



## California Law Alert

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### ON BEING PROACTIVE - WHY WE FILE MOTIONS FOR SUMMARY ADJUDICATION

We represent many different clients in asbestos products liability litigation in California. One of our clients is a contractor company that was involved in construction in the San Francisco Bay Area starting in the late 1950's, and continuing through to the present day. In the 1960's and 1970's this contractor purchased and installed asbestos-containing materials which, when used in the customary manner, released asbestos fibers into the air on those construction sites.

When plaintiffs file personal injury or wrongful death lawsuits claiming damages and injuries from exposure to asbestos at construction sites in the Bay Area this client is often accused of contributing to the cause of plaintiffs' diseases on the theory that they purchased and installed asbestos-containing materials at plaintiffs' work sites.

Very often, especially when plaintiffs are represented by one particular Bay Area law firm, the contractor is alleged to be liable for plaintiffs' injuries under theories of strict liability and false representation. Plaintiffs also include claims for punitive damages.

We routinely ask plaintiffs' counsel to dismiss these claims voluntarily, because plaintiffs do not have, and cannot obtain, evidence that the contractor was a manufacturer or supplier of asbestos-containing materials, and can never prove oppression or malice. Sometimes we are able to convince plaintiffs to dismiss these claims, but more often than not we file motions for summary adjudication, in conjunction with a motion for summary judgment, to dismiss the strict liability and punitive damages claims. We rely, in part, on Section 402A of the Restatement (Second) of Torts, which imposes strict liability on the seller of a product for physical harm to the user or consumer. That section states, in pertinent part:

- (1) One who sells any product in a defective condition and reasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  - (a) the seller is engaged in the business of selling such a product, and
  - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

We are able to establish that our client is neither the manufacturer or seller of any product, but rather is a contractor that is a consumer of the product when it is purchased for installation at a commercial construction site. A key California case on which we rely is Monte Vista Development Corp. v. Superior Court, 226 Cal. App. 3d 1681 (1991), where the appeals court held that Willey Tile, a subcontractor that installed a defective soap dish, was not a "seller" of the soap dish under section 402A of the Restatement (Second) of Torts. The court held that "Willey Tile was not in the business of selling soap dishes or any other fixtures. It purchased the soap dish that injured Plaintiff, as well as other fixtures, in order to complete its subcontract with Monte Vista."

Plaintiffs' usual response to our motion is to dismiss the strict liability, false representation and punitive damages claims prior to the hearing. If plaintiffs refuse to dismiss the claims, we inevitably prevail at the hearing on the motion. This means that the case proceeds solely on a negligence theory, eliminating the consumer-expectation test and permitting good arguments to be made about the state of the scientific knowledge of the hazards of exposure to asbestos during the time the contractor was using asbestos-containing materials.

Narrowing plaintiffs' theories of liability to the negligence standard assists us during settlement negotiations, where the vast majority of cases are resolved.

The real benefit of taking strict liability and punitive damages out of plaintiffs' tool box pre-trial became apparent in a recent trial with other contractors who had not moved for summary adjudication on strict liability and punitive damages. While we were able to maintain a constant drum beat of the limits of plaintiffs' theories of liability, the other contractors had the threat of strict liability and punitive damages going to the jury. Unfortunately for them, the case drew a judge who was not at all sympathetic to defense arguments. As the case heads toward a close, all contractor defendants still face the prospect of closing arguments and jury instructions that may hold them liable under theories of strict liability and negligence, and subject to punitive damages.<sup>1</sup>

We will continue to be aggressive in our workup of cases for trial and will force plaintiffs to either produce evidence of our clients' liability or move prior to trial to dismiss claims that are not viable. Clearly, a proactive approach to trial preparation serves our clients well.

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<sup>1</sup> For a variety of reasons, including the fact that we were the sole negligence-only defendant in the case, we were able to resolve plaintiffs' claims mid-trial.

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