The "sophisticated-intermediary" defense in products liability

Understanding and litigating this products liability defense, including the recent Kesner *holding by the California Supreme Court*

By Rajeev Mittal

"Telephone" is a popular children's game in which one person whispers a short phrase or message into the ear of the next player through a line of participants until the last player announces the phrase to the entire group. While the objective of the game is to have the message travel through the entire group unaltered, invariably, the final message announced to the group differs significantly from that spoken by the first player. This can be due to myriad factors, such as difficulty hearing or understanding the whispers of the preceding players, erroneous corrections after mishearing the phrase, and even intentional alterations by whimsical players.

While the game is often played by children in a party or playground setting, it is often invoked as a metaphor for the inherent unreliability of information the further removed it is from its primary source.

In California, a plaintiff injured by a consumer product can bring an action against anyone in the chain of distribution of that product. In other words, anyone from the manufacturer of the product to the distributor that dispersed it to retailers around the state to the store at which the plaintiff purchased it can be held liable for the injuries the product caused.

In some cases, the dangerous propensities of the product arise from only one component or ingredient in the product, rather than from the product as a whole. This is common with asbestos-containing products, where it is the raw material ingredient, *asbestos*, that is incorporated into a finished product that ultimately causes injury. In such cases, the supplier of the raw material may also be held liable for the plaintiff's injuries given the inherent dangerousness of asbestos.

Indeed, in asbestos cases specifically, the California Supreme Court recently held that the owner of a premises where one is exposed to asbestos owes a duty even to the members of that exposed person's household who are secondarily exposed to asbestos from the clothing or person of the household member who carries the asbestos fibers home from the premises unwittingly. (*Kesner v. Superior Court of Alameda* (2016) __ Cal.4th __; *Haver v. BNSF Railway Company* (2016) __ Cal.4th __.)

The "sophisticated-intermediary" doctrine

In 2016, California officially adopted the "sophisticated-intermediary" doctrine. The affirmative defense is available in products-liability failure-to-warn actions to suppliers of hazardous raw materials who supplied their product to an intermediary, usually a manufacturer who incorporates the raw material into a finished product. The finished product eventually ends up in the hands of an end user, usually an ordinary consumer who purchased it at a retail store. It is this finished product that allegedly caused the plaintiff's injury.

Adopted by the California Supreme Court in *Webb v. Special Elec. Co., Inc.* (2016) 63 Cal.4th 167, the sophisticated-intermediary defense is implicated by the answer to the question: when a company supplies a hazardous raw material for use in a finished product, what is the scope of the supplier's duty to warn ultimate users of the finished product about risks related to the raw material?

The duty can be discharged if an adequate warning is given by the supplier to the intermediary or the intermediary is already aware of the dangers; and the supplier actually and reasonably relies on the intermediary to convey appropriate warnings to downstream users who will encounter the product.

The key language here is "ultimate" or "downstream" users. That is, the supplier *always* owes a duty to warn the *ultimate user* of the hazards of its raw material. Therefore, despite the doctrine's name and the role of the intermediary in the factual analysis, ultimately, answering the question of whether this duty has been satisfied should focus on what information flowed or should have flowed to the *ultimate user* of the finished product. It is important to keep this in mind through all stages of a failure-to-warn case: discovery, summary judgment, and at trial. Being an affirmative defense, the defendant bears the burden of proof.

The test

The Supreme Court began its analysis of the sophisticated-intermediary defense by first examining three other product liability defenses: the sophisticated user defense; the component parts doctrine; and the bulk supplier doctrine. (*Webb*, 63 Cal.4th at pp. 182-185.) As an initial matter, the component parts doctrine does not apply where the injury is not caused by a finished product into which the supplied product has been incorporated, but instead by the supplied product itself when used in an intended fashion. (*Ramos v. Brenntag Specialties, Inc.* (2016) 63 Cal.4th 500.) Further and similarly, the bulk-supplier doctrine does not apply to inherently dangerous materials, such as asbestos, because asbestos is not processed or otherwise substantially changed before reaching the end user.

(*Webb,* at pp. 184-85.) Therefore, the sophisticated-intermediary defense is the only one available to hazardous raw-material suppliers whose material is inherently dangerous, such as asbestos.

The court then examined the origins of the sophisticated-intermediary defense in the Restatement Second of Torts, section 388, comment n, the application of the defense in *Persons v. Salomon N. Am., Inc.* (1990) 217 Cal.App.3d 168, and the more recent treatment of the defense in the Restatement Third of Torts, Product Liability, section 2, comment i. (*Id*. at pp. 185-187.) Based on its review of these authorities, the Supreme Court adopted and set forth a two-part test for the sophisticated-intermediary defense. While the raw material supplier always owes a duty to the end user of the finished product to warn about known or knowable risks in the use of its product, this duty can be discharged if the raw material supplier: (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. (*Id.* at p. 187.)

The first prong

As to the first prong of the defense, the Supreme Court explained that "generally the supplier must have provided adequate warnings to the intermediary about the particular hazard." (*Webb*, 63 Cal.4th at p. 188.) The court noted that there is a "limited exception" to this requirement, whereby "[i]n 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*.) In that circumstance, "the seller is not required to give actual warnings telling the buyer what it already knows." (*Ibid*.)

The second prong

As to the second prong of the defense, the Supreme Court explained that neither a warning to the intermediary nor intermediary sophistication, on its own, is sufficient to avoid liability. (*Webb*, 63 Cal.4th at pp. 188-189.) "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, italics added.) The court cited *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270 (*Pfeifer*), "a recent case involving asbestos products sold to the Navy," where the Court of Appeal held that, "'to avoid liability [under the sophisticated-intermediary defense], there must be some basis for the supplier to believe that the *ultimate user* knows, or should know, of the item's hazards.'" (*Webb*, at p. 189, quoting *Pfeifer*, at p. 1296.) Quoting *Pfeifer*, the Supreme Court stated that "'the intermediary's sophistication is not, as [a] matter of law, sufficient to avert liability; there must be a sufficient reason for believing that the intermediary's sophistication is likely to operate to protect the user, or that the user is likely to discover the hazards in some other manner.'" (*Ibid.*, quoting *Pfeifer*, at pp. 1296-1297.)

Webb was an asbestos case in which plaintiff Webb was exposed to asbestos from his work with asbestos-cement pipe manufactured by Johns-Manville Corporation (Johns-Manville) with raw asbestos supplied by defendant Special Electric Company, Inc. (Special Electric), resulting in Webb's development of "mesothelioma, a fatal cancer caused by inhalation of asbestos fibers." (63 Cal.4th at pp. 177-179.) Plaintiffs alleged multiple theories of recovery, including that Special Electric was both strictly liable and negligent for failing to warn Webb of the health dangers of the asbestos it supplied. (*Id*. at pp. 178-179.) During the trial, Special Electric filed motions for nonsuit and a directed verdict on plaintiffs' failure to warn claims, "argu[ing], in part, that it had no duty to warn a sophisticated purchaser like Johns-Manville about the health risks of asbestos." (*Ibid*.) The trial court deferred ruling on those motions and the jury subsequently returned a verdict in favor of plaintiffs on those claims. (*Ibid*.) Treating the deferred nonsuit and directed verdict motions as a motion for judgment notwithstanding the verdict, the trial court granted the motions and entered judgment in favor of Special Electric, based on its determination that "Special Electric was not liable for failure to warn." (*Id.* at p. 179.) The Court of Appeal reversed the judgment, finding that "the entry of JNOV was improper because substantial evidence demonstrated that Special Electric breached a duty to warn Johns-Manville and foreseeable downstream users like Webb about the risks of asbestos exposure." (*Ibid.*)

Application of the defense

Turning to the application of the sophisticated-intermediary defense in the case before it, the Supreme Court observed that Special Electric "arguably forfeited" the defense because, although it "argued in the nonsuit and directed verdict motions that it had no duty to warn a sophisticated purchaser like Johns-Manville about asbestos, it never attempted to show that it actually or reasonably relied on Johns-Manville to warn end users." (*Webb*, 63 Cal.4th at pp. 192.) "Assuming the defense was preserved," the court held, inter alia, that "the record does not establish as a matter of law that Special Electric actually and reasonably relied on Johns-Manville to warn end users like William Webb about the dangers of asbestos." (*Id*. at p. 193.) The court observed that while "actual reliance is an inference the factfinder should be

able to draw from circumstantial evidence about the parties' dealings," the trial record was "devoid of evidence supporting such an inference." (*Ibid*.)

In summary, *Webb* has several key holdings that both Plaintiffs' and Defense lawyers would be wise to thoroughly understand. First, the duty of a raw material supplier to warn is to the *end product user*, not the intermediary manufacturer. (*Webb,* 63 Cal.4th at 185 ["[t]he supplier's duty [to warn] also logically extends to others who encounter the hazardous raw material, for example, after it has been incorporated into a finished product" i.e., the "consumers of finished products"]. In addition, the Court explained that the sophisticated-intermediary doctrine addresses how a "supplier may discharge its duty to warn end users about known or knowable risks in the use of its product." (*Id*. at p. 187.)

Second, the duty, like any duty of care, is to act reasonably – in this context, to take reasonable steps under the circumstances to assure that the *end product user* gets the warning. (*Id.* at 187 ["in failure-to-warn cases, whether asserted on negligence or strict liability grounds, there is but one unitary theory of liability which is negligence based – the duty to use reasonable care in promulgating a warning"].) Third, if the manufacturer does not provide a warning to the end user directly, then it "may discharge its duty to warn end users" by following the *Webb* two-step scheme: (a) give "adequate warnings to the product's immediate purchaser," i.e., the intermediary; *or* "se[ll] to a sophisticated purchaser that it *knows* is aware or should be aware of the specific danger;" and (b) actually and reasonably rely "on the purchaser to convey appropriate warnings to downstream users who will encounter the product." (*Ibid.* [emphasis added].)

As *Webb* dictates, then, in every raw asbestos fiber supplier case, the supplier-defendant must make the above showing. Unless the defendant has evidence that it warned the end user directly, then it *by definition* seeks to invoke the sophisticated-intermediary doctrine, which, per *Webb*, applies when the defendant contends that it "discharge[d] its duty to warn end users" by relying on an intermediary to do so. (*Webb,* at p. 187.)
Webb adopts this doctrine "as it has been expressed" in the Restatement sections: Rest.2d section 388, cmt, n (which addresses when warnings to a party in the supply chain are sufficient to satisfy the supplier's duty to warn product end users); and Rest.3d section 2, cmt. I (substantively the same as Rest.2d). (*Id.* at 185-187.) Accordingly, if defendants have no evidence that they warned the end user directly, then the *only* way to have discharged the duty is via the sophisticated-intermediary doctrine. And it is the *Defendant's burden* of proof to show compliance: (1) an adequate warning *or* sophistication; *and* (2) actual *and* reasonable reliance.

In practice: *Discovery*

Though the sophisticated-intermediary doctrine is a "two-part" test, in practice attorneys should flesh out facts surrounding three areas: (1) whether the supplier adequately warned the direct purchaser of the dangers of their product or sold to a knowledgeable intermediary; (2) whether the supplier actually and reasonably relied on that intermediary to convey warnings to downstream users; and (3) whether the supplier had a sufficient reason for believing that the intermediary's sophistication is likely to operate to protect the user, or that the user is likely to discover the hazards in some other manner. (*Webb,* 63 Cal.4th at p. 189.)

As an example, I will consider a product that is commonly the subject of asbestos litigation: asbestos-containing drywall joint compound. Joint compound is either a dry powder that needs to be mixed with water or a pre-mixed wet product that is applied to seal joints between drywall boards during wall construction. Prior to about 1978, many joint compound manufacturers incorporated raw asbestos fibers supplied by a separate entity in their formulas. The joint compound was then distributed and sold to retail consumers who were injured via exposure to the asbestos during the stages of work with joint compound that create respirable dust (pouring and mixing the dry powder, sanding the product after it is applied to the wall, and cleanup of debris).

Facts such as the knowledge possessed by the entities in the chain of distribution regarding the hazards of asbestos and whether warnings were passed down the chain and ultimately conveyed to the end user are standard fare in asbestos litigation. While these are relevant to the sophisticated-intermediary defense, to narrow in on the elements that might make or break the defense, one must dig deeper. California's Form Interrogatory No. 15.1 is a good place to start for plaintiffs' lawyers.

More targeted and detailed discovery may be warranted, as well. Did the supplier warn the intermediary at all or simply rely on the intermediary's own knowledge regarding the hazards of asbestos? What was the supplier's understanding of the intermediary's sophistication and, more importantly, what was the *basis* for that understanding? Were they in asbestos-related trade organizations together and therefore receiving the same information regarding asbestos state-of-the-art; did they have past dealings in which information regarding asbestos hazards had been repeatedly conveyed; were the events in question during a time period when the hazards of asbestos were already widely known in the industry?

Even if the answers to the above questions reveal an adequate warning provided by the supplier to the intermediary *or* adequate intermediary sophistication, the analysis proceeds and so should detailed discovery. Did the supplier actually and reasonably rely on the warned or sophisticated intermediary to convey the warnings to end users? How? Did the parties have a contract dictating that the warnings would be passed along? Did the supplier receive

assurance from the intermediary that the warnings would be passed along? Did the supplier do any investigation into the manufacturer's procedures for conveying warnings to its customers? How many more "middlemen" such as distributors or retailers will the product pass through before reaching the ultimate user, and what are those "middlemen" doing to ensure the warning is properly conveyed? Past dealings and course of conduct may be relevant here, as well.

Finally, as *Webb* holds, the supplier must have had a sufficient reason for believing the intermediary's sophistication would operate to protect the end user. Thus, it is important to explore this reasoning in discovery. Why did the supplier believe that the warnings would ultimately be conveyed to the end user? Years of asbestos litigation have revealed an interesting wrinkle here: prior to the promulgation of OSHA in 1972, few, if any, bags of asbestos-containing joint compound contained a warning regarding the dangers of inhaling asbestos. Even after 1972, many such warnings failed to warn of the risks of cancer and death. How can a supplier claim it had reason to believe a manufacturer would convey warnings to end users if the finished product contains or has a history of containing no such warning at all?

In sum, comprehensive discovery on the factual elements underlying the sophisticated intermediary is necessary and can ultimately make or break a failure to warn case against hazardous raw material suppliers.

In practice: *Summary judgment* and *adjudication*

Having conducted comprehensive discovery on the issue, the next time the sophisticated-intermediary defense is likely to arise is at the close of discovery in summary judgment or summary adjudication motions.

A supplier defendant may move for summary adjudication of the failure to warn claim arguing that the elements of the defense have been satisfied. Simply put, if the supplier provided an adequate warning and there was a reasonable basis for believing it would be passed to the consumer, its hands are clean.

Alternatively, an opportunity for a plaintiff to file an offensive motion for summary adjudication may also present itself here. The facts of your particular case will be the ultimate determinant. Again, using the joint compound example above, there are many checkpoints along the road the defendant must travel at which the defense can be halted. What warning was passed from the asbestos supplier to the joint compound manufacturer? If it was inadequate, the defense fails, unless the manufacturer was sophisticated on the hazards and the supplier knew of this sophistication. Accordingly, we ask, what was the level of the manufacturer's sophistication? Perhaps it knew that asbestos should not be inhaled, but was it aware of the risk of cancer and death? If its level of sophistication is inadequate, the defense fails. Assuming there is evidence in the record establishing adequate warning or sophistication, the next step is determining whether the supplier actually and reasonably relied on the manufacturer to convey the warnings to end users and the basis for believing it would actually be done. Is there evidence regarding a contract or other assurance that warning language would be included on the finished product? Did the supplier do anything to determine whether warning language would be passed on? Did it know of the manufacturer's procedures for warning customers? Was there a warning on the finished product at all? If not, the defense may fail.

In practice: *Trial*

Assuming triable issues of fact remain regarding the sophisticated-intermediary defense and the case goes to trial, it is likely to arise again in the context of Special Jury Instructions. Given the multiple elements of the defense, whether one comprehensive Instruction or multiple piecemeal Instructions are used is likely a matter of personal preference. In any event, it is extremely important, especially from the perspective of plaintiff's counsel, that the Instruction(s) are complete statements of the law so as not to mislead the jury.

First, any Instruction should clarify to whom the supplier's duty to warn is owed. It is always owed to the ultimate user and can only be *discharged* via satisfaction of *all* the elements of the defense. An Instruction that does not make this clear may improperly suggest or imply that, so long as the supplier defendant warned *anyone* in the chain of distribution, the analysis is complete and its duty is satisfied. That is simply not true.

Second, Special Instruction(s) on the issue should address whether there was a *basis* for the supplier defendant's belief that the intermediary would act to protect end users from the hazards of the raw material and that the end user would ultimately receive the warning. In other words, the jury must be made aware that it is not enough for a supplier to simply warn the intermediary or sell to an already-sophisticated intermediary, but rather the supplier must have had a reason to believe that the intermediary would then pass that warning along to end users.

In sum, Special Jury Instructions present a ripe opportunity for obfuscation and confusion of the sophisticated-intermediary issue. It is imperative that the jury understands the defense and that *all* elements of it must be satisfied in order for the supplier defendant to prevail on the theory.

Conclusion

As mentioned at the outset of this article, the supplier's duty to warn of its material's hazards is to the *ultimate user*, and the focus should always remain on what warnings and information ultimately ended up with that user. While the supplier defendant can discharge this duty,

in part, by warning an intermediary in the chain of distribution, it cannot clean its hands of liability by merely warning the intermediary or selling to a sophisticated intermediary and ethereally expecting that the warning will make its way downstream to end users.

There must be a basis, and evidence in the record supporting that basis, for the supplier's belief that information regarding the hazards of its raw material will be conveyed to the ultimate user of the finished product. Without such a basis, the suppliers are simply playing Telephone, except that the lack, distortion, or unreliability of the information that ends up with the last "player" could have potentially deadly consequences.

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