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Duty To Warn For Other Manufacturers' Products?

Law360, New York (November 23, 2009) -- As the pool of viable defendants in asbestos-related lawsuits becomes shallower and shallower, particularly for occupational industrial exposures, plaintiffs and their counsel are responding with new legal theories targeting a different group of product manufacturers.

Those manufacturers are NOT being sued for any asbestos-containing products they allegedly manufactured, however. They are being sued for the products manufactured by "traditional" asbestos-containing product manufacturers, many of whom were bankrupted by the litigation years ago.

The basis for these unique claims is the relatively novel theory that the manufacturer of a product, albeit non-asbestos-containing, has a legal duty to warn users of its product regarding the dangers associated with asbestos exposure because it was "foreseeable" that the manufacturer's asbestos-free product would or could be used in some way with an asbestos-containing product that allegedly created the risk of harm to the plaintiff.

Although these legal theories have also been advanced in product liability cases not involving asbestos products, nearly all of the recent decisions addressing (and for the most part rejecting) such liability theories have arisen in asbestos litigation.

This article examines those more recent decisions and the three general scenarios in which these claims are being brought. The clear trend has been for courts to reject such theories in all three scenarios, but courts have not been unanimous.

Indeed, although there are more and better-reasoned intermediate appellate decisions in California rejecting such theories in all three scenarios, there are also a few decisions by those courts upholding them.

Although both companies and claimants have decisions in their arsenals on this issue, it would seem, for now, that even in asbestos litigation, where courts have been inclined

to stretch the limits of traditional product liability theories, those opposing these duty to-warn theories have the better side of the argument.

Typical Scenarios Where Plaintiffs Push for an Expanded Duty to Warn

Scenario #1: Asbestos-Containing Replacement Parts Incorporated Into the Manufacturer's Product

Within the past year, California appellate courts have issued contradictory opinions regarding whether a manufacturer has a duty to warn of the dangers of asbestos in replacement parts that were manufactured and sold by another company.

See *Taylor v. Elliot Turbomachinery Co. Inc.*, 90 Cal.Rptr.3d 414 (Cal. Ct. App. 2009); *Merrill v. Leslie Controls Inc.*, 99 Cal.Rptr.3d 839 (Cal. Ct. App. 2009); *O'Neil v. Crane Co.*, 99 Cal.Rptr.3d 533 (Cal. Ct. App. 2009).

These three California cases were all decided upon a similar set of facts: A manufacturer sold its product, say a pump or a valve, to the U.S. Navy for use on one of the Navy's vessels.

The manufacturer supplied the product to the Navy with certain asbestos-containing parts, such as gaskets or packing.

Several years, if not decades, after the product was installed on the ship, the plaintiff alleges that he was exposed to asbestos from the packing or gaskets within the manufacturer's product.

By virtue of the length of time between the time of sale and the plaintiff's alleged exposure, the packing and the gaskets in the product would have been removed and replaced several times during the course of routine maintenance, meaning that the plaintiff's alleged exposure relates to packing and gaskets that were manufactured by some other party.

Under these circumstances, plaintiffs have argued that the manufacturer had a duty to warn of the dangers associated with asbestos in the replacement parts because it was foreseeable that the product's internal parts would be replaced during the life of the product.

The O'Neil court relied on this very reasoning to impose a duty to warn on the product manufacturer.

The courts in *Taylor* and *Merrill* (which were decided two weeks after *O'Neil*), on the other hand, were not persuaded by the plaintiffs' attempts to expand the duty to warn under a theory of foreseeability.

Rather, in well-reasoned opinions, the Taylor and Merrill courts maintained that no such duty exists under this set of facts because the manufacturer was not in the chain of distribution of the products that allegedly caused the plaintiffs' injuries (i.e. the asbestos-containing packing and gaskets).

Courts in other jurisdictions have reached decisions consistent with Taylor and Merrill in analogous contexts.

See, e.g., *Braaten v. Saberhagen Holdings*, 193 P.3d 493 (Wash. 2008) (holding that manufacturers of pumps and valves did not have a duty to warn the plaintiff regarding the hazards of asbestos-containing packing and gaskets that they did not manufacture or sell); *Ford Motor Co. v. Wood*, 703 A.2d 1315 (Md. Ct. Spec. App. 1998) (finding that an automobile manufacturer did not have a duty to warn of replacement asbestos-containing brakes and clutches that it did not manufacture, sell or supply).

The California appellate courts' departure from the majority in *O'Neil*, however, will encourage asbestos claimants and their counsel to continue to pursue liability against manufacturers under this set of facts.

Scenario #2: Asbestos-Containing Products Affixed to the Manufacturer's Product

There is less debate about a manufacturer's duty to warn when the asbestos-containing part or product is affixed to, rather than incorporated into, the manufacturer's product. See *Taylor*, 90 Cal.Rptr.3d at 421.

Like Scenario #1, these cases have also arisen in the Naval context.

Instead of involving asbestos-containing components that were ultimately replaced with asbestos-containing parts manufactured by others, these cases arise because asbestos-containing insulation manufactured by others was used to cover the product to increase the performance of the product.

The plaintiff alleges that he was exposed to asbestos when he removed or disturbed the insulation to service or repair the product.

Here, a plaintiff would argue that the manufacturer had a duty to warn users of its pump regarding the alleged dangerous properties of the asbestos-containing insulation because it was foreseeable that users of its product would insulate the pump with asbestos-containing material prior to use.

In a sense, this scenario is one step further removed from a manufacturer's traditional duty to warn than Scenario #1, because, though the manufacturer may have foreseen that the insulation would be used on its product, the manufacturer did not supply its product with the asbestos-containing insulation at the time of sale.

Courts have denied plaintiffs' attempts to extend the manufacturer's duty to warn to products affixed or applied to the manufacturer's product, regardless of how foreseeable it was to do so.

See, e.g., *Taylor*, 90 Cal.Rptr.3d at 421 (finding that pump and valve manufacturers did not have a duty to warn about insulation applied to their products because the manufacturers' products themselves did not cause the risk of harm); see also *Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008) (en banc) (holding that the manufacturer of an evaporator did not have a duty to warn regarding asbestos-containing insulation that was removed and replaced during maintenance of the evaporator).

Scenario #3: Asbestos-Containing Materials Used in Connection With the Manufacturer's Product

The final scenario requires a slightly different hypothetical. Imagine the manufacturer of a power saw that can be used to cut, among other things, asbestos-containing pipe.

The plaintiff alleges that he used the power saw for that very purpose. Plaintiff's use of the power saw to cut the asbestos-containing pipe allegedly results in the release of respirable asbestos fibers.

Under this scenario, plaintiffs have pursued liability against the saw manufacturer on the grounds that it was foreseeable that dust and other contaminants, such as asbestos fibers, would be created when the saw was applied to the work-piece material.

In fact, some plaintiffs have gone so far as to claim that the danger — i.e. asbestos fibers — did not exist until the manufacturer's product was applied to the asbestos-containing pipe and, for this reason, the manufacturer's product "created" the dust.

At least one California appellate court was unwilling to extend a manufacturer's duty under these facts for the same reason that California courts (as well as the bulk of jurisdictions in the country) have not embraced an expansion of liability under the above scenarios — the manufacturer simply does not have a duty to warn of dangers in another manufacturer's product.

See *Cullen v. Indus. Holdings Corp.*, No. A097105, 2002 WL 31630885 (Cal. Ct. App. 1 Dist. Nov. 21, 2002).

In *Cullen*, an unreported opinion, the court discussed whether the manufacturer of a grinding wheel that was designed specifically for use with asbestos-containing pipe had a duty to warn regarding the release of asbestos when its product was applied to the pipe.

In rejecting this argument, the court reasoned that the grinding wheel manufacturer did not have a duty to warn of the alleged dangers of the asbestos released from the pipe,

because the alleged dangerous condition existed in the asbestos-containing work piece material, not in the defendant's grinding wheels.

There is support for the Cullen decision outside of California as well. See *Smith v. Lead Indus. Ass'n Inc.*, No. 2368, at 15 (Md. Ct. Spec. App. Sept. Term, 2002) (unreported), vacated on other grounds, 871 A.2d 545 (Md. 2005) (noting that it would be absurd to require a power saw manufacturer to warn of the risks of asbestos exposure merely because a power saw could foreseeably be used to cut into asbestos-containing insulation).

On the other hand, however, plaintiffs advancing a duty to warn theory under this scenario spotlight the California court decision in *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzer Co.*, 129 Cal. App.4th 577 (2004).

In *Tellez-Cordova*, a California court addressed the liability of a manufacturer of a grinder that the plaintiff allegedly applied to a metal work-piece material, releasing metallic dust, which allegedly caused the plaintiff's injuries.

In concluding that the grinder manufacturer may have a duty to warn, the court noted that the metallic dust was released from not only the metal work- piece material, but also from the metal grinding wheel that was used in connection with the manufacturer's grinder.

Based on this narrow set of facts, the manufacturer had a duty to warn regarding the release of metallic dust from the grinding wheels used with its product.

The *Tellez-Cordova* opinion, whether or not it was correctly decided, is based on a rather unique set of facts, distinguishable from the facts in Scenario #3 and Cullen, because the allegedly dangerous agent was released from the product's attachment in addition to the work piece material.

Nonetheless, ignoring the nuance of the *Tellez-Cordova* decision, mass torts claimants will continue to rely on the court's decision as support for their theory that a manufacturer has a duty to warn for the dangers and defects in another manufacturer's product.

Conclusion

The majority of courts that have examined this issue have appropriately upheld the traditional tort principle that a manufacturer does not have a duty to warn of dangers present in another manufacturer's product.

As evidenced by the recent California appellate court decisions in *O'Neil* and *Tellez-Cordova*, however, at least some courts are willing to entertain liability theories under a broader duty to warn, one that covers not only dangers inherent in the manufacturer's

own products, but also dangers associated with products that could be used on or in connection with the manufacturer's product.

Although this theory of an expanded duty to warn is unquestionably the exception rather than the norm in most jurisdictions today, plaintiffs will continue to press the courts for liability under these expansive theories until the highest courts of each state have categorically rejected such efforts.

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