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California Asbestos Law Client Alert

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Blow to Certain Product Manufacturers Blunted

Earlier this month, we issued a Client Alert regarding a decision by the California First Appellate District in consolidated case of *Leonard Shields, et al. v. Hennessey Industries, Inc.* (2012) _____ Cal. App. 4th _____, in an Alert entitled "In Blow to Certain Products Manufacturers, California Appellate Court Uses *O'Neil* Exceptions to Allow Plaintiffs' Case to Withstand Judgment on the Pleadings." The subject of that Client Alert was the *Shields* opinion, finding that a manufacturer of brake arcing machines could be held strictly liable for harm caused by another manufacturer's product. Click this link for our prior Client Alert.

Less than one month later, the Fourth District Court of Appeal just issued, on May 22, 2012, a contrary decision involving the *exact same* defendant and the *exact same* product as were the subject of *Shields*.

In *Barker v. Hennessey Industries, Inc.* (2012) _____ Cal. App. 4th _____ (No. B232316), the subject matter was once again the California Supreme Court decision in *O'Neil v. Crane* (2012) 53 Cal. App. 4th 335, in which the Supreme Court rejected the plaintiffs' strict liability and negligence causes of action against the manufacturers of valves and pumps for the Navy. Because the valves and pumps themselves did not contain asbestos, but rather only incorporated other manufacturers' asbestos-containing products, it rejected the plaintiffs' theory of liability. However, the Supreme Court noted that manufacturers of non-asbestos-containing products with asbestos-containing components **could** be held liable in strict liability if (1) the manufacturer's product caused, created or contributed substantially to the plaintiffs' harm or (2) the manufacturer participated substantially in creating a harmful **combined** use of the products. In *Barker*, the Fourth District affirmed the granting of summary judgment in favor of Hennessey Industries, because the record established that Hennessey Industries' machines were designed to and could be used in a non-hazardous manner not involving asbestos-containing brake shoes and drums, and that its machines were hazardous only when used in combination with asbestos-containing materials.

The Fourth District explained why its decision was not inconsistent with the First District's decision in *Shields*. It explained that in *Shields*, the **allegations** of the complaint asserted that the only brake shoe linings that Hennessey's machines could service contained asbestos. Hennessey's motion for judgment on the pleadings was denied, because that **allegation** established (for the purpose of the motion) that the **sole and intended** use of the brake arcing machine resulted in the release of asbestos particles. The Fourth District stated that had that been the proof to the Court below, it would have reversed the trial court's granting summary judgment. But because the uncontroverted evidence established that there were non-hazardous uses of Hennessey's machines, the summary judgment motion was properly granted.

As always, a vast gulf exists between **allegations** and **proof**. But the moral of the story is clear: manufacturers of products that do not themselves contain asbestos must establish that at the time of the plaintiff's exposure to asbestos, a non-hazardous use of its product existed.

Burnham Brown's attorneys have extensive experience in asbestos and other product defect litigation, and can advise product manufacturers looking to resolve cases as efficiently as possible.

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Burnham Brown's San Francisco Bay Area location is in walking distance to Alameda County Superior Court and an 18 minute BART ride to San Francisco Superior Court.