

Beware Unsubstantiated Attacks On The 'Bare Metal' Defense

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On July 25, 2016, in *Arbogast v. A.W. Chesterton Co.*[1], the U.S. District Court for the District of Maryland became the first court in Maryland to apply the “bare metal” defense in asbestos-related products liability litigation following the decision of the Maryland Court of Appeals in *May v. Air & Liquid Systems Corp.*[2]

Maryland, along with other jurisdictions around the country, recognizes what is known in asbestos-related personal injury litigation as the “bare metal” defense. Essentially a misnomer, the “bare metal” “defense” is not a defense at all. In simplest terms, “bare metal” cases hold that equipment manufacturers do not have a duty to warn about the potential hazards of asbestos-related injuries when the source of the asbestos exposure comes from aftermarket replacement component parts or insulation that the manufacturer neither manufactured nor placed into the stream of commerce.

In December 2015, the Maryland Court of Appeals examined the “bare metal” defense and held that an equipment manufacturer could, in narrow circumstances, have a duty to warn under Maryland law, despite not manufacturing or otherwise placing the asbestos-containing replacement part at issue into the stream of commerce. The May court stated that this duty to warn exists where: (1) pumps on U.S. Navy warships came from the factory with asbestos components such as cover gaskets and gland packing, and no safer materials were available at that time; (2) asbestos was a “critical part” of the pump; (3) maintenance activities were known to require disturbing worn-out asbestos-containing gaskets and packing; and (4) the “bare metal” manufacturer knew or should have known of the risks to machinist mates performing the maintenance or repairs from exposure to asbestos.

In *Arbogast*, the District of Maryland first applied the “bare metal” defense following the May decision. There, plaintiff Charles Arbogast and his wife alleged that Mr. Arbogast was exposed to various asbestos-containing products during his working life, including while he worked at Bethlehem Steel Sparrows Point Shipyard in Baltimore, Maryland. Mr. Arbogast testified that he believed he was exposed to asbestos-containing component parts of marine boilers identified by name, such as thermal insulation, while working aboard various large shipping vessels that were under construction or in for an overhaul. Mr. Arbogast did not know the maintenance history of any of these boilers that he worked with or around, and there was no evidence that the subject component parts were original or that the boiler maker manufactured, supplied or installed the allegedly asbestos-containing insulation and component parts. Thus, after the completion of discovery, the boiler defendant filed a motion for summary judgment, arguing that it had no duty to warn under the “bare metal” doctrine. The plaintiff



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opposed by stating, without any support, that the defendant's boilers needed asbestos components because of their high-heat applications at Bethlehem Steel.

The Honorable James K. Bredar of the District of Maryland analyzed the May decision and the elements that the Maryland Court of Appeals set forth to establish the "narrow circumstances ... where a manufacturer can be liable for products it has not touched." In Arbogast, however, the court found that there was no evidence to support any of the four factors. Specifically, there was no evidence in the record that showed the defendant's boilers contained asbestos components, that no safer non-asbestos material was available for those replacement components, that asbestos was a critical part of those boilers, or that maintenance of the those boilers involved handling asbestos gaskets and packing. Therefore, the moving defendant was awarded summary judgment.

Defendants must be vigilant not to let the plaintiffs' bar misinterpret May's holding with respect to the "bare metal" defense in Maryland. Plaintiffs are chomping at the bit to broaden the duty to warn far beyond the Court of Appeals' narrow holding. The May court did not overturn the decade-old precedent on bare metal, *Ford Motor Co. v. Wood*.^[3] May should not be read as applying beyond the limited circumstances presented by Mr. May, namely a machinist mate in the Navy encountering replacement parts not made or supplied by the original equipment manufacturer. The Arbogast court's decision reiterates that the Court of Appeals' May decision established only a narrow path through the otherwise solid "bare metal" defense. It is not enough for plaintiffs to state that a process was "hot" or, without appropriate foundation, that a given piece of equipment "required" the use of asbestos-containing component parts. Rather, plaintiffs bear the burden of producing adequate and competent evidence to support each of the four factors set forth in May to defeat the "bare metal" defense at summary judgment. The Arbogast decision provides the proper road map for courts to engage in the balancing analysis that the Court of Appeals intended.

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[1] *Arbogast v. A.W. Chesterton Co.*, 2016 U.S. Dist. LEXIS 97062, Case No. 1:14-cv-04049-JKB (D. Md. July 25, 2016)

[2] *May v. Air & Liquid Sys. Corp.*, 446 Md. 1, 219 A.3d 984 (2015).

[3] *Ford Motor Co. v. Wood*, 119 Md. App. 1, 703 A.2d 1315 (1998), cert. denied, 349 Md. 494, 709 A.2d 139 (1998)