



# California Tort and Asbestos Law Update

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## Stewart v. Union Carbide 2010 DJDAR 17352

TORTS: Asbestos / Products Liability / Sophisticated User / Concurrent or Alternative Cause

In a recent decision, the Second Appellate District reviewed arguments presented by defendant and appellant Union Carbide, the supplier of asbestos used in joint compound. Plaintiff and respondent Larry Stewart was a plumber or plumber's apprentice from 1967 until 2007 when diagnosed with mesothelioma. Stewart's most significant exposures to asbestos occurred while working on large commercial and residential construction projects in proximity to "drywallers." Stewart described in detail his exposure to asbestos from joint compound, testifying to "dust storms" created when drywall was sanded or when efforts were made to sweep. Stewart observed many boxes of joint compound during his career, but never saw a box with a warning about asbestos or that the products contained this mineral. Stewart prevailed, the jury allocating an 85% share of fault to Union Carbide and finding Stewart was entitled to punitive damages.

### Sophisticated User

An issue on appeal was the trial court's refusal to instruct the jury on the sophisticated user defense. Union Carbide requested an instruction to the effect that the warning given to the manufacturers and suppliers of the joint compound was imputed to the Stewart. Specifically, Union Carbide contended that its customers knew or should have know of the dangers of asbestos and that its duty to warn Stewart "is measured by the knowledge the customers should have had." The appellate court disabused Union Carbide's argument, finding that Union Carbide was essentially requesting a "Bulk Supplier" defense that was irrelevant to the facts of the case. The court reviewed *Johnson v. American Standard* (2008) 43 Cal 4th 56, which reiterated the rule that "manufacturers have a duty to warn consumers about the hazards inherent in their products," but recognized an exception to that rule, holding that "sophisticated users need not be warned about dangers of which they are already aware or should be aware." The court found 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 by reason of his profession and certification he should have had."

The court next analyzed the Bulk Supplier doctrine, which affords a defense to a component manufacturer or raw material supplier for injuries caused by the finished product unless the component itself was defective. The court noted "asbestos suppliers have sought the protection of the rule but it has not been afforded to them because raw asbestos is defective," citing *Garza v. Asbestos Corp. Ltd.* (2008) 161 Cal.App.4th 651. The court also discussed cases involving an employee of a sophisticated purchaser, finding such a relationship not present in the instant case. The sophisticated intermediary doctrine had no applicability because it is relevant only if the manufacturer provided adequate warning to the intermediary. *Persons v. Salomon North America Inc.* (1990) 217 Cal.App.3d 168. There was no basis to instruct on that doctrine since the evidence established Union Carbide never gave any warning regarding its product.

## Concurrent / Alternative Cause

Union Carbide complained that Stewart was exposed to asbestos containing products supplied by other companies. It cited Stewart's medical evidence "to the effect that all commercial asbestos fibers can cause mesothelioma, that the risk of mesothelioma is based on the cumulative effect of asbestos exposure and that all of plaintiff's exposures caused his illness." To establish the fault of other potentially responsible entities, Union Carbide "... had the burden to establish concurrent or alternative causes proving that [Larry Stewart] was exposed to defective asbestos containing products of the other companies; that the defective designs of the other companies products were legal causes of the plaintiff's injuries; and the percentage of legal cause attributable to the other companies." *Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461. The court affirmed the jury's conclusion that Union Carbide did not satisfy its burden.

## Commentary

What is interesting about this case is the failure to use the state of the art to support the sophisticated user defense as defined by *Johnson* or the sophisticated purchaser defense. Specifically, post 1972, NIOSH exposure criteria could have been employed to argue what was known or knowable regarding the hazards of asbestos and the precautions to be employed to comply with those standards. Based on the facts of *Stewart*, such argument would have failed since Union Carbide did not issue warnings and it does not appear the product suppliers did either. Interestingly, the court's focus on the absence of warnings and its discussion of Union Carbide's efforts to downplay the risks of asbestos exposure in the Punitive Damages section of the decision identifies an argument that should resonate for trades such as drywallers. Before 1972, if drywallers or other persons similarly situated were not informed that the products used in their trades contained asbestos, issues exist as to whether suppliers should be held accountable for asbestos related injuries ostensibly generated by the work performed.

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