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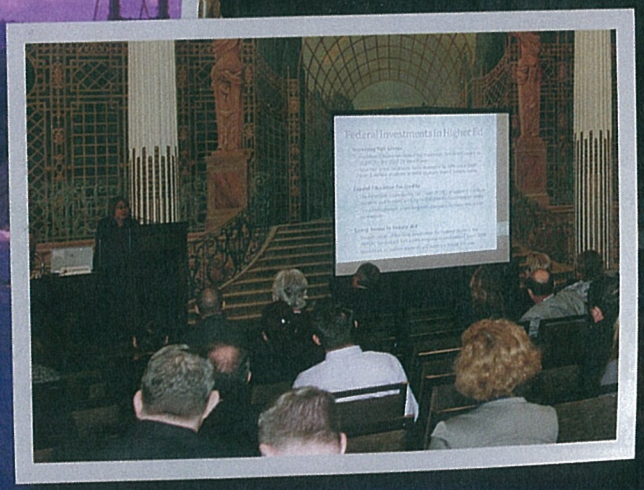

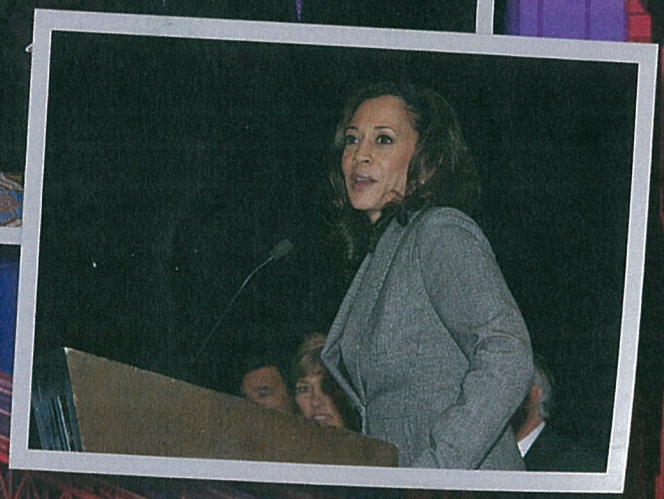

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Cautious Steps Forward, Discouraging Steps Backward – the Continuing Effort to Utilize the Sophisticated User Defense Established in *Johnson v. American Standard*

by Jeff Coons, Gordon & Rees, LLP

Four years ago, the California Supreme Court "adopt[ed] the 'sophisticated user' doctrine and defense to negate a manufacturer's duty to warn of a product's potential danger when the plaintiff has (or should have) advance knowledge of the product's inherent hazards. The defense is specifically applied to [those] who knew or should have known of the product's hazards, and it acts as an exception to manufacturers' general duty to warn consumers." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 61.) *Johnson* held that the defense bars liability for failure to warn, in both strict liability and negligence, where the plaintiff "knew or should have known of [the] risk, harm or danger." (*Id.* at 71.) This is because the user's knowledge of the dangers is the equivalent of prior notice. "[N]o one needs notice of that which he already knows," or should know. (*Id.* at 65, citations omitted.)

Since *Johnson* was decided, California and other courts have refined the elements of the defense. This development has been mostly in "toxic tort" cases, but defendants may be able to use the doctrine in other product liability cases as well. This article will identify recent decisions applying the doctrine and suggest what facts are likeliest to result in its successful application.

THE *JOHNSON* DECISIONS

Plaintiff William Keith Johnson was a trained and EPA-certified heating, ventilation and air conditioning (HVAC) technician who alleged that he brazed lines on an American Standard evaporator manufactured in 1965, resulting in exposure to phosgene gas, which caused him to develop pulmonary fibrosis. Mr. Johnson sued American Standard under a failure to warn theory and American Standard moved for summary judgment claiming: 1) it had no duty to warn about the potential hazard of R-22 because it did not manufacture that refrigerant, and 2) it had no duty to warn about the risks of R-22 exposure, because it assumed that trained HVAC technicians, including plaintiff himself, were aware of those risks. The trial court granted American Standard's motion on both grounds and the appellate court affirmed the ruling on the second ground only. The California Supreme Court agreed, holding that the sophisticated user defense applies where the user (such as a trained member of a trade or profession) either "knew or should have known of [risk] of harm or danger." (*Id.* at 71.) The court reasoned that the defense evolved out of the Restatement Second of Torts (section 388) and California's obvious danger rule, which provides that there is no reason to warn of known risks under either a negligence or strict liability theory. (*Id.* at 67, cf. *Nalwa v. Cedar Fair L.P.* (Dec. 31, 2012, S195031) __ Cal.4th __ [2012 Cal. LEXIS 11912] [extending primary assumption of risk doctrine, a theory closely related to obvious danger rule.]) Taking this reasoning a step further, the court ruled that under the sophisticated user defense, it is not necessary that the particular plaintiff know about the risk, as long as the plaintiff is a member of "a sophisticated group of users." (*Id.* at 65, 71.) Despite Mr. Johnson's protestations that he had not understood the dangers associated with R-22, the court found defendant's expert testimony regarding HVAC technicians persuasive and ruled that "[t]he evidence is clear that HVAC technicians knew or should have known

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of the dangers of R-22 heat exposure." (*Id.* at 74.)

As seen in practice in asbestos and other toxic tort cases, the objective standard *Johnson* allowed is essential. Plaintiffs are incentivized during their lawsuits to "know nothing" about asbestos or the potential dangers of asbestos. Defense implementation of the sophisticated user defense depends on fact patterns in which the individual plaintiff's professed lack of knowledge is immaterial because he/she is a member of a class of workers who *should have known* of the dangers of asbestos, or other alleged toxin, based on specialized training or knowledge.

After the California Supreme Court upheld the trial court ruling on American Standard's summary judgment motion, Mr. Johnson filed an amended complaint bringing causes of action for negligence on a negligence per se theory and for strict liability on a design defect risk-benefit theory against several manufacturers of the R-22 refrigerant. Mr. Johnson's amended complaint alleged that defendants' Material Safety Data Sheets (MSDSs), which manufacturers of hazardous substances such as R-22 refrigerant must by statute provide, were deficient because they failed to provide adequate information about hazards and safety precautions. The defendants successfully demurred to the amended complaint, largely based on the sophisticated user defense, and Mr. Johnson appealed the ruling.

The Court of Appeal gave the defendants a split decision, winning on one cause of action and losing on the other. (*Johnson v. Honeywell International, Inc.* (2009) 179 Cal.App. 4th 549.) The court determined that plaintiff's negligence per se theory was in fact a theory of negligence for failure to warn and the sophisticated user defense applied, upholding the trial court's ruling on demurrer for that cause of action. The court reasoned that "a manufacturer is not liable to a sophisticated user for failure to warn, even if the failure to warn is a failure to provide a warning required by statute." (*Id.* at 556.)

The court next addressed Mr. Johnson's strict liability/design defect under the risk benefit analysis cause of action. He alleged that defendants' R-22 refrigerant was defective and the risks inherent in the design outweighed the benefits, and further that feasible and safer alternatives existed at the time he was exposed to the hazardous by-products of the refrigerant. Because the design defect cause of action was not concerned with warnings, *Johnson II* found "no logical reason why a defense that is based on the need for warning should apply" to this cause of action. (*Id.* at 59.) The matter was remanded to the trial court for further proceedings on plaintiff's design defect cause of action.

ROLLIN V. FOSTER WHEELER & STEWART V. UNION CARBIDE

In June 2008, the trial court in *Rollin* extended the *Johnson* decision to shield defendants from liability when the injured employee's employer was a sophisticated user of asbestos products. Plaintiff Eugene Rollin claimed bystander exposure to asbestos attributable to defendants' equipment while working in the vicinity of others at the Mobil Oil Refinery in Torrance, California, between 1972 and 1986. At trial, the defendants presented documents describing the procedures Mobil Oil had implemented between 1972 and 1981 in an attempt to comply with OSHA regulations regarding worker exposure to asbestos. Defendants had requested that a jury instruction be given regarding their "sophisticated user" defense, a request which was denied. The jury returned a $10 million plaintiffs' verdict against defendants Foster Wheeler, Elliott Turbomachinery and Yarway, Inc.

One month after the jury returned its verdict, the state Supreme Court issued the *Johnson v. American Standard* decision. Shortly thereafter, the *Rollin* defendants moved for judgment notwithstanding the verdict (JNOV) based on the decision. The trial court granted defendants' motions, ruling that the Mobil documents "prove that Mobil was a knowledgeable user of asbestos-containing products during the period that Eugene Rollins was exposed to asbestos dust as a Mobil employee...." (*Rollin* Ruling on JNOV Motion ("*Rollin* Order"), issued June 9, 2008, page 3, ¶3.) The court acknowledged that it was extending *Johnson*, as Mr. Rollin had testified that he was not personally aware of the dangers of asbestos. However, the court noted that *Johnson* cited with approval lower court decisions that applied the defense to bar claims by employees who worked for sophisticated employers, specifically *Fierro v. International Harvester* (1982) 127 Cal.App.3d 862 and *In re: Related Asbestos Cases* (N.D. Cal. 1982) 543 F.Supp. 1142 (Employer: U.S. Navy).

While *Rollin* was on appeal, a case with similar facts was decided against the defense. In *Stewart*, career plumber Larry Stewart claimed bystander exposure to asbestos from drywall workers using joint compound manufactured by Hamilton Materials and USG. At trial, plaintiffs presented evidence that Hamilton and USG purchased the asbestos fibers used in their products from Union Carbide. At the close of evidence, Union Carbide asked that the jury be instructed on the "sophisticated purchaser" defense, specifically that, "where the risk of using a hazardous product is already known, or should be known, by the purchaser of that product, the product supplier has no duty to warn of the product's potential hazards." (*Stewart v. Union Carbide Corp.*, (2010) 190 Cal.App.4th 23, 27-28.) Union Carbide relied on *Johnson* in arguing that Hamilton and USG's supposed knowledge, as ostensibly sophisticated purchasers of asbestos fibers, absolved Union Carbide's duty to warn Mr. Stewart of any danger associated with asbestos fibers in Hamilton and USG's joint compound.

The Second Appellate District disagreed, ruling 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 which, by reason of his profession and certification, he should have had." (*Id.* at 28-29.) The *Stewart* court further noted that, "although Union Carbide alludes to the sophisticated intermediary doctrine, that doctrine, where it applies at all, applies only if a manufacturer provided adequate warnings to the intermediary," (*Id.* at 29, citations omitted.)

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In August 2012, the Second Appellate District issued its decision in *Rollin*, two years after the *Stewart* decision and more than four years after the trial court's ruling granting JNOV. (*Rollin v. Foster Wheeler, LLC* (2012) Cal.App. Unpub. Lexis 579.) From a defense perspective, the best thing that can be said about *Rollin* is that it is unpublished. The court, continuing in the same restrictive vein as the *Stewart* court, overturned the trial court's order granting defendant's motion for JNOV, limiting *Johnson v American Standard* to situations directly on point with the facts of that case, namely a plaintiff who is or should be sophisticated himself regarding asbestos. In Rollin, the plaintiff had no information about asbestos until the mid-1980s when his employer Mobil Oil instituted an asbestos program. On top of limiting Johnson, the court adopted almost identical language as the *Stewart* court in limiting the "sophisticated intermediary" defense to situations in which the defendant provides warnings to the intermediary: "No California court has applied the sophisticated intermediary doctrine to absolve a manufacturer of any duty to warn based solely on an intermediary's knowledge or sophistication with respect to a particular type of product. In the instant case, there was no evidence that defendants provided any warnings to Mobil. For that reason, the sophisticated intermediary doctrine does not apply." (*Id.* at p. 9.)

TWO MDL ORDERS: *GOTTSCHALL & MACK V. GENERAL ELECTRIC CO.*

In contrast to the *Stewart* and *Rollin* decisions, a recent order written by Judge Eduardo Robreno of the asbestos MDL (federal district court for Eastern District of Pennsylvania) in the *Gottschall* case granting a defendant's summary judgment motion has given defendants cautious optimism that it is possible to expand the reach of *Johnson*. (*Gottschall v. General Electric Co.*, MDL-875, No. 2:11-CV-60035-ER (E.D. Pa. December 8, 2012). However, as discussed below, the MDL's more recent decision in the *Mack v. General Electric* case has tempered the initial optimism which developed after *Gottschall*. Both cases originated in the federal court for the Northern District of California and will return for trial. Judge Robreno, a well-respected jurist appointed to the federal bench in 1992, applied California law in one case and surveyed the law of various jurisdictions before issuing his order in the other, ruling that the defense applies in maritime law. Thus, these decisions, while not precedential for California courts, may nevertheless prove persuasive.

In *Gottschall*, the court granted General Dynamics Corporation's summary judgment motion based on the sophisticated user defense. Mr. Gottschall served in the Navy from 1952 into the late 1980's and alleged exposure to asbestos aboard several Navy submarines manufactured by General Dynamics. Defendant's summary judgment motion advanced various arguments, including that it was immune from liability because the Navy was a sophisticated user of asbestos products, citing *Johnson* and relying upon the affidavits of two naval experts to establish that the Navy possessed knowledge of asbestos hazards during the relevant timeframe. In response, plaintiffs argued that General Dynamics was arguing the "sophisticated intermediary" defense and that "any policy determination to expand California law" to provide a defense in these circumstances "is not properly carried out by an MDL court."

Judge Robreno disagreed. Critically, the court noted that plaintiffs had submitted no evidence contradicting General Dynamic's naval experts that the Navy was aware of the hazards of asbestos at the time of Mr. Gottschall's exposure. Judge Robreno cited the *Johnson* court's "explicit approval of the reasoning of the federal court in *In re Related Asbestos Cases* in which the plaintiff was an insulator employed by the Navy. The Court allowed the manufacturer defendant's assertion of the sophisticated user defense due to the Navy's knowledge, without even considering the level of sophistication of the individual plaintiff." (*Id.* at p. 5.) In *Gottschall*, Robreno continued that, "the case at hand is indistinguishable with the facts of *In re Related Asbestos Cases* and *Johnson* when taken together," and granted General Dynamic's motion based on plaintiffs' failure to dispute defendant's evidence of Navy asbestos knowledge prior to Mr. Gottschall's alleged allsure.

Ten months later, in *Mack v. General Electric Co.* MDL-875, No. 2:10- 78940-ER (E.D. Pa. October 3, 2012), Judge Robreno recognized the sophisticated user defense in maritime law for the first time. Defendants Todd Pacific Shipyards, Northrop Grumman and General Dynamics moved for summary judgment on the sophisticated user defense and other arguments. In a far more detailed analysis of the sophisticated user defense than delivered in *Gottschall*, Judge Robreno noted that, "[t]he Court has previously rehearsed these issues without reaching a definite conclusion," and also noted "the inconsistencies and lack of clarity in the jurisprudence," after reviewing existing California case law, including *Johnson, Stewart* and *In re Related Asbestos Cases.* In the end, the Court adopted a narrower view of the defense in maritime law, similar to

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Stewart, in ruling that "the manufacturer or supplier of a product has the burden of demonstrating that the ultimate end-user (i.e., the plaintiff or person injured by the product – as opposed to the person or entity to whom the product was sold or supplied (e.g., an intermediary such as the Navy or an employer)) was a "sophisticated" user of the product." (*Id.* at p. 16-17.)

Although Judge Robreno's ruling found a *Stewart*-like sophisticated user defense under maritime law, unlike *Johnson*, he ruled that the defense only applies in negligent failure to warn cases, not against strict liability failure to warn claims as "it would run counter to the purpose for which strict liability is imposed for a manufacturer's liability to turn on the product users' characteristics, such as sophistication, which are out of the control of the manufacturer." (*Id.* at p. 24.)

Mack specifically ruled that a "sophisticated purchaser" defense, as opposed to the "sophisticated user" defense, does not exist under maritime law. The court noted that the sophisticated purchaser defense would, "at least with respect to Navy seaman, it would have the effect of leaving them (and their survivors) with no remedy. This is because the sophisticated purchaser defense places the burden of warning (and accompanying liability for failure to warn) on the purchaser of asbestos, which in the case of Navy seaman, was the United States Navy. As such, the recognition of a sophisticated purchaser defense under maritime law would have the effect of thwarting the primary aim of maritime law of protecting and providing remedies for those who work at sea." (*Id.* at p. 20.)

Judge Robreno is expected to rule on several non-maritime law summary judgment motions in 2013 in which defendants cite the *Gottschall* decision and provide evidence of the Navy being a sophisticated user of asbestos. Defendants will be watching closely.

MILLARD V. ROBERTSHAW CONTROLS COMPANY

In *Millard v. Robertshaw Controls Company* (San Francisco Superior Court, Case No. CGC-09-275091), the court granted Robertshaw Controls' summary judgment based on the sophisticated user defense in May 2012. Mr. Millard was a career insulator and member of the Asbestos Workers Union starting in 1965. He claimed to have worked in the vicinity of Robertshaw Controls' employees installing controls and disturbing asbestos-containing fireproofing between 1966 and 1968. Robertshaw Controls argued that the Asbestos Workers Union was a sophisticated user of asbestos and Mr. Millard, as a trained member of the union, was part of a class of users which were deemed to have the level of knowledge possessed by the union. In support of its motion, defendant produced evidence that:

- Plaintiff attended union classes regarding the "principles of insulation" starting in August or September 1965;
- Union members were skilled at their craft and fully trained in the application of insulation according to the union's person most qualified;
- Plaintiff served as the union's vice-president for two years in the mid-1970's;
- Plaintiff acknowledged receipt of *The Asbestos Worker* magazine published by the union; and
- The Asbestos Workers Union, and in particular plaintiff's local union, was aware of the hazards of asbestos by 1957 according to reports in the union magazine.

In opposition, plaintiffs failed to produce any evidence rebutting Robertshaw Controls' evidence that the union was a sophisticated user of asbestos. The court pointedly noted this when granting Robertshaw's motion, in ruling that the defendant had "sustained its burden of demonstrating that the sophisticated user defense is applicable and plaintiff failed to present evidence creating a triable issue whether plaintiff was not a sophisticated user." Plaintiffs' counsel has recently appealed the *Millard* ruling and defendant Robertshaw Controls' respondent's brief is due to be filed in March 2013. (Court of Appeal Case No. A136205.)

CONCLUSION

California defendants were hopeful that the *Rollin* appellate decision would affirm the trial court's ruling granting defendants' Motion for JNOV and the sophisticated user defense would be extended to included "sophisticated purchaser" fact patterns, at least in cases involving sophisticated multi-national corporations such as Mobil Oil. Unfortunately, that did not occur and instead the *Rollin* court simply parroted the recent *Stewart* ruling, narrowing the application of the sophisticated user defense to cases in which the plaintiff either is, or should be, sophisticated regarding the hazards of the substance at issue.

As seen in *Gottschall* and *Millard*, a defendant's likelihood of success in implementing the defense is greatly enhanced by pursuing the necessary discovery and providing evidence that meets the objective criteria established in *Johnson*, specifically that the plaintiff belongs to a sophisticated class of users based on his/her individual training or certification. Supportive evidence may include:

- Plaintiff's training/certification/degrees
- Plaintiff's union membership
- Union newsletters/manuals
- Union person most knowledgeable testimony
- Co-worker testimony re asbestos knowledge
- Employer safety materials, manuals, OSHA-compliance documents
- Employer person most knowledgeable testimony
- Expert declarations re employer knowledge

As also seen in both *Gottschall* and *Millard*, defendants' best chance for success in applying the sophisticated user defense may be beyond their control, namely, situations in which plaintiffs fail to provide evidence in opposition to summary judgment motions.