

PRODUCT LIABILITY

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MARYLAND EXPANDS THE POTENTIAL FOR  
MANUFACTURER LIABILITY IN FAILURE TO WARN CASES  
BY ADOPTING AN EXCEPTION TO THE BARE METAL  
DEFENSE

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Product manufacturers in Maryland have successfully argued for at least the last 16 years that, in terms of warnings, they are only responsible for products that they themselves have placed in the stream of commerce. In other words, manufacturers have generally avoided potential liability in tort for an alleged failure to warn of hazards associated with dangerous component parts that are used with their products, but that are placed in the stream of commerce by others. This is generally referred to as the “bare metal defense.” On December 18, 2015, however, the scope of this defense changed radically.

In *May v. Air & Liquid Sys. Corp.*, No. 5, September Term, 2015 Md. Lexis 864 (Md. Dec. 18, 2015), the Maryland Court of Appeals recognized a significant exception to the bare metal defense when it held that a manufacturer of pumps may be liable in negligence and/or strict liability for a failure to warn of the potential for injuries resulting from the use of dangerous component parts that were manufactured and placed in the stream of commerce by others. Specifically, the *May* court held that:

[A] manufacturer will have a duty to warn of asbestos-containing replacement components that it has not placed into the stream of commerce in strict liability in the same narrow circumstances as in negligence. That is, a manufacturer will have a duty to warn of asbestos-containing replacement components that it has not placed into the stream of commerce . . . only where (1) its product contains asbestos components, and no safer material is available; (2) asbestos is a critical part of the pump sold by the manufacturer; (3) periodic maintenance involving handling asbestos gaskets and packaging is required; and (4) the manufacturer knows or should know of the risks from exposure to asbestos.

*Id.* at \*34-35.

The court, cognizant of the significant change it was making to Maryland law, appears to have taken great pains to limit the scope of its decision. This is evidenced by the fact that the court states its opinion specifically in terms of asbestos products and pumps. While the court was very specific in terms of how it defined this new

exception, it is unlikely that the exception will remain confined solely to asbestos products and pumps because the underlying reasoning applies equally to other types of hazards and products.

There are, however, several important limitations in the opinion that are likely to ultimately confine the new exception. First, the court stressed that, “a manufacturer is generally not strictly liable for products it has not manufactured or placed into the stream of commerce.” *Id.* at \*40. Second, the exception applies only where a hazardous component is required for the product’s use (as opposed to a circumstance where there is a safe alternate component available for use with the product). As the court explained, “[h]ere we impose a duty on a manufacturer to warn when its product not only has asbestos components, but also *cannot function properly without these hazardous components . . .*” *Id.* at \*25 (emphasis added). According to the court, “[c]abining the duty in this way serves the policy of preventing harm without exposing manufacturers to limitless liability for products they did not manufacture or sell.” *Id.*

The adoption of this exception is not a surprise to those who have been following the bare metal defense at the national level, as the law has been in a state of flux, and this exception has emerged as something of a recent trend. *See Quirin v. Lorillard*, 17 F. Supp. 3d 760, 771 (N.D. Ill. 2014); *Surre v. Foster Wheeler*, 831 F. Supp. 2d 797, 801-02 (S.D.N.Y. 2011); *Macias v. Saberhagen Holdings, Inc.*, 282 P.3d 1069, 1083 (Wash. 2012); and *Berkowitz v. A.C. & S., Inc.*, 733 N.Y.S.2d 410, 411-12 (1<sup>st</sup> Dep’t 2001); *see also Schwartz v. Abex Corp.*, MDL 875, No. 2:05-CV-02511-ER, 2015 U.S. Dist. LEXIS 68074, \*2-3 (E.D. Pa. May 27, 2015) (holding that exception is available in negligence cases but not in strict liability cases). Other courts have taken a traditional approach and either rejected or implied that they would not embrace the exception. *See Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492, 494-95 (6<sup>th</sup> Cir. 2005); *Thurmon v. A.W. Chesterton, Inc.*, 61 F. Supp. 3d

1280, 1283, 1286 (N.D. Ga. 2014); *Faddish v. Buffalo Pumps*, 881 F. Supp. 2d 1361, 1368, 1372-73 (S.D. Fla. 2012); *O’Neil v. Crane Co.*, 266 P.3d 987, 991 (Cal. 2012); and *Toth v. Economy Form Corp.*, 571 A.2d 420, 422 (Pa. Super. 1990). Interestingly, to the extent that this exception is a modern trend, the trend has been led to a significant degree by the federal district courts. The *May* case is notable insofar as it makes Maryland one of the few states where the highest state court has unequivocally endorsed this modern exception to the bare metal defense.

The exception, as articulated by *May*, is extremely significant to the extent that it creates the potential for unlimited liability to an entity for products that the entity neither manufactured nor placed in the stream of commerce. Given this trend, going forward manufacturers should address the potential for liability related to hazardous components placed in the stream of commerce by third-parties by issuing warnings, at least to the extent that the hazardous components are necessary for the operation of the manufacturers’ product. Retrospectively, however, there may be little that a manufacturer can do to remove the risk from dangerous third-party components to which users have already been exposed. As a result, in retrospective situations it is important that manufacturers clearly understand the potential for liability and how to best address or mitigate this risk in any future litigation. Given this new and potentially vast source of liability, it is critical that product manufacturers and distributors, as well as their counsel, insurers, and risk managers understand the significance of this recent and significant change in the law. ♦

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