Legal Backgrounder

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Air & Liquid Systems Corp. v. Devries: Asbestos Litigation's "Bare Metals" Defense Goes Before the U.S. Supreme Court

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The so-called "bare metals" (or "replacement parts") defense is one that has developed in response to arguments by companies sued in asbestos litigation over components incorporated into their products that were not manufactured, distributed, sold, or otherwise supplied by those defendants. It holds that a manufacturer has no liability for harms caused by—and no duty to warn of hazards associated with—a product it did not manufacture or distribute.

The United States Supreme Court recently agreed to hear in its October Term 2018 a petition for certiorari aimed at resolving a circuit split as to the application of this defense. *Air & Liquid Sys. Corp. v. Devries*, 2018 U.S. Dist. LEXIS 2894 (May 14, 2018). While the conflicting case law was—and the eventual opinion from the Supreme Court will be—decided under maritime law, the decision will no doubt provide guidance to litigants addressing this question in a number of legal areas. The purpose of this Legal Backgrounder is to briefly review the issues that will be presented to the Court, rather than an extensive critical analysis of the results reached by lower courts that have addressed the question of the defense's application.

The Cases Finding No Liability Outside the Chain of Distribution

The availability of the bare metals defense under maritime law finds its origins in the U.S. Court of Appeals for the Sixth Circuit's almost fifteen-year old decision in *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488 (6th Cir. 2005). There, the court held that a manufacturer of a piece of equipment (like a valve) cannot be responsible for a third party's asbestos product that is incorporated into that equipment (such as a gasket).

Lindstrom and its progeny have based their holdings on two essential principles. The first is a traditional product-liability theory that one cannot—or at least should not—bear responsibility for a product that the defendant did not place into the stream of commerce. Stated differently, "the burden of accidental injuries caused by products intended for consumption [should] be placed upon those who market them, and treated as a cost of production against which liability insurance can be obtained." *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 801 (E.D. Pa. 2012) ((quoting Restatement (Second) of Torts § 402A, cmt. c (1965)). As these courts explain, the costs of such defects are better borne by the manufacturer or other entity in the chain of distribution for the product.

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The second principle on which these so-called "bright line" cases rest comes from the area of maritime law. As these decisions describe, a central feature of maritime law is that it be applied uniformly across the country. By adopting a bright-line test of no liability unless the defendant is within the chain of distribution for the product, these courts reason, application of the bare metals defense is in line with the Constitution's call for uniformity in the application of maritime law. Moreover, courts applying *Lindstrom* say that a survey of state law reveals support for their position in decisions from around the country. *Cabasug v. Crane Co.*, 989 F. Supp. 2d 1027, 1038-43 (D. Haw. 2013).

The *Quirin* Test—Potential Liability for Companies that Did Not Distribute the Component

In the case from which the appeal was taken by the U.S. Supreme Court, *In re: Asbestos Product Liability Litigation*, 873 F.3d 232 (3rd Cir. 2017) (which will be referred to here as *Devries* after one of the litigants), the Third Circuit departed from *Lindstrom* in favor of a test articulated by an Illinois federal court in *Quirin v. Lorillard Tobacco Co.*, 17 F. Supp. 3d 760, 768-70 (N.D. Ill. 2014). Describing its test as a more fact-specific inquiry, and emphasizing "foreseeability" as the linchpin to the inquiry, *Devries* set forth a multi-prong test to be applied in determining whether a defendant may resort to the bare metals defense. According to the court of appeals, a defendant may be liable if it could have known when placing its own product into the stream of commerce:

1. Asbestos is hazardous; and

2. Its product will be used with an asbestos-containing part, because

    a. The product was originally equipped with an asbestos-containing part that could reasonably be expected to be replaced over the product's lifetime;

    b. The manufacturer specifically directed that the product be used with an asbestos-containing part; or

    c. The product required an asbestos-containing part to function properly.

Like *Lindstrom* and its progeny, *Devries* also recognized the importance of uniformity under maritime law. It further acknowledged that maritime law is built on traditions of "simplicity and practicality," and also that maritime law has a "fundamental interest in the protection of maritime commerce." Nevertheless, the court of appeals found more important—indeed "dispositive"—the "special solicitude for the safety and protection of sailors" exhibited by maritime law. *In re: Asbestos Prod. Liab. Litig.*, 873 F.3d at 239. Like the *Lindstrom* line of cases, and putting aside the maritime considerations on which they are based, these competing decisions ending most recently with *Devries* also claim support through a survey of state law as well.

Competing Policy Considerations

As reflected in the discussion above, both sets of decisions claim to be based upon particular policy considerations. But the policies emphasized by each side in the debate certainly have responses. It is for the Supreme Court to reconcile these questions.

The *Lindstrom* Line of Cases. In finding it would be inappropriate to impose liability on those outside the stream of commerce for a particular product, the *Lindstrom* line of cases eschews what they clearly perceive as a "slippery slope" by extending liability beyond manufacturers/sellers. In doing so, those decisions focus on the economic allocation of risk by emphasizing how those in the chain of distribution can properly allocate risk. But the competing decisions note that under the *Quirin* test adopted by the Third Circuit, the original equipment manufacturer is well-positioned to bear the costs of the risk associated with asbestos-containing replacement parts. This is because when a manufacturer actually incorporates a particular component into its product, it could not then claim a lack of control over the risks associated with that component, since the manufacturer has the opportunity to test that component and become familiar with such risks. Thus, to the extent the manufacturer designs or markets its product in such a way that the product requires the same risk-bearing component, it exercises control over the risk associated with replacement components.

Courts applying the *Quirin* test also respond that it is meant to limit a manufacturer's liability to cases where the harm arises from risks that are effectively incorporated into the manufacturer's product, though they may be borne by a replacement component. Thus, those courts assert, where *Quirin* applies, the equipment manufacturer has at least as much power to control the risks associated with the asbestos-containing replacement components as the component manufacturers themselves. In fact, some of the courts employing this rationale hold that the equipment manufacture is even better situated than the component supplier to exert such control over the risk of personal injury.

The other side of the coin is the benefit derived from the sale of components. This benefit should not be conferred without the costs that attend it. According to the line of cases ending most recently with the Third Circuit's decision, under the cost-benefit approach, allowing equipment manufacturers to profit from the proliferation of asbestos-containing replacement components, while immunizing them from liability relating to such components, creates an incentive structure that fails to account for the costs such manufacturers impose on society. As those courts explain, "[t]his result is socially inefficient—not to mention, palpably unjust." *Chesher v. 3M Co.*, 234 F. Supp. 3d 693, 709-10 (D.S.C. 2017).

The *Devries* Line of Cases. *Devries* noted that four maritime principles were implicated by its decision. Those were uniformity, simplicity, protection of maritime commerce, and affording recovery to maritime workers. But *Devries* quickly dispatched with the first three of these. As to one of those principles, the fact that maritime law is built on "traditions of simplicity and practicality," the Third Circuit summarily observed that "this principle cuts in both directions" under both the *Lindstrom* and *Quirin* tests. But while *Lindstrom* can be defined as simple, the multi-prong test of *Quirin* is far from it. *Devries* also gives short shrift to the notion that maritime law has a fundamental interest in the protection of maritime commerce, and similarly discounts the interest in uniformity that is so paramount in maritime cases going back a century.

Ultimately, *Devries* turns decisively on the "special solicitude" for sailors referenced in some of Supreme Court's maritime case law. But as that same court of appeals has observed elsewhere:

> Although the trend in the … case law can be explained by reference to the rise in the importance of federal statutory schemes in shaping maritime remedies, it would be myopic not to recognize the other forces at work. One trend that cannot be ignored is that the Court seems to be cutting back on plaintiffs' rights in maritime actions. Throughout

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> the 1950s and 1960s, the Supreme Court expanded the rights of plaintiffs by generally allowing plaintiffs the benefit of whichever rule, state or federal, was more favorable to recovery … *Moragne*—or perhaps *Gaudet*—represented the apex of the Court's policy of expanding plaintiffs' rights in admiralty actions. *Higginbotham*, *Tallentire*, and *Miles*, in contrast, show a tendency on the part of the Court during the last two decades to reverse its policy of favoring seamen plaintiffs.

Calhoun v. Yamaha Motor Corp., U.S.A., 40 F.3d 622, 636 (3d Cir. 1994), *aff'd* 516 U.S. 199 (1996). Thus, one does not need to go even outside the Third Circuit to see that reliance on this notion can be quickly overstated.

Conclusion

As reflected in the decisions of the lower courts, there are a number of principles cited that appear to be in conflict with one another. First, as to the maritime aspect of these cases, proper guidance would include a reconciliation of the multiple doctrines discussed in the case law: uniformity, simplicity, protection of maritime trade, and protection of maritime workers. Likewise, an exploration of the interplay between these ideas and traditional tort concepts applicable in common-law product- liability litigation would be of great benefit to plaintiffs and defendants alike. With its decision, the Supreme Court will no doubt inform litigants as to which of these conflicting rulings—and competing principles—are correct.