IADC Committee Newsletter

PRODUCT LIABILITY

August 2014- Second Edition

IN THIS ISSUE

California courts have limited product manufacturer efforts to use the sophisticated user and purchaser defenses to avoid liability in cases where the manufacturer argues it had no duty to warn an injured third party employee. This article reviews the published and unpublished cases following the California Supreme Court's highly anticipated adoption of the sophisticated user defense in 2008, and offers analysis and alternative strategy.

The Erosion of California's Sophisticated User and Purchaser Defenses in Product Liability Litigation

ABOUT THE AUTHORS

Merton Howard chairs the Litigation Section at Hanson Bridgett LLP in San Francisco, California. His practice covers all aspects of civil litigation and legal project management. He defends businesses in claims involving mass torts, toxic exposure, product liability, California's Proposition 65, unfair competition, and premises liability. Additionally, he assists clients with regulatory compliance, product labeling, and crisis management. He can be reached at mhoward@hansonbridgett.com.

Kyle Mabe is an associate with Hanson Bridgett LLP in San Francisco. He represents companies in product liability, toxic tort, and business litigation matters. He can be reached at kmabe@hansonbridgett.com.

ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at www.iadclaw.org.
To contribute a newsletter article, contact:

Jessalyn Zeigler
Vice Chair of Newsletter
Bass Berry & Sims PLC
jzeigler@bassberry.com

Introduction

There has been considerable activity in California following the state Supreme Court's adoption of the sophisticated user defense in 2008.[1] The defense relieves manufacturers of the duty to provide warnings about potential product hazards of which users are or should be already aware. The defense evolved out of both section 388 (Comment k) of the *Restatement (Second) of Torts* and the obvious danger rule. Generally, the sophisticated user defense is concerned with the knowledge of the product user, not with the knowledge of the purchaser.

In comparison, the sophisticated purchaser doctrine, which is an extension of the bulk supplier defense and the component parts doctrine, arose out of comment *n* to section 388 of the *Restatement (Second) of Torts.* This defense tends to focus first on the role of the purchaser or intermediary, although the manufacturer must also consider the end user. Suppliers of raw materials and component parts are not liable to ultimate consumers if (1) the goods or materials they supply are not inherently dangerous; (2) they sell the goods or material in bulk to a sophisticated buyer; (3) the material is substantially changed during the manufacturing process; and (4) the supplier has a limited role in developing and designing the end product.[2] Under the component parts doctrine, the manufacturer of a product component generally is not liable for injuries caused by the finished product unless the component itself was defective at the time it left the manufacturer.[3] However, the component part manufacturer may face liability if it participates in the design of the finished product.

Despite early optimism, these defenses have not proven to be as effective as some had hoped, particularly in where product manufacturers may not have provided a warning with their product, such as in asbestos bodily injury lawsuits. For example, in lawsuits brought by employee product users, where the employer has or should have the requisite knowledge about potential product hazards, manufacturers attempted to extend and/or blend these defenses to avoid liability by arguing they had no duty to warn the employees. Difficulty arose when manufacturers could not prove they provided any specific warning or product hazard information, as courts have been unwilling to find that the manufacturers have no duty toward the employees. Indeed, new case law shows that when an employee is injured, the determinative question on the issue of duty concerns the degree of employee knowledge or access to information, not necessarily the employer's sophistication. Thus, in cases where there is insufficient evidence that the manufacturer provided warnings or hazard information that reasonably could have reached end users, those defendants have had little success convincing appellate courts that they had no duty toward the employees.

To avoid owing a duty to a plaintiff employee, the manufacturer must have had some basis to believe that the ultimate users knew or should have known about the potential product hazards. But duty is not the only tort element in play here, as the appellate courts have also discussed causation in the context of the duty analysis under these defenses. Given the trends in the cases reviewed below, defendants who failed to provide sufficient warnings may find it more

[1] *Johnson v. American Standard, Inc.*, 43 Cal. 4th 56, 71 (Cal. 2008).
[2] *Artiglio v. General Elec. Co.*, 61 Cal. App. 4th 830, 839 (Cal. Ct. App. 1998).
[3] *O'Neil v. Crane Co.*, 53 Cal. 4th 335, 355 (Cal. 2012).

productive to focus effort on defeating proximate cause, rather than the issue of duty.

The Sophisticated User and Sophisticated Purchaser Defenses Generally

1. Sophisticated User

Generally, a manufacturer owes a duty to warn potential users of its product about the known, inherent dangers of the product of which the user may be unaware.[4] Failure to warn gives rise to negligence and strict liability.[5] A manufacturer can be relieved of liability, however, where it shows the injured party was a "sophisticated user" who should have known about the product's dangers.[6] This defense applies to both negligence and strict liability causes of action.[7]

Establishing the sophisticated user defense requires a manufacturer to "identify the relevant risk, show that sophisticated users are already aware of the risk, and demonstrate that the plaintiff is a member of the group of sophisticated users."[8] The test is objective, focusing on whether the plaintiff knew, or should have known, of the particular risk of harm giving rise to the injury.[9] Sophistication is measured across a class of users, rather than each individual's actual knowledge.[10]

> [I]ndividuals who represent that they are trained or are members of a sophisticated group of users are saying to the world that they possess the level of knowledge and skill associated with that class. If they do not actually possess that knowledge and skill, that fact should not give rise to liability on the part of the manufacturer.[11]

Additionally, the sophisticated user must have possessed the requisite knowledge at the time the injury occurred.[12]

For the defense to apply, the sophisticated user's knowledge must parallel the warning the manufacturer would otherwise be required to give.[13] The manufacturer must demonstrate that sophisticated users know what risks are presented by the use of the product, the degree of danger presented by those risks, and how to use the product to reduce or avoid the risks, to the extent that information is known to the manufacturer.[14]

2. Sophisticated Purchaser

A manufacturer may discharge its duty to warn by warning an intermediary about the product's dangers provided it also reasonably believes that information would ultimately reach the product's users.[15] Additionally, in lieu of warning the intermediary, a manufacturer may be relieved of liability when (1) it supplies a product to a sophisticated intermediary possessing the requisite knowledge of the product's dangers, and (2) it was reasonable for the manufacturer to assume the intermediary would inform the

[4] *Id.* at 351.
[5] *Id*. at 363-364.
[6] *Johnson v. American Standard, Inc.*, 43 Cal. 4th 56, 71 (Cal. 2008).
[7] *Id*. at 72, ". . .although California law recognizes the differences between negligence and strict liability causes of action, the sophisticated user defense is applicable to both." (citations omitted).
[8] *Buckner v. Milwaukee Electric Tool Corp.*, 222 Cal. App. 4th 522, 535, (Cal. Ct. App. 2013) citing *Johnson v. American Standard, Inc.*, supra, 43 Cal. 4th 56.
[9] *Johnson v. American Standard, Inc.*, supra, 43 Cal. 4th at 73.
[10] *Id*. at 71.
[11] *Id*.
[12] *Id*. at 73.
[13] *Id*.
[14] *Buckner*, supra, 222 Cal. App. 4th at 536.
[15] *Pfeifer v. John Crane*, 220 Cal. App. 4th 1270, 1297 (Cal. Ct. App. 2013).

product's user.[16] Delivery to a sophisticated intermediary alone is not, however, sufficient to relieve a manufacturer of its duty to warn as a matter of law.[17] A manufacturer must also show there was reason to believe the intermediary would protect the end user, or that the user was otherwise likely to discover the hazards of the product.[18] A showing that an injured user received the product through its connection with a sophisticated intermediary, without more, is insufficient to preclude failure to warn liability.[19]

Johnson v. American Standard, Inc.

The seminal California sophisticated user case illustrates the doctrine's application. In *Johnson v. American Standard*, a heating, ventilation, and air conditioning (HVAC) technician sued several manufacturers in a product liability action for injuries caused by the technician's exposure to chemicals released from the manufacturers' products in the course of the technician's work.[20]

In a motion for summary judgment, defendant American Standard argued it owed no duty to warn the plaintiff because it could reasonably assume the group of trained individuals to which plaintiff belonged knew the risks involved in working with the product.[21] According to the defendant, the technician, and HVAC technicians similarly situated, could reasonably be expected to know the hazards involved in their particular use of the product.[22] The technician received a year of HVAC training at ITT Technical Institute, and gained additional certifications and training both on and off the job, including an Environmental Protection Agency (EPA) "universal" certification, the highest such certification the EPA offers to HVAC technicians.[23] Additionally, the dangers of the defendant's product were identified in material safety data sheets (MSDS) that HVAC employers are required to use for training and educating employees about the hazards involved in the chemicals they use.[24]

Affirming the grant of summary judgment, the California Supreme Court held that the defendant-manufacturer had no duty to warn sophisticated users such as the plaintiff about dangers of a product of which they should already be aware.[25] In light of the undisputed evidence presented through testimony of both the plaintiff's and defendant's experts, HVAC technicians knew or should have known the risks associated with the plaintiff's particular use of the product.[26] Further, a manufacturer need not show the specific user of a product was aware of the risk, so long as the expected user population is generally aware of the risk.[27] Thus, despite the plaintiff's claim that he did not understand the risks of the product, the Court found the defendant was nevertheless relieved of failure to warn liability because the plaintiff should have known the risks by virtue of his professional training.[28]

The Sophisticated User and Purchaser Defenses Following *Johnson v. American Standard*

Although the sophisticated user doctrine has a potentially broad scope, subsequent decisions from the California Courts of Appeal have

[16] *Id*. at 1296-1297.
[17] *Id*.
[18] *Id*.
[19] *Id*. at 1297.
[20] *Johnson v. American Standard*, supra, 43 Cal. 4th at 61-62.
[21] *Id*. at 64.
[22] *Id*. at 74.
[23] *Id*. at 61.
[24] *Id*. at 62.
[25] *Id*. at 74.
[26] *Id*.
[27] *Id*. at 73-74.
[28] *Id*. at 74.

narrowed its application. Rarely has a class of users been found to possess knowledge and experience sufficient to relieve a manufacturer of its duty to warn. Nearly every aspect of the doctrine has been narrowly construed, with courts requiring manufacturers to show specific knowledge, at a specific time, resulting from significant and specific experience or training. Moreover, the courts have all but closed the door on the sophisticated intermediary/purchaser defense. Adhering strictly to the requirement that a manufacturer must have reason to know an adequate warning will reach the end user, courts seem to have all but eliminated the sophisticated purchaser defense in California.

1. *Johnson v. Honeywell International, Inc.*

Initially, the outlook for the doctrine as a defense in product liability actions appeared bright. The first case to discuss the doctrine following *Johnson v. American Standard* both expanded and narrowed its scope. In *Johnson v. Honeywell International, Inc.*, which arose from the same litigation as the *Johnson v. American Standard* decision, the Second District California Court of Appeal held that the sophisticated user defense applies even where a plaintiff asserts negligence *per se* as part of his or her failure to warn claim.[29] Under *Johnson v. Honeywell International*, the sophisticated user defense will relieve a manufacturer of liability despite the manufacturer's failure to include a warning required by a statute or regulation.[30] The court reasoned that under the doctrine of negligence *per se*, a plaintiff "borrows" a statute to prove a duty and standard of care.[31] But instead of focusing on the typical duty analysis, the Court observed that the sophisticated user defense goes to a plaintiff's proof of causation as well; "[s]ophisticated users are charged with knowing the dangers, so that 'the failure to warn about those dangers is not the legal cause of any harm that product may cause.'"[32]

Johnson v. Honeywell International's expansion of the doctrine ended with negligence *per se*, however, as the court also held that the defense was entirely inapplicable to strict products liability actions premised on a design defect theory.[33] This holding makes sense in light of the rationale behind the sophisticated user defense; the doctrine concerns the alleged failure warning of a product's dangers, not any inherent defect in a product's design.[34] Nevertheless, *Johnson v. Honeywell International* signaled the beginning of a trend in the Courts of Appeal to further limit the application of the sophisticated user defense.

2. *Stewart v. Union Carbide Corp.*

Following *Johnson v. Honeywell International*, the Second District Court of Appeal next considered the sophisticated user defense in *Stewart v. Union Carbide*.[35] This was the first case to discuss the possible expansion of *Johnson v. American Standard*'s sophisticated *user* defense to a sophisticated *purchaser* (or intermediary).[36] Although the court in *Stewart* fell short of holding the sophisticated purchaser defense inapplicable to products liability actions in California, it limited its potential future application.

[29] *Johnson v. Honeywell Internat., Inc.*, 179 Cal. App. 4th 549, 558 (Cal. Ct. App. 2009).
[30] *Id*. at 556.
[31] *Id*. at 558.
[32] *Id*. citing *Johnson v. American Standard, Inc.*, 43 Cal. 4th 56, 65 (Cal. 2009).
[33] *Honeywell Internat., supra,* 179 Cal. App. 4th at 559.
[34] *Id*.
[35] *Stewart v. Union Carbide Corp.*, 190 Cal. App. 4th 23 (Cal. Ct. App. 2010).
[36] *Id*. at 27-30.

Thoroughly distinguishing *Johnson v. American Standard*, the *Stewart* court noted that the focus of the sophisticated user defense is the knowledge of a product's end consumer, and *Johnson v. American Standard* in no way relieved manufacturers of liability where they show an intermediary possessed the requisite sophistication.[37] Further, the *Stewart* court suggested that if a sophisticated purchaser defense applies at all, a manufacturer would still need to show that it provided warnings to the sophisticated purchaser-intermediary.[38] Thus, not only did *Stewart* refuse to extend *Johnson v. American Standard's* reasoning to a sophisticated purchaser theory, it limited any future application of that theory before it even gained traction.

3. Chavez v. Glock, Inc.

The sophisticated user doctrine saw a glimmer of hope in the 2012 case *Chavez v. Glock*.[39] For the first time in a published opinion since *Johnson v. American Standard*, the Court of Appeal held the sophisticated user defense applied to a failure to warn claim and relieved the manufacturer of liability accordingly.[40] Primarily a design defect case, the *Chavez* court affirmed the trial court's summary judgment ruling in favor of the defendants as to the plaintiff's related failure to warn claims because the plaintiff, Enrique Chavez, qualified as a sophisticated user.[41] The product was a Glock 21 pistol, and Chavez had been a trained Los Angeles police officer for ten years, prior to which he served four years in the United States Marines.[42] Chavez argued that while he was a sophisticated user as to Glock 21 pistols in general, the manufacturer failed to warn about the specific danger that the pistol "should only be used with specific holsters that restrict access to the trigger guard in light of the light trigger pull and lack of a manual safety device."[43] The Court of Appeal rejected this argument, noting that Chavez, as a sophisticated user, was familiar with the Glock 21 and its light trigger pull and lack of safety devices.[44] Although clearly not a groundbreaking holding for the sophisticated user doctrine, *Chavez* at least indicated the doctrine is a viable defense, under the right facts.

4. Pfeifer v. John Crane.

In 2013, the California Court of Appeal revisited the sophisticated purchaser defense in *Pfeifer v. John Crane*, although with a holding no more helpful to defense counsel than *Stewart*.[45] In upholding the trial court's decision to not instruct the jury on the sophisticated purchaser defense, the *Pfeifer* court clarified the extremely limited nature of that defense in California.[46] After reiterating *Stewart*'s analysis of *Johnson v. American Standard*, the *Pfeifer* court held that to avoid failure to warn liability by relying on the sophistication of an intermediary or purchaser, a manufacturer or supplier must have reason to believe the ultimate user knows or should know of a product's hazards.[47] "The fact that the user is an employee or servant of the sophisticated intermediary cannot plausibly be regarded as

[37] "It is apparent that [the sophisticated purchaser theory] has nothing to do with *Johnson*." *Id*. at 29,
[38] *Id*. at 29-30.
[39] *Chavez v. Glock, Inc.*, 207 Cal. App. 4th 1283 (Cal. Ct. App. 2012).
[40] *Id*. at 1314.
[41] *Id*. at 1323.
[42] *Id*. at 1313.
[43] *Id*. at 1313-1314.
[44] *Id*.
[45] *Pfeifer v. John Crane*, 220 Cal. App. 4th 1270 (Cal. Ct. App. 2013);
Stewart v. Union Carbide Corp., 190 Cal. App. 4th 23 (Cal. Ct. App. 2010).
[46] *Pfeifer*, supra, 220 Cal. App. 4th at
[47] *Id*. at 1297.

a sufficient reason, as a matter of law, to infer that the latter will protect the former."[48]

Although essentially eviscerating any usefulness the sophisticated purchaser doctrine may have had, the *Pfeifer* court did provide some guidance for manufacturers and suppliers of products to a third party. In place of supplying a warning to an intermediary, a manufacturer or supplier may be relieved of liability where it can show (1) that it reasonably believed the intermediary would warn the users; (2) the employee-user knew or should have known of the dangers in light of his own training or experience (*i.e.,* a sophisticated user); or (3) the specific dangers of a product were so readily known and apparent to the intermediary that the intermediary would be expected to protect its employee-users.[49] Note that all three of these avenues of defense were previously available to defendants, with or without reference to the sophisticated purchaser/intermediary doctrines.

5. *Buckner v. Milwaukee Electric Tool Corp*.

Returning to its hostility towards the sophisticated user doctrine, the appellate court in *Buckner v. Milwaukee Electric Tool Corp*, upheld the trial court's grant of a new trial on the grounds that the jury's finding that the plaintiff was a sophisticated user was unsupported by the evidence.[50] The product at issue was a 17 year old power drill, and the plaintiff a 20 year veteran of the construction industry who was injured when the drill bound and counter-rotated.[51] Although uncontroverted evidence showed that the plaintiff and users with his level of knowledge knew the risk of counter-rotation, the Court of Appeal agreed with the trial court's finding that the evidence was insufficient to show the drill's users were aware of the *specific risk* that the drill could not be safely used without a side-arm attachment.[52] Narrowly defining the risk of which a user must be aware, the court held "[t]he sophisticated user must know or be deemed to know not only the bare hazard posed by the product, but also the severity of the potential consequences, and any mitigation techniques of which the manufacturer is aware."[53] Under *Buckner*, general knowledge of a product's dangers will not suffice for the sophisticated user defense to apply. To escape failure to warn liability, a defendant must present evidence that sophisticated users of a product are aware of its specific risks, the specific consequences of those risks, and specific mitigation techniques to avoid those risks.

6. *Scott v. Ford Motor Co.*

The California Court of Appeal rejected the proposed application of the defense again in *Scott v. Ford Motor Co*.[54] In *Scott*, the owner and operator of several automotive service stations asserted asbestos-based product liability causes of action, including failure to warn, against Ford for asbestos-related injuries in connection with the latter's brakes and clutches.[55] Following a jury verdict in favor of the plaintiff, Ford appealed the denial of its motion for judgment notwithstanding the verdict.[56] Although the jury did not fill out a special verdict form, because the jury was instructed that the sophisticated user defense was a complete defense, the Court

[48] *Id*. at 1298.
[49] *Id*. at 1297.
[50] *Buckner v. Milwaukee Electric Tool Corp.*, 222 Cal. App. 4th 522 (Cal. Ct. App. 2013).
[51] *Id*. at 528.
[52] *Id*. at 537.
[53] *Id*.
[54] *Scott v. Ford Motor Co.*, 224 Cal. App. 4th 1492 (Cal. Ct. App. 2014).
[55] *Id*. at 1496.
[56] *Id*. at 1499.

concluded the jury rejected the defense.[57] Focusing on the requirement that a sophisticated user must know a product's potential dangers at the time of injury (or in this case, exposure to the allegedly hazardous substance), the *Scott* court held that substantial evidence supported the jury's findings.[58] This was largely due to the nature of asbestos exposure claims; evidence was presented that injury manifests years after exposure, and early exposures contribute more to an injury than later exposures.[59] As a result, the Court held that Ford failed to show the class of users to which the plaintiff belonged was aware of the alleged dangers of asbestos brakes from their earliest uses of the products.[60] While *Johnson v. American Standard* had already noted the time-of-knowledge requirement, *Scott's* characterization of that requirement essentially prevented the future application of the doctrine to the vast majority of cases involving asbestos exposure when the defendant is unable to prove that the plaintiff knew or should have known about the alleged risk at the time of first exposure.

7. *Collin v. CalPortland Co*.

In a recent opinion, *Collin v. CalPortland Co.*, the Third District Court of Appeal yet again found the sophisticated user defense inapplicable to the facts.[61] Another asbestos-exposure case, the court held that defendant J-M Manufacturing Company failed to present sufficient evidence on summary adjudication to bar the plaintiff's failure to warn claim as a matter of law.[62] The plaintiff had over 50 years of experience in construction beginning in 1954 and held a contracting license, but did not receive any formal notice or training regarding asbestos until 1976.[63] In holding the plaintiff's experience insufficient to qualify for sophisticated user status, the Court noted the absence of expert testimony indicating the plaintiff and those similarly situated would have received training such that they knew or should have known of the dangers of asbestos prior to 1976.[64] Experience alone, it appears, is inadequate to create an inference of sophistication.

8. *Webb v. Special Elec. Co., Inc*.

The next chapter in California's sophisticated user defense may be published in the near future. In a case currently under review by the California Supreme Court, the Second District Court of Appeal in *Webb v. Special Electric Co.* overturned the trial court's grant of judgment not withstanding verdict on the plaintiff's failure to warn claim.[65] Although it was undisputed that the manufacturer supplied the product to a sophisticated intermediate broker, because there was no evidence that a warning reached the ultimate, unsophisticated plaintiff, the Court of Appeal held that the manufacturer could not be relieved of liability as a matter of law.[66] In its petition for review, the defendant manufacturer presented several issues to the Supreme Court, primarily focused on whether a manufacturer can be relieved of its duty to warn when it supplies its product to a

[57] *Id*. at 1500-1501.
[58] *Id*. at 1500.
[59] *Id*. at 1500-1501.
[60] *Id*. at 1501.
[61] *Collin v. CalPortland*, 2014 Cal. App. LEXIS 688 (Cal. Ct. App. Jul. 1, 2014). This opinion was initially not certified for publication, but on July 30, 2014, the court reconsidered that decision and ordered the opinion to be published in the Official Reports. As of August 1, 2014, the case had not yet received an Official Reports citation.
[62] *Id*. at 40.
[63] *Id*. at 38-39.
[64] *Id*. at 39-40.
[65] *Webb v. Special Elec. Co., Inc.*, 214 Cal. App. 4th 595, 621 (Cal. Ct. App. 2013) review granted by *Webb v. Special Electric Company, Inc.*, 157 Cal. Rptr. 3d 569 (Cal. 2013).
[66] *Id*.

sophisticated broker, and has no reasonable means of assuring a warning reaches the end consumer.[67] A decision in favor of the defendant could breathe new life into the sophisticated user defense, while a contrary decision would once again whittle away the doctrine's usefulness as a defense.

9. Recent Unpublished California Cases Of Note

- *Ponce v. Raymond Handling Solutions*, 2014 Cal. App. Unpub. LEXIS 4797 (Cal. App. 2d Dist. July 9, 2014) – Manufacturer not entitled to summary judgment where it failed to meet its burden of production to show that the plaintiff and the class of users to which he belonged knew or should have known about the limits and safety aspects of a forklift handlebar.
- *Rollin v. Foster Wheeler*, No. B209935, Calif. App., 2nd Dist., Div. 2 (August 2, 2012) – Manufacturer not entitled to defense judgment based solely on evidence regarding employer's knowledge of asbestos hazards and OSHA regulations. The defendant did not present evidence that plaintiff knew or should have known about asbestos hazards. The sophisticated user defense does not apply to absolve a manufacturer of its duty to warn based solely on an intermediary's knowledge or sophistication with respect to a particular product.
- *Walkowiak v. Mp Assocs.*, 2011 Cal. App. Unpub. LEXIS 1709 (Cal. App. 2d Dist. Mar. 9, 2011) – Summary judgment affirmed as to plaintiff's failure to warn claim where manufacturer of pyrotechnic devices showed that the plaintiff, as a licensed pyrotechnic operator, was a sophisticated user who knew or should have known the risks involved in operating a simulated missile launcher for entertainment special effects.
- *Perez v. Vas S.P.A.*, 2010 Cal. App. Unpub. LEXIS 6701 (Cal. App. 2d Dist. Aug. 24, 2010) – Theory behind sophisticated user defense applied in determining whether flagrant misuse of a paper rewinding machine constituted a superseding cause of injury where the danger of misuse should have been obvious to persons experienced in the field of paper manufacturing.
- *Teston v. Valimet*, 2009 Cal. App. Unpub. LEXIS 6986 (Cal. App. 5th Dist. Aug. 28, 2009) – Sophisticated user defense combined with the raw material supplier defense applied to relieve a supplier of bulk aluminum powder of its duty to warn a manufacturer of the risks involved in using the powder as part of a mix of ingredients used in an incendiary device.
- *Polinger v. Delta Air Lines*, 2009 Cal. App. Unpub. LEXIS 6424 (Cal. App. 2d Dist. Aug. 10, 2009) – Sophisticated user defense applied to a failure to warn claim where users of an aircraft's cargo loading system, such as the airline and its specially trained employees, knew or should have known of the risks associated with the equipment.
- *Cunningham v. Buffalo Pumps*, 2008 Cal. App. Unpub. LEXIS 9430 (Cal. App. 2d Dist. Nov. 24, 2008) – Manufacturer failed to establish sophisticated user and intermediary defenses where it only asserted the sophistication of the plaintiff's

[67] Petition for Appeal, *Webb v. Special Elec. Co.*, 2013 Ca. S. Ct. Briefs LEXIS 717.

employer, the United States Navy, where the manufacturer failed to provide warnings to the sophisticated intermediary and did not present sufficient evidence to establish the Navy possessed the requisite level of sophistication.

10. Federal Cases

- *Willis v. Buffalo Pumps, Inc.*, 2014 U.S. Dist. LEXIS 99699 (S.D. Cal. July 18, 2014) – Federal district court anticipated that the California Supreme Court would likely hold that the sophisticated user defense would not apply where a manufacturer alleges that an employer's sophistication should be attributed to an employee plaintiff.
- *Cabasug v. Crane Co.*, 2013 U.S. Dist. LEXIS 180918 (D. Haw. Dec. 27, 2013) – Sophisticated user defense cognizable under maritime law for both negligence and strict liability duty to warn claims.
- *Younan v. Rolls-Royce Corp.*, 2012 U.S. Dist. LEXIS 79318 (S.D. Cal. June 6, 2012) – Summary judgment precluded by triable issue of material fact as to whether the plaintiff was a sophisticated user where the plaintiff presented evidence indicating his helicopter training did not apprise him of the specific risks involved in the use of a particular helicopter.
- *Genereux v. Am. Beryllia Corp.*, 577 F. 3d 350 (1st Cir. Mass. 2009) – Manufacturer not entitled to summary judgment based on sophisticated user defense because there was a genuine issue of material fact as to whether the user was or should have been aware of the specific dangers posed by polishing beryllium metals and the exposure to particular concentrations of beryllium.
- *Herrera v. Louisville Ladder Group, LLC*, 2009 U.S. Dist. LEXIS 107384 (C.D. Cal. Nov. 16, 2009) – Manufacturer denied summary judgment based on the sophisticated user defense where the manufacturer failed to establish that the plaintiff was a member of a class of sophisticated users who knew or should have known the dangers of failing to tie down an extension ladder.
- *Castellanos v. Louisville Ladder, Inc.*, 2009 U.S. Dist. LEXIS 40547 (N.D. Cal. May 11, 2009) – Triable issue of material fact existed as to whether the plaintiff was a member of a class of sophisticated users who knew or should have known the dangers involved in the use of extension ladders.

Conclusion

Manufacturers and suppliers who retroactively seek to prove they had no duty to warn employees of sophisticated purchasers or intermediaries face an uphill battle. In response to recent court decisions, the Judicial Council of California has proposed a revision of the standard jury instruction for the Sophisticated User Defense, CACI No. 1244.[68] If adopted, the new instruction would require the defendant to prove that at the time of the injury, the plaintiff, because of his particular position, training, experience, knowledge, or skill, knew or should have known all of the following:

(1) That there was a risk posed by the product;

[68] http://www.courts.ca.gov/documents/CACI14-02.pdf

(2) The severity of the potential consequences posed by the product risk; and

(3) Any ways to use the product to reduce or avoid the risks that were known to the defendant.

Comments to this proposal are due August 29, 2014.[69] This proposed jury instruction requires the defendant to provide more specific evidence about product risks and the providing of hazard information, which is consistent with the emerging case law. If a manufacturer did not identify the risk at the time of injury, it is unlikely to prevail on a defense of no duty.

As the law regarding duty is clarified, defendants should look for other options. If an employer was truly sophisticated or informed, the defense may argue that the alleged failure to warn did not cause the employee's injury because of the actions (or lack thereof) of the intermediary employer. After all, "[t]here is no requirement that a manufacturer give a warning which could not possibly be effective in lessening the plaintiff's risk of harm."[70] In other words, if the employer possessed the hazard information in question, the manufacturer or supplier may escape liability if the plaintiff cannot meet his burden of showing that the employer or the plaintiff would have changed their behavior to avoid the risk if the manufacturer had provided the information already known to the employer. This defense will not be effective in every case, but it may prove a valuable alternative in certain situations where courts are finding a duty to warn.

[69] http://www.courts.ca.gov/policyadmin-invitationstocomment.htm

[70] (*Conte v. Wyeth, Inc.* 168 Cal. App. 4th 89, 112 (Cal. Ct. App. 2008) (review denied by *Conte (Elizabeth Ann) v. Wyeth, Inc.*, 2009 Cal. LEXIS 233 (Cal., Jan. 21, 2009); quoting *Rosburg v. Minnesota Mining & Mfg. Co.*, 181 Cal.App.3d 726, 735 (Cal. Ct. App. 1986); see *Rutherford v. Owens-Illinois, Inc.*, 16 Cal.4th 953, 968 (Cal. 1997) (plaintiff must prove alleged failure to provide adequate warning was a substantial factor in bringing about the injury).)

PAST COMMITTEE NEWSLETTERS

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

AUGUST 2014
The Ethical Use of Social Media in Litigation
Daniel B. Carroll and Julie L. Tersigni

JUNE 2014
Noneconomic Damages: A State-By-State Survey of Limiting Caps and Their Constitutionality
Robert Miller and Kathleen Carrington

APRIL 2014
Garlock Bankruptcy Judge: Asbestos Settlements "Infected With the Impropriety of Some Law Firms"
Mary Margaret Gay, Mark Behrens and Virginia Knapp Dorell

A Deal is a Deal, Even in the Arena of Product Liability Indemnity
Daryl G. Dursum

MARCH 2014
New FDA Rule on Drug Labeling May Mean Increased Exposure and an Uncertain Path for Generic Pharmaceutical Manufacturers
James W. Matthews, Katy E. Koski, Michael H. Hinckle and Jason L. Drori

False Advertising, Scientific Opinion and the First Amendment – The Second Circuit's Opinion in *Ony, Inc. v. Cornerstone Therapeutics, Inc.*
Scott A. Elder and Aliyya Z. Haque

FEBRUARY 2014
CPSC's Proposed Interpretive Rule Would Make Significant Changes to Voluntary Recalls
Kara Stubbs

JANUARY 2014
The Continued Push for Transparency in Asbestos Litigation
Ann Thornton Field and Jeannie Park Lee

DECEMBER 2013
Light at the End of the Tunnel? Will Pennsylvania Adopt the Restatement (Third) of Torts in Products Liability Cases?
John J. Bateman and Kevin J. Penhallegon