



# FEDERAL BAR ASSOCIATION

## Northern District of Ohio Chapter

### *Inter Alia*

February 2011 Issue

## **Distinguishing the Sophisticated User from the Sophisticated Intermediary Defense**

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Many mass tort and toxic tort actions assert claims for product liability based on failure to warn. The plaintiff claims that the manufacturer of the product had a duty to warn of a dangerous characteristic of the product. However, a manufacturer need not warn of every hazard. “Modern 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.”<sup>1</sup>

A manufacturer’s duty to warn may be discharged when the person using or controlling the use of the product is or should be aware of the dangers associated with it. This is the sophisticated user and/or sophisticated intermediary defense. This article discusses the legal background for this defense from the Restatement (Second) of Torts, points out the differences between the sophisticated intermediary and sophisticated user defenses, and reviews how courts have recently analyzed these defenses. As the cases cited in this article demonstrate, this doctrine is typically raised in a dispositive motion, but it may also be submitted to the jury as an instruction.

### **Origins in Restatement (Second) of Torts Section 388**

The sophisticated user and sophisticated intermediary defenses developed from section 388 of the Restatement (Second) of Torts, which states: Chattel Known to be Dangerous for Intended Use.

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Comment n to section 388, entitled “Warnings given to third person,” outlines the sophisticated user and sophisticated intermediary defenses. The comment states that chattel or product is often supplied for the use of persons other than the manufacturer’s original purchaser. For example, the product manufacturer sells to a wholesaler who sells to a retailer who, in turn, sells the product to a consumer. In these situations, “the question may arise as to whether the person supplying the chattel is exercising that reasonable care, which he owes to those who are to use it, by informing the third person through whom the chattel is supplied of its actual character.”

A manufacturer must have a “reasonable assurance that the information will reach those whose safety depends upon their having it.”<sup>2</sup> Some of the factors to consider are the known or knowable character of the third person (i.e., whether the third person will communicate the dangerous characteristics of the product to those who use it) and the magnitude of the risk or the seriousness of the likely harm. As the risk of serious injury from a product increases, so does the manufacturer’s duty to exercise reasonable care in communicating the hazardous potential of the product. If the dangerous nature of the product is great, a warning or label that sufficiently

describes the dangerous characteristics of the product may be appropriate so that it reaches those that are likely to use the product.

Courts applying this doctrine consider several of the factors listed in the comments to section 388. The courts consider whether the manufacturer was reasonable in the manner in which it communicated the warning to those that would use the product. They also examine whether the manufacturer's reliance on a third party, typically the plaintiff's employer, to communicate the dangerous propensities of the product to the end user was reasonable under the circumstances.

### **The Sophisticated User**

When the 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.<sup>3</sup> Courts typically apply an objective standard when evaluating whether the end user was aware of the hazardous nature of the product. The knowledge imputed to the end user will be based on that person's background and experience, among other factors.

The duty to warn does not "turn on the individual plaintiff's actual understanding of the risk."<sup>4</sup> Rather, "legal duties must be based on objective general predictions of the anticipated user's population's knowledge, not case-by-case hindsight examinations of the particular plaintiff's subjective state of mind."

### ***The Obvious Danger Doctrine and Proximate Causation***

The sophisticated user defense is based on the common-sense belief that a manufacturer need not warn of hazards about which the plaintiff is already aware. In *Hall v. Ashland Oil Co.*, the court explained that an inadequate warning cannot be the proximate cause of an injury when the plaintiff was aware of the product's hazardous potential:

In tort law, one with a duty to warn is not liable for failing to warn a party of facts that the party already knew. . . . The theory of this exception is that a failure to warn a party of a danger of which it was independently aware cannot be the proximate cause of injury resulting from that danger, since presumably the party would not have acted differently even if warned.<sup>5</sup>

In *Johnson v. American Standard, Inc.*, the Supreme Court of California stated that, although it had not previously adopted the sophisticated user defense, it recognized

that the doctrine was quite similar to the obvious danger rule, which was a well-established law in that jurisdiction.<sup>6</sup>

### ***Knowledge and Other Experience***

A person may be expected to know of the hazards of a product due to his or her training, employment, or other experience, such as reviewing the manufacturer's Material Safety Data Sheet (MSDS), warning labels, and other safety-related information. In *Johnson*, the Supreme Court of California adopted the sophisticated user doctrine and affirmed summary judgment for the manufacturer of an evaporator that contained refrigerant. The plaintiff, who held a universal certification (the highest certification a heating, ventilation, and air conditioning (HVAC) technician can obtain from the Environmental Protection Agency (EPA)), claimed that he developed pulmonary fibrosis from exposure to phosgene gas created during brazing refrigerant lines.<sup>7</sup>

Although the plaintiff claimed that he was not aware of the dangers of phosgene gas, the court found the manufacturer's duty to warn was discharged because an HVAC technician with a universal certification knew or should have known of the hazard of brazing refrigerant lines. The court also noted that plaintiff's expert admitted that HVAC technicians knew or should have known of the risks of phosgene gas, that plaintiff read the MSDS for the refrigerant, and that the EPA study guide for universal certification required HVAC technicians "to understand the decomposition products of refrigerants at high temperatures."<sup>8</sup> All of these factors supported the conclusion that HVAC technicians knew or should have known of the dangers of heating refrigerant.

Similarly, in *Humble Sand & Gravel, Inc. v. Gomez*, the Texas high court held that the supplier of flint had no duty to warn operators of abrasive blasting equipment of dangers of inhaling silica dust because it was common knowledge in the industry: "A supplier has no duty to warn of risks involved in a product's use that are commonly known to foreseeable users, even if some users are not aware of them."<sup>9</sup> Whether the risk is commonly known is an objective standard. In *Triplett v. Minnesota Mining and Manufacturing Co.*, although the court found the manufacturer's duty to warn was discharged by the intermediary's knowledge (see discussion below), it also noted that the knowledge of the end user is based on an objective standard: "the reasonably anticipated knowledge, perception, appreciation, circumstances, and behavior of expected users."<sup>10</sup>

In *Dusoe v. Union Carbide*, the court granted the manufacturer summary judgment based, in part, on the sophisticated user doctrine. The manufacturer of an oxygen regulator involved in an explosion of a welding system was not required to warn because of the plaintiff's extensive welding knowledge and experience; attendance at a training program for several weeks 15 years prior to the accident, which included instruction and testing about the welding system; and responsibility to train other employees on welding equipment. Based on these factors, the court found that the plaintiff's "experience and knowledge reduced or eliminated the need and utility of a warning."<sup>11</sup>

In contrast, a different federal court, in *Russell v. Ashland, Inc.*, held the sophisticated user defense inapplicable in a case involving benzene exposure and denied defendant's motion for summary judgment.<sup>12</sup> The court noted that Arkansas had not adopted section 388 of the Restatement (Second) of Torts but found that the proper inquiry was on the knowledge of the end user, not the employer or intermediary. Because no evidence established that the plaintiff end user was educated in the hazards and dangers of benzene, the court found the manufacturer's duty to warn was not discharged. The court in *Russell* analyzed that case under the sophisticated user criteria; however, the facts of that case suggest that a sophisticated intermediary analysis may have been more appropriate.

### ***The Sophisticated Intermediary Learned Intermediary Defense***

The sophisticated intermediary defense in mass tort and toxic tort actions evolved out of the learned intermediary defense from pharmaceutical litigation.<sup>13</sup> In the pharmaceutical context, a manufacturer of a pharmaceutical product may "fulfill its duty to warn by supplying an adequate warning to the medical profession concerning risks attendant upon use of a drug."<sup>14</sup> Similarly, in the toxic tort context, the sophisticated intermediary defense applies in cases where the manufacturer claims to have discharged its duty to warn to the plaintiff's employer. The employer, who controls the employee's actions and safety at the work site, acts in a manner akin to the physician in the pharmaceutical context. The sophisticated intermediary defense is sometimes couched in the language of a bulk supplier or sophisticated purchaser.

### ***Reasonable Reliance***

One who supplies a 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 employer to warn the end user of the product's dangers.<sup>15</sup> "The 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."<sup>16</sup> "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."<sup>17</sup>

A manufacturer is not shielded from liability merely by providing all significant information regarding a product's potential hazards to the intermediary. Comment n to section 388 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.

Rather, the manufacturer must be reasonably assured that the safety information will reach the end user. As a practical matter, in many jurisdictions the employer is seldom a party to the action due to the preclusive effect of workers' compensation statutes. While other factors can be significant, including whether the manufacturer provided warnings and whether the manufacturer's reliance on an intermediary to warn the end user was reasonable, proof establishing the knowledge of the intermediary is critical.

Reasonable reliance is the crucial element for a manufacturer in proving that the employer was a sophisticated intermediary. A manufacturer may discharge its duty to warn "when the product is sold to a 'knowledgeable or sophisticated intermediary' whom the manufacturer has adequately warned."<sup>18</sup> "Delegation of the duty to warn makes particular sense where the manufacturer cannot control how the intermediary will use the product." To establish the defense, "the intermediary must have knowledge or sophistication equal to that of the manufacturer, and the manufacturer must be able to rely reasonably on the intermediary to warn the ultimate consumer."<sup>19</sup> 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.”<sup>20</sup>

### ***Analysis of the Intermediary’s Knowledge***

The sophisticated intermediary defense typically requires a fact-intensive, case-by-case analysis of the intermediary’s knowledge of the risks associated with the product. In each of these cases, the court documents detail the employer’s knowledge. Unlike the California Supreme Court’s analysis in *Johnson*, which applied an objective standard, the decisions discussed below do not explicitly apply an objective or a subjective standard. That said, it appears the courts apply a subjective analysis when analyzing the sophisticated intermediary defense.

In a twist on these related defenses, the recent decision in *Taylor v. Airco* found that the employer, not employee, was the end user for the purpose of applying the defense.<sup>21</sup> The employer was in the position to issue all product-related warnings directly to the employees. In addition, the employer conducted monthly safety meetings and had access to the same information as the supplier regarding the risks of vinyl chloride. The court granted the motion for summary judgment of the manufacturer and supplier of the product. The court found the employer to be a sophisticated user because the employer had its own library of materials on the potential health effects of vinyl chloride, had its own company-wide medical department, was a member of the chemical industry trade group, and participated in the trade group’s research programs.<sup>22</sup> All of these facts demonstrated that the employer had access to precisely the same information as the manufacturer and supplier of the product and, therefore, it was reasonable for the manufacturer and supplier to rely on the employer to provide adequate warnings to its employees.

For similar reasons, an Ohio trial court granted a bulk supplier’s motion for summary judgment based on the sophisticated intermediary defense, even where the bulk supplier provided no warnings to the employer.<sup>23</sup> In that case, the plaintiffs, employees of a foundry, claimed injury by exposure to silica dust. The sand was supplied 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. Despite the sand suppliers’ failing to warn the employer, the court found that the employer 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. Further, the supplier's reliance on the employer to communicate the hazards associated with silica to its employees was reasonable because it "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."<sup>24</sup>

Similarly, another recent Massachusetts decision, *Genereux v. American Beryllia Corp.*, granted a manufacturer summary judgment on the basis of the plaintiff's employer's knowledge of the hazard at issue. In determining whether the employee or employer was the end user, the court examined the "broad range of information available to the employer."<sup>25</sup> The court found that the employer was a sophisticated intermediary because of the "knowledge held by employees, the employer's policies and internal memoranda, and warnings provided to the employer by its suppliers." The specific facts of the case warranted application of the sophisticated intermediary doctrine.

In a recent asbestos decision, *Tatera v. FMC Corp.*, the Court of Appeals of Wisconsin denied the defendant's motion for summary judgment on a negligence claim. In *Tatera*, there was no evidence that the supplier sent content sheets to the employer warning of the presence of asbestos in the brake linings.<sup>26</sup> Therefore, whether the employer knew the product contained asbestos was a material fact in dispute.

An Ohio trial court ruled against a sand supplier to a foundry 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 Co.*, the court noted that the employer, a foundry, had "violated OSHA regulations and took [OSHA] inspectors to play golf when the inspectors came to the plant."<sup>27</sup> The plaintiff's employer, although knowledgeable of the hazards associated with respirable silica, was not a "reliable conduit" to communicate the hazard to its employees.

### ***What Can We Learn from These Cases?***

The sophisticated user and sophisticated intermediary defenses apply to product liability cases alleging a failure to warn. A manufacturer seeking to invoke either of these defenses must determine to whom it discharged its duty to warn – the plaintiff or the employer. Courts applying the sophisticated user defense consider whether the

end user knew or should have known of the hazards associated with the product, an objective standard. Courts applying the sophisticated intermediary defense appear to be using a subjective standard when evaluating the employer's knowledge of the hazard. Regardless of the standard applied, when the manufacturer meets this burden, it may have a complete defense if the content of its warning was suspect, or even if there were no warnings at all.

Since the original publication of this article the Hamilton County Court of Appeals, in *Doane v. Givaudan Flavors Corp.*, 184 Ohio App.3d 26, 2009-Ohio-4989, issued an opinion applying the sophisticated purchaser doctrine in Ohio. The Court in *Doane* upheld the trial court's Order granting summary judgment for the suppliers of diacetyl, a chemical used in butter flavoring finding that the injured plaintiffs' employer, Givaudan, was a sophisticated purchaser of the chemical. The Court acknowledged, among several factors, Givaudan's creation of a task force to investigate claims of lung ailments at the facility; its regulation of employee safety; and its exclusive control over the chemical diacetyl after delivery. The Court held that Givaudan was a sophisticated purchaser with knowledge equal to or greater than that of Defendant suppliers and that Defendant suppliers' reliance on Givaudan to relay any warnings to its employees concerning the chemical diacetyl was reasonable.

## Endnotes

<sup>1</sup>Restatement (Second) of Torts §388, cmt. n.

<sup>2</sup>*Id.*

<sup>3</sup>*Billsborrow v. Dow Chem., U.S.A.*, 579 N.Y.S.2d 728 (2d Dep't 1992) trichloroethylene exposure case).

<sup>4</sup>*Johnson v. Am. Standard, Inc.*, 179 P.3d 905, 916 (Cal. 2008).

<sup>5</sup>*Hall v. Ashland Oil Co.*, 625 F. Supp. 1515, 1520 (D. Conn. 1986).

<sup>6</sup>*Johnson*, 179 P.3d at 911-12.

<sup>7</sup>*Id.* at 909.

<sup>8</sup>*Id.* at 917.

<sup>9</sup>*Humble Sand & Garvel, Inc. v. Gomez*, 146 S.W.3d 170, 183 (Tex. 2004).

<sup>10</sup>*Triplett v. Minn. Mining and Mfg. Co.*, 422 F. Supp. 2d 779, 785 (W.D. Ky. 2006).

<sup>11</sup>*Dusoe v. Union Carbide*, 2005 WL 705960, at \*6 (Mass. Super. Ct. Jan. 20, 2005).

<sup>12</sup>*Russell v. Ashland, Inc.*, 574 F. Supp. 2d 957, 959 (W.D. Ark. 2008).

<sup>13</sup>*See Hall v. Ashland Oil Co.*, 625 F. Supp. 1515, 1519-20 (D. Conn. 1986) (discussion of learned intermediary defense to employer/employee relationship).

<sup>14</sup>*Id.* at 1518.

<sup>15</sup>*Newson v. Monsanto Co.*, 869 F. Supp. 1255, 1259 (E.D. Mich. 1994).

<sup>16</sup>*Adams v. Union Carbide Corp.*, 737 F.2d 1453, 1456 (6th Cir. 1984) (discussing Restatement (Second) of Torts

§388 cmt. n).

<sup>17</sup>*Lambert v. BP Products North America, Inc.*, 2006 WL 924988, at \*2 (S.D. Ill. Apr. 6. 2006).

<sup>18</sup>*Triplett v. Minn. Mining and Mfg. Co.*, 422 F. Supp. 2d 779, 786 (W.D. Ky. 2006).

<sup>19</sup>*Id.*

<sup>20</sup>*Newson*, 869 F. Supp. at 1259.

<sup>21</sup>*Taylor v. Airco, Inc.*, 503 F. Supp. 2d 432, 444 (D. Mass. 2007).

<sup>22</sup>The *Taylor* court did not distinguish between the sophisticated user and intermediary. Instead, the court found that the employer was the end user, and, accordingly, the court's opinion uses the term "sophisticated user" defense.

<sup>23</sup>*In re Jackson Group 1*, No. 469127 (Cuyahoga County Ct. C.P. 2006).

<sup>24</sup>*Id.*

<sup>25</sup>*Genereux v. Amer. Beryllia Corp.*, 518 F. Supp. 2d 306, 313 (D. Mass. 2007). The *Genereux* court called the plaintiff's employer a "sophisticated user" and made no reference to the term "sophisticated intermediary."

<sup>26</sup>*Tatera v. FMC Corp.*, 2009 WL 1298974, ¶ 46 (Wis. App. 2009).

<sup>27</sup>*Glass v. 3M Co.*, No. 2004-CV-175 (Auglaize County Ct. C.P. 2006).

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This article originally appeared in the Fall 2009 *ABA Mass Tort Newsletter*.