

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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IN THIS ISSUE

Michael L. Fox and Brian M. Davies of Sedgwick LLP report on a decision from the California Court of Appeal limiting application and refusing to apply the sophisticated user doctrine in an asbestos case involving a Navy seaman.

California Appellate Court Limits Application of Sophisticated User Doctrine

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Stepping back from broad application of the sophisticated user doctrine in product liability and toxic tort litigation, the Second District of the California Court of Appeal, recently affirmed a jury's \$21 million verdict for a Navy seaman against a manufacturer of asbestos-containing gaskets and packing, rejecting the defendant's effort to assert the sophisticated knowledge of the plaintiff's employer as a defense to the plaintiff's claim. In *Pfeifer v. John Crane, Inc.*, 2013 WL 5815509 (2nd. Dist. 2013), the defendant, John Crane, Inc. (JCI), sought to have the jury instructed that, because the Navy knew or should have known of the hazards of asbestos, the defendant had no duty to warn the plaintiff-employee of the hazards of working with the defendant's products. The trial court denied the proposed instruction and entered a directed verdict on the sophisticated user defense against the defendant. After surveying the law in California and other jurisdictions, the Court of Appeal affirmed the trial court's decision, signaling a potential restriction of the sophisticated user doctrine.

This article briefly summarizes *Pfeifer*, explains the California decision in the context of other courts' application of the sophisticated user doctrine, and suggests potential implications for manufacturers and suppliers defending product liability and toxic tort claims.

A. Factual Background of *Pfeifer*

Until 1971, JCI manufactured asbestos-containing flange gaskets, sheet gasket material, and packing for use on industrial valves and pumps. From 1963 to 1971, the plaintiff worked as an apprentice fireman and boiler tender aboard Naval destroyers, using gasket and packing material manufactured and supplied by the defendant. The plaintiff's

use of these materials caused asbestos fibers, previously embedded in graphite and other bonding agents, to be released into the air. Expert opinion showed that the plaintiff's exposure to asbestos from the defendant's products substantially contributed to his mesothelioma.

The evidence also showed that, by 1960, medical researchers agreed that asbestos caused cancer. All writing appearing on Navy product packaging was regulated by the Navy. From the 1940s to the 1970s, the Navy conducted studies of its workers, which showed hazards from exposure to asbestos dust. However, the Navy negligently classified the defendant's products as "non-dusty." Therefore, in adhering to the Navy's specifications, none of the defendant's products used by the plaintiff during his service warned him of the presence of asbestos, or its potential health hazards. Though he was required to wear a respirator during his work, the plaintiff was not trained on the hazards of asbestos during his service.

B. Appeal for Denial of Sophisticated User Defense Instruction

At trial, JCI proposed jury instructions for a sophisticated user defense as to any exposure to its products by the plaintiff during his employment in the Navy. First, the defendant argued that it had no duty to warn the employees of a sophisticated user of its product's hazards, arguing that the Navy's superior knowledge about the hazards of asbestos was or reasonably should have been shared with the Navy's employees, shielding the asbestos product manufacturer from liability to the Navy's employees, such as the plaintiff. Second, the defendant argued that employees of a sophisticated user were sophisticated users themselves.

The trial court rejected the defendant's proposed instructions, finding that the "sophisticated intermediary defense" actually proposed by the defendant was unsupported by evidence, and that such a version of the sophisticated user defense, as presented by JCI, did not exist in California. In its appeal, JCI argued that evidence supported its sophisticated user defense instructions, and that the trial court should not have directed a verdict against it.

C. Defenses Applying the Sophisticated User Doctrine

1. Sophisticated User Defense

The sophisticated user defense derives from Comment k to Restatement of Torts § 388, which states that a supplier of goods is liable for injuries sustained by the user of its goods if the supplier (1) knows or reasonably should know its goods are dangerous; (2) has no reason to expect the user of its goods will realize the danger involved; and (3) does not reasonably warn them of the danger. Comment k recognizes the situation when a person with special experience would realize the danger of the goods used.

In *Johnson v. American Standard, Inc.*, 43 Cal.4th 56 (2008), the Supreme Court of California recognized this defense for the first time, acknowledging that Section 388 had been adopted into California law. *Johnson* involved a certified HVAC technician who alleged product liability claims for exposure to R-22 refrigerant during his work. After receiving multiple certifications, he reached the highest technician level attainable from the EPA.

The California Supreme Court's decision, in a section called "How the Defense Operates in California," held that there is no liability to a

sophisticated user of a product for failure to warn of a product's dangers if the sophisticated user knew or should have known of the dangers. This defense applies equally for negligence and strict liability claims. Actual knowledge of the dangers makes the defense moot. Thus, for those who hold themselves out as a member of a group of sophisticated users, the inquiry focuses on whether the plaintiff should have known of the hazards. The duty to warn is eliminated when the expected user population is generally aware of the risk at issue. The issue of whether a plaintiff could negate the sophisticated user defense by showing that the sophisticated user's misuse of the product was foreseeable had not been presented, and thus was not decided.

Johnson held that the technician was a sophisticated user as to R-22, and would have been made aware of the hazards of exposure through his training and multiple certifications. Since the manufacturers and suppliers of R-22 did not need to warn the technician about its hazards, the technician's actual lack of knowledge of the product's dangers did not proximately cause his injuries. Accordingly, the Court affirmed the trial court's granting of summary judgment as to the product claims.

2. Sophisticated Intermediary Defense

Similar to the sophisticated user defense, the sophisticated intermediary or purchaser defense, derived from Comment n to Section 388 and followed in most states, dictates that there is no duty to warn a purchaser who is already knowledgeable about a product hazard and can be expected to pass on that knowledge to the product user. See Mary-Christine (M.C.) Sungaila & Kevin C. Mayer, *Limiting Manufacturers' Duty to Warn: The Sophisticated User and Purchaser Doctrines*

(2009) 76 DEF. COUNS. J. 196. Indeed, the California Supreme Court explained that “[t]he rationale supporting the [sophisticated user] defense is that ‘the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer’s employees or downstream purchasers.’” *Johnson, supra*, 43 Cal.4th at 65 (citations omitted).

The California case of *Stewart v. Union Carbide Corp.*, 190 Cal.App.4th 23 (2010), recognized but did not apply the defense. In *Stewart*, the plaintiff was a plumber who claimed exposure to asbestos-containing joint compound through his work. In his suit, the plumber sued a supplier of raw asbestos for causing his mesothelioma. The supplier argued that manufacturers using its product knew or should have known of the hazards of asbestos, and thus its own duty to warn is measured by the knowledge of those manufacturers.

Stewart rejected this argument, noting that the sophisticated intermediary defense operates when warnings about a product’s dangers are given to an intermediary supplier. It is presumed that the knowledgeable or sophisticated intermediary will then pass the warnings along to the user. *Stewart* interpreted *Johnson* to require a focus on what the end-user knew or should have known, rather than the actual or imputed knowledge of the intermediary. Thus, the defendant’s proposed instruction was found to have no basis.

Like the decision in *Stewart*, some jurisdictions decline adoption of the sophisticated intermediary defense based on an employer’s knowledge. In *Taylor v. American Chemistry Council*, 576 F.3d 16 (1st. Cir. 2009), the court held that

Massachusetts law does not incorporate a “reasonable reliance determination” in connection with its sophisticated intermediary defense. The court stated the defense’s only consideration is whether the end user knew or reasonably should have known of the hazards. However, it allowed the user’s employer’s status as a sophisticated user to defeat claims of failure to warn. Other jurisdictions allow less room to escape liability.

In *Mack v. General Electric Company, et al.*, 2012 WL 4717918 (E.D. Pa. 2012), a case cited by *Pfeifer*, the court rejected any use of the employer’s knowledge as a defense. The court reasoned that it would effectively leave no remedy for Navy seaman claiming exposures during their service, thereby thwarting the primary aim of maritime law of protecting and providing remedies for seaman. Further, the court disallowed any intermediary from qualifying as sophisticated users, including the Navy and employers of end-users. However, because the holding of the case is limited to asbestos exposure under maritime law, it is unclear whether different policy considerations under different factual circumstances would alter the Eastern District of Pennsylvania’s application of the defense.

Conversely, many other courts recognize some form of the sophisticated intermediary defense based on the employer’s knowledge. In its most restrictive form, some courts allow the sophisticated intermediary defense when an intermediary’s superseding intervention eliminates the supplier’s liability. *In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831 (2d. Cir. 1992) required the intervening cause to be abnormal and unforeseeable. Similarly, the court in *O’Neal v. Celanese Corp.*, 10 F.3d 249 (4th Cir. 1993), required evidence to be presented showing that it was reasonable to believe that a warning from the supplier was unnecessary

because the intermediary was well aware of the danger.

Notably, *Pfeifer* discusses *In re Related Asbestos Cases*, 543 F.Supp. 1142 (N.D. Ca. 1982), which takes a middle ground in considering a user's employer's knowledge. There, insulators and shipyard workers employed by the United States Navy during varying periods alleged asbestos exposure against product manufacturers. The district court, while recognizing the sophisticated user defense had not been officially adopted in California, held that the manufacturers could apply the defense, as long as it was not absolute, and the insulators and shipyard workers were allowed to negate the defense by showing that the sophisticated employer's misuses of the product was foreseeable.

More commonly, courts allow suppliers to claim intervening proximate cause based solely on evidence of an intermediary's knowledge. Sometimes, the defense is allowed based on the evidence produced concerning the capabilities and sophistication of the intermediary, such as in *Akin v. Ashland Chemical Co.*, 156 F.3d 1030 (10th Cir. 1998). In other jurisdictions, an employer's regulatory duties to its employees establishes a presumption of knowledge of the hazards of the products it purchases. Jurisdictions adopting this approach include the State of Mississippi (*Mississippi Valley Silica Co., Inc. v. Eastman*, 92 So.3d 666 (2012)), and the Third Circuit (*Bates v. E.D. Bullard Co.*, 76 So.3d 111 (3d. Cir. 2011)).

D. *Pfeifer's* Status as a Sophisticated User

While there is no uniform application of the sophisticated user defense and sophisticated intermediary defense in regards to an employer's knowledge, a majority of jurisdictions apply the defenses as allowing

an employer's knowledge to preclude liability for suppliers of products, including those matters involving exposure during service in the Navy, as *Pfeifer* claimed.

Nevertheless, the court in *Pfeifer* viewed the crux of the defendant's argument to be that suppliers and manufacturers had no duty to provide warnings of their product's hazards to employees of an intermediary with knowledge or potential knowledge of the hazards. *Pfeifer* recognized the several federal decisions applying the sophisticated user defense in an employer-employee relationship, as well as others that hold that the intermediary employer's knowledge cannot be imputed to the employees, but declined to follow them.

Pfeifer holds that an intermediary's sophistication is not, as a matter of law, sufficient to establish the defense. Evidence must be presented showing a reasonable basis for believing that the intermediary's sophistication is likely to protect the user, or that the user is likely to discover the hazard on his or her own.

Applying its facts, the *Pfeifer* court found that there was no evidence that the defendant had any reason to believe that the Navy would issue warnings regarding its products, or that it was readily known and apparent to the Navy that the defendant's products were dangerous. The court agreed that the evidence may have shown that the Navy, as a sophisticated intermediary, was negligent regarding its study of the defendant's products. However, because no evidence showed that the defendant reasonably inferred the Navy would warn the plaintiff of the dangers of the defendant's products, *Pfeifer* found the defendant could not show that the plaintiff would realize the dangers. Thus, it affirmed the denial of the defendant's

proposed instruction, and upheld the directed verdict on the defense.

E. Conclusion

The California Supreme Court held in *Johnson* that the sophisticated user doctrine applies when the plaintiff knew or should have known of a product's hazards, and suggested that the intermediary supplier's or the plaintiff's employer's actual or constructive knowledge of the hazard would suffice as well. Now, *Pfeifer* potentially puts California among the minority of jurisdictions which limit application of the sophisticated user doctrine even when the plaintiff's employer knew or should have known of the product's hazards. Defendants must present evidence that the plaintiff's employer had actual knowledge of the product defect at issue, through warnings presented by the supplier, or by evidence the specific dangers

were so readily known or apparent that the employer would be expected to protect its employees.

Pfeifer also requires a defendant to show that it had no reason to believe the sophisticated employer's knowledge was not passed on to the employee. Thus, *Pfeifer* requires a supplier to present evidence that it could not reasonably have anticipated a sophisticated employer's negligence in failing to warn its employees of the hazards known to it.

New discovery tactics will be necessary to assert the sophisticated user defense for employees of a sophisticated user. A supplier of a hazardous product must analyze the evidence establishing its relationship with the employer more thoroughly, as well as the employer's relationship with the supplier's product, in order to ensure successful application of the sophisticated user defense.

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