

Asbestos: Product Liability Update

Breaking Developments In London Market Law

1/21/09

Washington Supreme Court Adheres to Traditional Limitations to Products Liability Claims: Rules That Equipment Manufacturers Have No Duty to Warn of Dangers Posed by Products They Did Not Manufacture or Sell

On December 11, 2008, the Washington Supreme Court issued opinions in two asbestos cases that presented the issue whether manufacturers of naval equipment, such as pumps, valves and evaporators, owed a duty under common law products liability or negligence to warn of the dangers posed by asbestos-containing insulation, gaskets and packing, materials they neither manufactured nor sold but that were used in conjunction with their naval equipment. The Court's decisions were issued in *Braaten v. Saberhagen Holdings, Inc. et al.* and *Simonetta v. Viad Corporation, et al.*¹ In both cases the Supreme Court held that the equipment manufacturers did not owe a duty to warn of the dangers of asbestos-containing products that they did not manufacture, sell or otherwise place into the stream of commerce.

¹ *The Simonetta opinion may be found at 197 P.3d 127 (Dec. 11, 2008.) The Braaten opinion may be found at ___ P.3d ___; WL 5175083 (Dec. 11, 2008.)*

FACTS

At issue in the *Simonetta* case, was an evaporator that was installed to a Navy vessel, the USS Saufley, in the early 1940s. After it was installed, and pursuant to Navy requirements, the evaporator was insulated with asbestos-containing insulation that was manufactured, sold and installed by other companies. Although the evaporator was manufactured and sold free of insulation, its manufacturer/seller knew that it would likely be insulated and that the insulation would likely contain asbestos. Joseph Simonetta served aboard the USS Saufley as a machinist in the late 1950s, and he performed maintenance work to the evaporator. In the course of that work he removed exterior insulation to gain access to the evaporator, and he reinstalled the insulation when his work was finished. More than 40 years later, Mr. Simonetta was diagnosed to have lung cancer.

The defendants in the *Braaten* case were valve and pump manufacturers whose equipment was also installed to Navy vessels. After they were installed many, but not all, of the valves and pumps were insulated pursuant to Navy requirements, and the insulation often contained asbestos. The pumps and valves were incorporated within the ship's piping systems by means of flange connections, which commonly used asbestos-containing gaskets. Also, the valves and pumps were shipped with internal packing and gaskets, and sometimes the packing and gaskets contained asbestos. During periodic maintenance of the valves and pumps, the internal packing and gaskets were routinely replaced with new packing and gaskets that were made and sold by others. Vernon Braaten worked as a pipefitter for 35

years at the Puget Sound Naval Shipyard. He installed, removed and performed certain maintenance to valves and pumps aboard Navy vessels that were being built or repaired at the shipyard, and he testified that he worked with the defendants' equipment. He claimed he was exposed to asbestos from the exterior insulation applied to the equipment, from flange gaskets, and from gaskets and packing internal to the equipment. The defendants did not manufacture or sell the exterior insulation or the flange gaskets, and there was no proof that the packing or the internal gaskets to which Mr. Braaten claimed exposure were materials that had originally been delivered with the pump or valve as opposed to replacement packing and gaskets that had been manufactured and sold by others. Mr. Braaten was diagnosed to have mesothelioma, and he ultimately died from that disease.

THE PROCEEDINGS BELOW

In both cases, the trial court dismissed the equipment manufacturers on summary judgment. The trial court found that since they had not manufactured, nor sold, nor installed the asbestos-containing materials to which the plaintiffs were exposed, the equipment manufacturers owed no duty to warn of the dangers of such products. The Court of Appeals disagreed and reversed the trial court's ruling in both cases. Observing that the issue presented in both cases was one of first impression in Washington, the Court of Appeals held that the defendant equipment manufacturers owed a duty under common law principles of both negligence and products liability to warn of the asbestos dangers, notwithstanding that none of the defendants had manufactured or sold the asbestos-containing materials.²

Under the analysis employed by the Court of Appeals, the determining factor was not whether the defendants had manufactured or sold or otherwise placed the asbestos-containing product into the stream of commerce. Rather, its analysis focused on whether the plaintiffs encountered asbestos dangers while *using* the defendants' equipment and whether it was reasonable to impose a duty on the equipment manufacturers to warn of such dangers. As to the plaintiffs' negligence claims, the Court of Appeals found that the equipment manufacturers knew that asbestos-containing insulation or other asbestos-containing materials would be applied to or incorporated within their equipment and that persons like Mr. Simonetta and Mr. Braaten would be exposed to such materials when they serviced or maintained the equipment. According to the Court of Appeals, such "use" of the defendants' equipment resulted in the plaintiffs' asbestos exposure and, accordingly, the duty to warn of the dangers of such exposure was appropriately placed with the equipment manufacturers. Relative to plaintiffs' products liability theory, the Court of Appeals found that absent a warning concerning the risk of asbestos exposure that might be sustained during ordinary maintenance of the equipment, a jury could find that the equipment was unreasonably dangerous. The Court of Appeals acknowledged that the duty to warn had not traditionally applied to parties who had not manufactured or sold the dangerous product. However, it determined that the facts presented in these cases required a "logical extension of the common law."³

² *Although Washington's Product Liability Act (RCW 7.72.010, et seq.) presently applies to products liability claims; asbestos claims wherein the plaintiff typically was substantially exposed to asbestos prior to the passage of the Product Liability Act are governed by common law principles of negligence and products liability. Thus, the Court of Appeals and later the Supreme Court looked to 388 and 402A, respectively, in analyzing the duties owed by the defendants under plaintiffs' theories of negligence and products liability.*

³ *Both opinions of the Court of Appeals were reported. See Simonetta v. Viad Corp., 137 Wn. App. 32, 151 P.3d 1019 (2007) and Braaten v. Saberhagen Holdings, Inc., 137 Wn. App. 15, 151 P.3d 1010 (2007).*

THE SUPREME COURT'S HOLDINGS

In reversing the Court of Appeals decisions in these cases, the Washington Supreme Court concluded that the extension that the Court of Appeals had crafted to the common law duty to warn was not sufficiently supported by precedent or policy. In its *Simonetta* opinion, the Supreme Court analyzed the cases cited by Mr. Simonetta and referenced in the Court of Appeals' opinions. The Court observed that the claims that were at issue in those cases were claims that had been asserted against manufacturers and sellers of the dangerous product rather than parties that were outside the chain to the products' distribution. It could find no precedent under principles of negligence or strict products liability for imposing a duty to warn upon a party that was not somewhere in the chain of distribution of the product at issue. The Court then addressed whether policy considerations justified an extension of the common law duty.

The plaintiffs had argued that imposing a duty under negligence principles was appropriate because the equipment manufacturer could foresee that asbestos-containing materials would be applied to or incorporated within their equipment. However, the Supreme Court observed that while foreseeability may help define the limits of a duty, it did not serve to create a duty, and it did not do so in this case. The Court also considered the policy considerations for imposing strict products liability upon manufacturers and others within a product's chain of distribution. While such a burden may appropriately be placed upon those who market a product and who can insure against potential liabilities for its distribution, it was not appropriately placed on a party outside of the product's chain of distribution. The Court could find no policy justification for extending strict liability to such parties.

Whereas the *Simonetta* opinion provides the Supreme Court's analysis and reasoning for adhering to the traditional limits of products liability, its decision in *Braaten* shows that there will be few if any exceptions to the rule. In *Braaten*, the Court declined to find a duty to warn even as to gasket and packing material that may have replaced similar material that had originally been delivered with the defendants' equipment. The defendants had manufactured valves and pumps; they did not make or sell the packing or gasket material that had replaced the gaskets and packing that had originally been installed within the equipment. As to such replacement packing and gaskets, the defendants were outside the chain of distribution; and therefore they could not be held responsible for warning of the asbestos content of such material.

Lane Powell represented one of the valve and pump manufacturers in *Braaten*. The *Lane Powell* team included [Barry Mesher](#), [Brian Zeringer](#), [Gabe Baker](#), [Rob Fulton II](#), [Jeff Odom](#), [Joseph Corr](#) and [Abe Lorber](#).

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