

California's Highest Court Rejects Expansion of Duty to Warn of Dangers of Third Party Products

In *O'Neil v. Crane Co.*, (Cal. Sup., Jan. 12, 2012), the plaintiffs alleged that their father and husband, Patrick O'Neil, was exposed to asbestos while serving aboard the USS Oriskany from June 1965 to August 1966. Specifically, the plaintiffs alleged that O'Neil suffered exposure while replacing or removing asbestos-containing packing and insulation on the steam engines and pumps of Crane Co. and Warren Pumps. It was undisputed that the asbestos-containing packing and insulation was not manufactured by Crane or Warren but, rather, by third parties.

The California Supreme Court held that a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products.

The plaintiffs argued that Crane Co. and Warren should be held strictly liable and negligent because it was foreseeable that workers would be exposed to and harmed by the asbestos replacement parts and products used in conjunction with their pumps and valves.

However, the court ruled that foreseeability of harm alone is insufficient to impose strict liability for injuries arising from the use of another manufacturer's product. Manufacturers can be held liable for a defective component part supplied by another company, but there must be some way to trace the injury to the defendant's marketing or distribution of the product, the court concluded.

The court reasoned that "expansion of the duty of care as urged [by plaintiffs] would impose an obligation to compensate on those whose products caused the plaintiffs no harm. To do so would exceed the boundaries established over decades of product liability law."

EDITORS:

Joseph J. Welter
Arlow M. Linton

CaseWatch: Asbestos provides timely summaries of and access to asbestos litigation news, including verdicts and decisions from the nation's appellate courts, and is distributed monthly via e-mail. We appreciate your interest in our newsletter, and we welcome your feedback. We also encourage you to share the newsletter with your colleagues. If others in your organization are interested in receiving the publication, or if you do not wish to receive future issues, please contact Arlow M. Linton.

Attorney Advertising



In addressing the plaintiff's strict liability claims, the court held that it is fundamental that the imposition of liability requires a showing that the plaintiff's injuries were caused by an act of the defendant or an instrumentality under the defendant's control.

The court found that neither Crane Co. nor Warren Pumps manufactured, sold, or required the alleged asbestos-containing products and that there was not sufficient evidence that the defendants' products were "designed to be used" with asbestos-containing products. The asbestos-containing products met the Navy's specifications, but the Navy was free to choose non-asbestos-containing products, the court said.

New York Federal District Court Judge Grants Summary Judgment to Boiler Manufacturer on Duty to Warn Claim

In *Surre v. Foster Wheeler, LLC, et. al.*, (S.D.N.Y., Dec. 20, 2011), John J. Surre alleged that he developed mesothelioma as a result of his exposure to asbestos-containing materials while working as an apprentice for Quality Insulation from 1963 to 1964. Specifically, Surre alleged that he was exposed to asbestos while applying asbestos-containing block and cement insulation to Pacific-brand boilers manufactured by Crane Co.

Crane moved for summary judgment seeking dismissal of the plaintiff's failure to warn cause of action. Crane's motion was granted.

Under New York law, to succeed on a failure to warn claim in a products liability action, the plaintiff must demonstrate that (1) the defendant had a duty to warn, (2) defendant breached that duty, (3) the defect was the proximate cause of the plaintiff's injury, and (4) the plaintiff

suffered damages as a result of the breach. Further, a manufacturer, has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known.

The issue in *Surre* was the extent to which Crane, a manufacturer, had a duty to warn against the dangers of a third party's product (asbestos-containing insulation) that might be used in connection with its own.

A duty to warn of the dangers of a third party product is imposed on a manufacturer where the manufacturer has control over the product, places the product in the stream of commerce, or plays a part in selecting the product to be used in connection with its own. The latter occurs when a third party product is necessary for the use of the manufacturer's product or where a manufacturer knows its product will be outfitted with a defective third party product due to contract specifications.

The court noted that it was undisputed that Crane did not manufacture or place into the stream of commerce the asbestos to which Surre was exposed. Further, there was no evidence that Pacific boilers required asbestos insulation to function or that asbestos insulation was specified for the exterior of the Pacific boiler.

The plaintiff argued that Crane had a duty to warn because Crane had reason to foresee that asbestos insulation would be installed on Pacific boilers. To support this position, plaintiff relied on Crane publications, the most recent of which was published in 1952, that identified asbestos material as one of several materials that could be used to insulate the Crane products.

The court, rejecting this argument, held that a duty to warn against the dangers of a third party's product does not arise from foreseeability alone. Rather, the court noted, plaintiff was required to have provided evidence that Crane played a role in selecting the type of insulation applied by Surre.

Essentially, Surre argued that because Crane advocated the use of asbestos in 1952, they should have known more than 10 years later that purchasers of its boilers would still be insulating with asbestos. The court rejected this argument as "simply too great a leap."

The court acknowledged that several New York state court cases have reached contrary conclusions. However, the court held, the facts of the instant case make it different from *Gitto v. Chesterton* (No. 07-04771 [S.D. N.Y. Dec. 7, 2010]); *Curry v. Am. Standard* (No. 08-10228 [S.D. N.Y. Dec. 6, 2010]); *DeFazio v. Chesterton* (No. 127988/02 [N.Y. Sup. Ct. Aug. 12, 2011]); or *Sawyer v. A.C. & S. Inc.* (No. 111152/99 [N.Y. Sup. Ct. June 24, 2011]).

Verdicts

New York Jury Awards \$2 Million to Plaintiff

In *Failing v. Hedman Resources et al.*, No. 142698 (NY Sup. Ct., Dec. 6, 2011), Gerald Failing alleged that he contracted mesothelioma as a result of his having worked with asbestos-containing products manufactured by, among others, Hedman Resources, Inc. Hedman is a Canadian asbestos mining company that supplied some of the raw asbestos that Failing poured and mixed at a plastics manufacturing plant in North Tonawanda, New York.

The jurors agreed unanimously on the following: that Failing was exposed to asbestos from the use of Hedman products; that Hedman was negligent in manufacturing, selling, or distributing asbestos-containing products without warnings; that Hedman's negligence was a substantial factor in causing injury to Failing; and that Hedman's negligence was with reckless disregard for the safety of others.

The jury awarded \$650,000 in past pain and suffering, \$350,000 in past medical expenses, \$650,000 in future pain and suffering, and \$350,000 in future medical expenses for a total verdict of \$2 million. The jury apportioned 100 percent of the liability to Hedman.

Washington Jury Awards \$1.45 Million to Plaintiff Alleging 67 Days of Exposure

In *Hammett v. Residual Holdings*, (Wash. Cir. Ct., Kings Co., Jan. 4, 2012), Roger Hammett Jr. filed suit against numerous defendants whose conduct allegedly exposed him to asbestos resulting in mesothelioma. Hammett allegedly was exposed to asbestos while stripping pipe insulation from steam pipes during his 67 days serving as a messman aboard the USS Seattle in 1966.

At trial, the defendant Sea-Land Service Inc. argued that any exposure aboard the USS Seattle would have been de minimis and wouldn't have caused Hammett's mesothelioma. However, the Washington jury returned a \$1.45 million verdict and found Sea-Land 70 percent liable.

Verdict Challenges

Mississippi Circuit Court Vacates \$322 Million Asbestos Verdict

In *Brown v. Phillips 66 Company*, (Miss. Cir. Ct., Smith Co., Dec. 27, 2011), a Mississippi Circuit Court vacated a \$322 million jury verdict, thought to be the largest asbestos verdict in history, on the motion of defendant Union Carbide Corporation.

Thomas Brown filed suit against several defendants, including Union Carbide, alleging that he had been exposed to asbestos dust while mixing drilling mud manufactured by Union Carbide. In May 2011, a jury found for the plaintiff on his defective design and failure to warn causes of action in the amount of \$322 million, including \$300 million in punitive damages.

In October 2011, Judge Eddie H. Bowen was removed from the case for failing to disclose his parents' prior asbestos claims. After the trial, Union Carbide learned that Judge Bowen's father had filed two asbestos lawsuits, one remained pending and the other had been settled by Judge Bowen's father and mother. In removing Judge Bowen, the Mississippi Supreme Court held that given the facts, "a reasonable person, knowing all of the circumstances, would harbor doubts about Judge Bowen's impartiality."

Judge William Coleman, appointed after Judge Bowen had been removed, granted Union Carbide's motion to vacate the verdict on Dec. 27, 2011.

Courts Address Summary Judgment Motions

New York Court Holds That Presence of Pump on Ship Creates Question of Fact

In *Bickel v. Aurora Pump Company*, (N.Y. Sup. Ct., N.Y. Co., Dec. 12, 2011), Alvin and Marian Bickel filed suit against numerous companies whose conduct allegedly exposed him to asbestos while he served in the U.S. Navy between 1960 and 1964.

During his time in the Navy, Alvin Bickel allegedly served as a gunner's mate on the USS Lake Champlain and USS Constellation, where he chipped paint, moved equipment, and maintained bomb elevators. The Bickels claimed that although Alvin Bickel never worked with any mechanical equipment, he worked around asbestos-containing insulation on nearby valves, pumps, and boilers. Aurora moved for summary judgment on the ground that Mr. Bickel did not identify any product manufactured by it as a source of his exposure.

The court held that the plaintiff's failure to identify Aurora created a prima facie showing of Aurora's entitlement to summary judgment. However, the court held plaintiff met his burden by producing "plant load reports" that indicated that a large number of Aurora pumps were installed aboard the Constellation, including in-fuel aviation, fuel aviation seawater, and heavy end aviation fuel pumps. This evidence, when combined with testimony regarding Alvin Bickel's work near pumps being dismantled, raised sufficient questions of fact regarding his exposure to asbestos from an Aurora product, the court concluded.

Our asbestos litigation team consists of the following attorneys:

To learn more and view biographies, please click on the attorney's name and be directed to www.GoldbergSegalla.com.

PARTNERS

William J. Greagan	Michael D. Shalhoub
John J. Jablonski	Susan E. Van Gelder
Patrick B. Naylor	Joseph J. Welter
David S. Osterman	Mary Q. Wydysch

SPECIAL COUNSEL

Jonathan P. Ciottone	Andrew J. Scholz
Kenneth R. Lange	Melanie S. Wolk
Sandra J. Sabourin	

ASSOCIATES

Sarah X. Fang	Bryan D. Richmond
Arlow M. Linton	Paul C. Steck
Patrick B. Omilian	



READ ADDITIONAL PUBLICATIONS FROM GOLDBERG SEGALLA

To subscribe to *CaseWatch: Asbestos* and additional Goldberg Segalla publications, visit 'resources' at GoldbergSegalla.com or scan the QR code below.



OFFICES

PHILADELPHIA

1700 Market Street, Suite 1418, Philadelphia, Pennsylvania 19103-3907
Telephone: 267.519.6800 Fax: 267.519.6801

NEW YORK

1200 Avenue of the Americas, 3rd Floor, New York, New York 10036-1615
Telephone: 646.253.5400 Fax: 646.253.5500

PRINCETON

902 Carnegie Center / Suite 100, Princeton, New Jersey 08540-6530
Telephone: 609.986.1300 Fax: 609.986.1301

HARTFORD

100 Pearl Street, 7th Floor, Hartford, Connecticut 06103-4506
Telephone: 860.760.3300 Fax: 860.760.3301

BUFFALO

665 Main Street, Suite 400, Buffalo, New York 14203-1425
Telephone: 716.566.5400 Fax: 716.566.5401

ROCHESTER

2 State Street, Suite 805, Rochester, New York 14614-1342
Telephone: 585.295.5400 Fax: 585.295.8300

SYRACUSE

5786 Widewaters Parkway, Syracuse, New York 13214-1840
Telephone: 315.413.5400 Fax: 315.413.5401

ALBANY

8 Southwoods Boulevard, Suite 300, Albany, New York 12211-2364
Telephone: 518.463.5400 Fax: 518.463.5420

WHITE PLAINS

11 Martine Avenue, Suite 750, White Plains, New York 10606-1934
Telephone: 914.798.5400 Fax: 914.798.5401

LONG ISLAND

100 Garden City Plaza, Suite 225, Garden City, New York 11530-3203
Telephone: 516.281.9800 Fax: 516.281.9801

FOR EDUCATIONAL PURPOSES ONLY.

© COPYRIGHT 2012 Goldberg Segalla LLP. ALL RIGHTS RESERVED.