IADC COMMITTEE NEWSLETTER

PRODUCT LIABILITY

MAY 2019

IN THIS ISSUE

The United States Supreme Court's recent opinion in Air and Liquid Systems Corp v. Devries limited the application of the "bare-metal defense" in asbestos cases, holding manufacturers of certain products liable for causing cancer to Navy veterans from asbestos products or components those manufacturers neither sold nor applied to their products. But, as the attached article sets forth, the Court's opinion is limited and thus not as harmful to product manufacturers as it might seem upon a quick read.

Recent Supreme Court Decision Rejects Bare-Metal Defense in Maritime Cases

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ABOUT THE COMMITTEE

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On March 19, 2019, the United States Supreme Court issued an opinion limiting the application of the "bare-metal defense," which stands for the proposition that manufacturers of bare metal products are not liable in products liability cases for materials that they did not manufacture that are later applied to their products. While an initial read of the Supreme Court's decision may be concerning to manufacturers and practitioners alike, a closer reading of the Court's opinion, *which analyzes maritime law*, indicates that its holding should not be read to endorse a broad imposition of a new duty to warn on manufacturers.

Background

The plaintiffs in the case were the two Navy veterans, Kenneth McAfee and John Devries, who were exposed to asbestos on naval ships and subsequently developed cancer. They and their spouses sued manufacturers of equipment such as pumps, blowers, and turbines. Although all of the equipment at issue *required asbestos to work properly*, the manufacturers generally did not deliver their products with asbestos already incorporated. Rather, the Navy added the asbestos to the equipment after it was installed on naval ships. In the few instances where asbestos was incorporated prior to delivery, the Navy replaced the manufacturers' asbestos with asbestos purchased from a third-party. The plaintiffs alleged that the manufacturers, despite not having incorporated the asbestos themselves, "were negligent in failing to warn of the dangers of asbestos." *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986, 991 (2019). In response, the manufacturers asserted the "bare-metal defense," contending that "they had no duty to warn because they did not themselves incorporate the asbestos into their equipment." *Id.* The question presented to the Supreme Court was whether, **in the maritime tort context**, a manufacturer has a duty to warn if the product requires the application of asbestos "in order to function as intended." *Id.* (emphasis added).

The Court's Analysis

The Supreme Court held that **in the maritime tort context** a manufacturer has a duty to warn when (1) "its product requires incorporation of a part," (2) "the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses," and (3) "the manufacturer has no reason to believe that the product's users will realize that danger." *Id.* at 995. **The Court was careful to note, however, that "the rule that [it] adopt[ed] . . . is tightly cabined," and it "does not require that manufacturers warn in cases of mere foreseeability."** *Id.* at 995. To the contrary, the new rule explicitly "requires that manufacturers warn only when their product *requires* a part in order for the integrated product to function as intended," and manufacturers know or have reason to know that the integrated product is dangerous. *Id.* (emphasis in original).

Importantly, the Supreme Court gave great weight to the nature of maritime law while developing this rule. The Court's opinion explains that "[m]aritime law has always recognized a special solicitude for the welfare of those who undertake to venture upon hazardous and unpredictable sea voyages." *Id.* at 995 (internal citations and

quotations omitted). It also specifically noted that "[t]he plaintiffs in this case are the families of veterans who served in the U.S. Navy," and that "[m]aritime law's longstanding solicitude for sailors reinforces our decision to require a warning in these circumstances." *Id.*

Justices Alito and Thomas joined Justice Gorsuch in a dissent of the Court's opinion. Justice Gorsuch first noted that "it is black-letter law that the supplier of a product generally must warn about only those risks associated with the product itself, not those associated with the 'products and systems into which [it later may be] integrated.'" *Id.* at 997 (quoting Restatement (Third) of Torts: Product Liability § 5, Comment *b*) (Gorsuch, J., dissenting). He warned of the possible effects of the decision, including: (1) confusion over when "side-by-side use of two products [will] qualify as incorporation of the products," (2) disagreement over what will qualify as an "integrated product" under the Court's new rule, and (3) uncertainty over whether a manufacturer's duty to warn a consumer may be absolved by a third-party manufacturer's warning to a consumer, as the third-party manufacturer's warning could, and should, enable consumers to realize the dangers associated with the incorporated product. *Id.* at 998–99. Justice Gorsuch does laud the majority opinion in limiting its holding to maritime cases; he notes "nothing in today's opinion compels courts operating outside the maritime context to apply the test announced today." *Id*. at 1000.

Conclusion

The Supreme Court's opinion in *Air and Liquid Systems Corp.* may, at first glance, appear to provide a new and threatening weapon for plaintiff's counsel in asbestos litigation across the country. The holding itself, however, is actually quite limited. It only applies in the maritime context, and, by its terms, "requires that manufacturers warn only when their product **requires** a part in order for the integrated product to function as intended." *Id.* (emphasis added). The Court, in turn, **rejects the plaintiff-friendly "foreseeability rule"** applied by some courts that holds a manufacturer liable when it was foreseeable that that manufacturer's product would be used with that of another manufacturer.

The Court's analysis will undoubtedly give rise to numerous attempts by plaintiffs' counsel to argue that the Supreme Court has rejected the bare-metal defense, and thus state courts should as well. Defense counsel should emphasize that the Supreme Court's holding *only* applies to maritime tort law and that the distinction between maritime and state tort law is an important one. The Court's opinion explicitly noted it considered the traditions of maritime law in coming to its conclusion. There is no "special solicitude" to consider in a typical state tort law action, and thus there are aspects of the Supreme Court's reasoning that cannot extend past the maritime law context. *Id.* at 995 (internal citations and quotations omitted).

In arguing against a state court's adoption of the Supreme Court's rule, defense counsel should also look to Justice Gorsuch's dissent,

and emphasize the host of practical problems the Court's new rule threatens. As the dissent suggests, "[h]eadscratchers like these are sure to enrich lawyers and entertain law students, but they also promise to leave everyone else wondering about their legal duties, rights, and liabilities." *Id.* at 999 (Gorsuch, J., dissenting). By emphasizing the uncertain nature of the Supreme Court's holding, defense counsel may successfully discourage a state court from adopting a similar rule.

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