

## **Discharging the Duty to Warn: Planning For a Sophisticated User Defense**

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*"Good fortune is what happens when opportunity meets with planning" - Thomas Edison*

Your best client calls. It has a new problem. A worker at its top customer has been diagnosed with leukemia. The employee filed suit against your client claiming his illness was caused by exposure to benzene that your client sold. You file an answer to the complaint and draft your product liability focused discovery to the plaintiff.

Have you done enough? Not even close. As with all toxic tort matters you need to plan for the end of the case from the very beginning. In this instance, you need to plan on how you will get the evidence needed for your sophisticated user defense.

### **Sophisticated User Defense**

The sophisticated user defense is an important tool to manufacturers of products involved in toxic tort litigation. For consistency and ease of reference this article refers to this type of defense as the "sophisticated user" defense. Other courts and commentators refer to this or nearly identically analyzed defenses as the "sophisticated purchaser," "sophisticated intermediary," or, particularly in the pharmaceutical context, the "learned intermediary" defense.

In analyzing the sophisticated user defense courts typically employ a fact-intensive case-by-case analysis of the intermediary's knowledge of the risks associated with the product, the manufacturer's reliance upon such knowledge, and the appropriateness of such reliance. In other words, proof is required to win a case with this defense. To obtain the necessary proof, as defense counsel, you need to plan ahead and make certain the record is complete when the time comes to file your dispositive motion.

The sophisticated user defense has been employed in virtually every toxic tort context. It has seen a particularly successful resurgence of late in the silica context. *See* C. Liljestrang, *Silica and the Sophisticated User Doctrine: Keeping Silica Manufacturer/Supplier Out of the Legal Quicksand*, 46 *For The Defense* 24 (2004); C. Liljestrang, *Silica and the Sophisticated User Doctrine: Avoiding Legal Sand Traps Under the Duty to Warn*, 47 *For The Defense* 61 (2005). The defense has also been used in cases involving asbestos (*Triplett v. Minnesota Mining and Mfg. Co.*, 422 F. Supp. 2d 779 (W.D.Ky. 2006)), polyurethane (*Swan v. I.P., Inc.*, 613 So.2d 846 (Miss. 1993)), welding rods (*In re Welding Rod Civil Actions Product Liability Litigation*, Cuyahoga County Case # CV-04-545413 (Ohio 2006)) and benzene (*Lambert v. B.P. Prod. North America, Inc.*, Civil No.. 04-347-GPM, 2006 WL 924988 at \*2 (S.D. Ill. April 6, 2006)).

This article first outlines the basic legal tenants of the sophisticated user defense. Next, we discuss how the defense has been applied and analyzed by courts in several benzene and PCB exposure cases. Finally, we provide recommendations on some things you can do to plan and develop the evidence required to make this defense a success in your next case.

### **The Rule**

The sophisticated user doctrine applies to product liability claims based on failure to warn or inadequate warning. “[T]he manufacturer's duty to warn may be discharged by providing information of the dangerous propensities of the product to a third person . . . upon whom [the manufacturer] can reasonably rely to communicate the information to the ultimate users of the product or those who will be exposed to its hazardous effects.” *Adams v. Union Carbide Corp.*, 737 F.2d 1453, 1456 (6th Cir. 1984) (discussing *Restatement (Second) of Torts* § 388, cmt. n) (toluene diisocyanate (TDI) exposure case). *Restatement (Second) of Torts* § 388 states that one who supplies a dangerous product to a third-party has a duty to warn the end user of the product if: (1) the product is defective or dangerous; (2) the supplier has no reason to believe the end user will realize its defective or dangerous condition; and (3) the supplier cannot reasonably rely on the purchaser/employer to warn the end user of the product’s dangers. *Newson v. Monsanto Co.*, 869 F. Supp. 1255, 1259 (E.D.Mich. 1994) (citing *Restatement (Second) of Torts* § 388) (polyvinyl butyryl exposure case). “Put another way, suppliers have no duty to warn where plaintiff’s employer is a sophisticated user of the product and is in the best position to warn employees of the product’s dangers[.]” *Lambert v. B.P. Prod. North America, Inc.*, Civil No. 04-347-GPM, 2006 WL 924988 at \*2 (S.D. Ill. April 6, 2006) (benzene exposure case).

### **Dangerous Condition of the Product**

Although specific causation is disputed in virtually every case, in most toxic tort cases, the potentially hazardous nature or dangerous condition of the product is not at issue. For example, in a benzene exposure case, the first element of the analysis—the dangerous condition of the product— is generally not disputed.

### **Supplier Believes the End User Will Realize Dangerous Condition of Product**

Where the end user of the product knows or has reason to know of the hazards associated with the product, the manufacturer's duty to warn is discharged. *See, e.g., Billsborrow v. Dow Chemical, U.S.A.*, 177 A.D.2d 7 (N.Y. App. Div. 1992) (trichloroethylene exposure case). A person may be expected to know of the hazards of a product due to his training, employment, or other experience, such as reviewing the manufacturer's Material Safety Data Sheet (MSDS), warning labels, and other safety related information. *See, e.g., Johnson v. American Standard, Inc.*, 133 Cal. App. 4th 496 (Cal. Ct. App. 2005) (finding EPA certified HVAC technician who worked on commercial systems a "sophisticated user" whom manufacturer of air conditioning equipment was not required to warn of danger of gas created during routine maintenance of the product); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170 (Tex. 2004) (holding supplier of flint had no duty to warn abrasive blasting operators of dangers of inhaling silica dust because information was common knowledge in the industry); *Triplett v. Minnesota Mining and Manufacturing Co.*, 422 F. Supp. 2d 779, 786 (W.D.Ky. 2006) (finding sophisticated user defense applied where intermediary had the same level of sophistication and knowledge of the product (respiratory protection) as the manufacturer).

This issue is illustrated by the Superior Court of Massachusetts' decision in *Dusoe v. Union Carbide Corp.*, 19 Mass. L. Rep. 109, 2005 Mass. Super. LEXIS 75 2005 Westlaw 705960 (Sup. Ct. Mass. Jan. 20, 2005). In *Dusoe*, the court granted the defendant manufacturer’s motion for summary judgment based, in part, on the sophisticated user doctrine. Plaintiff's failure to warn claims against Union Carbide, the manufacturer of an oxygen regulator involved in an explosion of a welding system, failed because the plaintiff's own experience and knowledge reduced or eliminated the need for and utility of a warning by the manufacturer. *Id.* The court relied on: (1) the plaintiff's extensive knowledge of welding; (2) the plaintiff's attendance at a Meineke Muffler franchise training program for several weeks fifteen years prior to the accident, which including instruction and testing about the welding system; (3) the plaintiff's responsibility to train other employees on welding equipment; and (4) the plaintiff's fifteen years of daily welding experience. Based on these factors, the court found that the plaintiff's “experience and knowledge reduced or eliminated the need and utility of a warning.” *Id.* at \*6.

### **Reasonable Reliance on Employer to Warn Employee of Risks of the Product**

Not only must the employer or intermediary have knowledge or sophistication equal to that of the manufacturer, but the manufacturer must be able to reasonably rely on the intermediary to warn the end user. See, e.g., *Triplett v. Minnesota Mining and Manufacturing Co.*, 422 F. Supp. 2d 779, 786 (W.D.Ky. 2006) (respiratory protection case). Whether the manufacturer can reasonably rely on the purchaser to convey the warning to the end user is determined by balancing “the reliability of the employer as a conduit of necessary information about the product; the magnitude of the risk involved; and the burdens imposed on the supplier by requiring it to directly warn the ultimate users.” *Newson v. Monsanto Co.*, 869 F. Supp. 1255, 1259 (E.D.Mich. 1994). A manufacturer is not precluded from liability merely by providing all significant information regarding a product’s potential hazards. Rather, the manufacturer must be reasonably assured that the safety information will get to the end user. See Comment n to Section 388, which states, in pertinent part:

Giving to the third person through whom the chattel is supplied all the information necessary to its safe use is not in all cases sufficient to relieve the supplier from liability. It is merely a means by which this information is to be conveyed to those who are to use the chattel. The question remains whether this method gives a reasonable assurance that the information will reach those whose safety depends upon their having it.

*Restatement (Second) of Torts* § 388, cmt. n.

Factors to be considered include the circumstances under which the warning was given to the third-party, the character of the third-party, and the purpose for which the product is used. *Id.* Another consideration is the magnitude of the risk created by the product. *Id.* Where the likelihood of injury from the product is significant, the process and substance of the supplier’s warning will be subjected to greater scrutiny. The court must weigh these factors rather than impose an absolute duty to warn because “[m]odern life would be intolerable unless one were permitted to rely to a certain extent on others’ doing what they normally do, particularly if it is their duty to do so.” *Id.* (citing *Restatement (Second) of Torts* § 388, cmt. n).

A recent decision out of Ohio was decided based on the reliability (or lack thereof) of the employer to inform its employees of the well-known hazards of the product. In *Glass v. 3M Company*, the trial court denied a sand supplier’s motion for summary judgment where the foundry/employer, “violated OSHA regulations and took [OSHA] inspectors to play golf when the inspectors came to the plant.” The court found that the plaintiff’s employer (foundry), although knowledgeable of the hazards associated with respirable silica, was not a “reliable conduit” to communicate the hazard to its employees. *Glass v. 3M Company*, Auglaize Cty, Cm. Pl., Case #2004-CV-175 (2006).

On the other hand, in a series of similar cases, an Ohio trial court applied the sophisticated user defense and granted the motions for summary judgment of suppliers of sand to the Buckeye Steel foundry where plaintiffs claimed they were injured by exposure to silica dust. *In re: Jackson Group I*, Cuyahoga Cty. Cm. Pl., Case #469127 (2006). There, the sand was supplied in bulk to the Buckeye Steel facility in unpackaged bulk shipments by rail or truck. The sand was dumped into a pit or blown into a silo and conveyed throughout the foundry. *Id.* at \*5. Although the sand suppliers provided essentially no warnings to Buckeye Steel, the court found that Buckeye Steel had sufficient knowledge of the risks associated with exposure to respirable silica dust through safety inspections and industry trade associations to discharge the suppliers’ duty to warn. *Id.* at \*5. Further, the suppliers’ reliance on Buckeye Steel to communicate the hazards associated with silica to its employees was reasonable since Buckeye Steel “continually updated its policies and procedures based on inspections and pro-actively worked with its employees in joint safety ventures to provide a safe working environment.” *Id.*

**Sophisticated User Doctrine Applied to Benzene Exposure Cases—Defense Denied**  
***Lambert v. BP Products North America***

A recent decision of the United States District Court for the Southern District of Illinois, *Lambert v. B.P. Prods. North America, Inc.*, discusses the sophisticated user defense in the benzene context. Civil No. 04-347-GPM, 2006 WL 924988 (S.D. Ill. April 6, 2006). Plaintiff Chester Lambert, Jr. was a United States Marine Corp. jet mechanic in Yuma, Arizona from 1983 to 1989. *Id.* at \*1. During his employment, he was frequently exposed to JP-4 jet fuel manufactured by Shell. *Id.* In May of 2003, the plaintiff was diagnosed with leukemia. *Id.*

The plaintiff filed suit in Illinois state court and stated claims for failure to warn under negligence and strict liability theories. *Id.* The case was removed to federal court under federal enclave and federal officer jurisdiction. *Id.* The parties agreed that Arizona law would be applied because the plaintiff’s exposure was in Arizona. *Id.* at \*2.

Defendant Shell filed a motion for summary judgment arguing that under the sophisticated user doctrine it was not required to warn because (1) plaintiff’s employer, the United States, was a sophisticated user *per se* and (2) it discharged its duty to warn the plaintiff by sending a MSDS to the United States in 1985 and 1988. *Id.*

The district court rejected Shell's sophisticated user defense. First, the court found that the United States was not a sophisticated user for “every time and season.” *Id.* Whether or not an employer is a sophisticated user is determined through “a fact-intensive, case-by-case inquiry” of the relevant factors of *Restatement (Second) of Torts*, section 388. *Id.* In *Lambert*, Shell failed to provide any warning to the plaintiff’s employer until 1985, three years after the plaintiff started working with the product. *Id.* at \*3. Shell contended that the United States performed toxicity studies for JP-4. However, those studies were not part of the record and thus were not considered by the court. *Id.*

Shell’s failure to provide evidence of the United States’ toxicity studies regarding the product was significant to this opinion. Had Shell been able to produce the United States’ own studies confirming that they were as knowledgeable as Shell about the hazards associated with JP-4 before the plaintiff’s first exposure in 1980, then the court may have had a difficult time denying Shell’s sophisticated user defense.

Interestingly, the court’s opinion also relied heavily on the plaintiff’s testimony. For example, since the plaintiff never saw an MSDS for JP-4, the court found that his testimony cast “doubt on the reasonableness of Shell’s reliance on the United States to give warnings to end-users of Shell’s product.” *Id.* at \*3. The court responded to Shell’s argument that as a bulk supplier it “had no way of knowing the final destination of the JP-4 it supplied to the United States” by finding that Shell had “personal contact” with the employer - and even with the plaintiff himself. *Id.* at \*3. The court cited to the plaintiff’s testimony that Shell tanker trucks “frequently visited the military base where he was stationed in Arizona” and suggested that “Shell could have attempted to identify and warn potential end-users of its products”, including the plaintiff. *Id.* The court also showed its concern for the magnitude of the risk when it stated that benzene is a carcinogen “for which there is no known safe level of exposure.” *Id.* at \*4.

***Warren v. Sabine Towing and Transportation***

A Louisiana Appellate Court conducted a similar fact intensive inquiry and found that the employer was a sophisticated user but nevertheless denied the defendant manufacturer's motion for summary judgment. *Warren v. Sabine Towing and Transp. Co.*, 831 So.2d 517, 522 (La. Ct. App. 2003). Plaintiff worked in the shipping industry from 1944 until he retired in 1983. *Id.* His employer, Sabine Towing, held itself out as a qualified transporter of petroleum products. *Id.* at 524. Sabine Towing’s primary business was transporting crude oil, gasoline, airplane fuel, diesel, kerosene, benzene, and other petrochemicals. *Id.* Until the 1960s, Sabine Towing transported only gasoline or crude oil. *Id.* at 525. Plaintiff estimated that 5% of all cargo

transported by Sabine Towing was pure benzene. *Id.* Sabine Towing's ocean-worthy vessels were capable of transporting in excess of 5 million gallons of cargo. *Id.* at 524. Plaintiff spent his entire career on Sabine Towing's ocean vessels. *Id.* at 525. Sabine Towing's crew members connected and disconnected hoses that piped benzene containing gasoline and pure benzene, as well as draining the hoses on the vessel. *Id.* The plaintiff was also exposed directly to fumes from the cargo during the loading and unloading process, during transportation, and during cleaning of the storage tanks. *Id.* The plaintiff was diagnosed with and died of leukemia in 2000. *Id.* at 522.

Defendant manufacturers of the gasoline and pure benzene transported by Sabine Towing admit that they did not warn the plaintiff or Sabine Towing about the hazards of benzene. *Id.* at 528. Rather, defendant manufacturer argued that they had no duty to warn Sabine Towing of the hazards of benzene exposure because it was a sophisticated user of petroleum products. *Id.* at 529. The Court noted several reasons why Sabine Towing was a sophisticated user of petroleum products. First, the Coast Guard regulations applicable to Sabine Towing identified benzene as toxic as far back as the 1940s. *Id.* at 530. The American Petroleum Institute published a document in 1948 stating that the association between benzene exposure and leukemia was well documented. *Id.* Further, Sabine Towing was owned in part by Pure Oil Company, which would have had access to the petroleum industry publications. *Id.* Plaintiff's own expert admitted that Sabine Towing was obligated to understand the hazards of the materials it transported. *Id.* The court found that “[t]he record clearly reveals that Sabine Towing either knew or should have known about the hazards of benzene early on such that it was a sophisticated entity to whom the defendants did not owe a duty to warn. *Id.*

In an unfortunate twist for the manufacturing defendants, while they were absolved of any duty to warn Sabine Towing of the hazards of benzene exposure, the court held that those defendants had a duty to warn the plaintiff directly. *Id.* at 531. The court was influenced by the defendant manufacturer's direct contact with and control over the plaintiff. First, much of the plaintiff's exposure to benzene occurred at one of the defendant manufacturer's facilities during the loading and unloading process. *Id.* During the loading and unloading operation, plaintiff had contact with the manufacturer's employees. *Id.* Further, at least one defendant manufacturer “charted” Sabine Towing vessels on occasion, thereby controlling how plaintiff performed his work. *Id.* “Because of the direct contact between [plaintiff] and the defendants and because the defendants maintained some control over aspects of the operations, we find that they had a duty to directly warn [plaintiff].” *Id.*

Proving that an intermediary is sophisticated is a fact intensive inquiry. Even where that inquiry is satisfied and the manufacturer had no duty to warn the sophisticated user, the Court will still consider whether the manufacturer had a duty to warn the plaintiff directly. The plaintiff's own testimony is often the most crucial in analyzing this issue. In *Lambert* and *Sabine Towing*, the plaintiff's contacts with the manufacturer persuaded the court that the manufacturer had an independent duty to warn end users of the product, such as the plaintiffs. Undoubtedly, the magnitude of the risk from exposure to benzene creates a high threshold if one hopes to completely negate the manufacturer's duty to warn.

***Hall v. Ashland Oil Company*, 625 F. Supp. 1515 (1986).**

In *Hall v. Ashland Oil Company*, 625 F. Supp. 1515 (1986), the United States District Court for the District of Connecticut found that the facts were not in the record to show that Pfizer was a sophisticated user of benzene. The federal district court denied the defendant benzene manufacturer and bulk supplier's motion for summary judgment where an employee died from leukemia after working at Pfizer's Groton, Connecticut facility. *Hall v. Ashland Oil Co.*, 625 F. Supp. 1515 (1986). Ashland Oil allegedly supplied benzene to this facility from 1972 to 1977. *Id.* at 1517. Plaintiff/employee worked at the facility from 1970 until 1980. *Id.*

The defendant argued that it was not required to warn employees of “its industrial customers” of dangers associated with its products because plaintiff's employer, Pfizer, was a “knowledgeable user” of benzene. *Id.* Significantly, defendant supplied the benzene in bulk liquid form in 4,000 gallon tank trailers. *Id.* The

defendant did not warn Pfizer about the hazards of benzene until it sent a MSDS sheet in 1977. *Id.* at 1520. Ashland Oil stated that the adequacy of its warning was irrelevant since it had no duty to warn Pfizer at all since Pfizer was aware of the hazardous nature of the product. *Id.* Ashland Oil argued that failing to warn a party of a hazard that it was already aware of cannot be the proximate cause of the injury. *Id.* The plaintiff responded and the court agreed that "knowledge of a risk is not necessarily the same thing as knowledge of the extent of the risk." *Id.* Here, as in *Lambert* and *Sabine Towing*, the court was concerned by the magnitude of the risk created by benzene.

The court declined to apply the sophisticated user doctrine, stating that "unless Ashland can establish as a matter of fact that Pfizer knew of these risks or had sufficient expertise to be charged by law with knowledge of them, Ashland has no theory that would justify a failure to warn either Pfizer or its employees. The factual basis to support its legal theory has not been made out at this point." *Id.* at 1521.

### **Sophisticated User Doctrine Applied to PCB Exposure case--Defense Granted**

An example where the defendant manufacturer's motion for summary judgment based on the sophisticated user defense was granted occurred in *Baker v. Monsanto Company*, 962 F. Supp. 1143 (S.D. Ind. 1997). In *Baker*, the plaintiffs filed claims against Monsanto, the manufacturer of polychlorinated biphenyls (PCB) to which the plaintiffs were exposed during their employment with Westinghouse. *Id.* at 1146. Monsanto filed a motion for summary judgment arguing that Westinghouse was a sophisticated, bulk purchaser of PCBs that was fully aware of the hazards of PCBs. *Id.* at 1147. After determining that the sophisticated user defense is available under Indiana law, the court spent the next eight pages outlining the detailed documentation in the record to support Monsanto's defense. *Id.* at 1151-52.

Monsanto presented evidence that Westinghouse knew as much about the hazards of PCBs as Monsanto. For example, Westinghouse specified the chemical properties for the PCB laden products Monsanto manufactured. *Id.* Westinghouse invested seventeen years in creating its own product similar to that purchased from Monsanto. *Id.* Westinghouse had a medical, engineering, and environmental department that explored the effects of Monsanto's PCB containing products and had letters from medical personnel stating the toxic nature of the product. *Id.* Westinghouse also drafted a research proposal stating that it had on staff "many experts on the industrial use of PCBs." *Id.* A Westinghouse report from 1972 listed "no fewer than forty-one Westinghouse personnel 'concerned with polychlorinated biphenyls (PCB).'" *Id.* Based on this and numerous other documents identified in the record, the court found that Monsanto supplied "countless" warnings to Westinghouse regarding PCBs, that Westinghouse was a "self-described expert" in PCBs, and that Westinghouse exclusively controlled Monsanto's PCB containing products in its plants. *Id.* at 1159.

The court's decision in *Baker* confirms that the sophisticated user doctrine can be successful when the appropriate evidence is in the record. Monsanto's extensive factual development of the plaintiff's employer's knowledge of the hazards of the product provided Monsanto with a complete defense to plaintiff's failure to warn claim.

### **What Can We Learn From These Toxic Tort Cases?**

#### **Practice Pointers**

1. *Does the doctrine apply?* When you are assigned a new toxic tort matter you must make an initial determination of whether the sophisticated user doctrine may apply to your case. Quite simply, if the plaintiff alleges injury caused by working with a product your client sold to an industrial customer, it may. And you will need a plan to develop the necessary facts to support your defense.

2. *Collect safety related documents about the product.* If the doctrine may apply to your case, start early to develop the evidentiary record needed to support your defense. Determine if and how your client (the manufacturer) notified customers (the plaintiff’s employer) of the potential hazards associated with the product. Obtain all the product warning labels and Material Safety Data Sheets as well as any other "safety" information provided by the manufacturer of the product. Determine if the defendant is a bulk supplier of the product to plaintiff’s employer’s facility such that the means of warning the employer and/or plaintiff were difficult. Know what interaction, if any, your client’s employees had with the end users of the product. Conduct extensive fact investigation into the records in the public domain that support your position, such as from trade association, medical journals, and newspapers. Often employer’s are members of trade associations or other groups that pay to sponsor safety related research and publications. Such proof can go a long way to establishing the sophistication of the employer and your client’s reasonable reliance on them to provide safety information to the end users.

3. *Plaintiff’s Deposition.* Prepare for the plaintiff’s deposition by making certain you have all of the records from plaintiff’s employer(s). These should include the employer’s safety manuals, their OSHA required Hazard Communication Plan, the employer’s training materials, the plaintiff’s personnel file, and any other safety related documents in the employer’s files that the plaintiff had or should have had access to. What does the plaintiff know about the manufacturer of the product or about the products potential hazards? When and how did he get that information? Did he read a label? Did he read any of the MSDS sheets? If not, confront him with the language on the label and the language on the MSDS sheet. Had he seen that information during the relevant time frame would he have performed his job differently, and how? Perhaps the plaintiff will validate the appropriateness of the safety information your client provided with its product. Also, if you can establish that the plaintiff took steps to avoid the hazard by trying to improve ventilation or by wearing a respirator, try to use this evidence to suggest that the plaintiff knew of the hazard.

4. *Employer’s Deposition:* Prepare for the employer’s deposition by not only reading their records, but by reading the relevant OSHA regulations. OSHA’s “general duty” clause imposes on employers the responsibility to provide employees with a safe work environment. Confirm that the employer is aware of their legal obligation and that they in fact did what was required of them by law. Establish that the employer takes pride in all facets of its work, including safety. Try to find safety awards won by the employer.

If your client has provided appropriate safety information for its products and if the employer has properly maintained their files, then you can structure your examination of the employer’s safety representative in such a manner that: (1) the employer either understood the hazards associated with the products and trained its employee about those hazards or (2) they knowingly violated the law. Document the safety training conducted by the employer, how it addressed the hazard at issue, and how the safety program evolved over the years. Try to find records to prove that the plaintiff attended the employer’s training sessions – such as attendance sheets that are frequently maintained. And learn the names and roles of all of plaintiff’s supervisors over the years, including any union presence that may have existed on plaintiff’s jobsite(s).

5. *Plaintiff’s Union.* If the plaintiff was a member of a union, issue a subpoena. Many unions run comprehensive safety training programs. Often, these programs are conducted in conjunction with major employers. Review all newsletters, contracts, and other materials for any safety related discussion. It is not unusual for union materials to provide very useful information to assist in establishing what employers and end users knew or should have known about the hazards at hand.

6. *Magnitude of Risk.* Closely consider the magnitude of the risk created by the product. The greater the risk of harm posed by the product, the more difficult it will be to get a court to absolve the manufacturer’s duty to warn.

*“Planning For a Sophisticated User Defense” (cont’d)*

In toxic tort cases the sophisticated user defense can be a powerful weapon, but to best use this weapon counsel must plan in advance and request the discovery needed to create the necessary record. Courts usually conduct fact intensive analyses that will only allow manufacturers to prevail if they step forward with the needed proof. The plaintiff, his employer, and even the plaintiff’s union are often the best sources for the extensive documentary evidence needed to support the manufacturer’s sophisticated user defense.

With proper planning and pre-motion effort, planning and opportunity can collide – and bring good fortune to both you, and your clients.



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