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Expert Analysis

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NJ Supreme Court to decide whether third-party manufacturers have duty to warn of asbestos exposure

Robert H. Wright of Horvitz & Levy discusses the New Jersey Supreme Court decision to hear a case that may decide if a manufacturer is liable for exposure to asbestos-containing replacement parts that it never made nor sold.

In *Whelan v. Armstrong International*, the New Jersey Supreme Court has agreed to hear an appeal that will decide a manufacturer's liability for asbestos-containing replacement parts that it did *not* manufacture or sell. The Supreme Court granted certification after the Superior Court, Appellate Division, held that a manufacturer has a duty to warn of risks not just from the products *it* manufactures or sells, but also from asbestos-containing replacement parts necessary for its products to function. *Whelan v. Armstrong International*, 190 A.3d 1090 (2018).

A former plumber and auto mechanic claimed he developed mesothelioma from repairing and replacing asbestos-containing components in the defendant-manufacturers' boilers, valves, steam traps, and brake drums. Replacement components included gaskets (used to seal steam traps), jacket insulation (used to insulate boiler pipes), cement (used for bonding), and car brake linings and mufflers.

Plaintiff also claimed he was exposed to loose asbestos-containing dust when he cleaned defendants' products. The trial court granted summary judgment for the manufacturers, finding they had no duty to warn of asbestos in products they did not make or sell.

The Appellate Division reversed, relying on an expansive definition of an asbestos-containing "product." According to that court, a manufacturer's "product" is not just what it makes, designs, or sells, but also extends to any replacement parts that are integral to the product's

function, so long as those parts will need routine replacement. Under the Appellate Division's reasoning, a manufacturer may have a stringent and expanded duty to warn not just of dangers associated with its own product but also of another manufacturer's product.

By contrast, other appellate courts have approached the issue by asking whether the *policies* supporting strict liability would be furthered by imposing liability on manufacturers for replacement parts manufactured by others. In 2012, the California Supreme Court addressed whether a manufacturer has a duty to warn of dangers arising from another manufacturer's product in *O'Neil v. Crane Co.*, 266 P.3d 987 (2012).

The facts of *O'Neil* are similar to those of *Whelan*. The *O'Neil* plaintiff sued pump and valve manufacturers, alleging they exposed him to asbestos-containing dust when he removed insulation and gaskets in order to access and repair the manufacturers' pumps and valves on a Navy ship.

Unlike the *Whelan* court, the *O'Neil* court focused not on what constitutes a "product" but on the public-policy rationale behind imposing strict liability on manufacturers for defective products. As the court observed, strict liability was never intended "to impose *absolute* liability." *O'Neil*, 266 P.3d at 1005.

The court recognized the impracticality of imposing a duty to warn that would extend to another manufacturer's defective product, as "a manufacturer cannot be expected to exert pressure on other manufacturers to make their products safe." *Id.* at 1005-06. The *O'Neil* court held that a manufacturer cannot be found strictly liable for another's product unless its own product "contributed substantially" to the overall harm or the manufacturer "participated substantially in creating a harmful combined use of the products." *Id.* at 991.

The *Whelan* court discussed the conflicting decisions on this issue and stated that there is "no clear majority rule" on a manufacturer's duty to warn of asbestos exposure from replacement parts, citing decisions from Maryland, Missouri, New York, Oregon, and Washington where liability was extended when both the original "product" and replacement parts contained asbestos. *Whelan*, 190 A.3d at 600-01.

But charting a different course, in a case factually similar to both *Whelan* and *O'Neil*, the Washington Supreme Court adopted a variant of the *O'Neil* rule in *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 495-96 (2008), finding pump and valve manufacturers had no duty to warn of asbestos-containing replacement gaskets and packing materials.

The *Whelan* Appellate Division limited *O'Neil* and *Braaten* to their facts. The Appellate Division described *O'Neil* as limited to a factual scenario involving two decades passing

between the shipment of the manufacturers' products and plaintiff's exposure and "the lack of evidence" that the replacement parts were integral to the product. *Whelan*, 190 A.3d at 1109. The Appellate Division also described *Braaten* as limited to replacement parts not found to be "integral" to the manufacturer's product. *See id.* at 1109-10.

However, the Appellate Division overlooked the policy discussions that informed those decisions. In a footnote, the *O'Neil* court recognized a "stronger argument for liability might be made in the case of a product that *required* the use of a defective part in order to operate," but cautioned that, even then, the policy rationales against imposing liability would remain." *O'Neil*, 266 P.3d at 996 n.6.

The *Whelan* Appellate Division relied on the footnote from *O'Neil*, but ignored the *O'Neil* court's ultimate conclusion. Thus, the Appellate Division reasoned that *O'Neil* "did not foreclose on the possibility of liability for component parts a manufacture[r] did not fabricate or distribute." *Whelan*, 190 A.3d at 1109 & n.15. Yet the Appellate Division overlooked the integral phrase in the *O'Neil* footnote clarifying that "the policy rationales against imposing liability on a manufacturer for a defective part it did not produce or supply" would still apply when determining liability for another manufacturer's replacement part. *O'Neil*, 266 P.3d at 996 n.6.

Thus, even if the *O'Neil* defendants' pumps and valves *required* routine replacement of asbestos-containing components, the public-policy concerns behind limiting the duty to warn of another's defective product would outweigh *Whelan*'s self-described "common sense" approach of finding liability based on a broadly-construed "product."

The Appellate Division's *Whelan* decision contributes to the split among states as to whether a manufacturer has a duty to warn of a defect in another manufacturer's product, and imposes an extended duty without discussing how a manufacturer would identify affected consumers or addressing if the test would or could apply outside of the asbestos context. That split might be resolved by focusing less on the abstract definition of a product and more on the question whether the expansion of liability serves the public policies supporting strict liability.

Footnotes

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