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California Supreme Court Clarifies *Sophisticated User* Product Liability Defense

The California Supreme Court's recent decision in *Stewart v. Union Carbide Corporation* [2010 DJAR 17352] on November 16, 2010, clarifies the scope and application of three distinct but closely-related product liability defenses: the "sophisticated user," the "sophisticated intermediary" and the "bulk supplier" defenses. When properly applied, each can provide a complete defense to design defect "failure to warn" claims under California's strict product liability law.

In *Stewart v. Union Carbide*, the defendant Union Carbide attempted to use a "sophisticated purchaser" defense for the failure to warn claims of the plaintiff Stewart, a plumber, who died of mesothelioma from asbestos exposure. This plumber alleged he was exposed to asbestos dust caused when dry wall installers applied and sanded joint compound. This plumber worked on large construction projects alongside dry wall installers who handled joint compound products that contained asbestos. The California Supreme Court affirmed the trial court's refusal of Union Carbide's "sophisticated purchaser" jury instruction because for this plumber, it would have been an improper extension of the sophisticated user, sophisticated intermediary, or the bulk supplier doctrines.

Under the bulk supplier doctrine, the manufacturer of a product, product component or raw material is not liable for injuries caused by the finished product where the product component itself was not defective when it left the manufacturer. (*Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577, 581.) As for joint compound that contains asbestos, the bulk supplier defense is inapplicable because raw asbestos is already a defective product. (*Jenkins v. T & N PLC* (1996) 45 Cal.App.4th 1224.) As a matter of law, a sophisticated consumer product user who is either already aware, or should be already aware, of any dangers of a product need not be warned by the manufacturer, under the sophisticated user defense. (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56) In *Johnson v. American*

Standard, Inc., the sophisticated user defense was allowed because the plaintiff was a professional EPA Certified air conditioning repair technician. Finally, under the sophisticated intermediary doctrine, a manufacturer's duty to warn is owed to the intermediary rather than the ultimate consumer user. This is because of the special training, knowledge and expertise of the intermediary, such as with warnings to physicians prescribing medicine to patients, warnings to ski rental shops that expertly fit equipment to a skier's weight and skill level (*Persons v. Salomon North America, Inc.* (1990) 217 Cal.App.3d 168, 171-172), or warnings to airline pilots rather than airline passengers. (*Stevens v. Cessna Aircraft Company* (1981) 115 Cal.App.3d 431; 433-434).

Thus, had the plumber in *Stewart v. Union Carbide Corporation* instead been a drywaller who actually used the joint compound, defendant Union Carbide would have had a better argument to apply the protection of the sophisticated user defense. Is there any guidance here for product manufacturers? First, carefully identify each entity in the product distribution chain and determine which entities should receive warnings and instructions from the manufacturer about unsafe or dangerous product risks. Second, determine whether there is any potential to argue there is a sophisticated intermediary between the manufacturer and the ultimate user, which creates a separate duty by the sophisticated intermediary to warn the ultimate user.

About the Author

Jack Janov is a partner in Locke Lord's Los Angeles office. He is a member of the Business Litigation practice group. As a seasoned trial lawyer, Mr. Janov defends product manufacturers in all aspects of product liability disputes, including litigation, trial, appeals, mediation, and arbitration.

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