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Whelan v. Armstrong Int'l, Inc.: Latest Asbestos Ruling Expands Manufacturer Liability for Injuries

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Several state and federal courts have recently addressed a hot-button issue in product liability law: whether the manufacturer of a product that has an asbestos-containing replacement part that causes injury may be liable even if the manufacturer itself did not manufacture or supply the replacement part. Consider this example: a manufacturer produces a steam trap or boiler that contains an asbestos gasket that needs to be replaced from time to time. Third parties supply the replacement gaskets. Is the original product manufacturer liable for injuries allegedly caused by the asbestos-containing replacement gaskets?

Recently, in *Whelan v. Armstrong Int'l, Inc.*, the New Jersey Supreme Court weighed in. The *Whelan* Court joined several other courts, including the U.S. Supreme Court, which have held that a manufacturer may be liable in certain circumstances for an injury caused by an asbestos-containing replacement part even if it did not make or sell that part.[1] This holding contrasts with other state courts that have recognized the so-called "bare metal defense" and have held that a manufacturer may not be liable for asbestos-containing replacement parts it neither manufactured nor sold.[2]

In *Whelan*, the plaintiff alleged that he was exposed to asbestos from several products: steam traps, boilers, brake systems, valves (each of which had one or more asbestos components) and gaskets, insulation, brakes, and packing (that had to be regularly replaced). But it was unknown whether the replacement components with which Whelan had worked were supplied by the defendants or by a different manufacturer.[3]

The case made its way to the New Jersey Supreme Court. There, the majority held that defendants could be strictly liable for failing to warn of asbestos-related dangers posed by third-party parts used to replace parts of defendants' product, if the plaintiff could prove four elements:[4]

- The defendant manufacturer or distributor's original product (as introduced into the market) had asbestos-containing components;
- The asbestos-containing components were integral to and necessary to the function of the original product;
- Regular maintenance of the defendant's product required replacement of the asbestos-containing components with similar, asbestos-containing components; *and*

- Exposure to the defendant's original, asbestos-containing product *or* the asbestos-containing replacement parts was a substantial factor in causing plaintiff's disease.

For causation purposes, the *Whelan* court did not distinguish "between the original asbestos-containing components and the asbestos-containing replacement components necessary for the continued operation of defendants' integrated products."[5] A defendant manufacturer could be liable for failure to warn if the plaintiff's injury was caused by either the original component part, or by the replacement part, or by both.

The New Jersey Supreme Court's decision differs slightly from the U.S. Supreme Court's decision last year in *Air and Liquid Systems Corp. v. DeVries*,[6] which applied maritime law and determined that a manufacturer could be liable for harm caused by asbestos-containing replacement parts, but only if "the product *requires* incorporation" of a hazardous component—mere foreseeability that a hazardous component might be used is not enough.[7] In a splitting-hairs contrast, *Whelan* does not require that a plaintiff show that a product *requires* an asbestos replacement part, but a plaintiff must present evidence that the asbestos part is "*necessary* to the function of the original product." "Necessary" may be a lower standard than "required."

The cases also differ in another important way. The U.S. Supreme Court held that the plaintiff must show that the defendant manufacturer knew of the hazards of the component part and that the manufacturer had no reason to believe that users would recognize the hazards.[8] The New Jersey test in *Whelan*, by contrast, did not require that the defendant manufacturer knew of the hazards because years ago it held in *Beshada v. Johns-Manville Products Corp.* that defendant-manufacturers could be liable "for failure to warn of [asbestos] dangers which were undiscoverable at the time of manufacture."[9] This has meant that manufacturer defendants cannot defend against failure to warn asbestos claims by claiming that they did not know that asbestos-containing parts were hazardous when made.

The *Beshada* rule could make the result in *Whelan* particularly harsh in some circumstances. Reading the two cases together, a company that manufactured a product decades ago could be liable for an asbestos component installed years later even if the manufacturer did not know of the hazards posed by the component part when it produced the original product.

[1] *Whelan v. Armstrong Int'l Inc.*, 2020 WL 2892232 (N.J. June 3, 2020).

[2] *Id.*, at *15.

[3] *Id.* at *6-7.

[4] *Whelan* at *5

[5] *Whelan* at *5

[6] 139 S.Ct. 986 (2019).

[7] *Id.,* at 994.

[8] 139 S. Ct. at 995.

[9] 90 N.J. 191, 205 (1982) (holding that a manufacturer could be strictly liable for failing to warn of hazards posed by its product which it did not and could not have known about at the time of production).

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