

## Md. Steels Itself Under The Bare Metals Defense

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Count Maryland as the latest jurisdiction to place its stamp of approval on the so-called bare metals defense in the context of asbestos-related lawsuits. The bare metals defense is the doctrine under which a defendant is not liable for replacement or component parts it did not place into the stream of commerce.

In actuality, Maryland was one of the first jurisdictions to adopt that doctrine. For most defendants, the Court of Appeals' holding in *Ford Motor Co. v. Wood*, 119 Md. App. 1, cert. denied, 394 Md. 494 (1998), stands for the general principle that a defendant cannot be held liable for a plaintiff's injury after exposure to asbestos-containing replacement products it did not manufacture, sell, supply or install.

Over the last 16 years, however, there has been a question in minds of some over the scope of *Wood*. Recently, in *May v. Air & Liquid Systems Inc.*, Case No. 2670 (Md. App. Oct. 3, 2014), Maryland's appellate court reaffirmed its acceptance of *Wood*, holding that three manufacturers of steam pumps aboard U.S. Navy ships could not be held liable for failing to warn of the dangers of asbestos-containing replacement parts they did not place into the stream of commerce. After *May*, there can be no doubt that Maryland is among the growing collection of jurisdictions that have embraced the bare metals defense.

### **May v. Air & Liquid Systems: A Common Factual Scenario in Asbestos Litigation**

The *May* case was, in all material respects, a typical lawsuit in today's asbestos litigation landscape. In the case, the plaintiffs, Philip Royce May and his wife, alleged May developed mesothelioma as a result of his exposure to asbestos-containing equipment and materials while serving as a machinist mate aboard various vessels during his 20-year service in the U.S. Navy. As a machinist mate, May's duties included replacing asbestos-containing gaskets and packing in the pumps that superheated the steam through each ship's steam-propulsion system. May claimed he was exposed to asbestos while removing gaskets with handheld scrapers, wire brushes and pneumatic brushes, fabricating new gaskets and removing packing from valves. May sued several companies at the outset of his lawsuit, however the only three defendants at issue in the *May* opinion were three manufacturers of steam pumps aboard the ships May served on.



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Although May identified seven different ships on which he served during his naval career, he admittedly did not serve on the maiden voyage of any of those vessels. In fact, all of the ships had been built and launched at least five years before May served on them, some more than a decade before he even joined the Navy. Because all of the ships at issue had been built and launched many years before May's military service, there was no dispute that the equipment aboard those ships had been maintained and serviced on numerous occasions before he encountered them. As a result, any asbestos-containing gaskets and packing products May worked on in connection to the steam pumps and other equipment aboard the ships were replacement parts that were manufactured, sold or supplied by companies other than the three pump manufacturer defendants.

After discovery closed, the three defendants in the May case moved for summary judgment, arguing that, under Maryland law, they did not have a duty to warn May regarding asbestos-containing replacement parts they did not place into the stream of commerce. The trial court agreed with the pump manufacturers' position and entered summary judgment in their favor.

### **The May Court Found Wood Was Controlling Authority**

The central issue in May was whether the Court of Special Appeals' holding in Wood, which had been in effect for nearly 16 years, applied in the context of May's alleged exposure to asbestos-containing replacement parts. The Court of Special Appeals answered definitively that it did.

The Wood case involved an allegation that the plaintiff's husband, Wood himself, developed mesothelioma as a result of his alleged exposure to brake and clutch products in various Ford vehicles. Because Wood worked on older model vehicles, he encountered brake and clutch products that were replacement parts, not parts that were original to the Ford vehicles on which he worked.

As a result, the Court of Special Appeals held that there was insufficient evidence to demonstrate Wood was exposed to asbestos-containing Ford products with the requisite "frequency, regularity and proximity." The court, however, further rejected the plaintiff's argument that Ford should nevertheless be liable for Wood's exposure to replacement parts in its vehicles, concluding that the company did not have any liability for replacement or component parts it neither manufactured nor placed into the stream of commerce.

After analyzing the nature of and reasoning behind the Wood decision, the May Court determined unambiguously that Wood is "dispositive" of May's failure-to-warn claims, whether arising under a theory of negligence or strict liability, against the three pump manufacturers. In doing so, the Court of Special Appeals rejected May's contention that the relevant language from Wood was merely dicta. Rather, the Court of Special Appeals explained that summary judgment was appropriate under the holding in Wood because "the Mays had no evidence that any of the defendant-manufacturers manufactured, marketed, sold or otherwise placed into the stream of commerce any of the asbestos-containing gaskets or packing to which May was exposed."

Of particular importance in upholding the entry of summary judgment in favor of the three pump manufacturers, the Court of Special Appeals specifically rejected the notion that a defendant can be held liable for replacement parts it did not manufacture, sell or supply on the basis that it was "foreseeable" that those parts would be incorporated into the defendant's product.

Citing a long string of Maryland authority, the May Court cautioned that recognizing a duty of care

under such a circumstance could expose a person to liability to “an indeterminate class of people.” In fact, 16 years earlier, the Wood Court specifically considered — and rejected — the very argument that Ford should be held liable for the plaintiff’s injuries because it was foreseeable that mechanics and other consumers would use asbestos-containing replacement parts in their vehicles. After May, it is clear that, however foreseeable the harm, a defendant cannot be held liable for failing to warn about products that it did not place into the stream of commerce.

### **The May Court Recognized Other Cases Citing the Bare Metals Defense**

Importantly, in affirming its previous decision in Wood, the Court of Special Appeals acknowledged the trend among jurisdictions throughout the country in limiting a defendant’s liability to products it actually manufactured, sold, supplied or installed.

Since Wood was decided nearly two decades ago, courts in California, Washington, Ohio, Florida, Pennsylvania and New York have all followed the holding in Wood or similarly applied the bare metals defense to preclude a defendant’s liability for replacement products it did not place into the stream of commerce, including cases involving allegations of exposure that were nearly identical to those presented in the May case. See, e.g., *O’Neil v. Crane Co.*, 53 Cal. 4th 335 (2012); *Simonetta v. Viad Corp.*, 165 Wash.2d 341 (2008), *Braaten v. Saberhagen Holdings*, 165 Wash.2d 373 (2008); *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005); *Faddish v. Buffalo Pumps*, 881 F. Supp.2d 1361 (S.D. Fla. 2012); *Conner v. Alfa Laval Inc.*, 842 F. Supp.2d 791 (E.D. Pa. 2012); *Surre v. Foster Wheeler LLC*, 831 F. Supp. 2d 797 (S.D.N.Y. 2011).

The Court of Special Appeals was receptive to the public policy arguments that those other courts have advanced in adopting the bare metals defense. For instance, because equipment manufacturers like the three pump manufacturers in May often do not manufacture or sell the replacement component parts to which the plaintiff was exposed, the manufacturers do not derive any economic benefit from the replacement products and cannot “treat the burden of accidental injury caused by asbestos in the replacement products as a cost of production against which liability insurance could be obtained.” See *Braaten*, 165 Wash.2d at 392.

In other words, manufacturers do not have any incentive or ability to spread the risk of products over which they have no control. Thus, the policy reasons for holding product manufacturers liable for defects in their own products do not extend to situations where the manufacturer has no power over, or even knowledge of, the replacement component parts used in its equipment, sometimes years or even decades after the equipment left the manufacturer’s hands. As plaintiffs’ firms continue to seek out new defendants in asbestos-related lawsuits, these policy arguments also could be used to limit or preclude the liability of other peripheral defendants in asbestos litigation.

### **Conclusion**

The May opinion was an important continuation of the trend of decisions restricting the liability of manufacturing defendants in asbestos-related lawsuits to products they placed into the stream of commerce. In May, the Court of Appeals had the opportunity to revisit its prior holding in Wood and could have elected to limit Wood to the narrow facts presented in that case or overturn it altogether.

Relying not only on the language from Wood, but from courts around the nation that have precluded a defendant’s liability for another company’s component parts, the Court of Special Appeals made clear its stance on the replacement parts issue has not changed in the 16 years since Wood was decided. As this

issue arises in other jurisdictions, it will be interesting to see whether other jurisdictions will again continue to follow in Maryland's footsteps.

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