

Asbestos litigation update: Third Circuit rules maritime negligence claims may survive ‘bare metal’ defense

By David Katzenstein, Esq., Craig Waksler, Esq., and Eli Granek, Esq.
Eckert Seamans

On October 3, 2017, the United States Court of Appeals for the Third Circuit adopted a foreseeability-based approach to determining whether the bare-metal defense in asbestos cases is available as a defense to negligence claims governed by maritime law.¹

The circuit court’s published opinion, issued in *In re Asbestos Products Liability Litigation (VI)* (“*In re Asbestos*”), limits the circumstances under which manufacturers of “bare metal” products can rely upon the bare-metal defense to obtain summary judgment.²

As discussed in further detail below, because the Eastern District of Pennsylvania hosts MDL-875 (the Asbestos Products Liability Litigation MDL), the decision’s effects will likely reverberate beyond the Third Circuit’s borders.³

BACKGROUND

The bare-metal defense evolved from the notion that a defendant’s duty to exercise reasonable care is limited to reasonably foreseeable risks, as well as the notion that

a defendant can be held liable only if the defendant’s conduct proximately caused the plaintiff’s harm.⁴

Typically asserted by manufacturers of products that did not contain asbestos but to which another party later added asbestos components — e.g., insulation placed upon “bare metal” products or gaskets attached to a “bare metal” flange

The first line of cases holds that the bare-metal defense is a bright-line rule prohibiting imposing liability on a manufacturer for the asbestos contained in another product.⁷ In jurisdictions that have adopted the bright-line approach, “a manufacturer of a bare-metal product is never liable for injuries caused by later-added asbestos-containing materials.”⁸

The bare-metal defense evolved from the notion that a defendant’s duty to exercise reasonable care is limited to reasonably foreseeable risks.

— the defense refers to the supposition that a product manufacturer “has no liability for harms caused by — and no duty to warn about hazards associated with — a product it did not manufacture or distribute.”⁵

The availability of the bare-metal defense differs by claim and jurisdiction, but most courts have aligned with one of two positions.⁶

Courts aligning with the second position have ruled that whether a manufacturer of a bare-metal product can be liable for an injury caused by later-added asbestos-containing materials depends on the circumstances.⁹

According to these courts, if the plaintiff’s injury was the reasonably foreseeable result of the manufacturer’s conduct, the manufacturer may be found liable to the plaintiff, despite the absence of asbestos in or on the product when it left the manufacturer’s possession.¹⁰

Before the *In re Asbestos* court’s decision, district courts in the Third Circuit largely had held that “the ... ‘bare metal defense’ is recognized when maritime law applies.”¹¹ The *In re Asbestos* opinion changes that; at least with respect to negligence claims.

IN RE ASBESTOS PRODUCTS LIABILITY LITIGATION (VI): THE THIRD CIRCUIT CURTAILS THE AVAILABILITY OF THE BARE-METAL DEFENSE

In re Asbestos involved the claims of two plaintiffs who had served in the U.S. Navy. After being diagnosed with cancer, the plaintiffs sued multiple defendants, alleging their disease was caused by exposure to asbestos from the defendants’ products.



David Katzenstein (L) is the member in charge of **Eckert Seamans’** office in Newark, New Jersey. He has more than 30 years of experience defending companies against complex product liability, environmental and commercial claims, and he has successfully tried multiple cases to verdict. He can be reached at 973-855-4715 or dkatzenstein@eckertseamans.com. **Craig Waksler** (C), based in the firm’s Boston office, concentrates his practice primarily on the defense against asbestos and mass-tort litigation matters, as well as personal injury and property damage cases. He represents a large number of asbestos defendants in Massachusetts and Rhode Island and is national counsel for several large manufacturing companies. He can be reached at 617-342-6890 or cwaksler@eckertseamans.com. **Eli Granek** (R) is an associate in Eckert Seamans’ Philadelphia office. He has experience counseling and defending manufacturers, distributors, contractors, employers and premises owners against complex exposure claims involving alleged exposure to asbestos, benzene and talc. He can be reached at 215-851-8421 or egraneke@eckertseamans.com. This article was originally published as an Eckert Seamans’ client alert. Republished with permission.

The defendants that had sold the Navy products without asbestos-containing components moved for summary judgment based on the bare-metal defense, and the district court, consistent with its precedent, granted the defendants' motions.¹²

Plaintiffs appealed the district court's order to the Third Circuit, arguing that the court had "misapplied the maritime law 'bare metal defense' and failed to consider the viability of [the p]laintiffs' negligence claims."¹³

In response, the Third Circuit remanded the case to the district court with instructions to clarify whether it had considered: (1) the plaintiffs' negligence claims when it entered summary judgment for the bare-metal manufacturers; (2) whether the bare-metal defense applies to negligence claims in addition to strict-liability claims; and (3) whether the claims against the bare-metal product manufacturers should survive summary judgment if the court found there was evidence the manufacturers could have foreseen that asbestos-containing components or parts would later be added to their products.¹⁴

Maritime law is guided by a "special solicitude for the safety and protection of sailors," the court explained, and, at least in this instance, that "special solicitude for sailors' safety" outweighed other considerations.¹⁸

Because adopting a flexible foreseeability standard would permit "a greater number of deserving sailors to receive compensation, and compensation that is closer to what they deserve,"¹⁹ the *In re Asbestos* court ruled that "a manufacturer of even a bare-metal product [may] be held liable for asbestos-related injuries when circumstances indicate the injury was a reasonably foreseeable result of the manufacturer's actions."²⁰

ANALYSIS

By reversing the MDL court and adopting the foreseeability standard, the circuit court reset the law regarding when a manufacturer may successfully invoke the bare-metal defense in defense to a maritime-law negligence claim.

Whether the decision entirely "invalidates" the bare-metal defense in maritime cases, as has been reported, however, remains to be seen.²¹

By reversing the MDL court and adopting the foreseeability standard, the circuit court reset the law regarding when a manufacturer may successfully invoke the bare-metal defense in defense to a maritime-law negligence claim.

The district court then issued an opinion explaining that it had considered the plaintiffs' negligence claims, it believed the bare-metal defense was a viable defense to both negligence and strict-liability claims, and it believed the bare-metal defense should be applied as a bright-line rule against holding a manufacturer liable for asbestos-related injuries incurred from exposure to another manufacturer's later-added asbestos-containing component.¹⁵

The plaintiffs appealed again and this time the Third Circuit panel reversed. Noting that neither the Third Circuit nor the Supreme Court previously had weighed in on these issues, the panel agreed with the district court that the bare-metal defense could be a defense to a maritime-law negligence claim.¹⁶

The court disagreed, however, that the defense applied to all bare-metal products without qualification.¹⁷

exist? According to the *In re Asbestos* court, the answer will vary as the inquiry requires a fact-specific, case-by-case analysis.²²

However, the circuit court did provide some guidance. Aggregating scenarios other courts have found sufficient, the *In re Asbestos* court suggested that the following circumstances would satisfy the foreseeability test:

A bare-metal manufacturer may be subject to liability if it reasonably could have known, at the time it placed its product into the stream of commerce, that:

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.²³

The "test" quoted above may serve as a starting point for determining whether a particular plaintiff's alleged exposure was foreseeable, but it does not end the debate in all cases.

As the circuit court cautioned (somewhat unhelpfully), "these may or may not be the only facts on which liability can arise." In short, the exact contours of the bare-metal defense's availability as a defense to a negligence claim remains undefined.

Strict-liability claims

Another question the *In re Asbestos* decision left unanswered is the bare-metal defense's availability in the context of a strict-liability claim.

On the one hand, the circuit court limited its holding to negligence claims, finding that the plaintiffs had waived the strict-liability issue.²⁴ On the other hand, the court's reasoning — that maritime law should be construed in a manner that maximizes injured sailors' recovery — could be interpreted to similarly confine the availability of the bare-metal defense in the strict-liability context if the later use of an asbestos component was foreseeable.

Scope of impact

Maritime law is federal substantive law, and a transferee court typically applies the substantive federal law of the circuit in which it sits. The federal asbestos MDL is assigned to the Eastern District of Pennsylvania, which is within, and thus bound by decisions from, the Third Circuit.

Consequently, the *In re Asbestos* opinion may affect the defenses available to a bare-metal product manufacturer in any case in the MDL involving maritime-law claims, regardless of where the case originally was filed.

Determining foreseeability

The *In re Asbestos* court ruled that the availability of the bare-metal defense as a defense to a negligence claim turns on whether "circumstances indicate the injury was ... reasonably foreseeable." But when can such circumstances be said to

In light of these arguments, plaintiffs going forward will likely submit that the *In re Asbestos* court's reasoning prevents district courts from dismissing strict-liability claims based on the bare-metal defense. Manufacturers of bare-metal products should respond by explaining how this argument misrepresents the *In re Asbestos* decision's scope.

Another question the *In re Asbestos* decision left unanswered is the bare-metal defense's availability in the context of a strict-liability claim.

First, the *In re Asbestos* court explicitly avoided reaching the strict-liability question and affirmed the district court's order granting summary judgment on this point.²⁵

Second, the court acknowledged that the bare-metal defense interacts with the doctrines of negligence and strict liability differently, and that the bare-metal defense might apply in a stronger fashion in a strict-liability action than in the negligence context.²⁶

Third, because the Third Circuit still has not addressed this issue, the favorable district court decisions — which forgo a foreseeability inquiry and hold that a bare-metal product manufacturer cannot be liable for exposure to asbestos from another company's later-added product — remain good law.

Whether the bare-metal defense remains a viable defense to a maritime-law strict-liability claim is more than academic. True, plaintiffs often assert failure-to-warn claims under both negligence and strict-liability theories. However, the differences between strict-liability and negligence claims manifest in important ways.

A plaintiff pursuing a strict-liability claim might be permitted to argue to a jury that a manufacturer was required to sell a product free from defect and accompanied by all possible warnings, whereas a plaintiff left with "only" a negligence claim would be constrained to challenge the reasonableness of the manufacturer's conduct.

The presence or absence of a strict-liability claim might affect whether the defendant can assert a state-of-the-art defense. Some jurisdictions do not require juries to apportion fault among all liable parties if the defendants are facing claims for strict

liability. Notably, moreover, certain evidence has been held admissible with respect to one theory, but not the other.

CONCLUSION

Notwithstanding the headlines, bare-metal product manufacturers facing product-liability claims under maritime law should not abandon the bare-metal defense.

While the *In re Asbestos* opinion makes it less likely that the bare-metal defense will apply to a plaintiff's negligence claim, through deposition testimony and discovery, a defendant might still be able to show that the later addition of an asbestos-containing component was not reasonably foreseeable under the circumstances.

Further, because the bare-metal defense has its roots, at least in part, in the concept of a defendant's duty, and because whether a defendant owed a duty under the circumstances typically is a question of law for the court to decide, summary judgment based on the bare-metal defense on a negligence claim remains possible in the right case.

Even where a case's facts fall within the circumstances that the Third Circuit has suggested might render the bare-metal defense inapplicable, bare-metal product manufacturers should still consider seeking partial summary judgment if the plaintiff has asserted a strict-liability claim.

The bare-metal defense remains available as a bright-line bar to strict liability, and the presence — or absence — of a strict-liability claim can influence the evidence and arguments permitted at, and any allocation following, a trial.

In short, following the *In re Asbestos* opinion, manufacturers of bare-metal products should continue to analyze the claims and defenses at issue, attempt to develop a record that supports summary judgment based on the bare-metal defense, and move for summary judgment on both negligence and strict-liability claims, when appropriate.

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NOTES

¹ *In re Asbestos Prods. Liability Litig.* (No. VI), No. 16-2602, 2017 WL 4366866 (3d Cir. Oct. 3, 2017) (published). A copy of the opinion is available at <http://www2.ca3.uscourts.gov/opinarch/162602p.pdf> (last accessed October 5, 2017). "Whether maritime law governs a tort action turns on two factors: (1) whether the situs of the tort was maritime, and (2) whether the tort bore a significant relationship to traditional maritime activity." *Quirin v. Lorillard Tobacco Co.*, 17 F. Supp. 3d 760 (N.D. Ill. 2014) (citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995)).

² See generally *Id.*

³ See, e.g., *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1178 (D.C. Cir. 1987) (Ginsburg, J.); *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 794 n. 4 (E.D. Pa. 2012) (Robreno, J.) (holding that where "a defense arises under federal law and the U.S. Supreme Court has not ruled on the issue, the transferee court typically applies the law of the circuit in which it sits").

⁴ *In re Asbestos Prods. Liability Litig.* (No. VI), 2017 WL 4366866 at *3.

⁵ *Evans v. CBS Corp.*, 230 F. Supp. 3d 397, 403 (D. Del. 2017) (quoting *Carper v. Gen. Elec. Co.*, No. 12-CV-06164, 2014 WL 6736205, at *1 (E.D. Pa. Sep. 4, 2014)); see also *Conner*, 842 F. Supp. 2d at 801 ("[A] manufacturer is not liable for harm caused by, and owes no duty to warn of the hazards inherent in, asbestos products that the manufacturer did not manufacture or distribute.").

⁶ See *Chesher v. 3M Co.*, 234 F. Supp. 3d 693, 698-99 (D.S.C. 2017) ("In recent years, a split has emerged between courts applying *Quirin*, or a similar, *Quirin*-like approach, and courts adhering to *Conner's* more restrictive view of a manufacturer's duty to warn."); *In re Asbestos Prods. Liability Litig.* (No. VI), 2017 WL 4366866 at *2.

⁷ *Lindstrom v. A-C Prod. Liability Tr.*, 424 F.3d 488, 496 (6th Cir. 2005); see also *Cabasug v. Crane Co.*, 989 F. Supp. 2d 1027, 1038-43 (D. Haw. 2013); *O'Neil v. Crane Co.*, 266 P.3d 987, 995-96 (Cal. 2012); *Simonetta v. Viad Corp.*, 197 P.3d 127 (2008); *Braaten v. Sabherhagen Holdings*, 198 P.3d 493, 495-500 (2008).

⁸ *In re Asbestos Prods. Liability Litig.* (VI), 2017 WL 4366866 at *2.

⁹ See, e.g., *Quirin*, 17 F. Supp. at 768-70; *Chicano v. Gen. Elec. Co.*, No. 03-CV-5126, 2004 WL 2250990, at *6 (E.D. Pa. Oct. 5, 2004).

¹⁰ See, e.g., *Chesher*, 234 F. Supp. 3d at 698-99; *Quirin*, 17 F. Supp. at 768-70.

¹¹ *Evans*, 230 F. Supp. 3d at 403.

¹² *In re Asbestos Prods. Liability Litig.* (VI), 2017 WL 4366866 at *2.

¹³ *Devries v. General Elec. Co.*, 188 F. Supp. 3d 454, 455 (E.D. Pa. 2016).

¹⁴ *Id.*

¹⁵ *In re Asbestos Prods. Liability Litig. (VI)*, 2017 WL 4366866 at *2.

¹⁶ See *Id.* at *2, *4, *6-7.

¹⁷ *Id.* at *1.

¹⁸ *Id.* at *5, *6.

¹⁹ *Id.* at *5, *6, *7.

²⁰ *Id.* at *1.

²¹ E.g., P.J. Dannunzio, *Third Circuit Invalidates 'Bare Metal' Defense in Asbestos Cases*, THE LEGAL INTELLIGENCER, Oct. 4, 2017 (available at <http://www.thelegalintelligencer.com/home/id=1202799678754/Third-Circuit-Invalidates-Bare-Metal-Defense-in-Asbestos-Cases?mcode=1202617075166&curindex=2>) (last accessed Oct. 6, 2017).

²² *In re Asbestos Prods. Liability Litig.*, 2017 WL 4366866 at *6-7 (“The finer contours of the

defense, and how it should be applied to various sets of facts, must be decided on a case-by-case basis.”).

²³ *Id.* at *6-7 (internal footnotes and citations omitted).

²⁴ *Id.* at *1, *4.

²⁵ *Id.* at *4.

²⁶ *Id.* at *3.