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# California Court of Appeals Accepts Trial Court's Refusal to Give "Sophisticated Purchaser Defense" Instruction to Jury on Failure to Warn

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*Hinshaw Alert*

In a decision likely to disappoint many defendants involved in the California asbestos litigation, California's Second Appellate District upheld a trial court decision in which the trial judge refused to instruct the jury under a "sophisticated purchaser defense." *Stewart vs. Union Carbide Corp.,* No. B216193 (2nd App. Dist. Nov. 16, 2010)

Plaintiff was employed as a plumber from the late 1960s until he developed mesothelioma in 2007. While working on various commercial and residential construction jobs, the plumber often worked near the drywallers who were installing drywall and using joint compound. The joint compound, which contained asbestos at certain times, was manufactured by USG and Hamilton Materials. The plumber presented evidence that USG and Hamilton Materials obtained the raw asbestos from Union Carbide Corp.

According to the plumber, the drywallers followed the plumbers on any given job. Drywallers would install the drywall, tape the joints, put joint compound over the tape and then sand the joint compound. Significant amounts of dust were created during the sanding phase. Laborers would later sweep up the area, thereby stirring the dust up again. The plumber testified that "there was no way to avoid breathing this dust."

During the closing at trial, the plumber's counsel argued that Union Carbide failed to meet its burden of proof and that there was a complete lack of evidence that the other entities listed on the special verdict form were at fault. Union Carbide objected to the plumber's counsel's comment in that it implied that Union Carbide had the burden of proving specific fault percentages. It asked the court to instruct the jury accordingly. The court refused.

A directed verdict was entered in favor of Union Carbide on the fraud count. However, the jury found in favor of the plumber and against Union Carbide on all causes of action for negligence and strict products liability on both failure to warn and design defect/consumer expectations theories. Although 47 entities were named in the action, the jury allocated 85 percent of the fault in the case to Union Carbide and 15 percent to Hamilton Materials; there was no fault allocation to the other entities. A multiple seven-figure verdict was rendered against Union Carbide.

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On appeal, Union Carbide argued that the trial court improperly refused to instruct the jury on the "sophisticated purchaser defense." In particular, Union Carbide wanted the jury to hear and be instructed on the following: "Where the risk of using a hazardous product is already known, or should be known, by the purchaser of that product, the product supplier has no duty to warn of the product's potential hazards; that a bulk supplier's or raw materials supplier's duty to warn is measured by what is generally known or should be known to purchasers of the raw product, rather than by the individual plaintiff's knowledge; and that the sale of a raw material to a sophisticated intermediary purchaser who knew or should have known of the risks of that raw material cannot be the legal cause of any harm the raw material may cause."

Union Carbide cited *Johnson vs. American Standard, Inc.,* 43 Cal. 4th 56 (2008), in support of its position on appeal. In *Johnson*, plaintiff was a certified air conditioning repair technician who was injured on the job while he was repairing an air conditioner that lacked a warning of a dangerous condition which could occur during repair. *Johnson* stands for the proposition that manufacturers have a duty to warn consumers about the hazards inherent in their products, but that there is an exception to the rule that "sophisticated users need not be warned about dangers of which they are already aware or should be aware."

Distinguishing *Johnson*, the *Stewart* court clarified that *Johnson* "did not impute an intermediary's knowledge to the plaintiff, or charge him with any knowledge except that which had been made available to him through his training and which, by reason of his profession and certification." The court criticized Union Carbide's position because the plumber had not obtained any knowledge of the dangers associated with asbestos and had no obligation to do so. *Johnson* also did not stand for the principle that since Union Carbide's customers (Hamilton Materials and USG) knew or should have known of the dangers of asbestos, Union Carbide did not have to warn the plumber. The court stated, "[a]s we have seen, however, *Johnson* was not concerned with the knowledge of the purchaser, but with the knowledge of the user." Further, "the employer-employee relationship is different than the relationship between a sophisticated user intermediary and an unknown number of non-employees who may at some point work with the sophisticated user's product."

The *Stewart* decision will be disconcerting to many because the court has limited the application of the sophisticated user doctrine to instances where the actual *user* knew or had reason to know of the product's dangers. It also seems to limit the application of the bulk supplier and component part defenses. Finally, the decision seems to unfairly imply that the "defendant" has the burden of proof to provide specific percentages of fault in order to reduce its own liability in the case. That has never been the law in California.