

## [Products Liability Law Daily Wrap Up, DEFENSES TO LIABILITY— ASBESTOS—3d Cir.: ‘Bare metal’ manufacturers potentially on the hook after rejection of bright-line rule, \(Oct. 4, 2017\)](#)

Products Liability Law Daily Wrap Up

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By Leah S. Poniatowski, J.D.

Guided by the bedrock principles of maritime law of safety and protection of sailors, the U.S. Court of Appeals for the Third Circuit adopted a fact-specific standard over a bright-line rule in asbestos-injury negligence cases against manufacturers of "bare metal" products that did not contain asbestos when made, but were later used with or dependent upon asbestos-containing products or materials. Rulings by a federal district court in Pennsylvania that had applied a bright-line test—under which the bare metal product manufacturers could never be liable for asbestos-related injuries—were vacated by the appellate court, which remanded the negligence claims for review under the fact-specific standard whereby the question is asked whether the facts of the case made it foreseeable that hazardous asbestos materials would be used (*In re Asbestos Products Liability Litigation*, October 3, 2017, Vanaskie, T.).

The widows of two sailors in the U.S. Navy had filed lawsuits based on the alleged asbestos exposure-related deaths of their husbands against the many manufacturers of components and insulation used in Navy ship engines. Both filed strict liability and negligence claims against the manufacturers. One subset of manufacturers produced "bare metal" goods—those shipped without asbestos-containing materials—that would later have an asbestos-containing component added. In response to the widow's claims, the manufacturers asserted the bare-metal defense, asserting that they could not be held liable because their products did not contain asbestos. A federal district court in Pennsylvania agreed, and entered summary judgments in favor of the manufacturers. The widows appealed.

The Third Circuit instructed the district court to address the negligence claims and to consider how available the bare-metal defense would be under either a bright-line rule or a fact-specific standard in light of the existing circuit split. The trial court determined that the bright-line rule should apply because it was the view of the majority and was in line with maritime law's preference for uniformity. Additionally, the lower court explained that the grant of summary judgment to the manufacturers was for both the strict liability and the negligence claims. The widows filed the present appeal.

**Bright-line rule v. fact-specific standard.** Whether the bare-metal defense could be used by a manufacturer allegedly liable for an asbestos-related injury had not been addressed previously by the Third Circuit or the U.S. Supreme Court. Other jurisdictions had ruled on the issue, and there was a split between the bright-line rule (which holds that a bare-metal product manufacturer can never be liable for asbestos-related injuries when later-added asbestos materials caused those injuries) and the fact-specific standard (which allows for liability against bare-metal product manufacturers when an injury is a reasonably foreseeable result by the manufacturer's actions).

**Maritime law.** The Third Circuit considered the benefits and shortcomings of both approaches and put the analysis in the context of maritime law. The appellate court explained that the protection of sailors was fundamental to maritime law and the "special solicitude" conferred to sailors for undertaking the risks of being at sea has led the law to be "at times more lenient . . . than a state's common law may be to a similarly-situated plaintiff," and that it was better "to give than to withhold the remedy" when it was not so required. Accordingly, the fact-specific standard, which allows for some manufacturers to be held liable, was better aligned with the ambits of maritime law.

**Foreseeability.** The Third Circuit stated that foreseeability was the "touchstone" of the bare-metal defense and that under the standard-based approach, a manufacturer of a bare-metal product could be liable for injuries arising from asbestos exposure if the facts support the finding that an injury was foreseeable to the manufacturer. Case precedent has established that manufacturers could be liable if they knew asbestos was hazardous when: (1) they put the product into the stream of commerce, and (2) that its bare-metal product would be used with an asbestos-containing part because (a) the product had been equipped with an asbestos-containing part which would reasonably be replaced in the product's lifetime, (b) the manufacturer specifically directed use of the product with an asbestos-containing part, or (c) an asbestos-containing part was required for proper function of the product. The Third Circuit indicated that these were not the only facts to be considered, stating that use of the defense must be determined case-by-case. Consequently, the negligence issue was remanded to the lower court for further review under this standard.

The widows waived their right to challenge the strict liability claim dismissal because it was not properly addressed in the opening brief.

The case is Nos. [16-2602](#) and [16-2669](#).

Attorneys: Richard P. Myers (Paul, Reich & Myers, PC) for Roberta G. Devries and Shirley McAfee. John S. Howarth (Wilbraham Lawler & Buba) for Buffalo Pumps, Inc. Shay Dvoretzky (Jones Day) for CBS Corp. Lee J. Janiczek (Reilly Janiczek McDevitt Herich & Cholden, PC) for Foster Wheeler LLC. Timothy E. Kapshandy (Sidley Austin LLP) for General Electric Co. Joseph I. Fontak (Leader & Berkon, LLP) for IMO Industries, Inc. Laurie J. Hepler (Greines Martin Stein & Richland) for Warren Pumps. Carol A. VanderWoude (Marshall Dennehey Warner Coleman & Goggin) for Ingersoll Rand Co.

Companies: Buffalo Pumps, Inc.; CBS Corp.; Foster Wheeler LLC; General Electric Co; IMO Industries, Inc.; Warren Pumps; Ingersoll Rand Co.

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