

Asbestos Alert!

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EROSION OF *O'NEIL v. CRANE*? HENNESSY HELD POTENTIALLY LIABLE FOR MACHINE WHICH DID NOT CONTAIN ASBESTOS, BUT WAS DESIGNED TO GRIND ASBESTOS-CONTAINING BRAKE LININGS.

On Friday, May 4, 2012, the California Court of Appeal, First Appellate District, filed its opinion in *Bettencourt v. Hennessy Industries, Inc.* Plaintiffs sued Hennessy, alleging that Hennessy manufactured arc grinding machines, the sole purpose of which was to grind brake shoe linings so that they would better fit wheel assemblies (a job that, in the absence of a Hennessy machine, was often done by hand with sandpaper). Plaintiffs alleged that because during the relevant time period all available brake shoe linings contained asbestos, that the inevitable result of the use of the Hennessy machine was the release of asbestos fibers. The trial court granted judgment on the pleadings to Hennessy. The Court of Appeal reversed.

Hennessy argued that under *Taylor v. Elliott Turbomachinery Co. Inc.* (2009) 171 Cal.App.4th 564 and *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335 [both holding manufacturers whose equipment originally contained asbestos components not liable for injuries caused by asbestos-containing replacement parts that were not supplied by the manufacturer], it could have no liability because its product did not contain asbestos and it did not put asbestos into the stream of commerce. Plaintiffs argued that under *Tellez-Cordova v. Campbell-Hausfield/Scott Fetzer Co.* (2004) 129 Cal.App.4th 577 [imposing liability upon the manufacturer of a tool whose sole function was to do work which resulted in the release of toxic dust], Hennessy could still be liable for both negligent and strict liability failure to warn because the use for which the Hennessy product was designed would inevitably result in the release of respirable asbestos fibers.

Bettencourt emphasizes the plaintiffs' allegations that the "sole, intended, and inevitable use" of the Hennessy machine was to do work which would inevitably lead to the release of respirable asbestos fibers and thus likened the situation to *Tellez-Cordova*, distinguishing the facts before it from a situation where someone used sandpaper to abrade and shape brake shoe linings on the ground that "sandpaper has a wide variety of uses."

Comment and Evaluation

This is a very rapidly-developing area of law. Plaintiffs will try to use *Bettencourt* to expand the list of viable defendants in asbestos cases by arguing that *Bettencourt* did not set a bright line between defendants who manufactured generic-use products such as sandpaper and those who manufactured products with limited uses (uses which would result in the release of asbestos fibers) to try to reach additional defendants. Plaintiffs will argue that the target products had only a single or very limited designed use, and/or that an overwhelming/majority/significant known use of the product involved

foreseeable release of asbestos fibers. How far plaintiffs get with this line of reasoning will depend upon future appellate and Supreme Court determinations. We believe that the better-reasoned line of thought is that *Bettencourt* and *Tellez-Cordova* should be narrowly interpreted to provide relief to plaintiffs only when the product at issue has but a single use which would inevitably result in the release of asbestos fibers. We note that defendants seeking to preclude an expansion of liability here will need to be extremely familiar with not just the general holdings, but also the minutia and specific wording and phraseology used in the *Bettencourt*, *Tellez-Cordova*, *Taylor* and *O'Neil* decisions.

For the full decision see: <http://www.courtinfo.ca.gov/opinions/documents/A129379.PDF>