# Liability For Another Manufacturer's Product?

JULIE P. SHELTON
KAREN M. BORG

Your manufacturing company has just been sued in a number of asbestos cases. No sweat, you think, we make an industrial component that doesn't contain asbestos, and we never specified that asbestos be used with it. A summary judgment motion, a couple telephone calls to set plaintiffs' counsel straight, and that should be that.

Feeling confident, you call your outside counsel and tell her the plan. Not so fast, she says, plaintiffs allege you failed to warn about the dangers of using your products in connection with another company's asbestos-containing products. In some courts, that is enough to go to verdict. You cannot count on a phone call to opposing counsel or summary judgment to resolve these cases anymore. You probably need to inform senior management that the company faces real exposure.

What, you reply, do you mean I have to tell my management that even though our products never used asbestos, we may have to pay to defend or go to verdict in an asbestos case? You ponder settlement. But even a nuisance settlement could mean seeing your company added to the roster of defendants in Mississippi, Madison County, Illinois and other unfriendly forums. Isn't the duty to warn limited to warning about the dangers involved with the manufacturer's own product?

There is no question a manufacturer has a duty to warn a foreseeable user about the risks of using its product. But, as a general rule, a plaintiff must prove his or her injuries were caused by defendant's act or omission or by an instrumentality under the defendant's control. It follows that, historically, courts have been reluctant to hold a manufacturer liable for failure to warn about the risks of using its product in connection with another product, where the defect belongs to the product manufactured by someone else.

Where the manufacturer did not place the defective product into the stream of commerce, there is no rationale for imposing liability. The manufacturer has not had an opportunity to test, evaluate, and inspect the product; it has derived no benefit from its sale; and it has not represented to the public that the product is its own. Imposing a duty in these circumstances expands the scope of potential liability beyond those in the distribution chain of the defective product to defendants whose safe products happen to be used in conjunction with a defective product manufactured by others. This is contrary to the principles of products liability and long-standing policy considerations. How can your company possibly be liable for a defect in another company's product?

In the context of asbestos litigation it may be possible, as plaintiffs push the limits of tort liability and seek new ways to expand a manufacturer's duty to warn, to increase the pool of solvent defendants. Over the years, plaintiffs have made numerous attempts to stretch traditional duty to warn concepts to encompass liability outside the chain of distribution of the defective product. Until lately, most of those attempts have failed. Our recent experience suggests that may be changing.

In June, Patrick Lamb, a member of our Legacy Liability team, represented Viking Pump Company in *Escamilla v. American Standard, Inc., et al.,* No. 303900 (Calif. Super. Ct. Los Angeles Cty.) The plaintiff, an electrician, alleged his exposure to asbestos-containing products caused his lung cancer. Mr. Escamilla claimed he was exposed to asbestos pipe covering and asbestos insulation connected to pumps manufactured by Viking Pump. There was no evidence of any asbestos in the Viking pumps that plaintiff testified he serviced. Plaintiff's sole claim against Viking Pump was

its alleged failure to warn Mr. Escamilla of the dangers associated with the use of its pumps in connection with *other manufacturers' asbestos-containing products*. However, this tenuous theory was enough to keep Viking Pump in the case through verdict.

Viking Pump filed motions for summary judgment and directed verdict on the grounds there was no evidence it manufactured or placed into the stream of commerce an asbestos-containing product. The trial judge denied both motions. Despite reasonable settlement demands by the plaintiffs, Viking Pump drew the line and refused to pay on a case that did not involve its own product. Viking Pump wanted to send a clear message to plaintiff's counsel that this theory would not be tolerated now or in the future. Viking Pump prepared and tried the case to verdict on plaintiff's failure to warn theory. The jurors agreed that Viking Pump did not belong in the case, and plaintiff ultimately failed to recover against any of the defendants at trial.

New York plaintiffs have also raised this expanded failure to warn theory. Like the *Escamilla* court, the New York appellate court refused to limit defendant's duty to warn to its own products. *Berkowitz v. A.C. and S., Inc.*, 733 N.Y.S.2d 410 (NY Ct. App. 2001). In *Berkowitz*, plaintiffs alleged injuries resulting from their exposure to products containing asbestos that had been used with defendant's pumps. The trial court denied defendants' motions for summary judgment, and the appellate court affirmed. The appellate court held a genuine issue of material fact existed as to whether the pump manufacturer had a duty to warn about dangers of asbestos it neither manufactured nor installed on its products. The court noted "[w]hile it may be technically true that its pumps could run without insulation….it is at least questionable whether pumps transporting steam and hot liquids on board a ship could be operated safely without insulation, which [Defendant] knew would be made of asbestos." *Id.* at 412.

Although the majority of case law limits liability for failure to warn to a manufacturer's own product, *Escamilla* and *Berkowitz* suggest courts are willing to widen the scope where there is evidence the manufacturer knows the product will be used in connection with an allegedly defective product like asbestos. This could place equipment manufacturers in the undesirable position of having to defend against a variety of products they did not manufacture. Indeed, plaintiffs' counsel are now routinely seeking substantial settlements from many defendants on the assumption that the *Berkowitz/Escamilla* theory of liability is established law. This is a trend defendants must stop in its tracks.

Defendants must aggressively act to keep courts within the historically limited duty to warn framework and to preserve these issues for appeal by filing motions for summary judgment and directed verdict. In the event such motions fail, defendants must be prepared to try these cases. Settlement cannot be an option when the claimed liability is for someone else's product. Settling sends the wrong message, and could result in more cases being filed against your company, with the attendant increase in defense and settlement costs. Few companies can ultimately afford to pay the liabilities associated with other manufacturers' products. Plaintiffs will continue to push the limits on this issue and defendants should therefore take a firm stand against the expansion of manufacturers' liability beyond their own products.

---

*Julie P. Shelton is Senior Counsel and Karen M. Borg is an Associate with Butler Rubin Saltarelli & Boyd LLP, a Chicago litigation boutique. Both practice in the firm's Legacy Liability and Product Liability Practice Groups. The views expressed are personal to the authors.*