

Product liability focus: Asbestos law isn't just for asbestos lawyers

Developments in this specialty practice can offer tremendous advantages to your general product liability case

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"Real lawyers don't practice asbestos litigation." At least that is what I was told when I began litigating plaintiffs' asbestos cases five years ago. But after moving on to a general plaintiffs' personal injury firm, working on a team that focuses on non-asbestos products cases, I was able to finally prove what I, and many others, know to be true. Asbestos litigation, although a "specialty" practice, is still litigation and asbestos is still a product like any other product. The effects of asbestos litigation reach beyond this specialized area and can positively impact your product liability lawsuit.

For decades, the plaintiffs' asbestos bar has been representing thousands of workers struck down by a hidden, dangerous and ubiquitous product, asbestos. The corporate defendants have tried every tactic imaginable to avoid liability and have legally challenged every aspect of product liability and causation in an attempt to avoid legal responsibility for their conduct. The plaintiffs' asbestos bar has fought back, won and even expanded the legal theories to recover for their clients. There is no reason "regular" plaintiffs' attorneys cannot, or should not, take what the asbestos bar has learned and put it to use in their general practice. It is the asbestos attorneys' creativity and perseverance that has borne superb legal theories that we should not overlook, particularly in the area of products liability.

The plaintiff is master of her complaint

This need not just be a concept learned in law school and forgotten. All too often, plaintiffs' attorneys are faced with the ultimate anxiety-inducing situation – the statute of limitations is about to run, a complaint needs to be filed...now! I know it is tempting to use an old complaint, doctor it up and file it. But filing a deficient complaint is hardly an ideal alternative. This is when it is helpful to have a few key concepts in your back pocket.

The plaintiff is the master of her complaint; but first, the plaintiffs' attorney must master the complaint. To master the complaint, the attorney needs to think through different prisms, or to be cliché, think outside the box. This includes thinking about asbestos. There are three topics of particular interest circulating in the asbestos bar that have far reaching effects on the general plaintiff's bar. These include: secondary ("para-occupational") exposure, the consumer expectation test, and the "sophisticated user defense."

Secondary exposure

In cases involving secondary exposure to asbestos, wives and children of men who worked with asbestos were exposed to fibers brought home on the men's work clothes, shoes and hair. Many practitioners might think it a workers compensation case, controlled by the exclusive remedy defense. However, the court in *Oddone v. Superior Court of Los Angeles* (2009) 179 Cal.App.4th 813, recognized a cause of action may exist for secondary exposure to other toxic chemicals. Outside the realm of asbestos, one can imagine countless areas where this may come up – pesticides in agricultural operations; carcinogenic chemicals at manufacturing plants; toxins at construction sites, gas stations, airports, and more. Although an employee would not be able to sue his employer for toxic work place conditions, under *Oddone* the employee's family members would!

The *Oddone* court laid out a guideline for successfully pleading a secondary exposure case. The Court looked to both *Bockrath v. Aldrich Chemicals Co.* (1999) 21 Cal.4th 71 and *Rowland v. Christian* (1968) 69 Cal.2d 108, to provide the standards by which the allegations of a complaint should be measured when a plaintiff seeks to recover for secondary exposure.

…A Plaintiff claiming to have been injured by an exposure to chemicals

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must also specify the chemical that caused the injury and in the course of doing so must of course also specify the injury. Importantly, he must also allege that as a result of the exposure the specified toxin entered the body.

(*Oddone, supra*, 179 Cal.App.4th at 821.)

Specify the injury, causal connection and harm

The holding in *Oddone* makes it clear that with specific allegations, a claim for secondary exposure is proper under California law. The Court essentially instructs Plaintiffs to do what asbestos litigators have been doing for years – *plead the specific injury, describe the actual exposure and use science to tie the two together*. It is essential that the manner in which the plaintiff was exposed to and harmed by the toxin is sufficiently described.

Give the court what it wants – specific injury, the scientific causal connection between the injury and the specific toxin and how the exposure harmed the plaintiff. For example, in a case involving toxic exposure to benzene causing leukemia, Plaintiff's complaint should allege:

- Plaintiff was exposed to defendant's benzene
- Leukemia is caused by benzene exposure
- Plaintiff has leukemia
- To a reasonable degree of medical probability, Plaintiff's exposure to defendant's benzene was a substantial factor in contributing to plaintiff's leukemia.

By sufficiently pleading the facts in the complaint, the court will be hard pressed to sustain a demurrer or a motion for summary judgment for that matter. Just remember to get an expert!

The Consumer Expectation Test

The Consumer Expectation Test is one of the two methods available to prove a defective product claim under *Barker v. Lull Engineering Co., Inc.* (1978) 20 Cal.3d 413. It holds that a plaintiff can meet her burden of proving a defect merely by showing an "ordinary consumer" would not expect the harm that befell her. Then the burden of proof shifts. For some time, defendants and courts alike have commonly, and incorrectly, asserted that the consumer expectation test is only available to uncomplicated products, likely because the test utilizes the words "ordinary consumer." The California Court of Appeal recently added more clarity in *Saller v. Crown Cork & Seal Co.* (2010 DJDAR 13636). In *Saller*, Plaintiffs' decedent, Mr. Saller, was exposed to asbestos pipe insulation during his employment at Standard Oil. Mr. Saller testified that he worked in close proximity to asbestos pipe insulation for approximately 7 1/2 years, while employed by Standard Oil. During his work, he never received any warning about risks associated with the pipe insulation.

Plaintiffs proposed jury instructions based on CACI 1203 (design defect, consumer expectation test) and CACI 1205 (strict liability, failure to warn). The court refused to give 1203, because "it was not applicable to this situation." The trial court agreed with defendant, a manufacturer of asbestos insulation, that the consumer expectation test did not apply, both because there were no consumer expectations about the safety of asbestos in the 1950s and 1960s and plaintiffs' only evidence of Mr. Saller's subjective consumer expectations about asbestos.

Focus on performance, not the product

In analyzing whether the consumer expectation test should apply to the use of asbestos, the Court examined *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548 and *Campbell v. General Motors Corp.* (1982) 32 Cal.3d. 112. In *Soule*, the Court held "[T]he inherent complexity of the product itself is not controlling on the issue of whether the consumer expectation test applies; a complex product may perform so unsafely that the defect is apparent to common reason, understanding and experience of its ordinary consumers." (*Id.* at 569.) *Campbell* established factors that the court used when analyzing plaintiffs' evidence. "If the product is one within the common experience of ordinary consumers, it is generally sufficient if the plaintiff provides evidence concerning (1) his use of the product; (2) the circumstances surrounding the injury; (3) the objective features of the products which are relevant to an evaluation of its safety." (*Campbell, supra,* at p. 127.)

The *Saller* court agreed that there is nothing complicated or obscure about the design of the insulation Mr. Saller used:

> "We agree that the consumer expectations test applied to the use of asbestos at Standard Oil and that Saller's testimony concerning his expectations about its safety in its ordinary use at Standard Oil were sufficient to require a jury instruction on the issue. The use of asbestos insulation is a product that is within the understanding of ordinary law consumers.

(*Saller, supra* at p. 15.)

The Court went on to criticize defendant's assertion that the test doesn't apply to asbestos products in use in the 1950s and 1960s because no one knew of the dangers of asbestos at that time. "If the knowledge of the hazardous nature of the product were a prerequisite for the test to apply, then no product would ever fail to meet the safety expectations of the reasonable consumer." (*Saller, supra* at p. 16.)

Finally, the fact that the only evidence presented on the issue of safety expectations was by Mr. Saller was also held to be sufficient. "To establish an inference that a product does not meet minimum safety expectations of ordinary users, the testimony of a single witness is sufficient. (*Soule, supra*, 8 Cal.4th at 568, *People v. Richardson* (2008) 43 Cal.4th 959, 1030-1031.)

While the *Saller* case deals with asbestos as a product, the lesson is universal – it is imperative to highlight the defect, not the product. The product itself may be technical, or "complicated" but the defect itself is, and should be, the focus. The complaint should highlight that the product's performance was so unsafe, the failure so catastrophic, that no reasonable consumer would have expected it to perform in such a manner.

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Sophisticated user defense

Another legal theory extensively explored in the asbestos cases is the "sophisticated user defense." Generally, this defense exempts a manufacturer from its typical obligation to provide users with warnings about a product's potential dangers, when the consumers are "sophisticated users." A sophisticated user is one who is readily aware or should be aware of the dangers of a product, such as a member of a trade or profession in which the dangers of the product are generally known. (*Johnson v. American Standard, Inc*. (2008) 43 Cal.4th. 56.) In *Johnson*, the defendants submitted extensive evidence showing that a person working in plaintiff's position (an HVAC technician) is required to participate in training, earn certifications and read study guides. The court held that someone in plaintiff's position is or should be aware of hazards associated with products used in the industry, obviating the need for a manufacturer's warning.

As soon as *Johnson* was published, asbestos defendants started including it in their library of affirmative defenses, particularly in cases involving Navy servicemen. Generally, defendant manufacturers of asbestos containing materials assert that they need only show that the Navy was a sophisticated user of their products to defeat a plaintiff's negligence, strict liability and related causes of action.

Only a defense to failure to-warn

First, and most importantly, the sophisticated user defense is only a defense to failure-to-warn claims, either in strict liability or negligence. It does not apply as an affirmative defense to design defect claims. (*Id.* at p. 65, *Johnson v. Honeywell International Inc.* (2009) 179 Cal.App.4th 549.) Do not limit yourself by pleading only failure-to-warn theories. Also plead design defect. Retaining an independent claim that the product itself is defectively designed will insulate your cause of action from a sophisticated user affirmative defense. If your client is a sophisticated user, the defendant has the initial burden to show undisputed facts supporting each element of the affirmative defense. *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 458. *Johnson* requires the defendant to show what is generally, objectively known in the trade or profession. It is not enough for the defendant to simply describe the position or job title held by the plaintiff. The law requires a description of how and why someone in plaintiff's position should be charged with knowledge of the dangers.

User v. Intermediary

Second, it is worth noting that this defense has rarely been successful in asbestos litigation. Many courts, including those in San Francisco, Alameda and Los Angeles Counties have held that it is not enough to shift the burden by establishing the sophistication of the Navy yet remain silent as to what defendants knew or could reasonably be expected to know as well as remaining silent as to defendant's relationship with the Navy. In the myriad of cases denying defendants' motions for summary judgment, courts have pointed out that *Johnson* did not apply the sophisticated user defense to bar the claim of an injured *unsophisticated* employee of a sophisticated entity nor did it address the ability of a plaintiff to negate the defense by showing a sophisticated user foreseeably misused the product.

Defendants' analysis has unsuccessfully paralleled the "learned intermediary" defense in prescription drug product liability cases. The learned intermediary defense provides in cases of medical prescriptions, if adequate warnings of dangers of drug has been given to doctors, there is no duty by the drug manufacturer to insure that that warning reaches the doctor's patient for whom the drug is prescribed. (*Carlin v. Superior Court* (1996) 13 Cal.4th 1104.)

The *Johnson* decision is a "sophisticated user" case; it is not a "learned intermediary" case. The court expressly declined to decide the issue of a manufacturer's reliance on a third party to warn the ultimate user of the dangers in the manufacturer's products. At footnote 5 of the decision, the court made clear it was not announcing a rule for foreseeable negligence of intermediaries since that issue was not before it. (*Id*., p. 69, fn. 5.) Further, if the defendant is actually asserting a sophisticated or learned intermediary defense, this doctrine actually does not relieve manufacturers and suppliers of liability for failure-to-warn based solely on an intermediary's knowledge or sophistication. Instead, the focus is whether a manufacturer or supplier acted reasonably in relying on an intermediary to pass its warning on to the ultimate user. (*Carlin v. Superior Court* (1996) 13 Cal.4th 1104 (1990) 217 Cal.App.3d 168, *In re: Related Asbestos Cases*, 543 F.Supp. 1152 (N.D. Cal. 1982.)

Thus, it is important to anticipate when a defendant will have a legitimate sophisticated user defense, as articulated in *Johnson*, and draft your complaint accordingly. Anticipate the defense, whether legitimate or not, and shore up your complaint with facts showing your client was NOT sophisticated; he had no training, certifications or experience in the trade. Also, expand your cause of action beyond failure to warn – assert design defects claims.

Conclusion

It is easy to dismiss asbestos litigation as a specialized area of law, one that is so unique as to render it inapplicable to your practice. However, the plaintiffs' asbestos bar has been perfecting the art of products liability and personal injury litigation for decades, and a lot can be learned from their unique way of thinking about and analyzing a case. Secondary exposure is a perfect example of a way to use something asbestos attorneys have been doing for some time and make it work in general products liability, particularly toxic tort. A case dealing with asbestos recently provided much needed clarity to consumer expectation test. And finally, the sophisticated user defense,

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used often by asbestos manufacturers to try and blame navy serviceman for the Navy's use of deadly asbestos, isn't as scary as it sounds and is easily avoided or defeated. As you can see, asbestos is quite similar to "regular" products liability and relevant to personal injury law. You shouldn't give short shrift to case law involving asbestos or causes of action utilized by the asbestos bar, you will likely find that it's the law!


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