Beveridge & Diamond

News Alert

Too Much to "Bare": US Supreme Court Rejects Bare Metal Defense Under Federal Maritime Law

April 1, 2019

AUTHOR

Chris Strunk
Of Counsel
+1.415.262.4016
cstrunk@bdlaw.com

In an eagerly anticipated decision by the asbestos bar, the United States Supreme Court in *Air & Liquid Systems et al. v. DeVries et at.*, Dkt. No. 17-1104, 2019 WL 1245520 (March 19, 2019) rejected the "bare metal defense" as applied to sailors under federal maritime law. The 6-3 decision, authored by Justice Kavanaugh and joined by Justices Roberts, Kagan, Ginsburg, Breyer and Sotomayor, held that:

> *A product manufacturer has a duty to warn when:*
>
> 1. *Its product requires incorporation of a part.*
> 2. *Tthe manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses.*
> 3. *The manufacturer has no reasons to believe that the product's users will realize that danger.*

Ibid. at *2.

Facts & Decision

The facts of *DeVries* mirror the facts of myriad cases that preceded it. Both plaintiffs were sailors who served aboard U.S. Navy warships between the 1950s and 1980s when asbestos was in widespread use. Present on those vessels were pumps, valves, steam traps, boilers, compressors and other equipment that had originally been supplied to the Navy by their manufacturers as "bare metal." Once acquired, however, the Navy used asbestos-containing

ABOUT B&D

Beveridge & Diamond's over 100 lawyers in eight U.S. offices focus on environmental and natural resources law, litigation and alternative dispute resolution. We help clients around the world resolve critical environmental and sustainability issues relating to their products, facilities, and operations.

Learn more at bdlaw.com

components provided by other manufacturers – such as gaskets, packing, and insulation materials – in conjunction with the product for the use the Navy intended. Most frequently, the equipment (and its asbestos-containing components) were placed into service on the high temperature and high-pressure steam systems aboard ship. The sailors were exposed to asbestos as a result of their work on the equipment, as well as being present when that work was performed. In this case, plaintiff John DeVries was a U.S. Navy engineering officer who served aboard the Gearing-class destroyer *USS Turner* between 1957 and 1960, and plaintiff Kenneth McAfee was a boatswain's mate who serviced compressors which contained asbestos-containing components on a different vessel during the late 1970s and 1980s.

The decision may result in a resurgence of maritime and Navy asbestos claims.

In reaching its decision, the Court analyzed three approaches that had previously been employed by courts grappling with the defense in the various federal circuits. The first approach was the more "plaintiff-friendly" rule of foreseeability, under which a manufacturer is liable "when it was foreseeable that its product would be used with another product or part, even if the manufacturer's product did not require use or incorporation of that other product or part." *Id*. at *4. The second approach, the more "defendant-friendly" bare metal defense, states that a manufacturer is not liable for the asbestos-containing products of others subsequently installed within or affixed to its products. This rule is dominant in state courts on the west coast. *See O'Neil v. Crane Co.*, 53 Cal.4th 335 (2012), *Simonetta v. Viad Corp*., 165 Wn.2d 341 (2008), and *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373 (2008). The Court rejected both of these rules in the maritime context, finding that the "rule of foreseeability would sweep too broadly," while at the same time holding that "the bare-metal defense goes too far in the other direction." *Ibid*.

Instead, the Court adopted a third approach, which it found to constitute a middle ground between the two approaches. *Ibid*. Under this approach, a duty to warn attaches when its product requires the incorporation of a part that the manufacturer knows or has reason to know might make the integrated product dangerous. *Ibid*. This approach largely parallels the holding of *Matter of New York City Asbestos Litig., Dummitt et al. v. A.W. Chesterton et al.*, 27 N.Y.S.3d 723 (2016), which "recognize[d] a manufacturer's duty to warn of the peril of a known and foreseeable joint use of its product and another product that is necessary to allow the manufacturer's product to work as intended," and which the Court cited with approval. *Id*. at 795. It support of its rationale, the Court found that "the product manufacturer will often be in a better position than the parts manufacturer to warn of the danger from the integrated product," because the parts manufacturer "may not always be aware that its part will be used in a way that poses a risk of danger." *DeVries*, 2019 WL 1245520 at *5. Importantly, the Court found that "[m]aritime law's longstanding solicitude for sailors reinforces our decision to require a warning in these circumstances."

Dissent

The dissent, authored by Justices Gorsuch, Thomas, and Alito, restated the common law rule that a manufacturer's duty to warn "is restricted to warnings based on the characteristics of *the manufacturer's own product*," whether or not that product is "integrated" with another product. *Ibid*. at *7, emphasis in original. The dissent cautioned that "we dilute the incentive of a manufacturer to warn about the dangers of its products when we require other people to share the duty to warn and its corresponding costs." *Id*. Citing *O'Neil, supra*, the dissent also noted that "consumer welfare is not well served by requiring manufacturers to warn about the dangerous propensities of products they do not design, make or sell." *Id*. Further, it raised pointed questions about the difficulties of defining an "integrated product," noting that

the purpose of tort law is to align liability with responsibility, and "not mandating a social insurance policy in which everyone must pay for everyone else's mistakes." Finally, the Court noted that the "silver lining" in the decision was the express limitation of the decision to the maritime context.

Analysis

The Court's decision is an unquestionable blow to the "bare metal defense," and may even result in a resurgence of maritime and Navy asbestos claims on the west coast and elsewhere. But while the "bare metal" defense may no longer be the "absolute" defense it had previously been in some federal jurisdictions, the decision highlights the importance of other defenses.

First, and importantly, the Court's decision emphasized the liability of a manufacturer for an "integrated product" made dangerous as a direct result of asbestos-containing products *selected and installed by the Navy* pursuant to military specifications. However, the government contractor defense was not before the Court. *Boyle v. United Technologies Corp.* 487 U.S. 500 (1988).

Second, the Court's holding was expressly dependent upon the fact that the manufacturer "has no reasons to believe that the product's users will realize that danger." In jurisdictions such as California, which have recognized both the sophisticated user and sophisticated intermediary defenses, it is likely that these defenses will become more significant. *See Johnson v. American Standard 43 Cal.4th 56* (2008); *Webb v. Special Electric Co., Inc.* 63 Cal.4th 167 (2016).

Finally, the issue of the *application* of the "bare metal" product is critical. Given that the first "prong" of the Court's newly-stated test is that the "bare metal" product "*requires* incorporation of [an asbestos] part," it will be critical for a plaintiff to show that the product "required" incorporation of that part to function. Certainly, a "bare metal" product that could have multiple applications – only some of which may require the use of asbestos – may still be entitled to claim the defense under *DeVries*.

The Court's decision likely creates more questions than it answers. But for now, both plaintiffs and the defense will continue to test the limits of this new law as the litigation continues.

Beveridge & Diamond's Toxic Tort and Environmental Tort practice group defends large companies in virtually all industries against toxic tort and product liability claims involving a wide range of chemicals and related substances, including metals such as arsenic, lead, and mercury. While the majority of clients tend to be in oil, chemicals, and manufacturing, we represent any type of company with actual or potential exposure to toxic tort liability or product liability. For more information, contact the author.