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## PENNSYLVANIA

### MARITIME / ASBESTOS A Ship Is Not a “Product”



**Carl D. Buchholz, III**

In a case of first impression, Judge Eduardo Robreno, U.S. District Court for the Eastern District of Pennsylvania, ruled in *Mack v. General Electric Company, et al.* (E.D.Pa. 2012) that a Navy ship is not a “product” for purposes of a strict product liability claim and, further, that maritime law recognizes a “sophisticated user” defense to a negligent failure to warn claim, but not “sophisticated purchaser” defense.

Plaintiff James Mack filed suit against three shipbuilders for his asbestos-related disease, claiming he was exposed to asbestos aboard various Navy ships during the 1960s and 1970s while employed as a welder by the Department of Defense. Mack brought both negligence and strict liability claims against the defendant shipbuilders, alleging they were strictly liable for causing his disease and/or negligent for failing to warn him of the hazards of asbestos on the ships.

In determining whether maritime law applied to plaintiff’s claims, Judge Robreno noted that the claims must meet both a locality test and a connection test. As to the locality test, Judge Robreno found that that test was satisfied as long as some portion of the alleged asbestos exposure occurred on a vessel on navigable waters, citing his prior holding on this issue in *Conner v. Alfa Laval, Inc.* 799 F. supp. 2d 455 (E.D.Pa. 2011). As to the connection test, Judge Robreno noted that all of plaintiff’s alleged exposure occurred during sea-based work aboard the various ships, as opposed to land-based exposure, which satisfied the connection test.

Judge Robreno next examined whether the “sophisticated user” and/or “sophisticated purchaser” defenses to a product liability claim should be recognized under maritime law. The “sophisticated user” and/or “sophisticated purchaser” defenses are recognized

in Section 388 of the Restatement (Second) of Torts. The defense provides that a manufacturer of a product is not subject to a product liability claim for an allegedly hazardous product if the purchaser or user is “sophisticated” and should realize the dangerous condition of the product.

In initially examining the “sophisticated purchaser” defense, Judge Robreno noted that in situations involving asbestos hazards aboard vessels, the risks involved are often serious and even fatal. He further recognized the risk of asbestos was faced by large numbers of maritime workers aboard both commercial vessels and navy ships. As such, he found that the magnitude of the risk of asbestos injury was quite large, while the burden of providing warnings to users, such as the cost of providing warning labels on products, would have been comparatively small. As such, he concluded that the “sophisticated purchaser” defense was not available under maritime law in cases involving asbestos.

On the other hand, Judge Robreno found that maritime law does recognize a “sophisticated user” defense in the context of asbestos cases. According to Judge Robreno, the “sophisticated user” would be a recognizable defense precluding liability of an asbestos product manufacturer in cases brought by Navy seamen, where the Navy was shown to be sophisticated as to the hazards of asbestos. However, Judge Robreno concluded that it is the burden of the manufacturer or supplier of a product to demonstrate that the ultimate user was a “sophisticated” user of the product.

However, Judge Robreno also observed that existing case law is inconsistent on the issue of whether the

“sophisticated user” defense can only be raised against a failure to warn claim or whether it may also be raised against a strict liability claim pertaining to defective or inadequate warnings. Judge Robreno thought it was noteworthy that the Restatement (Second) of Torts provides the “sophisticated user” defense only in the sections of the Restatement pertaining to “negligence,” and does not provide any similar defense in the sections pertaining to “strict liability.” Thus, Judge Robreno concluded that even if a defendant can establish that a plaintiff was “sophisticated” as to the hazards of asbestos, it is only a defense to negligent based claims, i.e., negligent failure to warn, and does not preclude liability that may arise under a strict product liability claim, i.e., defective or inadequate warnings.

Having determined that the “sophisticated user” defense does not bar a strict product liability claim, Judge Robreno then addressed the other significant issue of whether a Navy ship is a “product” for purposes of strict liability under maritime law—an issue of first impression.

After concluding that maritime law is intended to promote maritime commerce and to protect those working at sea, and that the concept of strict liability is to place the burden of preventing the harm on the party best able to prevent the harm, Judge Robreno concluded that a ship should not be considered a “product” for purposes of strict product liability claims. On the contrary, Judge Robreno noted that the entities best able to protect sea-bound workers and to prevent harm to those workers are the manufacturers of the various products aboard the ship. Judge Robreno felt that to impose potential liability upon a shipbuilder for each of the thousands of products assembled in

a Navy ship pursuant to Navy specifications would be “an undue, unmanageable, and cumulative burden likely to discourage the activity of ship building.” Judge Robreno also observed that he found the role of a builder of Navy ships to be more like the provider of a service than a manufacturer or supplier of a product.

Thus, after concluding that a Navy ship is not a “product” within the meaning of strict product liability law, Judge Robreno granted summary judgment in favor of the defendant shipbuilders with respect to plaintiff’s claims pertaining to strict liability, leaving only plaintiff’s negligent failure to warn claim. As to the defendant shipbuilders’ “sophisticated user” defense to plaintiff’s negligent failure to warn claim, Judge Robreno ruled that the defendants had not presented any evidence that the plaintiff was sophisticated as to the hazards of the asbestos containing insulation from which he alleged asbestos exposure and, therefore, summary judgment was not warranted as to plaintiff’s negligent failure to warn claims.

The opinion of District Judge Robreno is a thoughtful and detailed analysis regarding issues of first impression that recognized the significant litigation costs and expenses that a shipbuilder would be subject to for thousands of items used in the reconstruction of a vessel which the shipbuilder had no involvement in creating or manufacturing. Unfortunately, we do not generally find the same type of thoughtful and detailed analysis of liability and litigation costs and expenses that are imposed by courts on product manufacturers under land-base product liability law. If plaintiff Mack does not settle his remaining negligent failure to warn claims against the defendant shipbuilders and/or does not obtain a favorable result if the case goes to trial, Judge Robreno’s opinion that a Navy ship is not a

“product” will undoubtedly be appealed to the Third Circuit Court of Appeals.

*Mack v. General Electric Company, MDL-875, No. 2:10-78940-ER, 2012 WL 4717918 (E.D. Pa. Oct. 3, 2012)*

If you have any questions regarding Judge Robreno’s decision in *Mack v. General Electric Company*, or any other maritime or asbestos related questions, please contact Carl D. Buchholz, III.

**Carl D. Buchholz, III**, is Chair of the Maritime, Insurance Coverage and Appellate Sections. His federal appellate practice includes an argument before the United States Supreme Court, as well as numerous arguments before the U.S. Court of Appeals for the Third Circuit. His state appellate practice includes seven arguments before the Pennsylvania Supreme Court, as well as numerous arguments before the Pennsylvania Superior Court and Commonwealth Court. In 2006, the Pennsylvania Supreme Court appointed Carl to the Disciplinary Board of the Supreme Court of Pennsylvania. In 2010, the Pennsylvania Supreme Court designated Carl as Chair of the Disciplinary Board. He graduated from Muhlenberg College in 1967 and Villanova Law School in 1970 where he was a member of the *Villanova Law Review* and graduated with honors.

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## OMSNIC AWARD



**Robert A. Fitch**, a partner in our New York office, was recently honored with the Victoria J. Sterling Award as Attorney of the Year for 2011 by OMSNIC/Fortress Insurance Companies at their biannual conference in Chicago. This award is given to attorneys who consistently demonstrate commitment to aggressive advocacy and strong support for the Oral and Maxillofacial Surgeon insureds and who are loyal partners with OMSNIC and Fortress in defending oral surgeons and dentists.

### **Robert A. Fitch**

Bob concentrates his practice on professional and medical malpractice, commercial motor vehicle litigation, and the defense of product liability claims. He is admitted to practice in the state and federal courts of New York as well as the U.S. Court of Appeals for the Second Circuit. Bob has been defending doctors in New York for many years, and over 90% of his assigned cases go to verdict. He has been rated AV by Martindale-Hubbell.

*Bob can be reached directly at: (212) 323-7070 or [rfitch@rawle.com](mailto:rfitch@rawle.com).*

## WORKERS' COMPENSATION PROGRAM

**Claudio J. DiPaolo**, Chair of Rawle & Henderson's Workers' Compensation Section, recently presented "*Effective Claims Handling of New York Workers' Compensation Matters from Initiation of Claim through Final Adjudication*" to workers' compensation claims representatives of Hortica Insurance & Employee Benefits in St. Louis, Missouri. Claudio has practiced in the area of workers' compensation law for over 15 years. He has defended workers' compensation claims on behalf of self-insured corporations, insurance carriers, and various political entities.



**Claudio J. DiPaolo**

Claudio has spoken about workers' compensation topics to various groups and clients throughout the country, and has written extensively on workers' compensation law. He earned his J.D. from the Widener University School of Law in 1993. Claudio is admitted to practice in Pennsylvania and New York, as well as before the U.S. Court of Appeals for the Third Circuit and the U.S. District Court for the Western District of Pennsylvania.

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