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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Asbestos Liability Unlikely For Replacement Parts

Law360, New York (March 16, 2009) -- For several years, plaintiff's lawyers have touted the manufacturers of mechanical equipment such as pumps and valves as the "next wave" of asbestos defendants, despite these companies having never manufactured the asbestos-containing components for which they were arguably liable.[1]

With asbestos litigation having nearly bankrupted the original targets of plaintiffs' lawsuits, the risks faced by equipment manufacturers have been considerable.

Plaintiffs' recent focus on these defendants has forced courts to grapple with issues that would stretch the theory of vicarious liability to its natural breaking point.

Plaintiffs argued that a manufacturer may be liable not only for the equipment it sold but also for products from different companies that it anticipates will be used with its equipment.

For example, pump manufacturers are commonly sued for asbestos gaskets installed in their products 20 years after they are sold that are manufactured by different companies.

Although the manufacturer may expect its original components will be replaced, it normally will not have manufactured the replacement parts that are sold and installed by third parties.

Initially, plaintiffs scored victories with their theory but the tide has shifted and a clear trend has emerged in the opposite direction. Appellate courts have returned to traditional principles and barred liability for products the equipment manufacturers neither sold nor included with their equipment.

Washington Courts First Accept Then Reject Expansive Theories Of Liability For Equipment Manufacturers

In 2007, a Washington appellate court decided *Braaten v. Saberhagen Holdings (Bratten I)* and *Simonetta v. Viad Corp. (Simonetta I)*, a pair of decisions that held equipment manufacturers liable for after-market replacement parts, along the lines promoted by plaintiffs' attorneys across the country.[2]

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 gaskets, packing and insulation originally supplied with defendants' equipment had been removed before plaintiffs served onboard their ship.

Plaintiffs argued that the equipment manufacturers reasonably should have expected that asbestos-containing replacement parts would be used with their equipment, and should have provided warnings to prevent end-users from being exposed to asbestos when the parts were removed and replaced.

The lower appellate court agreed, reasoning 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.[3]

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 hazards of gasoline leakage despite the fact that the company did not manufacture or supply the gasoline." [4]

However, plaintiffs' victories were short-lived. On Dec. 11, 2008, the Washington Supreme Court overturned both cases and rejected liability for after-market replacement parts. The court found it to be 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.[5]

Plaintiffs insisted that defendants still be held liable under negligence principles because they knew or at least should have foreseen 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 limits the defendant's duty to provide warnings where a duty is already established. Equipment manufacturers simply have no duty to provide warnings about products they neither manufactured, sold nor supplied.

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. Had there been no leak, there would have been no danger and no duty to warn.[6]

California Joins the Trend: Taylor v. Elliott Turbomachinery Co. Inc.

On Feb. 25, 2009, the California Court of Appeal decided Taylor v. Elliot Turbomachinery Co. Inc. and joined the Washington Supreme Court in rejecting plaintiff's expansive theories of tort liability for equipment manufacturers.[7]

The facts were remarkably 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 installed 20 years earlier.

It was undisputed that Mr. Taylor was exposed to asbestos on the Hornet. Plaintiffs' 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 should not be held liable for replacement parts sold and manufactured by other companies. The trial court granted defendants' motions and the Court of Appeal affirmed.

The court principally relied on California's "chain of distribution" line of cases that culminated with Cadlo v. Owens-Illinois Inc.[8]

These authorities recognized the strong public policy against holding one company liable for the products of another that "could potentially lead to commercial as well as legal nightmares in product distribution." [9]

In essence, 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." [10]

Companies that operate in the “gray area” of the distribution chain, such as designers, marketers and copyright holders, must at a minimum receive some “financial benefit” in order to be liable for products they neither manufactured nor sold.[11]

The Taylor court buttressed its opinion with a discussion of the “component parts doctrine” that previously had been applied to manufacturers of fungible and unquestionably non-hazardous components such as “chains, valves, sand [and] gravel.”[12]

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.[13]

Taylor in some sense extends this doctrine to include pumps and other finished products incorporated within a ship’s propulsion system, a larger product, even though the defendants acknowledged their products did contain asbestos-containing components when they were originally supplied.

The California panel, like the Washington Supreme Court, also found it to be significant that the defendants never manufactured the asbestos-containing component parts originally installed with their equipment.[14]

Although it is most certainly not the last word on the topic, Taylor may mark a turning point in the efforts by plaintiffs’ attorneys to fill the void left in the wake of bankruptcy filings by the traditional asbestos defendants.

--By Alex P. Catalona, Schiff Hardin LLP

Alex Catalona is an associate with Schiff Hardin in the firm's San Francisco office.

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[1] 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] Braaten v. Saberhagen Holdings 151 P.3d 1010 (Wash. App. 2007) (“Braaten I”), and Simonetta v. Viad Corp. 151 P.3d 1019 (Wash. App. 2007) (“Simonetta I”).

[3] Braaten I at 1017.

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

[5] 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”).

[6] *Simonetta II* at 137.

[7] *Taylor v. Elliott Turbomachinery Co. Inc.*, No. A116816, 2009 WL 458543, (Cal. App. 1 Dist. February 25, 2009) (“*Taylor*”). The appellate panel did not lack for practical experience. Authoring the unanimous opinion was Justice Robert Dondero, former presiding judge of the San Francisco Superior Court, sitting by designation of the Chief Justice. Concurring in the decision were Justice Henry Needham, former complex litigation judge for the Alameda Superior Court responsible for overseeing the Alameda asbestos litigation, and Judge Mark Simons, former presiding judge of the Contra Costa Superior Court.

[8] *Cadlo v. Owens-Illinois Inc.* 125 Cal.App.4th 513 [23 Cal.Rptr.3d 1] (2004) (“*Cadlo.*”)

[9] *Taylor* at *9.

[10] *Id.* at *7-8, *10-12, emphasis in original, and citing *Bay Summit Community Assn. v. Shell Oil Co.* 51 Cal.App.4th 762 [59 Cal.Rptr.2d 322] (1996), *Peterson v. Superior Court* 899 P.2d 905 (Cal. 1995), and *Vandermark v. Ford Motor Co.* 391 P.2d 168 (Cal. 1964). Note also that Division 5 of California’s 1st Appellate District, which issued *Taylor* also issued in *Cadlo*, and that Justice Simons concurred in both opinions.

[11] *Taylor* at *8.

[12] *Artiglio v. General Electric Co.* 61 Cal.App.4th 830, 837 [71 Cal.Rptr.2d 817] (1998), cited in *Taylor* at *19.

[13] *Ibid.*

[14] *Taylor* at *1; *Simonetta II* at 134.