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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Expanding The Duty To Warn In Wash. Liability Cases

Law360, New York (October 21, 2008) -- “The makers of Smucker’s jam knew, or should have known that their products would be combined with peanut butter. This knowledge imposed on Smucker’s a duty to warn consumers of the hazards of peanut allergy associated with its product’s use.”

No such holding has yet been rendered by a Washington court. However, two cases on appeal to the Washington Supreme Court threaten to expand the duty to warn owed by product manufacturers and sellers in an alarming new way.

In *Simonetta v. Viad Corp. et al.*[1] and its companion case, *Braaten v. Saberhagen Holdings Inc., et al.*[2], the Washington Supreme Court will soon determine whether the Court of Appeals correctly found that a manufacturer may owe a duty to warn of dangers posed by products made, sold and installed by others but used in conjunction with the manufacturer’s product.[3]

The *Simonetta* and *Braaten* cases arise out of the respective plaintiffs’ alleged exposure to asbestos.

Joseph Simonetta worked as a machinist in the Navy in the late 1950s. His duties included servicing and repairing an evaporator that had been insulated over its exterior with asbestos-containing insulation.

Vernon Braaten worked as a pipe-fitter at the Puget Sound Naval Shipyard (“PSNS”) from 1967 until 2002. As part of his work, Mr. Braaten installed and removed pumps and valves from piping systems aboard Navy vessels that were being constructed or repaired at PSNS.

Mr. Braaten claimed exposure to asbestos-containing insulation placed around the valves and pumps with which he worked, as well as to asbestos-containing gaskets and packing internal to the equipment or otherwise used to install the equipment.

The defendants in these cases were manufacturers of the evaporator (*Simonetta*) and the pumps and valves (*Braaten*) that were placed aboard Navy vessels and with which the plaintiffs allegedly worked.

The defendants' equipment was sold and delivered to the Navy without insulation. It was only after the equipment was installed aboard ship that it was insulated. Whether it was insulated at all and what type of insulation it received was a function of the system to which it was installed.

None of the defendants in either case manufactured, sold or installed the insulation that was subsequently applied to their equipment, nor did they require or specify the use of such insulation.[4]

In both cases the trial court dismissed plaintiffs' negligence and strict liability claims on summary judgment, finding that the defendants' equipment did not cause any injury; rather the injuries were caused by asbestos-containing products manufactured and supplied by others and subsequently affixed to the defendants' equipment.

The trial court determined that equipment manufacturers owed no duty with respect to asbestos-containing products they did not make, sell or install. The Court of Appeals issued separate opinions and reversed the trial court's ruling in each case.

Observing that the issue presented was one of first impression in Washington, the Court found that under both products liability and negligence theories the equipment manufacturers owed a duty to warn of the dangers posed by another manufacturer's product that was used in conjunction with the defendants' own product.

In addressing plaintiffs' negligence claim, the Court of Appeals undertook to identify the duty owed by the defendants that was allegedly breached.[5]

The Court determined that a manufacturer has a duty to warn of hazards involved in the use of its product of which it knows or reasonably should know.[6]

The Court reasoned that the equipment manufacturers knew that the Navy would insulate their equipment with asbestos-containing insulation that would pose a danger to those who serviced the equipment. The Court concluded that this knowledge gave rise to a duty to warn.[7]

The Court's analysis of plaintiffs' strict liability claims focused on § 402A of the Restatement (Second) of Torts.[8] The Restatement imposes strict liability where:

(1) One ... sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property ... if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[9]

Although defendants' products were not defective, the Court reasoned that liability extends where "a product, though faultlessly manufactured, is unreasonably dangerous when placed in the hands of the ultimate user ... without ... adequate warnings concerning the manner in which to safely use it." [10]

According to this standard, a manufacturer could be strictly liable for failing to warn of the dangers of a third party product that is necessary to its product's use.

In both of its opinions the Court of Appeals wrote that its decision was supported by precedent and public policy. Both opinions cite to *Teagle v. Fischer & Porter*, a case that involved a flowrater device that carried chemicals.

The ends of the flowrater were sealed with rings that were made by a different manufacturer. The rings failed and the flowrater exploded, injuring the plaintiff. The flowrater manufacturer was held strictly liable for a product that was unsafe because it lacked a warning that certain brands of O-rings were incompatible with ammonia.[11]

Both opinions also cited to *Stapleton v. Kawasaki*[12], in which a motorcycle leaked gasoline when it was turned upside down while its fuel switch was in the "on" position. The gasoline ignited injuring the plaintiff. The defendant motorcycle manufacturer was held liable for failing to warn of the danger posed by the gasoline.

Both of the foregoing cases can be distinguished. Unlike the flowrater device in *Teagle*, there was no failure of any of the defendants' equipment.

Nor was there anything about the design or the operation of a valve, pump or evaporator that caused them to release a dangerous substance, as did the open switch of the *Kawasaki* motorcycle in the *Stapleton* case.

Indeed there was nothing about the equipment at issue in these cases that contributed to the danger of the asbestos-containing materials that were subsequently applied to it.[13]

In making the case that public policy favors an extension of the duty to warn, the Court explained that "In modern asbestos litigation, the manufacturers of the hazardous substance are, for the most part, no longer amenable to judgment. And there is no doubt that asbestos manufacturers are culpable for the injuries to *Braaten*." [14]

The *Braaten* court went on to note that "[The] manufacturers did profit from the Navy's purchase of their products ... [W]hen a product's design utilizes a hazardous substance ... the seller of the product containing the substance has an independent duty to warn." [15]

In seeking review of the Simonetta and Braaten decisions, the equipment manufacturers argued that the Court of Appeals placed undue reliance on the concept of foreseeability while failing to fully consider the public policy considerations underlying strict products liability.[16]

Strict liability is imposed on manufacturers of defective and dangerous products because those manufacturers are the ones who design and test their product; they are in the best position to know its risks.

Additionally, the manufacturer of a product can price that risk into the product's cost, spreading that cost across a broad base of consumers and diluting the financial impact that any one injury will have.

A manufacturer does not, however, have superior understanding of the dangers of products not its own. Furthermore, the manufacturer cannot as effectively price the risk of others' products into the cost of its own.

Accordingly, the proper target of strict liability is the manufacturer of the hazardous substance, not the manufacturer whose product might utilize it.

Moreover, the proliferation of warnings that would necessarily accompany each product would not only be unduly burdensome to the manufacturer, but also confusing, rendering the warnings virtually meaningless, if not unintelligible.

The decisions of the Court of Appeals in Simonetta and Braaten not only fail to further the underlying purpose of products liability, they will undoubtedly lead to a proliferation of litigation and potentially to absurd results.

For instance, under the scope of the duty as recognized by the Court of Appeals, Bic (a maker of lighters) would have to warn not only that its lighters should be kept away from children, but also of the dangers of cigarettes.

The maker of the frame for a child's sandbox would have to warn that sand might contain silica and the manufacturer of raw steel would have to warn that welding fumes might harm someone engaged in the steel's fabrication.

Troublingly, an affirmation of Simonetta and Braaten would threaten all of these manufacturers with increased litigation and liability.

The Washington Supreme Court granted review of the Simonetta and Braaten decisions in January, 2008, and it heard oral argument in both cases on March 11, 2008.

The Supreme Court's ruling is expected at any time. Its ruling will not only affect defendant manufacturers in the asbestos litigation, but all manufacturers whose products are sold and used in this state.

A reversal of the Court of Appeals decisions seems not only appropriate but necessary to save Washington businesses from expansively increased and fundamentally uncertain liability.

--By Barry N. Mesher (pictured), Brian D. Zeringer and Abraham K. Lorber, Lane Powell PC

Barry Mesher and Brian Zeringer are both partners with Lane Powell in the firm's Seattle office. Abraham Lorber is an associate with the firm in the Seattle office.

[1] *Simonetta v. Viad Corp.*, 137 Wn.App 15, 151 P.3d 1019; *Simonetta v. Viad Corp.*, 162 Wn.2d 1011, 175 P.3d 1094 (2008) (petition for review granted).

[2] *Braaten v. Saberhagen Holdings*, 137 Wn.App. 32, 151 P.3d 1010; *Braaten v. Saberhagen Holdings*, 162 Wn.2d 1011, 175 P.3d 1093 (2008) (petition for review granted).

[3] As the asbestos exposure at issue in both cases occurred before the passage of the Washington Product Liability Act (“WPLA”), the cases are governed by pre-WPLA law. *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn.App. 22, 33-34, 935 P.2d 684 (1997).

[4] Although Mr. Braaten also claimed exposure to gaskets and packing materials that were internal to the pumps and valves, there was no evidence that he was ever exposed to any material that was originally delivered with the pumps and valves furnished by the defendants.

[5] A product liability claim for negligence requires that the defendant breach a duty owed to the plaintiff. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992).

[6] *Braaten* at 47-48 (citing *Novak v. Piggly Wiggly Puget Sound Co.*, 22 Wn.App. 407, 412, 591 P.2d 791 (1979)).

[7] *Braaten* at 48; *Simonetta* at 25.

[8] Since both plaintiffs’ asbestos exposure substantially occurred before passage of the Washington Product Liability Act (“WPLA”), the cases are governed by pre-WPLA law. *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn.App. 22, 33-34, 935 P.2d 684 (1997).

[9] Restatement 2d of Torts, § 402A (1965).

[10] *Simonetta* at 26 (citing *Novak* at 412) (internal quotations omitted).

[11] *Teagle v. Fischer & Porter Co.*, 89 Wn.2d 149, 570 P.2d 438 (1977).

[12] *Stapleton v. Kawasaki Heavy Indus.*, 608 F.2d 571 (5th Cir. 1979).

[13] The *Simonetta* opinion also cites to *Wright v. Stang*, 54 Cal. App. 4th 1218 (1997), a California case in which a firefighter was injured when a deck gun broke loose from the fire truck's mounting. The deck gun was manufactured by one company while the mounting

assembly was manufactured by another. The deck gun did not fail, but its pressure was too much for the assembly on which it was mounted. The Court found persuasive the fact that the California court had allowed plaintiff to sue the deck gun's manufacturer in products liability for failing to warn of the dangers of an inadequate mounting system. However, unlike the deck gun assembly, the defendants' equipment did nothing to trigger the release of asbestos fibers.

[14] Braaten at 46 (internal citations omitted).

[15] Id.

[16] The Supreme Court has observed: "The existence of duty is a question of law," *Hutchins v. 1001 Fourth Ave. Associates*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991), and "depends on mixed considerations of logic, common sense, justice, policy, and precedent." *Snyder v. Medical Service Corp. of Eastern Washington*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001) (internal quotation omitted). Rather than a determining factor for establishing the existence of a duty, foreseeability is a concept better used to determine the scope or reach of an established duty. Once a duty is established, a jury may be asked to determine the reach of that duty or whether the defendant performed (or otherwise breached) its duty, e.g., *Shepard v. Mielke*, 75 Wn. App. 201, 205, 877 P.2d 220 (1994).

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