Liability for Replacement Parts in a Post-'Tincher' World

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Pennsylvania has applied Section 402A of the Restatement (Second) of Torts as the basis for strict products liability. The threshold requirement of Section 402A is that the defendant be engaged in the business of manufacturing or selling the culprit product. Defendant manufacturers have argued that they should not be liable for failure to warn individuals about the potential harms from exposure to asbestos in connected or replacement parts manufactured or sold by third parties.

Courts in Pennsylvania and across the country have varied rulings on the issue of whether defendant manufacturers can be strictly liable for asbestos containing components parts that they did not manufacture, sell or distribute. Some courts have held that the original manufacturer may be strictly liable because it was foreseeable that the component would be used in the manufacturers' products and the manufacturer failed to warn of known hazards.

Pennsylvania's products liability law on the replacement parts issue is even more unsettled in light of the Supreme Court's ruling in *Tincher v. Omega Flex*, (Pa. 2014), which overruled *Azzarello v. Black Brothers Company*, (Pa. 1978). Under *Azzarello*, courts were required to determine whether a product was "unreasonably dangerous," and there was a strict dichotomy between strict liability and negligence causes of action which precluded evidence of conduct, industry standards and government regulations.

Although the court overruled *Azzarello*, it maintained a products liability formulation based on Section 402A of the Restatement (Second) of Torts. But, the court also ruled that a fact finder may consider negligence principles such as risk-utility and consumer expectations in determining whether a product is defective. As a result, the clear boundary drawn between strict liability and negligence under *Azzarello* has been rejected, and a post-*Tincher* jury may be allowed to consider evidence in strict liability cases that was previously only permitted in negligence cases.

Prior to *Tincher*, Pennsylvania courts were seemingly split on whether a product manufacturer could be strictly liable for replacement components it did not manufacture or sell but were used in the original product. In *Toth v. Economy Forms*, (Pa. Super. 1990), the Superior Court held that a scaffolding manufacturer is not liable under theories of strict products liability or negligence for a defective wooden plank that was manufactured, sold and supplied by another company. The plaintiff in *Toth* unsuccessfully argued that the scaffold manufacturer should be liable for defective

design and failing to provide adequate warnings.

The issue has been considered by other state and federal courts in Pennsylvania in the context of the "bare metal" defense in cases involving alleged liability for exposure to asbestos. Pursuant to the "bare metal" defense, equipment manufacturers argue that they cannot be liable for asbestos containing replacement component parts, such as gaskets, packing and insulation, that were used in their products after the product was placed into the stream of commerce.

In an unpublished opinion, *Schaffner v. Aesys Technologies,* (2010), the Pennsylvania Superior Court held that a product manufacturer could not be held liable under theories of strict liability or negligence for a product it neither supplied nor manufactured. A similar conclusion was reached by the Philadelphia Court of Common Pleas in *Kolar v. Buffalo Pumps,* (2010) (Moss, J.). In considering the "bare metal" defense, the court held that there could be liability against a defendant for a substantial change to the defendant's pumps and traps if it was foreseeable that asbestos gaskets and packing would be used in the products.

Two federal court judges reached different conclusions in considering the "bare metal" defense—holding that a product manufacturer can be liable for replacement parts it did not manufacture or supply, as in *Chicano v. General Electric,* No. 03-5126, (E.D. Pa. 2004) (O'Neil, J.); and *Hoffeditz v. AM General*, No. 09-70103, (E.D. Pa. 2011) (Robreno, J.). In both cases, the courts held that the defendants were liable because the products were designed to incorporate the use of asbestos-containing components.

No Pennsylvania state court has yet considered what effect the change in products liability law under the *Tincher* case will have on the potential liability for defective replacement components. The status of Pennsylvania law on the issue was recently considered in the case of *Schwartz v. Abex*, No. 05-02511, (E.D. Pa. May 27, 2015).

In *Schwartz*, U.S. District Judge Eduardo C. Robreno of the Eastern District of Pennsylvania considered the availability of the "bare metal" defense in evaluating whether the defendant was liable for harm allegedly caused by asbestos insulation that it did not manufacture or sell, but that was installed on propeller controls, engine controls and fuel on the engines it had manufactured. Robreno predicted that "Pennsylvania law would hold a product manufacturer liable for failing to warn about asbestos hazards of component parts used with its product which it neither manufactured nor supplied … only if the product manufacturer (1) knew its product would be used with an asbestos-containing component part of the type at issue, (2) knew that asbestos was hazardous, and (3) failed to provide a warning that was adequate and reasonable under the circumstances and knew when it placed the product into the stream of commerce that asbestos was hazardous."

Robreno's conclusion appears to conflict with the Pennsylvania Superior Court's pre-*Tincher* ruling in *Toth* by allowing a theory of liability to be asserted against a company for components it did not manufacture or sell. As Robreno noted in *Schwartz*, courts

across the country have split as to whether liability still exists where a defendant does not manufacture or sell the replacement part at issue.

Courts in some jurisdictions have held that there is no liability under any theory, as in *Conner v. Alfa Laval*, (E.D. Pa. 2012) (applying maritime law); and *Simonetta v. Viad Corporation*, (Wash. 2008); *Braaten v. Saberhagen Holdings*, (Wash. 2008); *O'Neil v. Crane,* (Cal. 2012). In New York, a manufacturer can be liable for insulation applied to the pump if it is shown that the manufacturer knew that the insulation, which it did not manufacture or supply, would be made of asbestos, as in *Berkowitz v. A.C. & S.*, (N.Y. App. (1st Dept.) 2001). The Maryland Appellate Court also recently held that a manufacturer can be liable for failing to warn about dangers associated with replacement parts it did not manufacture or distribute, as held in *May v. Air & Liquid Systems*, No. 5 Sept. Term 2015, Md. App., (Dec. 18, 2015).

Judge Robreno distinguished *Schwartz* from *Tincher* by noting that *Tincher* was a design defect case rather than a failure to warn case. However, the California Supreme Court considered the same issue under the very cases upon which *Tincher* was based and reached a different conclusion.

The *Tincher* court relied heavily on the California Supreme Court's ruling in Barker v. Lull Engineering, (Cal 1978), in holding that elements of negligence can be applied in products liability claims. Applying Barker, the California Supreme Court in O'Neil, supra, held that "a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product" and noted that "foreseeability alone is not sufficient to create an independent tort duty." The court further held that replacement of asbestos-containing components with after-market, asbestos-containing components did not trigger a duty to warn about the after-market component where the manufacturer neither manufactured or supplied the component.

If the trial courts follow the rationale of the California courts in Barker, which was the underlying basis for Tincher and the California Supreme Court's ruling in O'Neil, Pennsylvania should arrive at the same conclusion as the O'Neil court and foreclose all theories of liability against a product manufacturer for replacement parts it did not manufacture or place into the stream of commerce. However, allowing negligence principles into products liability cases under Tincher could also permit a court to examine a defendant's knowledge regarding the future use of component parts in its product.

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