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SUPREME COURT'S DEVRIES DECISION DOESN'T SPELL THE END OF "BARE METAL" DEFENSE IN ASBESTOS CASES

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Last month, the United States Supreme Court rejected the "bare metal" defense to products liability claims in maritime cases. *Air & Liquid Systems v. DeVries*, No. 17-1104, 2019 WL 1245520 (U.S. Mar. 19, 2019). Some have predicted that the decision marks the beginning of the end for that defense even outside the maritime context. But the prediction is premature. The *DeVries* decision comes after the highest courts in some states have already embraced the "bare metal" defense and in doing so rejected the same arguments that the *DeVries* majority has now endorsed. Those state decisions will continue to control in those jurisdictions, at least in non-maritime cases. Further, those state courts are unlikely to reverse course and accept arguments that they so recently rejected.

In *DeVries*, the families of naval veterans who had died of cancer brought products liability claims against the manufacturers of pumps, blowers, and turbines used on naval ships, claiming that the manufacturers were negligent in failing to warn of the risks of asbestos-containing insulation the Navy used with their products. The district court granted summary judgment for the manufacturers, holding that under the "bare metal" defense, the manufacturers were not liable for failing to warn about asbestos-containing products

that they did not manufacture or supply. The U.S. Court of Appeals for the Third Circuit reversed, holding that the manufacturers had a duty to warn because it was "foreseeable" that the asbestos-containing products would be used with their products.

A majority of the Supreme Court affirmed the Third Circuit's decision, but rejected both the "bare metal" defense and the "foreseeability" test, adopting instead a middle approach. The Court held that "[i]n the maritime tort context, a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize that danger."

Justice Gorsuch, joined by two other justices, dissented, advocating for the "bare metal" defense. Justice Gorsuch concurred with the majority's rejection of a foreseeability standard, agreeing with the majority that "[r]equiring a product manufacturer to imagine and warn about all of those possible uses—with massive liability looming for failure to correctly predict how its product might be used with other products or parts—would impose a difficult and costly burden on manufacturers, while simultaneously overwarning users." But although he agreed that the Court's new three-part standard represented an improvement over the court of appeals' "foreseeability" test, he cautioned that the new test appeared to suffer from many of the same defects the Court itself had identified.

Justice Gorsuch cited *O'Neil v. Crane Co.*, 266 P.3d 987, 991 (Cal. 2012) as illustrating the traditional common-law rule that a manufacturer has no duty to warn about another manufacturer's products, even if those products might be used in connection with the manufacturer's own products. The *O'Neil* court also addressed products liability claims against the manufacturers of pumps and valves used on naval ships. As in *DeVries*, the *O'Neil* plaintiffs claimed that the manufacturers were negligent in failing to warn of the risks of asbestos-containing insulation, gaskets, and packing. But unlike the *DeVries* majority, the California Supreme Court unanimously held that public policy would not be served by requiring manufacturers to warn about the dangerous propensities of products they did not design, make, or sell. The court described as a "bedrock principle" of product

liability law that the plaintiff's injury must have been caused by a "defect" in the defendant's product.

Much like the California Supreme Court, the Washington Supreme Court has held there is "little to no support . . . for extending the duty to warn to another manufacturer's product." *Simonetta v. Viad Corp.*, 197 P.3d 127, 132-33 (Wash. 2008). The court concluded that product liability should be "limited to those in the chain of distribution of the hazardous product." *See also Braaten v. Saberhagen Holdings*, 198 P.3d 493, 504 (Wash. 2008). Likewise, Texas rejected market share liability as a means of holding non-manufacturers liable in asbestos cases, reasoning that a "fundamental principle of traditional products liability law is that the plaintiff must prove that the defendants supplied the product which caused the injury." *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 68 (Tex. 1989); *see also Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 340 (Tex. 2014).

In rejecting the "bare metal" defense, the *DeVries* majority relied on arguments that other state courts have found wanting. The contrasting policy rationales between the decisions in *DeVries* and *O'Neil* are striking:

- **Burden of Warning**. *DeVries*: although "issuing a warning costs time and money," the "burden usually is *not significant*." *O'Neil*: "recognizing a duty of care would clearly impose a *significant* burden on defendants and all other companies that could potentially be held liable for injuries caused by products they neither made nor sold."
- **Awareness of Risks**. *DeVries*: "the product manufacturer will often be in a better position than the parts manufacturer to warn" because the product manufacturer "is typically more *aware of the risks*." *O'Neil*: "it is doubtful that manufacturers could insure against the '*unknowable risks* and hazards' lurking in every product that could possibly be used with or in the manufacturer's product."
- **Substantial Confusion**. *DeVries*: rejected arguments that the duty would lead to "substantial confusion" or "uncertainty about when product manufacturers must provide warnings." *O'Neil*: expressed concern about the "excessive and unrealistic burden" of requiring manufacturers to become " 'experts in other manufacturers' products.' "

- **Excessive Warning**. *DeVries*: rejected an argument that the duty would lead to "excessive warning of consumers," stating "we are *not aware of substantial overwarning* problems in those jurisdictions that have adopted this approach." *O'Neil*: "such an expanded duty could also undermine consumer safety by inundating users with *excessive warnings*. 'To warn of all potential dangers would warn of nothing.' "

The reasoning of *DeVries* is unlikely to persuade courts, like the California Supreme Court, that in the recent past have rejected the same arguments. On the other hand, if state courts are now going to apply federal maritime law to state asbestos cases (as some commentators have predicted), that should include the 1:1 ratio between punitive and compensatory damages that is the upper limit in such cases. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008). Some defendants might see that as a fair tradeoff.