ONE MORE TIME: ANOTHER TAKE ON THE NATIONAL SCENE OF THE "BARE-METAL DEFENSE" IN ASBESTOS LITIGATION

BY STEVEN F SATZ AND RICHARD J. MIRRA

The major manufacturers of asbestos have all gone bankrupt or ceased to exist due to the onslaught of asbestos related injury claims. Plaintiffs are now seeking to expand liability for failure to warn to defendants who did not produce asbestos, but whose products are used with or incorporate asbestos-containing parts such as gaskets, packing or insulation. The manufacturers of such products typically maintain that they are not liable for injuries caused by asbestos-containing parts that they did not manufacture or place into the stream of commerce. This is the so-called "bare-metal" defense. However, as one MDL court observed, "it is more properly understood ... as a challenge to a plaintiff's *prima fade* case to prove duty or causation." Conner y. Alfa Laval, Inc., 842 F. Supp. 2d 791, 793 (E.D. Pa. 2012) (Robreno, USDJ).

THE MAJORITY VIEW

The courts of several states and federal circuits have weighed in on the issue. The majority view is that a manufacturer has no duty to warn regarding asbestos-containing parts that it did not manufacture or place into the stream of commerce. See e.g, Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 496 (6th Cir. 2005); O'Neil v. Crane Co., 53 Cal. 4th 335, 342, 362, 135 Cal. Rptr. 3d 288, 266 P.3d 987 (2012); Simonetta v. Viad Corp., 165 Wash. 2d 341, 354, 363, 197 P.3d 127 (2008); Braaten v. Saberhagen Holdings, 165 Wash. 2d 373, 396, 198 P.3d 493 (2008). This view is rooted in the policy considerations expressed in comment c to the Restatement (Second) of Torts §402A (1965), which justifies imposing strict liability on those in the "chain of distribution" of a defective product.

THE HUGHES CASE

This article discusses a recent New Jersey decision, Hughes v. A.W. Chesterton Co., 435 N.J. 326 (App. Div. 2014), certif. denied 220 N.J. 41 (2015), in which the Appellate Division found that the chain of distribution rationale for determining the existence of a duty to warn was "unduly limited when applied to the facts of this case." Id. at 338. Hughes was one of four "replacement parts" cases argued together in the Superior Court of New Jersey, Appellate Division. The Court held that the defendant manufacturer had a duty to warn, but that it was not liable based upon proximate cause. See 435 N.J. Super. at 344-347. Hughes is consonant with the bare-metal defense albeit its analysis tied the result to causation rather than to "duty."

THE REPLACEMENT PARTS ISSUE

The replacement parts issue must be distinguished from "assembler's liability," in which a manufacturer incorporates a defective component part into its finished product. Plaintiffs in the Hughes cases conceded that there was no evidence that they were exposed to asbestos from the original asbestos-containing parts incorporated into the pumps they serviced years after the pumps were manufactured. Nor was there any evidence that the Defendant specified or required asbestos-containing components to be used when the pumps were serviced subsequent to their manufacture. Lastly, there was no proof that any of the asbestos-containing replacement components were placed into the stream of commerce by the Defendant manufacturer.

Plaintiffs alleged that the defendant manufacturer was strictly liable because it was foreseeable that asbestos-containing replacement gaskets and packing would be used in its pumps during their lifespan. Plaintiff also argued in two of the four cases that the defendant was liable in negligence because it either knew, or should have known, that workers would be called upon to replace and install asbestos-containing gaskets and packing while performing service or repair work.

THE DUTY TO WARN

The "New Jersey Product Liability Act" (N.J.S.A 2A58-1 to 11) does not apply to environmental torts. N.J.S.A 2A:58C-6. The Hughes Court's analysis is based on the common law, which provides for a cause of action sounding in strict liability, negligence, or both.

Plaintiffs' negligence claims were rejected on policy grounds in that the Supreme Court of New Jersey regards strict liability as better suited to resolving inadequate warnings cases. Id. at 346. See May v. Air & Liquid Systems Corp. 219 Md. App. 424, 435 at n.7, 100 A3d 1284 (Md. App. 2014), cert. granted 2015 Md. LEXIS 149 (2015)(noting that "negligence concepts and those of strict liability have 'morphed together'... in failure to warn cases"). Plaintiffs also had no proof that the defendant knew or should have known that the failure to warn had a propensity to injure them. 435 N.J. Super. at 346.

Hughes was decided within the framework of strict liability, which requires proof that the product was defective, that the defect existed when the product left the defendant's control and that it caused injury to a reasonably foreseeable user. The "defect" in a warnings case is the failure to warn unsuspecting users that the product can cause injury. 435 N.J. Super. at 336. The Court noted that not all asbestos-containing products pose an equal risk of harm, thus the mere absence of a warning does not make the product defective. See Becker v. Baron Bros., 138 N.J. 145, 159-61 (1994). The focus must be on the unique aspects of the particular product that allegedly caused the harm complained of.

The fundamental purpose of a warning is to reduce a product's risk as much as possible

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without interfering with its intended use. Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 201 (1982). The manufacturer or seller must take reasonable measures to communicate the warning to those who are likely to use or to come into contact with its product. The Hughes Court pointed out, however, that in some cases the duty to warn may extend even to products that the defendant did not manufacture or place into the stream of commerce. 435 N.J. Super. at 339, citing Molina v B F Goodrich Co., 261 N.J. Super. 85, 93 (App. Div. 1992), certif. denied, 134 N.J. 482 (1993); Seeley v. Cincinnati Shaper Co., Ltd., 256 N.J. Super. 1, 18 (App. Div.), certif. denied, 130 N.J. 598 (1992). In Molino, a tire manufacturer was deemed to have a duty to warn of dangers posed by a wheel rim that it did not make because its tire could not function without the rim it was mounted on to form an assembled unit. See 435 N.J. Super. at 340. In Seeley, the replacement of major components in a pre-owned industrial machine did not absolve the manufacturer of a duty to warn because the danger was "'inherent in the machine as originally manufactured'" and the specific replacements "'could reasonably have been contemplated."' Id. at 341.

The Hughes Court determined that the defendant had a duty to warn regarding the danger of exposure to the asbestos-containing gaskets and packing which was inherent in its product as originally manufactured and that the cost of placing a warning on the product at the time of manufacture would not significantly impair its utility. Id. at 341-34. The fact that the original asbestos-containing parts were replaced regularly during routine maintenance did not absolve the defendant of the duty to warn because it was reasonably foreseeable that those parts would be replaced with other asbestos-containing parts. Id. at 340-341.

CAUSATION: THE ULTIMATE ISSUE

The Court then shifted its focus to the issue of causation. Plaintiffs in asbestos cases must prove product-defect causation and medical causation. Product-defect causation in a failure to warn case requires proof that the product defect, that is, the absence of a warning, existed when the product left the manufacturer's control and that it resulted in injury to a reasonably foreseeable user. See e.g., James v Bessemer Processing Co., 155 N.J. 279, 296 (1998). Medical-causation requires proof of exposure to friable asbestos from a particular product sufficient to satisfy the "frequency, regularity and proximity" test developed in Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162-1163 (4th Cir. 1986) and adopted in New Jersey in Sholtis v. American Cyanamid Co., 238 N.J. Super. 8, 28-29 (App. Div. 1989). And see Kurak v. A.P. Green Refractories Co., 298 N.J. Super. 304, 322 (App. Div. 1997). To put it another way - proof of causation includes product identification and proof of exposure of sufficient intensity and duration to demonstrate a causal connection between the exposure and the plaintiff's illness. See Hughes, supra at 338, 344-345.

Plaintiffs' inability to identify the source of the particular asbestos-containing replacement parts that allegedly caused their injuries was fatal to their claims. Id. at 346. The Court explained that:

> While it is true that the alleged defect in the pump was a failure to warn, it is also true that plaintiffs allege they were injured by asbestos contained in parts that were replaced long after the pumps left [Defendant's] control. We do not agree that plaintiffs may prove causation by showing exposure to a product without also showing exposure to an injury-producing element in the product that was manufactured or sold by defendant. ... The imposition of liability based upon such proofs would rest upon no more than mere guesswork ... and [it] would fail to limit liability 'only to those defendants to whose products the plaintiff can demonstrate he or she was intensely exposed.' James, supra, 155 N.J. at 302-03, 714 A.2d 898.
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> (435 N.J. Super. at 345-346)

THE BARE METAL DEFENSE

The Hughes Court declined to follow the majority view regarding the duty to warn, but the result it reached is consistent with the bare-metal defense. The Courts refusal to limit the duty to warn to those in "chain of distribution" of a defective product simply shifted the dispositive analysis from "duty" to "proximate cause." The bare-metal defense, by its nature, implicates both duty and proximate cause.

Yet Hughes has been cited unevenly in subsequent cases. Some courts seem to regard it as a "majority rule" decision while at least one court disapproved of it as contrary to the majority view. See Robinson v. Ar & Liquid Svs. Corp., 2014 U.S. Dist. LEXIS 99778 at 6 (D.N.J. 2014) and compare May v. Air & Liquid Systems Corp., supra at 439 n.11. Judge Robreno recently expressed uncertainty as to which side it falls on. See Schwartz v. Abex Corp., 2015 U.S. Dist. LEXIS 68074 at 59 n.62 (E.D. Pa. 2015). This is ironic in that the same court observed, in an earlier case, that the bare metal defense is properly understood as "a challenge to a plaintiffs prima facie case to prove duty or causation." Conner v. Alfa Laval, Inc., 842 F.2d at 793. Hughes reminds us that plaintiffs in asbestos cases can and should be challenged on both elements.

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