

Products Liability

California Supreme Court to Decide Whether Equipment Manufacturers May be Liable for Asbestos-Containing Replacement Parts

Article Contributed by Alex P. Catalona, Schiff Hardin LLP

In 1982, Johns-Manville Corporation became the first of many big-name asbestos defendants to file for bankruptcy protection. While the number of asbestos defendants has steadily dwindled since that time, plaintiffs' attorneys have become increasingly innovative in targeting new defendants.

In recent years, plaintiffs' lawyers have latched onto manufacturers of marine pumps and valves as the "next wave" of potential asbestos defendants.¹ This equipment, while mainly consisting of strictly metal machinery, also contained non-metal gasket and packing components that would at times have contained asbestos, thereby drawing the attention of the plaintiffs' bar. But while unquestionably innovative, the lawsuits have also been controversial.

Equipment manufacturers are most often sued not for asbestos-containing components included at the time their products were sold, but for parts manufactured and sold by other companies that are added years, and in some cases decades, later. In a hypothetical case, Company A sells a large piece of machinery in 1940, and in 1950 its various components are removed and replaced as part of ordinary maintenance. Some of these original components contain asbestos but are replaced with component parts manufactured and sold by a different company, Company B. Then, in 1960, plaintiffs use Company A's equipment during which time they are arguably injured by Company B's components. The plaintiffs' bar has in recent years sought compensation not only from Company B, the company that sold the allegedly hazardous component parts that caused injury, but also from Company A that sold the machinery into which those parts are later installed.

While the theory of strict products liability was developed to ensure that product-related injuries be fairly compensated, courts have struggled to decide whether manufacturers should be responsible for products they neither manufactured nor sold. Plaintiffs' lawyers maintain that manufacturers should be held liable for injuries caused by components they reasonably anticipate will be used with their equipment. Although wear-and-tear and replacement may be anticipated, these parts are often manufactured and sold by different companies and installed by third parties. The actual

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manufacturers of the replacement parts remain liable, but plaintiffs' lawyers insist that manufacturers of the original equipment, into which these products are later installed, be equally liable, creating the possibility of doubling or even tripling the amount of compensation paid out on a per-product basis.²

Washington State Cases

In 2007, a Washington appellate court decided *Braaten v. Saberhagen Holdings (Braaten I)* and *Simonetta v. Viad Corp. (Simonetta I)*, a pair of opinions that held equipment manufacturers liable for after-market replacement parts, along the lines promoted by plaintiffs' attorneys across the country.³ In both cases, defendants sold equipment that was installed on Navy ships more than a decade before plaintiffs came into contact with it, and there was undisputed testimony that the asbestos-containing gaskets, packing and insulation originally supplied with defendants' equipment had been removed before plaintiffs served onboard their ship.

Plaintiffs argued that defendants should have expected that asbestos-containing replacement parts would be used with their equipment and should have provided warnings to prevent end-users from exposure to asbestos when the parts were removed and replaced. The lower appellate court agreed, holding that when a manufacturer "utilizes a hazardous substance" in the design of its equipment, it is required to provide warnings to prevent hazards caused when the material is replaced.⁴

The court drew an analogy to a case where Kawasaki failed to warn against gasoline leaking from its fuel tanks when its fuel switch was in the "on" position. "Like the present case, the motorcycle was not dangerous because of product failure but because its design required the use of a hazardous substance that was released during normal use. The gasoline fumes, not the motorcycle, actually caused the explosion which led to the harm. Kawasaki was required to warn about the flammable properties of gasoline despite the fact that the company did not manufacture or supply the gasoline."⁵

Plaintiffs' victories were short-lived. On December 11, 2008, the Washington Supreme Court overturned both cases and rejected liability for after-market replacement parts. The Court found it critical that the defendants were not in the chain of distribution for the relevant replacement parts, placing them well beyond the traditional limits of product liability.⁶

Plaintiffs insisted that defendants were still liable under negligence principles because they knew or at least should have known that asbestos-containing replacement parts would be installed in their equipment. The Supreme Court explained, however, that the legal concept of foreseeability does not create a duty. Rather, foreseeability is a concept that is used to limit a defendant's already existing duty to provide warnings. Equipment manufacturers simply could have no duty to provide warnings about products they did not manufacture, sell or supply. To use the lower court's

analogy, Kawasaki owed no duty to warn about the flammable nature of gasoline, but it was responsible for its motorcycles' defective fuel switch that caused the gasoline to leak. Although the machine carried gallons of flammable material, had there been no leak, there would be no danger, and, thus, no duty to warn.⁷

California Joins the Trend

On February 25, 2009, the First District of California's Court of Appeal decided *Taylor v. Elliot Turbomachinery Co., Inc.*⁸ The facts were similar to the two Washington cases. In 1943, five equipment manufacturers supplied the Navy with propulsion equipment that was installed on the *USS Hornet*. When installed, these products incorporated asbestos-containing packing, gaskets and insulation, manufactured by other companies. After joining the Navy in 1964, Reginald Taylor was assigned to the *Hornet* where he operated and repaired defendants' equipment that had been installed 20 years earlier. It was undisputed that Mr. Taylor was exposed to asbestos on the *Hornet*. Taylor's expert witness, however, admitted that the asbestos-containing component parts that defendants originally supplied with their equipment had been removed and were no longer present in 1964 when Taylor came on board the ship.

The defendants moved for summary judgment on the ground that they were not liable for replacement parts sold and manufactured by other companies. The trial court granted defendants' motions and the Court of Appeal affirmed. The court drew a bright line and held that companies outside of a product's distribution chain may not be held liable for the dangers or defects attributable to those products. "The evolution of this notion reflects a bright-line legal distinction tied to the *injury-producing product* in the stream of commerce. Other manufacturers cannot be expected to determine the relative dangers of various products they do not produce or sell and certainly do not have a chance to inspect or evaluate."⁹

The *Taylor* Court buttressed its opinion with a discussion of the "component parts doctrine" that previously applied to manufacturers of fungible and unquestionably non-hazardous components such as "chains, valves, sand, [and] gravel."¹⁰ Under this line of cases, component manufacturers are not liable for hazards created by a finished product when their components play no role in the creation of the hazard.¹¹

O'Neil and Merrill.

In September of 2009, the Court of Appeal's Second District issued two very different opinions. In *O'Neil*, Division Five of the Los Angeles-based court was sharply critical of the *Taylor* decision issued by the San Francisco-based First District, and held that both *Taylor* and the Washington Supreme Court's decisions were wrongly decided.¹² A week later, Division Three of the court turned full circle when it issued *Merrill* and fully adopted the rationale and holdings of *Taylor* and the decisions of the Washington Supreme Court.

O'Neil v. Crane Co.

Between June 1965 and August 1966, Patrick O'Neil was exposed to asbestos on board the *USS Oriskany*, a ship built between 1944 and 1950. Defendants' valves and pumps, which were covered with asbestos-containing thermal insulation and which included asbestos-containing gasket and packing components were installed in or before 1950. After a 15-day jury trial, the court granted the pump and valve defendants' motion for nonsuit on the ground that there was no evidence O'Neil was exposed to asbestos-containing products that were in fact manufactured or sold by the defendants. The Court of Appeal reversed.

Writing for the Court of Appeal, Judge Orville A. Armstrong, held that he was compelled to reverse the trial court due to *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzer Co.*, an opinion also authored by Judge Armstrong.¹³ In *Tellez-Cordova*, the plaintiff was allegedly injured by metallic dust generated from the defendants' grinders, sanders and saws that "were designed to be used in but one ultimate 'finished product' that is, in combination with the specified abrasive wheels and discs" that allegedly "disintegrated into toxic dust."¹⁴ Notably, the defendants' grinders, sanders and saws were purchased at the same time as the allegedly hazardous grinding wheels.¹⁵ In *O'Neil*, the Court was confronted with asbestos-containing replacement parts sold more than 10 years after defendants sold their pumps and valves.¹⁶

The thrust of defendants' argument, accepted by the lower court, and rejected by the Court of Appeal, was that while they sold the equipment used by Mr. O'Neil, they did not manufacture or sell any of the asbestos-containing component parts that arguably injured Mr. O'Neil during the 1965-1966 period.¹⁷ It was undisputed that any asbestos-containing product originally installed with defendants' equipment had been removed and replaced years before Mr. O'Neil began working on their equipment.¹⁸ The court, however, could "see no relevance" to this issue. It held that pump and valve manufacturers "knew those products [insulation, gaskets and packing] would over time be replaced with the same kind of product" and therefore should have provided warnings in 1950 so "subsequent users, too, would have been protected."¹⁹ In other words, the manufacturers were liable not for providing the hazardous substance that caused injury but for designing products "to be used *with* asbestos-containing insulation and packing which would become dangerous during the ordinary and foreseeable use" of their equipment.²⁰ The court decided that selling pumps and valves without warnings made them defective in and of themselves because they "needed the asbestos-containing products in order to function."²¹

The court also knocked down what it saw as the trial court's overreliance on the component parts doctrine, where a manufacturer is not liable for supplying a "building block" component of another company's product when that component plays no role in the creation of a hazard. While this doctrine played a supporting role in *Taylor*, it was the primary rationale for the trial court's decision

Merrill v. Leslie Controls, Inc.

Plaintiff Richard Merrill worked with Leslie Controls' valves during a twenty-year Navy career from 1959 to 1979. Merrill estimated that over that 20-year period, he removed asbestos-containing gaskets and packing from approximately one hundred Leslie Controls' valves; however, he could not provide evidence "that Leslie Controls supplied the old internal packing and gaskets which he removed or supplied the new packing he installed."²³ After the trial court denied Leslie Controls' motion for summary judgment, Division Three of the Court of Appeal reversed and held that Leslie Controls may not be held liable for post-sale asbestos-containing replacement parts that they did not manufacture, sell, distribute or in any way place into the stream of commerce.²⁴

The *Merrill* Court distinguished *Tellez-Cordova* because the tools sold by those defendants could only be used with the allegedly hazardous discs and wheels that were needed for them to function.²⁵ By contrast, the gaskets and packing components that plaintiff replaced in valves were more or less generic and used in any number of valves as well as completely different kinds of equipment.²⁶ The *Merrill* Court bolstered its opinion by applying the component parts doctrine defense, holding that Leslie Control's valves were component parts for which warnings were unnecessary because the manufacturers of the finished products were "better able to insure that the component is suitable for their specific applications."²⁷

In the unpublished portion of the opinion which addressed the negligent failure to warn cause of action, the court cited strong policy reasons against imposing tort liability for a failure to warn about hazardous substances that the defendant did not sell, distribute or manufacture.²⁸ While Leslie Controls had "limited, even negligible ability to prevent future harm" by providing warnings relative to those products, imposing liability would create unforeseen and potentially immeasurable risks which could financially overwhelm companies that do not sell the offending products.²⁹ The court rejected liability for negligent failure to warn in part because the risks for which there were no warnings were not fully appreciated until years and even decades after the equipment was sold.³⁰ This analysis ties directly to *Taylor* where the injury-producing asbestos was used in 1964, more than 20 years after the defendants sold their pumps and valves.³¹ While environmental scientists gained a greater understanding of asbestos hazards during the 1945-1965 period, the *Taylor* and *Merrill* Courts shared the concern that manufacturers who sold asbestos-containing equipment in the 1940s could be liable for failing to warn of dangers not appreciated until the 1960s, while at the same time the manufacturers of those replacement parts in the 1960s were required to provide warnings on those products all along. "California law, as we have seen, does not require a defendant to warn of dangerous properties inherent in products manufactured by others, who were in the best position to warn of danger posed by their products."³²

After the Los Angeles-based court issued seemingly contradictory opinions in *O'Neil* and *Merrill*, the parties filed motions for rehearing and the Second District reexamined both opinions. Each panel declined to change its results or core holdings, but in *Merrill* the court vacated its September 25 opinion and issued a new opinion on November 17, 2009 with no substantive changes.³³ Notably, the *Merrill* panel declined to mention the *O'Neil* opinion, and reaffirmed its reliance upon *Taylor* and the Washington Supreme Court decisions.

On December 23, 2009, the California Supreme Court granted the petition for review in *O'Neil*.³⁴ Whether or not the Court also reviews *Merrill*, it is now finally poised to decide the issue of equipment manufacturers' liability for after-market replacement parts.

Alex P. Catalona practices product liability litigation as part of a general litigation practice in San Francisco with the law firm of Schiff Hardin LLP. He can be reached at acatalona@schiffhardin.com.

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See, e.g., Pump, Valve and Equipment Manufacturers: Evolving Theories of Liabilities in Various Jurisdictions and Defense Perspective, Andrews Publications (April 26, 2007) (MCLE Course).

2

See, e.g., *Bostick v. Flex Equip. Co., Inc.*, [54 Cal.Rptr.3d 28](#), [44](#), [61](#) (Cal. Ct. App. 2007) (Croskey, H., concurring) (discussing how California still permits double recovery in products liability cases).

3

Braaten v. Saberhagen Holdings, [151 P.3d 1010](#) (Wash. App. 2007) ("*Braaten I*"); *Simonetta v. Viad Corp.*, [151 P.3d 1019](#) (Wash. App. 2007) ("*Simonetta I*").

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Braaten I, 151 P.3d at [1017](#).

5

Simonetta I, 151 P.3d at [1027](#) (citing *Stapleton v. Kawasaki Heavy Industries Ltd.*, [608 F.2d 571](#) (5th Cir. 1979)).

6

Braaten v. Saberhagen Holdings, [193 P.3d 493](#), [498](#) (Wash. 2008) ("*Braaten II*"); *Simonetta v. Viad Corp.*, [197 P.3d 127](#) (Wash. 2008) ("*Simonetta II*").

7

Simonetta II, 197 P.3d at [137](#).

8

Taylor v. Elliott Turbomach. Co., Inc., [90 Cal.Rptr.3d 414](#) (Cal. Ct. App. 2009).

9

Id. at [422–23](#) (emphasis in original) (citing *Bay Summit Community Assn. v. Shell Oil Co.*, [59 Cal.Rptr.2d 322](#) (Cal. Ct. App. 1996)); *Peterson v. Superior Court*, [899 P.2d 905](#) (Cal. 1995); *Vandermark v. Ford Motor Co.*, [391 P.2d 168](#) (Cal. 1964).

10

Artiglio v. General Electric Co., [71 Cal.Rptr.2d 817](#), [820](#) (Cal. Ct. App. 1998) (cited in *Taylor*).

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On June 10, 2009, the California Supreme Court declined to review the *Taylor* decision. See *Taylor*, 90 Cal.Rptr. 3d at [414](#).

12

O'Neil v. Crane Co., [99 Cal.Rptr.3d 533](#), [547](#), [n.10](#) (Cal. Ct. App. 2009).

13

O'Neil, 99 Cal.Rptr. 3d at [546–547](#) (citing *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Company*, [28 Cal.Rptr.3d 744](#), [749](#) (Cal. Ct. App. 2004) and *Taylor*, 99 Cal.Rptr. at [432–433](#)).

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Tellez-Cordova, 28 Cal.Rptr. 3d at [748–49](#), [750](#).

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Id.

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O'Neil, 99 Cal.Rptr. 3d at [536](#).

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Id. at [544](#).

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Id. at [544 n.8](#).

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Id. at [546](#).

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Id. at [543](#).

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Id. at [545](#).

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Id. at [539](#).

23

Merrill v. Leslie Controls, Inc., [101 Cal.Rptr.3d 614](#), [623](#) (Cal. Ct. App. 2009).

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Id. (citing and relying upon *Simonetta II* and *Braaten II*).

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Id. at [626](#).

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"[M]anipulation and removal of the asbestos-containing products at issue here would have presented a danger to [Merrill's] health whether they were used in combination with [Leslie Controls'] equipment, some other type of equipment, or even all by themselves." *Id.* at [627](#) (quoting *Taylor*, 90 Cal.Rptr. 3d at [432–33](#)).

27

Id. at [626–627](#) (citing *Springmeyer v. Ford Motor Co.*, [71 Cal.Rptr.2d 190](#), [196](#) (Cal. Ct. App. 1998)).

28

Merrill v. Leslie Controls, Inc. [No. BC352170](#) at [19](#), part V (November 17, 2009), (Unpublished Portion). The court also addressed the appeal by co-defendant Elliott Company,

but did not publish that portion of the opinion which is not addressed in this article.

29

Merrill, No. BC352170 at 19, part V.

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Id.

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Id. at 19 (citing *Taylor*).

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Id. at 19 part V (citing *Taylor*).

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Compare *Merrill*, [101 Cal.Rptr.3d 614](#) (November 17, 2009), with *Merrill v. Leslie Controls, Inc.*, [99 Cal.Rptr.3d 839](#) (Cal. Ct. App. 2009) (the appellate court's original September 25, 2009 opinion).

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California Supreme Court Minutes for Wednesday, December 23, 2009.

Legal Topics:

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