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Asbestos

Asbestos Litigation In California: The Creation And Retroactive Application Of Special, Expansive, Asbestos-Only Rules Of Liability — Part Three

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Commentary

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This is the third installment in a series describing how the California courts have developed and retroactively applied special rules in asbestos litigation radically different from California tort law principles applied in all other toxic tort litigation. The first two installments dealt with the unique, asbestos-only causation principles originating in *Rutherford v. Owens-Illinois* 16 Cal. 4th 953 (1997), and diluted in subsequent Court of Appeal decisions, that have effectively eliminated any requirement that an asbestos plaintiff show either that asbestos fibers from defendant's product actually participated in the disease process (the common law test) or that it substantially contributed to the risk that plaintiff would contract his disease (the relaxed *Rutherford* test). This installment analyzes a second asbestos-only California rule: the view first expressed in *Arena v. Owens Corning Fiberglas Corp.*, 63 Cal.App. 4th 1178 (1998) that a jury could find that raw asbestos is a defectively designed product. The court in *Arena* found that raw asbestos that was mined and sold for incorporation in a third party's insulation product was designed because any "preconceived plan" is a design and because "the miner's subjective plan of blasting [asbestos] out of the ground, pounding and separating the fibers and marketing them for various uses constitutes a design." *Id.* at 1187. The *Arena* court found further that this "design" was defective if an ordinary consumer's expectations about the safety of using asbestos were not met. *Id.* at 1190.

Arena's conclusion that raw materials found in nature can be defectively designed is fundamentally at odds with hornbook tort law. The sale of chemicals and other raw materials that have inherently dangerous qualities has been a necessary and commonplace business practice in America since the advent of the industrial revolution. Benzene, zinc, mercury, ethanol, vinyl chloride, sulfuric acid, sand, silicone and arsenic, are just a few examples of raw materials that have industrial uses but also have intrinsic qualities that can harm those exposed to them. These materials are quite familiar to American lawyers and judges because they have collectively been the subject of myriad product liability complaints alleging injury caused by their intrinsically hazardous properties.

All of those raw materials could be deemed "designed" in the sense that they were subject to a preconceived plan and that sellers made a conscious decision to remove them from their natural state and to market them for commercial uses. But to our knowledge, no state's highest court (including California's) has held that any of those raw materials has been, or can be,

defectively "designed", or as *Arena* found as to asbestos, that a raw material that is mined, processed and marketed may be deemed defectively designed if it has inherently dangerous qualities. It should not be surprising then that in the more than fifteen years since it was published, *Arena* has been cited only once outside California, in a footnote having nothing to do with the issue of whether raw materials can be designed. *See Conwed Corp. v. Union Carbide Chemicals & Plastics Co., Inc.*, 287 F. Supp. 2d 993, 996 at n.3 (D. Minn. 2001) (citing *Arena* for the proposition that "the dangerous propensities of asbestos are not created or changed by the manufacturing process.")

That raw materials are not designed products is not only settled law, but also a matter of common sense. Raw materials found in nature are not designed; hazards associated with their use are therefore not the product of any defendant's design decision; and when a person is injured by the use of such materials, the injury is not caused by any defect in the material's design. Courts and commentators have thus agreed that such materials are not subject to design defect clams. *See* Restatement (Third) of Torts: Prod. Liab. § 5, cmt. c ("a basic raw material such as sand, gravel or kerosene cannot be defectively designed"); *Riggs v. Asbestos Corp. Ltd.*, 304 P.3d 61, 69 (Utah Ct. App. 2013) (raw asbestos "could not be defectively designed or manufactured because it is a raw unadulterated material); *Cimino v. Raymark Indus. Inc.*, 151 F. 3d 297, 331 (5th Cir. 1998) (noting that "[c]omment c to § 5 . . . makes clear" that design defect does not apply to raw asbestos); *Cowart v. Avondale Indus., Inc.*, 792 So. 2d 73, 77 (La. App. 2001) ("Unimin cannot be held liable under an unreasonably dangerous design theory because it did not 'design' or manufacture its sand"); *Bergfeld v. Unimin Corp.*, 226 F. Supp. 2d 970, 980 (N.D. Iowa 2002), *aff'd*, 319 F.3d 350 (8th Cir. 2003) (same); *Satterfield v. Morris*, 2014 WL 2744687, at *3 (D.S.C. June 17, 2014) (quoting Restatement (Third) of Torts: Prod. Liab. § 5, cmt. c and finding denatured ethanol to be a non-defective raw material, "like kerosene"). *Arena* and other lower court decisions in California following it stand alone in finding that raw asbestos is the exception to this general rule. See also, *Maxton v. Western States Metals*, 203 Cal.App.4th 81, 94 (2012) ("Raw materials generally cannot by themselves be defective unless they are contaminated. . . . The one notable exception to this rule is raw asbestos, which as we have explained, *ante*, is inherently dangerous.")

In finding that raw asbestos could be a designed product, the *Arena* court relied on *Soule v. General Motors Corp.*, 8 Cal. 4th 548 (1998), the seminal California Supreme Court case addressing application of the consumer expectations test in design defect claims. The court in *Arena* observed that "[t]he *Soule* court noted that the consumer expectation test might be applied where an automobile exploded while idling at a stop light, but not where the defect was complex and technical, because an ordinary consumer would have no reasonable experience or expectation about a car's frame, suspension or interior performance in a crash." *Arena*, 63 Cal. App. 4th at 1185 (citing *Soule*, 8 Cal. 4th at 566-67 n. 3).[1] The *Arena* court concluded from this observation that raw materials could be deemed designed under the consumer expectations text because "*Soule* demonstrates that the consumer expectations test merely looks at the condition of the product and the ordinary expectations regarding its safety, and does not imply a requirement that the product be processed or manufactured." *Arena*, 63 Cal. App. 4th at 1185.

But *Soule* demonstrates no such thing. There was no question in *Soule* that the complex brake assembly actually at issue there, as well as the hypothetical automobile so fundamentally defective that it exploded while idling at a stop light, were designed products. Moreover, the California Supreme Court in *Soule* expressly held that a claim based on the consumer expectations test required findings both that a "product did not perform as safely as it should" and that "the failure [to perform] resulted from *the product's design*. . . ." 8 Cal. 4th at 566 (emphasis added). *See also id.* at 569 ("In particular circumstances, *a product's design* may perform so unsafely that the defect is apparent to the common reason, experience and understanding of its ordinary consumers.") (emphasis added). *Arena*'s conclusion that *Soule* "does not imply a requirement that the product be processed or manufactured" (63 Cal. App. 4th at 1185)—that is, that it be designed—cannot be reconciled with *Soule*'s express requirement that the failure of the product to meet the ordinary consumer's safety expectations must have "resulted from" a defect *in the design*.

Arena acknowledged that comment c to the proposed final draft of the Restatement (Third) of Torts: Prod. Liab. § 5 had explained that basic raw materials like sand, gravel and kerosene cannot be designed. But the court in *Arena* found comment c inapplicable to raw asbestos, reasoning that raw asbestos is different

from the basic raw materials at issue in comment c because it "is not a component material that is usually innocuous, such as sand, gravel, nuts or screws." *Id.* at 1190. Unlike such innocuous products, *Arena* explained, "it is the asbestos itself that produces the harmful dust." *Id.* The *Arena* court then found that comment c "[b]y its terms, . . . is inapplicable" because in "the instant case" it was not "just a possible design defect in the manufactured end product that caused the injury, but a defect in the raw asbestos contained in the product." *Id.*

Raw asbestos cannot be rationally excluded from the ambit of comment c on these grounds. The drafters of § 5 and comment c had reasoned that sand, gravel and kerosene cannot be defectively designed, not because they are innocuous, but because they are a "basic raw material" and therefore are not designed products at all. *Id*. The notion that comment c applies only to raw materials that are "usually innocuous" (*id.*) and not to those that are intrinsically dangerous appears nowhere in comment c, and is purely an invention of the *Arena* court. Moreover, *Arena*'s reinterpretation of comment c creates awkward problems since kerosene, which is highly flammable,[2] is hardly innocuous, and even sand, although "usually innocuous," also has intrinsically dangerous characteristics and has been the subject of considerable litigation in which the intrinsic properties of the sand itself caused the injury.[3] The court in *Arena* sought to solve this problem by simply rewriting the list of examples given in comment c, deleting the reference to kerosene—which is plainly intrinsically dangerous—and adding "nuts [and] screws"— which, to be sure, are usually innocuous, but which are clearly *designed* products, not basic raw materials, and therefore have nothing to do with comment c. *Id.*

The absence of cases in American jurisprudence holding that the intrinsic hazards of a raw material constitutes a defect in design is, *inter alia*, because it is hornbook law in California and elsewhere that products, including raw materials, are not defective merely because they are inherently dangerous. *Walker v. Stauffer Chem. Corp.*, 19 Cal. App. 3d 669, 674 (1971) ("The mere fact that bulk sulfuric acid is potentially dangerous is no reason to render [the seller of bulk sulfuric acid for use in drain cleaner] liable to plaintiff in the instant case"); *Groll*, 148 Cal.App.3d 444, 448 (highly flammable petroleum distillate sold as lantern fuel not defective if sold with adequate warning); Restatement (Third) of Torts: Prod. Liab. § 2, cmt. a ("products are not generically defective because they are dangerous"); Restatement (Second) of Torts § 402A cmt. j ("product bearing . . . a warning, which is safe for use if it is followed, is not in [a] defective condition, nor is it unreasonably dangerous"); David G. Owen, *The Puzzle of Comment J*, 55 Hastings L.J. 1377, 1395 (2004) (comment j was specifically intended to apply to products for which warnings are "the only practical way to reduce a risk, particularly in the case of pharmaceutical drugs and *other chemical and inherently toxic products*") (emphasis added). Indeed, *Arena* acknowledged this point, noting correctly that "[d]espite its dangerous nature, rat poison is not defective if properly labeled with appropriate warnings." 63 Cal. App. 4th at 1184.

Groll, another appellate decision that addresses the liability of a seller of an intrinsically hazardous basic raw material, most vividly illustrates the radical way in which *Arena* departs from black letter California tort law. In *Groll*, Shell Oil sold BT-67, a highly flammable petroleum distillate, to a distributor who repackaged and relabeled it before selling it to the plaintiff as lantern fuel. The plaintiff was badly burned by an explosion precipitated by his using the product to start a wood burning fire. The BT-67 reached the plaintiff in the same condition as it was in when sold by Shell Oil, and BT-67's intrinsically dangerous characteristic—that is, its extreme flammability—incontrovertibly caused plaintiff's injury. Nevertheless, the Court of Appeal held that BT-67 was not defective on the dual grounds that it was sold with adequate warnings and that "[s]ince [Shell Oil] manufactured and sold BT-67 in bulk, its responsibility must be absolved at such time as it provides adequate warning to the distributor who subsequently packages, labels and markets the product." *Groll*, 148 Cal. App. 3d at 449.[4] There is no principled way to distinguish *Groll* from cases involving raw asbestos sold with adequate warnings.

Arena suffers from another problem as well. The gravamen of *Arena*'s holding is that extracting raw asbestos from the ground and processing it for commercial uses may be deemed a design. But *Arena* also acknowledges that there is no evidence that the processing of raw asbestos either alters or increases the danger of exposure to asbestos. *Id.* at 1188-89. As we have seen, under *Soule*, a design defect claim requires proof that the plaintiff's injury was caused *by reason of* a defect in

the design. 8 Cal. 4th at 1187-90. If, as *Arena* expressly found, the mining and processing of asbestos (i.e., its design) did not make asbestos more dangerous than it would otherwise be, then the plaintiff cannot meet this requirement. *See, e.g.*, *Union Carbide Corp., v. Aubin*, 97 So. 3d 886, 895-98 (Fla. App. 2004) (reversing denial of motion for JNOV on plaintiff's design defect claim because, while a jury could have found that the raw asbestos was processed, there was no evidence that the processing caused plaintiff's harm by making the asbestos more dangerous than it would otherwise be); *Riggs*, 304 P. 3d at 69 (same).

Worse still, however, some California courts purporting to follow *Arena* appear to have concluded from its analysis that because raw asbestos's intrinsic hazards render it defectively designed, it is *per se* defective. In *Stewart v. Union Carbide Corp.*, 190 Cal. App. 4th 23, 29 (2010), for example, the court found in *dictum* that Union Carbide could not avail itself of the rule that a seller of a non-defective component part is not liable to those injured by using the finished product because *Arena* and its progeny had held that "raw asbestos is a defective product." And in *Marteney*, *supra.*, the trial court found, relying principally on *Arena* and *Stewart*, that "the [California] Courts of Appeal appear to view asbestos as a different sort of product, one which is so inherently defective that it has no safe use at all, and therefore is defective no matter how used and irrespective of any warnings." *Marteney* JNOV Order at 11. *See also Maxton*, at 93-94 ("the one notable exception to [the component parts doctrine] is raw asbestos, which . . . is inherently dangerous" and "is dangerous in any form").

The first thing to say about these cases is that *Arena*, while confused and inconsistent with California tort law, did not actually hold that raw asbestos is *per se* defective irrespective of whether it is sold with adequate warnings. There was no evidence in *Arena* that the seller of raw asbestos, or the intermediary who incorporated it in the insulation products to which plaintiff had been exposed, had provided any warnings whatsoever about asbestos dangers or any instructions on its safe use. Moreover, the plaintiff in *Arena* tried the case entirely on a consumer expectations theory of design defect. Hence, as the appellate court in *Arena* expressly noted, "[b]ecause [the failure to warn] theory was never raised in this case, we decline to address its applicability." 63 Cal. App. 4th at 1185 n. 4. Likewise, *Garza v. Asbestos Corporation, Ltd.*, 161 Cal. App. 4th 651 (2008), which relied on *Arena* and discussed *Groll*, acknowledged that *Arena* had not addressed *Groll*, but noted that the facts before it were "diametrically opposed to *Groll*" because "there is no evidence that [the defendant] provided warnings to its purchasers of asbestos within the relevant time frame, either on the 100-pound bags in which it was shipped or on any safety data materials shipped with the product as in *Groll*. . . ." 161 Cal. App. 4th at 662. The Court of Appeal in *Garza* thus followed *Arena*, but expressly left open the possibility that raw asbestos accompanied by adequate warnings would not be deemed defective.

More importantly, to the extent that *Arena* and *Stewart* stand for the proposition that raw asbestos is *per se* defective or that it had (and has) no safe uses, they are simply wrong. If asbestos is *per se* defective, trial courts in California and across the country have been engaged in a colossal waste of time giving asbestos defendants their day in court. The *dictum* in *Stewart* notwithstanding, no court in California or elsewhere has ever held that asbestos or asbestos-containing products are *per se* defective, and many have expressly held to the contrary. *See, e.g.*, *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297, 331 (5th Cir. 1998) ("If asbestos-containing finished products are not all unreasonably dangerous or defective, then it necessarily follows that ordinary raw asbestos sold to a sophisticated and knowledgeable manufacturer of such products is not of itself defective or unreasonably dangerous."). The incontrovertible facts, with which plaintiffs' own experts do not take issue, are that there are many different types of asbestos with widely differing toxicity. *See*, *e.g.*, *Rutherford*, 16 Cal.4th at 972 ("Asbestos products . . . have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others") (citations omitted). Indeed, there is a vigorous continuing scientific debate about whether uncontaminated chrysotile asbestos can cause mesothelioma at all.

Moreover, asbestos was a legal, regulated product with important social benefits. It was often encapsulated in end-products that did not emit respirable fibers and posed no health hazard. When so encapsulated, asbestos is obviously not *per se* defective, and even where the evidence shows that a product does release respirable fibers, plaintiffs' own warning experts typically testify that workers using those products should have been properly warned and instructed on safe use, not that asbestos could not be used safely under any

circumstances. Indeed, asbestos is still legal and is used in some products today pursuant to federal regulations expressly permitting such use.[5]

Marteney illustrates both the way a unique set of tort principles has been applied retroactively to asbestos, and only asbestos, in design defect claims, and the draconian result for sellers of asbestos products. In *Marteney*, the plaintiff alleged that he suffered injury from exposure to raw asbestos sold by Union Carbide to an intermediary who incorporated it in joint compound. Union Carbide argued that the raw asbestos it sold to the intermediary was not defective because its warnings to the intermediary about asbestos hazards were reasonable and had discharged Union Carbide's duty to warn the plaintiff under all the circumstances of the case. The jury agreed, finding for Union Carbide on plaintiff's failure to warn claim.

But the jury, having been instructed that raw asbestos was a designed product whose defectiveness was governed by the consumer expectations test, nevertheless found for plaintiff on the design defect claim, apparently agreeing with plaintiff's argument that because he had not expected to contract mesothelioma from exposure to asbestos, the asbestos was defectively designed.[6] Union Carbide moved for JNOV, arguing that raw asbestos is not a designed product, citing *Groll* for the proposition that basic raw materials containing adequate warnings are not defective, and pointing out that the jury had found that Union Carbide had not breached its duty to warn plaintiff.

The trial court denied the motion, relying principally on *Arena* and *Stewar*t. The court first noted that there was "substantial authority indicating that a consumer is entitled to bring a cause of action against an asbestos manufacturer based on the consumer's expectations." Marteney JNOV Order at 11. After quoting *Arena* at length, the court distinguished *Groll* by noting that "[i]t is simply a fact that the Courts of Appeal are applying different rules to asbestos than to lantern fuel, and that they do not presently allow an asbestos manufacturer to be immune from liability based upon warnings, even sufficient warnings, to an intermediary." *Id.* at 12. It concluded that "the Courts of Appeal appear to view asbestos as a different sort of product, one which is so inherently defective that it has no safe use at all, and therefore is defective no matter how used and irrespective of any warnings." *Id*. at 11.

Thus, the *Marteney* trial court, in reliance on *Arena* and *Stewart*, upheld a jury verdict against a seller of raw asbestos even though the jury had found that the seller had sold its product with warnings adequate to discharge its duty to the plaintiff. When combined with application of the diluted version of the *Rutherford* causation test now being applied by California appellate courts, the result is that the seller of raw asbestos accompanied by adequate warnings as to its safe use may nevertheless be found liable in tort if the plaintiff can prove a single exposure to defendant's asbestos fibers. This would not be the result under the legal principles applicable in California (and everywhere else) to sellers of raw materials other than asbestos and is permitted only because special rules, untethered to logic or principle, are being applied to sellers of asbestos.

In the next and final installment of this series, we discuss still another special asbestos-only rule: the view of what may now be a majority of California appellate courts that sellers of asbestos may not avail themselves of the component parts and bulk supplier defenses generally available to defendants in other toxic tort cases under California common law principles. This last installment will also discuss the refusal of certain California appellate courts to apply the sophisticated user and sophisticated intermediary doctrines to sellers of asbestos in failure to warn claims, although confusion about the scope of those doctrines in the California courts is not limited to asbestos.

Endnotes

1. In *Soule*, the court held that the consumer expectations test was not applicable to the allegedly defective product at issue—a complex brake assembly—because ordinary consumers could not have any expectations about how such mechanisms should perform.

2. *See Groll v. Shell Oil Co.*, 148 Cal. App. 3d 444, 448 (1983) (lantern fuel, which is, like kerosene, a highly flammable petroleum distillate, is not defective when sold with appropriate warnings).

3. See *Cowart v. Avondale Indus., Inc.*, 792 So. 2d at 77 ("Unimin cannot be held liable [for injuries caused by inhalation of sand product] under an unreasonably dangerous design theory because it did not 'design' or manufacture its sand").

4. We discuss in the next and final installment of this series the refusal of the California courts to recognize the applicability of the bulk supplier/component parts doctrine to sellers of raw asbestos.

5. Under the logic of *Stewart*'s misreading of *Arena*, a supplier of asbestos incorporated in an end-product conforming to current federal regulations and containing adequate warnings would still be liable to anyone injured while using it on a design defect theory because asbestos is per se a defective product.

6. Applying the consumer expectations test in this way does not make sense in a component parts case like *Marteney*. There, the consumer of the raw asbestos at issue was clearly the manufacturer/intermediary to whom Union Carbide sold its product together with warnings that the jury found reasonable. ■

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