thus, the court preserved the rule that a company is not generally liable for asbestos-containing parts it did not manufacture, sell, or supply, "but recognize[d] that narrow circumstances exist where a manufacturer can be liable for products it has not touched."

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