

## Products Liability Law Daily Wrap Up, DEFENSES TO LIABILITY—ASBESTOS—D. Ariz.: Deceased Navy machinist's family's suit against asbestos manufacturers may go to trial, (Feb. 13, 2015)

By John W. Scanlan, J.D.

Design defect and failure-to-warn claims brought by the family of a deceased civilian Navy worker against manufacturers of asbestos-containing products could proceed to trial, the U.S. District Court for the District of Arizona ruled in denying the manufacturers' motions for summary judgment. In addition, the court allowed the family to seek punitive damages from the manufacturers ([Coulbourn v. Air & Liquid Systems Corp.](#), February 11, 2015, Bolton, S.).

**Background.** George Coulbourn was a civilian U.S. Navy employee from 1959 until he retired in 1994. Until 1975, he worked in various positions at the Norfolk, Virginia Naval Shipyard both in the machine shop and aboard Navy ships. Part of his duties included repairing and overhauling machinery and equipment such as gaskets, pumps, valves, compressors, and turbines. In 2012, he was diagnosed with mesothelioma located primarily in the right lung. He and his wife brought in Arizona state court a tort action against various product manufacturers and suppliers to the U.S. Navy, which was removed to federal court. He died in 2013, and the complaint was amended to include wrongful death claims based in negligence and strict liability, alleging both design defect and failure-to-warn claims. The defendants moved for summary judgment and partial summary judgment on issues of liability and damages.

**Causation/bare metal defense.** The plaintiffs made a threshold showing that the worker was exposed to asbestos-containing products manufactured by Copes Vulcan and Edward Valve, Inc. (predecessor-in-interest to Flowserve US Inc.). The worker testified that he had inhaled asbestos dust while working with asbestos-containing valves and replacement parts supplied by the two companies as part of his normal workload, and that he knew that he was working with their products from the packing and manuals. His testimony was consistent with documents Copes Vulcan produced in discovery that showed it manufactured and sold asbestos-containing products to the Navy and with similar evidence supplied by the plaintiffs regarding Edward Valve products. Copes Vulcan and Flowserve had not shown why this evidence would be insufficient to show the worker's exposure to their products.

**Causation/substantial factor.** A reasonable jury could conclude that Copes Vulcan and Edward Valve products contributed to the development of the worker's mesothelioma. The worker testified that he was exposed to asbestos fibers from products made by both companies. Copes Vulcan and Flowserve (successor to Edward Valve) argued that at least 90 percent of the worker's exposure during the seven-year period he worked as an apprentice machinist and journeyman mechanic came from unknown products made by other companies; further, they presented experts who testified that his primary risk for mesothelioma came from exposure to amphibole asbestos fibers from other types of thermal insulation, not the airborne chrysotile asbestos in their gaskets and packing which generally were encapsulated and could not be released through his handling of the products. However, the plaintiffs' experts opined that a person can contract mesothelioma from chrysotile asbestos fibers even though some may not be released; diffuse malignant mesothelioma is dose-responsive and the cumulative effect of exposures to asbestos, they said. The plaintiffs' experts opined that inhalation of asbestos fibers from Copes Vulcan and Edward Valve products was a substantial contributing factor and a medical cause in the development of his disease. The court stated that it was the function of the jury to weigh this competing evidence, and not the responsibility of the court to decide the issue on a motion for summary judgment.

**Learned intermediary doctrine.** Defendant Goodyear Tire & Rubber Co. may not rely upon the learned intermediary doctrine as a defense because it is no longer a viable defense in the state of Arizona. Even if it had been available to Goodyear, the court said, there was no evidence showing that the company had provided any warning to the Navy about the dangers of asbestos exposure or that the Navy should have been aware of the dangers of asbestos exposure in all the products supplied to it by Goodyear.

**Government contractor defense/design defect.** Defendants Air & Liquid Systems, CBS Corp., and Warren

Pumps, LLC were not entitled to summary judgment based on the government contractor defense because the evidence did not conclusively show the “type of careful consideration necessary to determine that the government made a discretionary decision” when it approved the use of asbestos in the products at issue. Although the companies argued that the Navy’s design specifications (Milspecs) required the use of asbestos in ship turbines, generators, and pumps, a report and testimony by an expert for the plaintiff stated that most military specifications left up to the manufacturer whether to use asbestos-containing or non-asbestos-containing products, a fact that was implicitly acknowledged by Air & Liquid Systems when it said that Navy specifications “required that gaskets and packing on many pumps contain asbestos.” A schematic stamped “Approved” presented by Warren Pumps could not support summary judgment on the government contractor defense because it showed “rubber stamp” approval rather than “continuous exchange” and “back and forth dialogue” between the manufacturer and the Navy.

**Government contractor defense/failure to warn.** Similarly, a reasonable jury could reject the government contractor defense on the failure-to-warn claims because the evidence regarding the extent to which the defendant companies could have included product warnings despite the Navy’s involvement in approving system warnings was not undisputed. The court found that the Navy had set up a collaborative process between it and its contractors, and that it instructed contractors through the Milspecs to provide warnings in manuals and service instruction books, but this did not show that the Navy exercised discretion over the content of the warnings by selecting specific warnings to be included in the manuals.

**Punitive damages.** Finally, the court declined to find that the plaintiffs could not pursue punitive damages. All defendants except CBS argued that there was insufficient evidence to show that they acted with “evil mind,” but the plaintiffs produced evidence showing that asbestos-containing dust was known in manufacturing circles as far back as the 1930s to be a carcinogen capable of causing lung pathologies. Even if this was not the same type of asbestos as the asbestos in the products around which the worker had worked, a reasonable jury could find that the defendants had been deliberately indifferent to the substantial risk of substantial harm by failing to do more to limit asbestos use in their products or provide warnings about the risks.

The case is No. CV-13-08141-PCT-SRB.

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Companies: Air & Liquid Systems Corp.; CBS Corp.; Copes Vulcan Inc.; Crane Co.; Crane Environmental Inc.

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