In-House Insight

Stripped Bare: The Supreme Court’s Decision in Air & Liquid Systems v. DeVries Signals the End for the Bare-Metal Defense

by Lawrence G. Cetrulo, Michael J. Cahalane, and Brian D. Fishman

It is black-letter products liability law that a product manufacturer cannot be liable for injuries arising from a product that it did not manufacture or control. In Air & Liquid Systems Corp. v. DeVries, the third majority opinion authored by Justice Brett Kavanaugh in a thinly reasoned decision in derogation of the rights of manufacturer defendants, the U.S. Supreme Court held that “a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product’s users will realize that danger.” The Court relied on “maritime law’s long-standing solicitude for sailors”—a euphemism, perhaps, for the Court’s sympathy for seamen—to justify the Court’s expansion of liability to a party for products it neither manufactured nor controlled.

The two newest members of the Supreme Court found themselves on opposite sides of the issue, a circumstance that apparently surprised veteran Court-watchers. As Justice Neil Gorsuch reasoned in his dissent, a manufacturer’s duty has traditionally been “restricted to warnings based on the characteristics of the manufacturer’s own product.” Rather than apply this hornbook rule, which is simple in articulation and straightforward in application, the majority invented a new three-part test by which it will analyze future tort claims. In doing so, the Court embraced a results approach over common sense and favored activism over strict application of precedent. DeVries effectively marks the end of the so-called “bare-metal” defense in maritime cases and portends its erosion in state law cases as well.

The “Bare-Metal” Defense

The DeVries case arises out of the plaintiffs’ allegations of exposure to asbestos-containing products while serving in the U.S. Navy. The pumps, blowers, and turbines manufactured by the defendants, and to which John DeVries was allegedly exposed, were equipped with asbestos-containing components not manufactured by defendants. The original manufactured equipment was not shipped with asbestos components (hence the shorthand description of the defense—“bare-metal”), but such equipment allegedly required subsequent application of asbestos insulation in order to function properly. DeVries claimed that manufacturers have a duty to warn when their products required incorporation of a “necessary” part that makes the “fully integrated” product dangerous for its intended uses. The 6-3 majority held that in the maritime tort context, a manufacturer has a duty to warn when it knows or has reason to know that a part, required for its equipment to function properly, is likely to be dangerous and the manufacturer has no reason to believe the end user will realize that danger.

The defendants in DeVries sold equipment to the Navy for use on ships that was delivered “bare-metal,” that is, without any asbestos-containing insulation. All of the equipment required insulation, however, in order to function safely and properly. The Navy applied asbestos insulation after delivery of the equipment. Because the Navy is generally protected from suit under sovereign immunity principles, and since most manufacturers of asbestos-containing thermal insulation are bankrupt as a result of asbestos liabilities, the only targets available for a plaintiff’s recovery were so-called “bare-metal” equipment manufacturers.

The Court considered three approaches for application of a general “duty to warn” principle in cases in which a manufacturer’s product requires incorporation of a dangerous part in order to function as intended. The first approach, which the Court describes as the “plaintiff-friendly foreseeability rule,” states that a “manufacturer may be liable when it was foreseeable that the manufacturer’s product would be used with another product or part, even if the manufacturer’s product did not require use or incorporation of
that other product or part.” The second approach is the “defend-
dant-friendly bare-metal defense,” which states that “if a manufac-
turer did not itself make, sell, or distribute the part or incorporate
the part into the product, the manufacturer is not liable for harm
cau5ed by the integrated product, even if the product required incor-
poration of the part and the manufacturer knew that the integrated
product was likely to be dangerous for its intended uses.”

The third approach, which the Court ultimately adopted, is an
amalgam of the first two. “Foreseeability that the product may be
used with another product or part that is likely to be dangerous is
not enough to trigger a duty to warn. But a manufacturer does have
da duty to warn when its product requires incorporation of a part and
the manufacturer knows or has reason to know that the integrated
product is likely to be dangerous for its intended uses.” In its ana-
lysis, the majority observed that equipment manufacturers are in a
better position to warn than parts manufacturers, as parts manufac-
turers may be unaware that their part will be used in a dangerous
manner. As justification for this relaxed rule, the majority points to
maritime law’s “long-standing solicitude for sailors.”

In dissent, Justice Gorsuch relied on common law principles that
hold no duty to warn about another manufacturer’s products, even
when those products are used together with the original manufactur-
er’s product. This precept ensures that parts manufacturers retain
their duty to warn, while at the same time reflecting more realistic
consumer expectations. In so arguing, the dissent made compari-
sions with other products that are frequently used in concert with
dangerous component parts. For instance, “Would a company that
sells smartphone cases have to warn about the risk of exposure to
cell phone radiation? Would a carmaker have to warn about the risks
of improperly stored antifreeze? Would a manufacturer of flashlights
have to warn about the risks associated with leaking batteries? Would
a seller of hot dog buns have to warn about the health risks of con-
suming processed meat?”

Importantly, the dissent highlights the uncertainty introduced
by the majority’s test: The majority fails to define what qualifies as
an “incorporated” or “integrated” product. Simply put, the dissent
argues that “tort law is supposed to be about aligning liability with
responsibility, not mandating a social insurance policy in which ev-
everyone must pay for everyone else’s mistakes.” That the defendants
acted properly and provided all legally required warnings decades
ago when the products were sold has no bearing under a DeVries
analysis. Rather, manufacturers of products lacking the offending
component are retroactively liable for breaching a duty they did not
know they had and with which they cannot now comply.

Future of the “Bare-Metal” Defense
With the Navy immune from suit under traditional theories of so-
vereign immunity, and many parts manufacturers bankrupt, plaintiffs
with asbestos exposures primarily resulting from service in the Navy
have precious few “targets” for liability. The DeVries decision and its
ex post facto imposition of liability will, no doubt, resuscitate the so-
called “Navy cases” that had experienced a decline in active litiga-
tion, courtesy of the bare-metal defense. Manufacturers of shipboard
equipment should brace for the inevitable resurgence of litigation,
particularly in jurisdictions like California, Washington, Massachu-
setts, and Maryland, among others, which recognize the bare-met-
al defense. For now, the bare-metal defense remains technically
intact, but only insofar as a defendant can effectively demonstrate

the level of knowledge of the end user: The final prong of Justice
Kavanaugh’s new test, whether “the product’s users will realize the
danger,” can be attacked with evidence of the Navy’s knowledge of
the dangers of their products, and by showing that the Navy, and not
the sailors, were the “users” of the products. A defendant unable to
meet both of these requirements will find the bare-metal defense
unavailing.

The effects outside of the maritime context will likely be more
substantial than the Court seems to intend. In non-Naval exposure
cases, bare-metal defendants, who were virtually immune from suit
in asbestos cases in many jurisdictions, may be targeted once again
by plaintiffs who will no doubt attempt to expand the Supreme
Court’s reasoning beyond the maritime context. Notwithstanding
Justice Kavanaugh’s express limitation of the Court’s holding to
the maritime tort context, plaintiffs will use the DeVries decision to
try to eradicate the bare-metal defense from state law claims. Manufac-
turers of land-based turbines, boilers, and other equipment frequently
sold without any asbestos insulation are likely to experience an
increase in litigation activity. These defendants must be prepared for
the erosion of the bare-metal defense through reliance on DeVries.
Conversely, this may relieve some pressure from premises defend-
ants, who are often the only solvent entity who may be responsible
for exposures in their facility, as many component part manufactur-
ers are bankrupt and equipment manufacturers were able to rely on
the bare-metal defense.

Justice Gorsuch’s dissent asserts that the common law, as prop-
erny applied, creates no duty to warn about another manufacturer’s
products, but instead only to warn about a manufacturer’s own prod-
uct. Justice Gorsuch elaborates that the new test makes particularly
little sense when viewed against the risk of widespread adoption
in other areas of tort law, such as automotive manufacturers being
required to warn about improperly stored antifreeze or a seller of
hot dog buns having to warn about the health risks of consuming
processed meat. Gorsuch, obviously concerned that the DeVries
holding will be expanded to other applications, concludes his dissent
with the aspiration that state courts exercise their liberty to refrain
from implementing the test announced by this decision, if it was,
indeed, driven only by “solicitude for sailors.”

Misguided Activism
As suggested by the dissent, “in deviating from the traditional
common law rule, the court may be motivated by the unfortunate
facts of this particular case” where “the bare metal defendants may
be among the only solvent potential defendants left.” In 1950 in the
Feres v. United States case, the U.S. Supreme Court held that
service members cannot bring tort suits against the government for
injuries that arise “out of or in the course of activity incident to
service.” This doctrine has been in place since, and Congress has
not chosen to alter the law, nor has the Supreme Court reversed
its precedent on this issue. The Court should not engage in poli-
icy-making. If the doctrine of Naval immunity results in an inequity,
Congress, rather than the courts, should act to create an avenue for
recovery. In the interim, the Navy’s immunity should not be the ratio-
nale for an unwarranted extension of liability upon heretofore inno-
cent manufacturers. The majority based its opinion on “long-standing
solicitude” for naval veterans, but sympathy for a plaintiff should not
be the basis for judicial activism.

A further rationale for the majority’s holding—that the parts
manufacturers, who created actual asbestos-containing products, are bankrupt—is equally misplaced. The bankruptcy courts have established an avenue of recovery from these entities in the form of bankruptcy trusts formed specifically to compensate plaintiffs injured by asbestos exposure. Unavailability of a defendant with deep enough pockets should not be the basis for passing liability along to an unrelated party. The majority reasoned that equipment manufacturers are in a better position to warn than parts manufacturers, as parts manufacturers may be unaware that its part will be used in a dangerous manner; this rationale is entirely incongruous and inapplicable in a case dealing with asbestos-containing parts, where the hazards of asbestos were likely equally known to both equipment and parts manufacturers.

The Court correctly observes that the two optimal targets for recovery, the Navy and parts manufacturers, are unavailable in many Navy cases. Searching for a more adequate, better-funded defendant, the plaintiffs settled on manufacturers of products that never contained asbestos. Based on the Court’s reasoning, an absence of alternatives results in liability passing to these parties who, at the time of manufacturing, acted properly and lawfully, but now will hold liability for actions by the Navy and other companies who have already filed for bankruptcy protection.

Stripped Bare

The DeVries decision marks a dangerous expansion of liability for equipment manufacturers. Decisions based upon policy making rationale leads to inconsistent results, as Justice Gorsuch’s dissent explains. The “solicitude” for sailors in this case has resulted in liability for equipment manufacturers who never sold a single asbestos-containing product and who have no way to comply with the newly imposed duty. Although the Court’s holding is “tightly cabined” in the maritime tort context, there can be no doubt that this decision will be cited in state court cases across the country as justification for expanding liability against manufacturers. The slippery slope of Supreme Court jurisprudence is likely to erode the bare metal defense and potentially expand liability for manufacturers in other contexts.

Endnotes

3DeVries, 139 S. Ct. at 996.
5 DeVries, 139 S. Ct. at 997.
6The bare-metal defense states: “If a manufacturer did not itself make, sell, or distribute the part or incorporate the part into the product, the manufacturer is not liable for harm caused by the integrated product—even if the product required incorporation of the part and the manufacturer knew that the integrated product was likely to be dangerous for its intended uses.” Id. at 993.

7U.S. Const. art. III, § 2, cl. 1 (“The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority … to all cases of admiralty and maritime jurisdiction…”; see also 28 U.S.C.A. § 1333 (“The district courts shall have original jurisdiction, exclusive of the courts of the states, of: (1) Any civil case of admiralty or maritime jurisdiction…”)).
8DeVries, 139 S. Ct. at 995.
9Id. at 993.
10Id.
11Id. at 993-94.
12Id. at 995.
13Id. at 999.
14Id.
15The “Navy case” is shorthand for cases where the plaintiff alleges exposure to asbestos while serving in the U.S. Navy.
20DeVries, 139 S. Ct. at 997.
21Id.
22Id. at 1000.
23Id.
25See, e.g., Knox v. Service Employees Int’l Union, Local 1000, 567 U.S. 298, 326 (2012) (Sotomayor, J., concurring) (“the majority breaks our own rules and, more importantly, disregards principles of judicial restraint that define the Court’s proper role in our system of separated powers”).
26DeVries, 139 S. Ct. at 992.
27Id. at 995.