Asbestos has been a component of brake pads and linings, clutch facings and various gaskets for many years. Millions of brakes and clutches on cars, trucks, and on auto parts shelves still contain dangerous levels of the material. Although it is not used in the production of new brakes or clutches made in the United States, a Chinese manufacturer used it as late as 2012, forcing the recall of thousands of cars.

Toxic-tort litigation

A ruling on the "sophisticated-intermediary defense" highlights a good year for toxic-tort plaintiffs at the California Supreme Court

By Raphael Metzger

In 2016 the California Supreme Court continued its venerable tradition of affording justice to workers who suffer debilitating occupational diseases from industrial exposure to toxic chemicals.

In *Webb* the court limited the scope and applicability of the sophisticated- intermediary defense, which had allowed chemical manufacturers to shift the blame for injuries caused by their toxic chemical products to California employers.

In *Ramos* the court limited the scope of the component part defense, precluding its application to industrial injuries caused by occupational exposure to manufacturers' industrial products not incorporated into finished end-use products.

In *Bristol-Myers* the Court invigorated the specific-jurisdiction doctrine to allow plaintiffs to sue in California the manufacturers of toxic chemical products who conduct substantial business activities but who are not amenable to general jurisdiction in this state.

Lastly, in *Kesner* and *Haver* the Court extended the duty of care in the handling of toxic chemicals on the part of manufacturers and employers to members of a worker's household who are exposed to toxic chemicals brought home by exposed workers. Altogether, it was a good year in the California Supreme Court for injured workers and their families.

Webb v. Special Electric

Perhaps the most important case of 2016 was the California Supreme Court's opinion on the sophisticated-intermediary defense in *Webb v. Special Electric Company, Inc.* (2016) 63 Cal.4th 147. For years this defense had been the bane of plaintiffs' toxic-tort attorneys. In *Webb*, our Supreme Court adopted the defense,

Copyright © 2017 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**

but did so in a manner that is actually quite favorable to plaintiffs: the court identified so many factors that typically present disputed issues of fact that it will be exceedingly difficult for defendants to obtain summary judgment based on the defense.

Webb was a truck driver who developed mesothelioma from occupational exposure to asbestos from delivering asbestos pipe to job sites. Special Electric Company, Inc., brokered the sale of raw crocidolite asbestos to Johns-Manville Corporation, which made asbestos-containing Transite pipe. Webb sued Special Electric for failing to warn of the toxic hazards of its asbestos.

A jury found in favor of plaintiff, but Special Electric moved for judgment notwithstanding the verdict, arguing it had no duty to warn a sophisticated purchaser like Johns-Manville about the health risks of asbestos, and the trial court granted the motion. A divided panel of the Court of Appeal found error and the California Supreme Court granted review.

While the court adopted the sophisticated-intermediary defense, it found that "[a]lthough the record clearly shows Johns-Manville was aware of the risks of asbestos *in general*, no evidence established it knew about the particularly acute risks posed by the crocidolite asbestos Special Electric supplied." Moreover, the record did "not establish as a matter of law that Special Electric actually and reasonably relied on Johns-Manville to warn end users . . . about the dangers of asbestos." Finding that substantial evidence supported the jury verdict, the court held that the trial court erred in granting judgment notwithstanding the verdict.

In so doing, the Supreme Court adopted a two-part test for applicability of the defense: "Under this rule, a supplier may discharge its duty to warn end users about known or knowable risks in the use of its product if it: (1.) provides adequate warnings to the product's immediate purchaser, or sells to a sophisticated purchaser that it knows is aware or should be aware of the specific danger, *and* (2.) reasonably relies on the purchaser to convey appropriate warnings to downstream users who will encounter the product."

The court observed that "the sophistication of a product's purchaser, standing alone, may not be sufficient to discharge the supplier's duty to warn. As the Second Restatement explains, providing thorough warnings to the immediate purchaser 'is not in all cases sufficient to relieve the supplier from liability. . . . The question remains whether this method gives a reasonable assurance that the information will reach those whose safety depends on their having it.' (Rest.2d Torts, § 388, com. n, p. 308). [citation] In addition to warnings or sophistication of the purchaser, it must have been reasonable for the supplier to rely on the purchaser to warn others who would foreseeably encounter the hazardous product." (*Webb*, 63 Cal.4th at pp.188-189.)

"Under the sophisticated-intermediary doctrine's first prong, generally the supplier must have provided adequate warnings to the intermediary about the particular hazard." (*Id.* at p. 188.) "In some cases the buyer's sophistication can be a substitute for actual warnings, but this limited exception only applies if the buyer was so knowledgeable about the material supplied that it knew or should have known about the particular danger." (*Ibid.*) "This narrow exception to the duty to warn is consistent with . . . recognition . . . that knowledge of a product's risks is the equivalent of prior notice. If a purchaser is so knowledgeable about a product that it should already be aware of the product's particular dangers, the seller is not required to give actual warnings telling the buyer what it already knows." (*Id.* at p.188.)

> To establish a defense under the sophisticated-intermediary doctrine, a product supplier must show not only that it warned or sold to a knowledgeable intermediary, but also that it actually and reasonably relied on the intermediary to convey warnings to end users.

(*Id.* at p.189.)

Importantly, the court held that "[t]his inquiry will typically raise questions of fact for the jury to resolve unless critical facts establishing reasonableness are undisputed." (*Id.* at p.189-190.) "Several factors are relevant in deciding whether it is reasonable for a supplier to rely on an intermediary to provide a warning. The most recent Restatement provision distills these factors into three distinct categories: 'the gravity of the risks posed by the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user.'" (*Id.*, at p. 190.)

The Court noted that "[t]he 'gravity' of risk factor encompasses both the 'serious or trivial character of the harm' that is possible and the likelihood that this harm will result. . . . This factor focuses on the nature of the product supplied. If the substance is extremely dangerous, the supplier may need to take additional steps, such as inquiring about the intermediary's warning practices, to ensure that warnings are communicated. The overarching question is the reasonableness of the supplier's conduct given the potential severity of the harm." (*Id.* at p. 190.) The court noted that relevant concerns for the second factor – the likelihood that the intermediary will warn – "include, for example, the intermediary's level of knowledge about the hazard, its reputation for carefulness or consideration, and its willingness, and ability, to communicate adequate warnings to end users." (*Ibid.*)

"The third factor for assessing the reasonableness of relying on an intermediary explores whether it was feasible for the supplier to convey effective warnings directly to end users. . . . Whereas the first two factors focus on the product and the intermediary, this factor focuses on

Copyright © 2017 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**

what the *supplier* can realistically accomplish. . . . If the goods are packaged it is entirely feasible for the manufacturer to include an appropriate warning on the package." (*Id.* at p. 191.) The court also noted that "[i]n addition to cautionary labels or packaging inserts, manufacturers may sometimes be able to affix a warning to the product itself." The court also held that "[l]ike the sophisticated user defense, the sophisticated-intermediary defense applies to failure to warn claims sounding in either strict liability or negligence." (*Id.* at p.187.)

Ramos v. Brenntag Specialties, Inc.

In *Ramos v. Brenntag Specialties, Inc.* (2016) 63 Cal.4th 500, the California Supreme Court held that the component-part defense does not exonerate suppliers of toxic industrial materials that cause an injury when used by workers in industrial manufacturing processes.

Ramos was a metal-foundry worker who developed interstitial pulmonary fibrosis. He sued numerous companies that supplied industrial products for use in the foundry's manufacturing process, asserting that the products, when used in their intended fashion, produced harmful fumes and dust that were a substantial cause of his lung disease. The defendant suppliers demurred, relying on *Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, a decision of Division 3 of the Second Appellate District, which had held that under the component-parts doctrine, a supplier of materials was not liable for injuries suffered under circumstances similar to those of Ramos. In reliance on *Maxton,* the trial court sustained defendants' demurrer without leave to amend.

The Court of Appeal in *Ramos* disagreed with the analysis and conclusion in *Maxton,* and held that the component-parts doctrine was not applicable because Ramos' injury had not been caused by a finished product into which the supplied product had been incorporated but instead by the supplied product itself.

The Supreme Court granted review to resolve the direct conflict between the Court of Appeal decision and *Maxton.* The Court agreed with the reasoning of the *Ramos* court's decision and affirmed, writing: "As the Court of Appeal explained, the protection afforded to defendants by the component parts doctrine does not apply when the product supplied has not been incorporated into a different finished or end product but instead as here, itself allegedly causes injury when used in the manner intended by the product supplier." (*Ramos*, 63 Cal.4th at p. 504.)

In so doing, the Supreme Court disapproved of the aberrant decision in *Maxton*, which had prevented numerous workers suffering from occupational diseases from having their day in court. This was a clear and decisive win for injured workers. *Maxton* is no more.

Bristol-Myers Squibb Company v. Superior Court

Bristol-Myers Squibb Company v. Superior Court (2016) 1 Cal.5th 783, is an important decision that the California Supreme Court issued in August on the issue of personal jurisdiction. Bristol-Myers, a pharmaceutical manufacturer, conducts significant business and research activities in California but is neither incorporated nor headquartered here. Complaints were filed in San Francisco Superior Court for 678 persons – 86 California residents and 592 nonresidents, all of whom claimed to have taken the drug Plavix and suffered adverse consequences.

Bristol-Myers moved to quash service of summons on the ground that the court lacked personal jurisdiction over it to adjudicate the claims of the 592 nonresident plaintiffs. In support of the motion, Bristol-Myers officers stated that the company is incorporated in Delaware, headquartered in New York City, maintains substantial operations in New Jersey, and that 51 percent of its U.S. workforce was located in these other states. Bristol-Myers also asserted that its research, development, and manufacture of Plavix did not take place in California, nor was any work related to its labeling, packaging, regulatory approval, or its advertising or marketing strategy performed by any of its employees in California. Bristol-Myers argued that California courts lacked jurisdiction over it as to the nonresident plaintiffs because it is neither incorporated nor headquartered in California.

The trial court denied the motion and Bristol-Myers petitioned the Court of Appeal for a writ of mandate, which was summarily denied. However, the California Supreme Court granted Bristol-Myers' petition for review. After the U.S. Supreme Court decided *Daimler AG v. Bauman* (2014) 134 S.Ct. 746, the California Supreme Court transferred the matter back to the Court of Appeal for issuance of an order to show cause in light of *Daimler*. The Court of Appeal again denied the writ, this time on the basis of specific jurisdiction, and Bristol-Myers again sought review, which was granted.

The Supreme Court concluded that pursuant to *Daimler AG v. Bauman,* the trial court lacked general jurisdiction over Bristol-Myers because it was neither incorporated nor headquartered in California, but that the company's extensive California activities were sufficiently related to the nonresident plaintiffs' suits to support the invocation of specific jurisdiction under *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434. Accordingly, the Supreme Court affirmed the judgment of the Court of Appeal which held that Bristol-Myers was subject to personal jurisdiction on the basis of specific jurisdiction.

Copyright © 2017 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**

Kesner v. Superior Court (Pneumo Abex) and *Haver v. BNSF Railway*

The California Supreme Court closed out the year with a blockbuster decision issued on December 1st in two "take-home" asbestos exposure cases: *Kesner v. Superior Court* (No. S219534) and *Haver v. BNSF Railway Company* (No. S219919).

The plaintiff in *Kesner* filed suit, claiming that he suffered exposure, in part, from clothing his uncle wore home from work at Pneumo Abex. The trial court granted Pneumo Abex nonsuit at the start of trial after concluding that the company did not owe a duty to household members such as Kesner. The First District Court of Appeal reversed. While acknowledging the danger of limitless liability, the court said "the balance falls far short of terminating liability at the door of the employer's premises."

The plaintiff in *Haver* alleged that she suffered exposure to asbestos from the clothing of her former husband, who allegedly came into contact with asbestos while employed at BNSF Railway Co.'s predecessor, Santa Fe Railway, in the 1970s. BNSF demurred to the complaint, relying on *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, the trial court sustained the demurrer without leave to amend, and the Second District Court of Appeal affirmed.

The California Supreme Court granted review in both cases and consolidated them for hearing. The Court held "that the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. This duty also applies to premises owners who use asbestos on their property, subject to any exceptions and affirmative defenses generally applicable to premises owners, such as the rules of contractor liability. Importantly, we hold that this duty extends only to members of a worker's household. Because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker's home, it does not extend beyond this circumscribed category of potential plaintiffs."

Raphael Metzger is the principal and founder of the Metzger Law Group, *a boutique litigation firm in Long Beach whose practice is devoted to representing workers who suffer occupational diseases from exposure to industrial toxic chemicals.*


Metzger

Copyright © 2017 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**