



Authors:

G. W. Shaw
+1.206.370.7955
bill.shaw@klgates.com

Michael K. Ryan
+1.206.370.8023
michael.ryan@klgates.com

James H. Curtis
+1.206.370.7894
james.curtis@klgates.com

K&L Gates comprises approximately 1,400 lawyers in 21 offices located in North America, Europe and Asia, and represents capital markets participants, entrepreneurs, growth and middle market companies, leading FORTUNE 100 and FTSE 100 global corporations and public sector entities. For more information, please visit www.klgates.com.

Washington Courts Outline Possible Expansion of the Duty to Warn in Asbestos Cases

In a pair of closely watched asbestos cases, the Washington Court of Appeals on January 29, 2007 greatly expanded the duty to warn in asbestos cases. Under these rulings, a product manufacturer whose products did not include any asbestos in its manufacture or finished product but “necessarily used” asbestos in the normal course of their use by another had a duty to warn individuals working with those products of the dangers of working with asbestos and those products that required the use of asbestos to function properly may now be considered “dangerous in the ordinary use” for the purposes of strict liability.

These decisions, explained in detail below, may have a direct impact on defendant manufacturers whose products may have required the use of asbestos-containing products to function properly. First, not only do these cases purport to expand the duty of asbestos defendants to warn about the potential use of asbestos products made and installed by others, but they may also be applied to ensnare in the broad web of the asbestos litigation system a completely new group of manufacturers whose products never contained asbestos. For asbestos defendants in Washington, these developments require immediate consideration in ongoing litigation. For manufacturers not yet embroiled in asbestos litigation this threat requires careful evaluation to determine litigation risk and to position the company for a suitable defense.

Simonetta v. Viad Corp.

The first case, *Simonetta v. Viad Corp.*, 2007 WL 214301 (Wash. Ct. App. 2007 Jan. 29, 2007), involves the scope of a manufacturer’s duty to warn about the potential health hazards of asbestos for its products that “necessarily” require the use of asbestos. In *Simonetta*, a former machinist filed suit against Viad sounding in both negligence and strict liability based on exposure to asbestos during Mr. Simonetta’s work on shipboard machinery while serving aboard a United States Navy ship. The only alleged exposure to asbestos from Viad’s product occurred when Mr. Simonetta opened a small door on the machine manufactured by Viad in order to examine and to repair some of its internal tubing. In order to open the machine, Mr. Simonetta was required to remove the block insulation, asbestos mud, and asbestos cloth that was added to the machine by the U.S. navy after its installation. Viad did not manufacture, supply or specify the use of any of these asbestos-containing products. Originally, the trial court granted summary judgment for Viad based on the lack of any duty owed to the machinist for products produced, supplied and installed by others. The Court of Appeals, however, reversed on both the negligence and strict liability claims under § 402A.

With respect to Mr. Simonetta's negligence claims, the Court of Appeals held: "A duty to warn exists toward users of the product who may encounter a known hazard. Accordingly, because Simonetta was a repairman engaged in the operation and maintenance of an evaporator, [Viad] owed him a duty of reasonable care to warn of the known hazards involved in the use of the product." In so holding, the Court of Appeals roundly rejected Viad's claims that it only had a duty to warn about dangers "inherent in its product" and stated:

the danger of asbestos exposure is 'inherent' in the use of its product, because the evaporators were built with the knowledge that insulation would be needed for the units to operate properly and that workers would need to invade the insulation to service the units. [Viad] also knew the Navy used asbestos for thermal insulation. A product designed so that use requires the invasion of asbestos insulation has a known inherent danger because the particles become respirable which exposes people nearby to their toxic nature.

The Court of Appeals went on to note that manufactures whose products required the use of asbestos "had a duty to warn workmen like Simonetta of the known danger [of asbestos exposure], even though it did not produce or supply the asbestos." The court further held that even though the evaporator left the manufacturer's control without insulation or asbestos, the product was nevertheless "defective" because it "had to be encapsulated in insulation for use, yet included no warning about the risk of exposure to a known danger, which would result from disturbing the insulation during ordinary use and necessary maintenance of the units." Accordingly, the Court held that "when a product requires the use of another product and the two together cause a release of a hazardous substance, the manufacturer has a duty to warn about the inherent dangers."

While the Court of Appeals acknowledged the expansive nature of its holding when it noted that the duty it found "has not traditionally applied to

products manufactured by another," it made no effort to reign in the illogical consequences of its ruling. For example, Viad also knew that its machinery would be installed and connected as part of the steam-powered propulsion system aboard a Navy warship. Given the court's expansive ruling, one can now argue that the manufacturer of an evaporator had a duty to warn sailors of the myriad hazards associated with other components of the system, including the engines, boilers, valves, fittings, or circulation pumps. Indeed, because the machinery was an integral part of the ship, a component manufacturer under the court's theory in Simonetta could possibly be held liable for any hazard aboard the ship, particularly because the manufacturer knew that the equipment would be aboard ship and a variety of potential hazards exist aboard ship.

Braaten v. Saberhagen Holdings

Braaten v. Saberhagen Holdings, 2007 WL 211026 (2007) (Wash. Ct. App. Jan. 29, 2007), involved a lawsuit filed by a former pipe-fitter against five manufacturers of various pumps, valves and turbines because of their alleged failure to warn about the dangers of asbestos inhalation involved with using their products. All five manufacturers either sold products (valves, pumps, or turbines) containing asbestos gaskets and packing, or were aware that asbestos insulation was regularly used in and around their machines when they were installed. The trial court granted summary judgment to all five manufacturers, ruling that they had no duty to warn about asbestos products manufactured and installed by others. The Court of Appeals reversed.

In the context of strict liability under § 402A, the Court held that summary judgment was improper because a trier of fact could determine that the pumps and valves were unreasonably dangerous when used as intended. In fact, the Court specifically noted that the defendants' pumps, valves, and turbines, because they required the use of asbestos in order to function properly, were "simply dangerous in the ordinary use." This conclusion led to the Court's holding that "when

a product's design utilizes [asbestos], and there is a danger of that [asbestos] being released from the product during normal use, the seller of the product containing the [asbestos] has an independent duty to warn.”

In the context of negligence, the Court noted that the only issue before it was whether these equipment manufacturers owed Mr. Braaten a duty to warn about the dangers of working with or around asbestos-containing products. In concluding such a duty did exist, the Court first noted that because Mr. Braaten used the manufacturers' pumps and valves, the manufacturers owed a general duty to warn. Next, the Court addressed the issue of the “foreseeability of the harm” alleged. In other words, whether these manufacturers knew, or should have known, “about the hazards of asbestos at the time [their products] were being sold and used.” The Court concluded that such a question is a question of fact and therefore was not appropriate for summary judgment.

Conclusion

Regardless of the meanings intended by the Court of Appeals or the interpretation of these decisions by counsel for litigants, the Simonetta and Braaten cases drastically alter the landscape of asbestos litigation in Washington state. Under the principles of these rulings, manufacturers of non-asbestos products can be held liable for the dangers associated with products manufactured, installed, and specified by others. Considering that many of the companies which manufactured the asbestos products at issue, such as the thermal insulation referenced in the opinions, are shielded from litigation by discharge in the scores of asbestos-related bankruptcies in the past twenty years, equipment and component manufacturers are now positioned by the courts to step into the shoes of the truly responsible parties and to bear the financial burden and social responsibility for products that they never manufactured, supplied, controlled, or specified.

K&L Gates comprises multiple affiliated partnerships: a limited liability partnership with the full name Kirkpatrick & Lockhart Preston Gates Ellis LLP qualified in Delaware and maintaining offices throughout the U.S., in Berlin, and in Beijing (Kirkpatrick & Lockhart Preston Gates Ellis LLP Beijing Representative Office); a limited liability partnership (also named Kirkpatrick & Lockhart Preston Gates Ellis LLP) incorporated in England and maintaining our London office; a Taiwan general partnership (Kirkpatrick & Lockhart Preston Gates Ellis) which practices from our Taipei office; and a Hong Kong general partnership (Kirkpatrick & Lockhart Preston Gates Ellis, Solicitors) which practices from our Hong Kong office. K&L Gates maintains appropriate registrations in the jurisdictions in which its offices are located. A list of the partners in each entity is available for inspection at any K&L Gates office.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

Data Protection Act 1998—We may contact you from time to time with information on Kirkpatrick & Lockhart Preston Gates Ellis LLP seminars and with our regular newsletters, which may be of interest to you. We will not provide your details to any third parties. Please e-mail london@klgates.com if you would prefer not to receive this information.

©1996-2007 Kirkpatrick & Lockhart Preston Gates Ellis LLP. All Rights Reserved.