WHEN IS A WARNING UNNECESSARY?
COMMON LAW EXCEPTIONS TO THE DUTY TO WARN

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Consider the following set of facts: A fifteen-year old boy is badly burned when he sticks a paper clip into one of the receivers of an electrical outlet. His family hires a lawyer, who files a products liability action against the manufacturer of the outlet. Shortly after filing the lawsuit, the boy's lawyer asks to take the deposition of the manufacturer's corporate representative. During the deposition, the lawyer asks, "Do you believe that a manufacturer has a responsibility to warn consumers about the reasonably foreseeable dangers that may arise from the use of its products?" Putting aside the fact that the lawyer's question improperly calls for a legal conclusion, the manufacturer's corporate representative may feel that the question unfairly places him in a Catch-22: "Do I answer the question 'No' and potentially come across as coldhearted and uncaring, or do I answer the question 'Yes' and potentially endanger my company's legal position?"

From a legal perspective, the correct answer to the question probably lies somewhere in the middle: "Maybe, but it depends entirely on the circumstances."

Certainly, some courts exclaim—as a seemingly blanket rule—that a manufacturer owes a duty to warn consumers of all known or reasonably foreseeable dangers that may arise from the use of its product. *See, e.g., Daley v. McNeil Consumer Prods. Co.*, 164 F. Supp. 2d 367, 373 (S.D.N.Y. 2001); *McKee v. Moore*, 648 P.2d 21, 22 (Okla. 1982); *Bristol-Myers Co. v. Gonzalez*, 561 S.W.2d 801, 804 (Tex. 1978). But even when expressed as a seemingly blanket rule, this proposition is hardly absolute and, at best, is only a general principle of law. Most states recognize one or more exceptions to this proposition. If one of these exceptions applies, a manufacturer may owe no duty to place a warning on its product—even when it knows of a potential danger that may arise from the use of its product.

This paper discusses some of these exceptions, including the common knowledge doctrine, the sophisticated user doctrine, the learned intermediary doctrine, the component supplier doctrine, and the bulk supplier doctrine.[1] Although this paper addresses each of these exceptions separately, these exceptions share overlapping features—and indeed, the courts do not often carefully distinguish between them. Essentially, these exceptions reflect a "common sense" approach to warnings jurisprudence: in a nutshell, a manufacturer owes no "duty to warn" where a warning would be silly, useless or impractical.

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[1]The purpose of this paper is principally to alert readers to the existence of these exceptions. By design, this paper is not an exhaustive survey of these exceptions. Some jurisdictions will analyze these exceptions differently from other jurisdictions.

A. Open and Obvious Dangers

Generally, a manufacturer owes no duty to warn of dangers that are "open and obvious and generally appreciated." *Wortel v. Somerset Indus., Inc.*, 331 Ill. App. 3d 895, 770 N.E.2d 1211, 1216 (1st Dist. 2002). *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. j (2000) ("In general, a product seller is not subject to liability for failing to warn or instruct regarding risks . . . that should be obvious to, or generally known by, foreseeable product users.").[2] "[T]he law of products liability does not require a manufacturer or distributor to warn of obvious risks." *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 382 (Tex. 1995). *See Ahrens v. Ford Motor Co.*, 340 F.3d 1142, 1146 (10th Cir. 2003); *Dunne v. Wal-Mart Stores, Inc.*, 679 So.2d 1034, 1038 (La. App. 1996); *see also Chase v. Brooklyn City School Dist.*, 141 Ohio App. 3d 9, 749 N.E.2d 798, 805 (2001) (noting that a manufacturer or supplier has "no duty to warn of dangers that are open and obvious to the user").[3]

In its most common application, the "open and obvious" exception recognizes that a manufacturer need not have to warn of those risks that *everyone* should already know. "There is certainly no usual duty to warn the purchaser that a knife or an axe will cut, a match will take fire, dynamite will explode, or a hammer may mash a finger." *Peppin v. W.H. Brady Co.*, 372 N.W.2d 369, 375 (Minn. App. 1975) (quoting WILLIAM PROSSER, HANDBOOK ON THE LAW OF TORTS § 96 (4th ed. 1971)). Other examples:

- A manufacturer of a fajita skillet need not warn users that the skillet will get extremely hot when used for its intended purpose. *Valinski v. Little Mexico Restaurant*, No. 233446, 2002 WL 31117040, *2 (Mich. App. Sept. 24, 2002) (unpublished).

- A manufacturer of a BB gun need not warn users of the risk of injury from a BB pellet. *Bookout v. Victor Comptometer Corp.*, 40 Colo. App. 417, 576 P.2d 197, 198 (1978).

- A manufacturer of a bullet-proof vest need not warn users that the vest "leaves some parts of the body obviously exposed." *Linegar v. Armour of Am., Inc.*, 909 F.2d 1150, 1154 (8th Cir. 1990).

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[2]In some jurisdictions, the "open and obvious" doctrine applies equally in premises liability cases as well as in products liability cases. *See, e.g., Branche v. Northwest Airlines, Inc.*, 984 F. Supp. 1107, 1109 (E.D. Mich. 1997); *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 518 (Tex. 1978).

[3]Although a manufacturer may not have a duty to warn of an open and obvious danger, the fact that a danger is open and obvious normally is not a defense to a design defect theory of liability. *See, e.g., Byrns v. Riddell, Inc.*, 550 P.2d 1065, 1068 (Ariz. 1976); *Auburn Mach. Works Co. v. Jones*, 366 So. 2d 1167, 1169 (Fla. 1979); *Wortel*, 770 N.E.2d at 1220; *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (2000).

- A manufacturer of a deep fryer need not warn users against the danger in allowing the cord of the fryer to dangle over the edge of a kitchen counter. *Schiller v. National Presto Indus., Inc.*, 225 A.D.2d 1053, 639 N.Y.S.2d 217, 218 (1996).

- A manufacturer of a tractor that is not equipped with seatbelts need not warn users about the danger of falling off of the tractor. *Ahrens*, 340 F.3d at 1147.

- A truck manufacturer need not warn users against the hazards that may arise from riding in the bed of a pickup truck. *See Maneely v. General Motors Corp.*, 108 F.3d 1176, 1181 (9th Cir. 1997); *Roland v. DaimlerChrysler Corp.*, 33 S.W.3d 468, 470 (Tex. App.—Austin 2000, pet. denied). *But see Bowersfield v. Suzuki Motor Corp.*, 111 F. Supp. 2d 612, 623 (E.D. Pa. 2000) (holding that the dangers of riding in the rear cargo area of a Suzuki Samurai were not necessarily open and obvious).

- A ladder manufacturer need not warn users against the danger of falling from a ladder. *See Smoot v. Vanderford*, 895 S.W.2d 233, 241 (Mo. App. 1995); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. j (2000) ("The danger should be obvious to foreseeable product users.").

However, the "open and obvious" exception is not confined simply to those risks that are obvious to *everyone*. It also recognizes that a manufacturer need not warn of those risks which, while not necessarily obvious to everyone, would be obvious to the "average user." *See Sauder Custom Fabrication, Inc. v. Boyd*, 967 S.W.2d 349, 349 (Tex. 1998) (holding that whether a risk is open and obvious depends on the perspective of the "average user" of the product, and not necessarily any "average person"). Therefore, if a manufacturer markets a product specifically for use in a particular industry or application, the manufacturer need not warn of those risks that would be obvious to the average users of the product *in that industry or application. See Rypkema v. Time Manufacturing Co.*, 263 F. Supp. 2d 687, 695 (S.D.N.Y. 2003). For example:

- A manufacturer of a cylindrical pressure vessel need not warn users—typically boilermakers—of the risk that they may fall if they release the tension bolt from a shipping ring. *Sauder*, 967 S.W.2d at 351 ("No ordinary person trained to do the work Boyd and his crew were doing could have failed to appreciate the obvious risk of falling.").

- A manufacturer of industrial products need not warn users of the risk that spinning blades or rollers may injure their fingers. *See, e.g., Marshall v. Sheldahl, Inc.*, 150 F. Supp. 2d 400, 405 (N.D.N.Y. 2001) ("bubble out" bag machine); *Lamb v. Kysor Indus. Corp.*, 2003 N.Y. Slip Op. 113688, 2003 WL

2009215 (N.Y. App. Div. May 2, 2003) (bridge saw); *Felle v. Grainger, Inc.*, 302 A.D.2d 971, 755 N.Y.S.2d 535, 537 (2003) (grinder); *McMurry, Jr. v. Inmont Corp.*, 264 A.D.2d 470, 694 N.Y.S.2d 157, 158 (1999) (industrial coating machine).

Most courts apply an objective standard to determine whether a risk is open and obvious. *See Rypkema*, 263 F. Supp. 2d at 694; *Raines v. Colt Indus., Inc.*, 757 F. Supp. 819, 824 (E.D. Mich. 1991); *Caterpillar, Inc.*, 911 S.W.2d at 383. Consequently, a plaintiff cannot prevail on a warnings cause of action by pretending to be the village idiot. Under the "open and obvious" exception, a plaintiff who protests that he was not personally aware (*i.e.*, subjectively aware) of a danger that would be obvious to the average user (*i.e.*, the objective user) cannot recover for an alleged failure to warn. *See Toney v. Kawasaki Heavy Indus., Ltd.*, 975 F.2d 162, 168-69 (5th Cir. 1992); *see also Glittenberg v. Doughboy Recreational Indus.*, 441 Mich. 379, 491 N.W.2d 208, 214 (1992) ("[A] plaintiff's subjective knowledge is immaterial to the antecedent determination of an open and obvious danger.").

The "open and obvious" exception is based upon the assumption that "nothing of value is gained by a warning where [the] danger is open and obvious." *Wortel*, 770 N.E.2d at 1216. "[I]f the risk is obvious from the characteristics of the product, the product itself telegraphs the precise warning that plaintiffs complain is lacking." *Glittenberg*, 491 N.W.2d at 215. *See also Hiner v. Deere & Co.*, 340 F.3d 1190, 1194 (10th Cir. 2003) (noting that "[i]f a danger is obvious, then its obviousness constitutes a warning. . . .").[4] As the Texas Supreme Court has explained:

> [A] warning that merely states the obvious would accomplish very little and to the contrary may actually be counterproductive. The fact that a risk is readily apparent serves the same function as a warning. . . . Warnings about obvious hazards are not likely to reduce the chances of injury. . . . Moreover, consumers are prone to ignore warnings of obvious dangers, thereby diminishing the importance given by users to warnings about non-obvious hazards.

Caterpillar, Inc., 911 S.W.2d at 382. *See also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. j (2000) ("When a risk is obvious or generally known, the prospective addressee of a warning will or should already know of its existence. Warning of an obvious

[4]This is true even when the ultimate user is a young child. In that event, the child would not herself likely read or digest any warning. If the danger is open and obvious, no warning would have any appreciable influence on the child's parents or guardians, who presumably should already know of the existence of the danger. *See Colon v. BIC USA, Inc.*, 199 F. Supp. 2d 53, 92-93 (S.D.N.Y. 2001); *Hittle v. Scripto-Tokai Corp.*, 166 F. Supp. 2d 142, 155 (M.D. Pa. 2001).

or generally known risk in most instances will not provide an effective additional measure of safety.").

B. Common Knowledge

Just as a manufacturer owes no duty to warn of obvious dangers, a manufacturer also owes no duty to warn of dangers that are "a matter of common knowledge." *McConnell v. Cosco, Inc.*, 238 F. Supp. 970, 977 (S.D. Ohio 2003). *See Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199, 694 A.2d 1319, 1330 (1997); *Young v. Wadsworth*, 916 S.W.2d 877, 878 (Mo. App. 1996); *Jackson v. Corning Glass Works*, 538 A.2d 666, 669 (R.I. 1988); *Anderson v. Green Bull, Inc.*, 322 S.C. 268, 471 S.E.2d 708, 710 (1996); *see also American Tobacco Co., v. Grinnell*, 951 S.W.2d 420, 426 (Tex. 1997) ("[T]here is no duty to warn when the risks associated with a particular product are matters 'within the ordinary knowledge common to the community.'") (quoting *Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 388 (Tex. 1991)).

In practical effect, the common knowledge doctrine is virtually indistinguishable from the "open and obvious" exception. To the extent that the two doctrines differ at all, they differ only in the way in which the court determines whether the danger is "well known." Under the "open and obvious" exception, a court determines whether the danger is "well known" by examining the very appearance of the product: the knife is sharp, the ladder is tall, the tractor lacks seat belts, etc. Under the common knowledge doctrine, a court determines whether the danger is "well known" by examining the extent to which knowledge of the danger has passed into the public consciousness. *See American Tobacco Co.*, 951 S.W.2d at 426.

The classic example of a case that implicates the common knowledge doctrine is a tobacco lawsuit. A burning cigarette in an ashtray would not, from its physical appearance alone, seem to pose any obvious risk of harm other than perhaps the danger of causing a fire. Obviously, though, the public has become aware—at least since the 1960s—that cigarettes may cause a variety of health problems. Thus, many courts have held that the dangers of cigarette smoking are matters of common knowledge. *See, e.g., Sanchez v. Liggett & Myers, Inc.*, 187 F.3d 486, 490-91 (5th Cir. 1999); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 236 (6th Cir. 1988); *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 274 (D.R.I. 2000). *But cf. Little v. Brown & Williamson Tobacco Corp.*, 243 F. Supp. 480, 493-94 (D.S.C. 2001) (refusing to apply the common knowledge doctrine to bar claims that may have accrued before the public became aware of the health risks of cigarette smoking).

Regardless, the distinction between the "open and obvious" doctrine and the common knowledge doctrine is largely academic. Like the "open and obvious" doctrine, the common knowledge doctrine recognizes that a manufacturer need not have to warn of those risks that *everyone* should already know. For example:

- A brewer need not warn users of the dangers of excessive drinking. *See Greif v. Anheuser-Busch Co.*, 114 F. Supp. 2d 100, 102 (D. Conn. 2000) ("While beer is a relatively mild form of alcoholic beverage, the complaint alleges, and everyone knows, that anyone who consumes enough of any product containing alcohol will become, to some degree, inebriated."); *see also Garrison v. Heublein, Inc.*, 673 F.2d 189, 192 (7th Cir. 1982) ("[T]he dangers of the use of alcohol are common knowledge to such an extent that the product cannot objectively be considered to be unreasonably dangerous.").

- An automobile manufacturer need not warn users to wear their seatbelts. *See Long v. Deere & Co.*, 238 Kan. 766, 715 P.2d 1023, 1029 (1986) ("[T]he common knowledge of the alleged advisability of using seat belts in automobiles is so widespread and the public reluctance to using them is so great that further warnings would be useless.").

- An automobile manufacturer need not warn users that a seatbelt will not protect the occupants of a vehicle from all possible injuries. *See Mazda Motor of Am., Inc. v. Rogowski*, 105 Md. App. 318, 659 A.2d 391, 397 (1995) ("It borders on the absurd to suggest that persons of ordinary intelligence would not appreciate the fact that seatbelts, no matter how well designed and made, cannot be expected to protect the occupants of a vehicle from all injury, no matter how substantial the impact of a collision.").

- A manufacturer of extension cords need not warn users that a cut or fray in the cord may create a danger of electrical shock. *See Brown v. Sears, Roebuck & Co.*, 136 Ariz. 556, 667 P.2d 750, 756 (Ariz. App. 1983) ("Surely every adult knows that if an electrical extension cord is cut or frayed a danger of electrical shock is created.").

- A manufacturer of gas furnaces need not warn users against installing a furnace in an area with inadequate ventilation. *See Raschke v. Carrier Corp.*, 146 Ariz. 9, 703 P.2d 556, 559 (Ariz. App. 1985) ("Although a gas furnace is a more complicated product than an extension cord, surely every adult knows that adequate ventilation is necessary for its proper operation.").

- An electric company need not warn its customers of the electrical shock hazard from buried power lines. *See Hanus v. Texas Util. Co.*, 71 S.W.3d 874, 884 (Tex. App.—Fort Worth 2002, no pet.) ("The dangers associated with electricity are beyond dispute . . . . Decedent clearly knew or should have known of the undisputable dangers associated with coming into contact with electrical lines . . . .").

- A gasoline supplier need not warn customers that gasoline is flammable. *See Ritz Car Wash, Inc. v. Kastis*, 976 S.W.2d 812, 814 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) ("[I]t is well known in the community that gasoline is volatile and must be handled with care.").

Similarly, the common knowledge doctrine recognizes that a manufacturer need not have to warn of those risks which, while perhaps not common knowledge to everyone, are common knowledge to the "average user." For instance, if the average user of a product is an experienced professional, a manufacturer owes no duty to warn that person of risks that are commonly known to other similarly experienced users. *Allen v. W.A. Virnau & Sons, Inc.*, 28 S.W.3d 226, 234-35 (Tex. App.—Beaumont 2000, pet. denied). A manufacturer may rely on the expertise of an experienced user, who should already be reasonably aware of the commonly known dangers in a product. *McLennan v. American Eurocopter Corp.*, 245 F.3d 403, 429 (5th Cir. 2001). Specifically:

- A manufacturer of plastic pipe for use in a gas pipeline need not warn pipeline installers to ground the pipe with wet rags during the purging process. *See Ex parte Chevron Chem. Co.*, 720 So. 2d 922, 925 (Ala. 1998) ("[A]mong installers of plastic pipe it was common knowledge that the failure to properly ground the pipe during the purging process would greatly increase the danger that static electricity wold build up and ignite natural gas and cause a fire.").

- A manufacturer of an electrical appliance need not warn installers against attaching the power cord to the terminal block. *Moore v. ECI Management*, 246 Ga. App. 601, 542 S.E.2d 115, 121 (2000).

- A manufacturer of helicopters for use in slinging operations need not warn pilots of the danger that the fuel transmitter may give inaccurate fuel gauge readings. *See McLennan*, 245 F.3d at 429 ("[T]he potential for inaccurate fuel gauge readings caused by sticking in a worn or dirty fuel transmitter was 'common knowledge' among flight crews at the time of the accident.").

- A wheat supplier need not warn pet food manufacturers that its wheat contains Vimitoxin. *See Southwest Pet Prods., Inc. v. Koch Indus., Inc.*, 273 F. Supp. 2d 1041, 1055 (D. Ariz. 2003) ("[A]ny ordinary pet food manufacturer, including Southwest, would have expected the presence of at least some vomitoxin in feed wheat that was purchased from the 1993-1994 midwestern crops. . . . [T]he problem was 'common knowledge' among buyers and sellers alike.").

As with the "open and obvious" exception, most courts analyze the common knowledge doctrine under an objective standard. *See McLennan*, 245 F.3d at 429; *see also*

Caterpillar, Inc., 911 S.W.2d at 383 ("[W]hether a recognition of risk 'is within the ordinary knowledge common to the community' is an objective standard."). Of course, to analyze the doctrine under any other standard would make no sense. The key inquiry is the knowledge of the community at large—an inherently objective criterion. By definition, a plaintiff may not escape the common knowledge doctrine by claiming that he lacks subjective knowledge of an otherwise commonly known danger. *See Southwest Feed Prods.*, 273 F. Supp. 2d at 1057 & n.23.

Nonetheless, in many cases, the "open and obvious" exception and the common knowledge doctrine may beg the question: "Just what is the danger?" The mere fact that a product has an obvious or commonly known danger will not shield a manufacturer from a plaintiff's warnings claim unless *that precise danger* actually led to the plaintiff's injury. *See, e.g., McConnell*, 238 F. Supp. 2d at 978 (holding that while the risk that a baby may fall from a highchair is commonly known, the risk that a baby may strangle itself on the straps of the highchair is not necessarily obvious or common knowledge); *Tamez v. Mack Trucks, Inc.*, 100 S.W.3d 549, 561-62 (Tex. App.—Corpus Christi 2003, no pet. h.) (holding that while the risk of a rollover accident may be common knowledge to tanker truck operators, the risk of a post-collision explosion in the fuel system of the truck is not necessarily obvious or common knowledge).

Likewise, neither the "open and obvious" exception nor the common knowledge doctrine will apply where the danger is qualitatively more significant than the plaintiff may otherwise have reasonably expected from her knowledge or experience. In other words, a plaintiff may potentially escape the common knowledge doctrine by arguing that while she reasonably might have known of *some* danger (*i.e.*, a minimal danger that she was willing to assume), she could not reasonably have known of the *extent* of the danger. *See Cigna Ins. Co. v. OY Saunatec, Ltd.*, 241 F.3d 1, 13 (1st Cir. 2001); *see also Wheeler v. John Deere Co.*, 935 F.2d 1090, 1104 (10th Cir. 1991) ("[I]f people generally believe that there is a danger associated with the use of a product, but that there is a safe way to use it, any danger there may be in using the product in the way generally believed to be safe is not open and obvious.").

This distinction has led to some seemingly inconsistent results. For instance, some courts have held that a manufacturer owes no duty to warn of the danger that a hot beverage may cause burns. *See, e.g., Austin v. W.H. Braum, Inc.*, 249 F.3d 805, 806 (8th Cir. 2001); *Holowaty v. McDonald's Corp*, 10 F. Supp. 2d 1078, 1085 (D. Minn. 1998); *Huppe v. Twenty-First Century Restaurants of Am., Inc.*, 130 Misc. 2d 736, 297 N.Y.S.2d 306, 308-09 (1985). Other courts, however, have imposed a duty to warn where the beverage is "exceedingly hot"—*i.e.*, the beverage is served at a temperature near the boiling point. *Nadel v. Burger King Corp.*, 119 Ohio App. 3d 578, 695 N.E.2d 1185, 1191 (1997). The difference in these cases is simply a function of the extent of the danger: a consumer may reasonably

expect that a hot beverage could cause burns, but a consumer would not necessarily have reason to expect that his "hot" beverage is in fact boiling.

By contrast, a plaintiff may not escape the common knowledge doctrine by arguing that while he reasonably might have known of the existence of a danger, he could not reasonably have anticipated the *severity of the potential injury*. The distinction between "danger" and "injury" is no defense either to the "open and obvious" exception or to the common knowledge doctrine. As the Michigan Supreme Court has explained:

> When . . . a risk is objectively determinable, warnings that parse the risk are not required. The general danger encompasses the risk of the specific injury involved. . . . [W]here the facts of record require the conclusion that the risk of serious harm from the asserted condition is open and obvious, . . . the law does not impose a duty upon a manufacturer to warn of all conceivable ramifications of injuries that might occur from the use or foreseeable misuse of the product.

Glittenberg, 491 N.W.2d at 218-19 (holding that a swimming pool manufacturer had no duty to warn about the danger of diving into shallow water, even though the plaintiffs purportedly were unaware of the potential for quadriplegic injury). *See also Coleman v. Cintas Sales Corp.*, 100 S.W.3d 384, 386 (Tex. App.—San Antonio 2002, no pet. h.).

In sum, the common knowledge doctrine, like the "open and obvious" exception, rests on a very practical notion: a warning is unnecessary where the user, from the knowledge ordinary to his community, should already be aware of the danger. "Where a warning is not needed . . ., providing a warning does not serve to make the product safer." *Glittenberg*, 491 N.W.2d at 215.

C. Actual Knowledge

Whether or not a danger is obvious or a matter of common knowledge, a manufacturer owes no duty to warn a person of a danger which that person in fact already knows. *See Long*, 715 P.2d at 1029 ("[A] person is not entitled to be warned about something he already knows.") (quoting 63 AM. JUR. 2D, PRODUCTS LIABILITY § 341); *USX Corp. v. Salinas*, 818 S.W.2d 473, 483 (Tex. App.—San Antonio 1991, writ denied) (holding that a defendant owes no duty to warn "when the party to be warned is already aware of the danger"); *see also McCroy v. Coastal Mart, Inc.*, 207 F. Supp. 2d 1265, 1275 (D. Kan. 2002); *Campbell v. Burt Toyota-Diahatsu, Inc.*, 983 P.2d 95, 97 (Colo. App. 1999); *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 677 N.Y.S.2d 764, 700 N.E.2d 764, 769 (1998); *cf. Caterpillar, Inc.*, 911 S.W.2d at 382 ("[T]he duty to warn is limited in scope, and applies only to hazards of which the consumer is unaware.").

Unlike with the "open and obvious" exception and the common knowledge doctrine, the courts necessarily analyze the actual knowledge doctrine under a subjective standard. Thus, even when a danger would not be apparent to most people, a plaintiff may not prevail on a warnings cause of action if he was himself subjectively aware of the danger. *See Clarke v. LR Sys.*, 219 F. Supp. 2d 323, 329 (E.D.N.Y. 2002) (holding that a plaintiff, who injured his hand in a plastic grinder machine, could not recover on a warnings claim where "he acknowledged several times in his deposition that he knew it was dangerous to put his hand on the V-belt without first turning off the power"); *see also Campbell*, 983 P.2d at 97.

Of course, subjective knowledge actually means subjective knowledge. The mere fact that a plaintiff has previously acquired experience with a product, for instance, is insufficient to establish that the plaintiff was subjectively aware of a danger in the product. "Past experience with a product does not necessarily alert users to all of the dangers associated with the product." *Blasing v. P.R.L. Hardenbergh Co.*, 303 Minn. 41, 226 N.W.2d 110, 48 (1975). *See also Shuras v. Integrated Project Serv., Inc.*, 190 F. Supp. 2d 194, 202 (D. Mass. 2002); *Fiorentino v. A.E. Staley Mfg. Co.*, 11 Mass. App. 428, 416 N.E.2d 998, 1004 (1981). *But cf. infra* Section E (noting that the plaintiff's past experience may allow a defendant to raise the sophisticated user doctrine).

The actual knowledge doctrine is consistent with the fundamental requirement of causation. An allegedly inadequate warning cannot have "caused" an injury if the intended recipient of the warning was already aware of the danger—and simply ignored it. *See Jaimes v. Fiesta Mart, Inc.*, 21 S.W.3d 301, 305 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (affirming a summary judgment against the plaintiff because she was "cognizant of the danger"); *see also Southwest Pet Prods.*, 273 F. Supp. 2d at 1061; *cf. Liriano*, 700 N.E.2d at 769 ("[W]here the injured party was fully aware of the hazard . . . lack of a warning about that danger may well obviate the failure to warn as a legal cause of an injury resulting from that danger.").

As with the "open and obvious" exception and the common knowledge doctrine, a plaintiff may not escape the actual knowledge doctrine by claiming that he did not know of the *severity of the potential injury*. *See Clarke*, 219 F. Supp. 2d at 329.

> If such were the law, not only would the actual knowledge exception rarely apply, but manufacturers would face the unreasonable and probably impossible burden of warning consumers about every conceivable injury that could result from use and misuse of its product. . . . It is enough that the warning gives general notice of the danger and the conduct to be avoided.

Brand v. Mazda Motor Corp., 978 F. Supp. 1382, 1388 (D. Kan. 1997). *See also McCroy*, 207 F. Supp. 2d at 1276 ("That plaintiffs did not appreciate the degree of potential injury is

unfortunate, but does not translate into a duty to warn when the basic danger is already known.").

D. Learned Intermediary

Generally, in cases involving prescription drugs and medical devices, a manufacturer owes no duty to warn the ultimate consumer of any dangers in the drug or medical device, as long as the manufacturer adequately warns the prescribing physician of those dangers. *See Rivera v. Wyeth-Ayerst Labs.*, 197 F.R.D. 584, 590 (S.D. Tex. 2000); *McCombs v. Synthes*, No. S01G1633, 2003 WL 22146378, *2 (Ga. Sept. 15, 2003); *Edwards v. Basel Pharmaceuticals*, 933 P.2d 298, 300 (Okla. 1997). This exception is known as the "learned intermediary doctrine." *See Vitanza v. Upjohn Co.*, 778 A.2d 829, 838 (Conn. 2001) (listing courts from forty-four other jurisdictions that have adopted the learned intermediary doctrine).

The learned intermediary doctrine stems from well-grounded policy considerations which are set forth in comment (k) to Section 402A of the Restatement (Second) of Torts. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965). *See Vitanza*, 778 A.2d at 836; *Edwards*, 933 P.2d at 300. Comment (k) explains that some products are unavoidably unsafe, yet provide such societal benefits that their use is appropriate, notwithstanding their inherent risk. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965). Beneficial dissemination of such unavoidably unsafe products depends on adequate labeling and warnings. *Id.* Accordingly, if these products are properly prepared and are accompanied with proper directions and warnings, then these products are not *unreasonably* dangerous.

In keeping with these policy considerations, the learned intermediary doctrine does not obviate the need for the manufacturer to provide warnings, but merely governs to whom the manufacturer must provide the warnings. *Rivera*, 197 F.R.D. at 590. With respect to prescription drugs and medical devices, the learned intermediary doctrine recognizes that the physician, by virtue of his training and experience, occupies the best position to evaluate his patient's needs and perform the necessary "risk/benefit" analysis for a particular course of treatment. As long as the manufacturer adequately informs the physician of the product's properties and dangerous propensities, the manufacturer may reasonably assume that the physician will exercise his informed judgment together with his underlying training in the best interest of the patient. *Edwards*, 933 P.2d at 300-01.[5]

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[5]At least one court has suggested that the manufacturer must have a reasonable assurance that the learned intermediary will communicate the warning to the end user. *See Humble Sand & Gravel v. Gomez*, 48 S.W.3d 487, 495 (Tex. App.—Texarkana 2001, pet. granted). Other courts, however, do not appear to require a separate finding that the manufacturer's reliance on the intermediary was reasonable. Instead, these courts suggest that because the intermediary is the end user's physician, the manufacturer may rely on the intermediary to convey an appropriate instruction or warning. *See, e.g., Rivera*, 197 F.R.D. at 590; *Vitanza*, 788 A.2d at 847; *Edwards*, 933 P.2d at 300-01.

However, the learned intermediary doctrine will not shield a manufacturer from liability to the end user if the manufacturer's warning to the intermediary is inadequate or misleading. *Id.*

Some courts have held that the learned intermediary doctrine bars a plaintiff's claims against a manufacturer as a matter of law. Other courts, however, have suggested that while the doctrine may operate to shield the manufacturer from liability, the adequacy of the warning that the manufacturer conveys to the learned intermediary is a question for the trier of fact. *Compare Vitanza*, 778 A.2d at 840 ("The learned intermediary doctrine is a rule of law stating a duty.") *with McCombs*, 2003 WL 22146378, at *2 (holding that the adequacy of the warning to the physician was a question for the jury).

Courts have recognized two exceptions to the learned intermediary doctrine. *Edwards*, 933 P.2d at 301. First, the doctrine may not apply to immunization drugs. The rationale underlying this exception is that immunization drugs are not administered as prescription drugs and often are provided outside of a physician-patient relationship. *Id.* Second, the learned intermediary doctrine may not apply when the Federal Drug Administration requires the manufacturer to provide a warning directly to the ultimate user. *Id.* Most of the courts recognizing this second exception have limited its application to contraceptives. *See, e.g., Spychala v. G.D. Searle Co.*, 705 F. Supp. 1024 (D.N.J. 1988); *Odgers v. Ortho Pharmaceutical Corp.*, 609 F. Supp. 867 (E.D. Mich. 1985); *Lukaszewicz v. Ortho Pharmaceutical Corp.*, 510 F. Supp. 961 (E.D. Wis. 1981); *MacDonald v. Ortho Parmaceutical Corp.*, 475 N.E.2d 65 (1985).[6]

E. Sophisticated Users

Another limitation on a manufacturer's duty to warn consumers of known dangers is the sophisticated user doctrine. This doctrine derives from the proposition that the manufacturer's liability necessarily depends upon whether the manufacturer's conduct, including its dissemination of warnings or other information, was reasonable under the circumstances. Under the sophisticated user doctrine, the manufacturer's duty to warn, if any, depends on the user's special knowledge, expertise or sophistication. *See House v. Armour of America, Inc.*, 886 P.2d 542, 549 (Utah App. 1994); *see also Todd Shipyards Corp. v. Hercules, Inc.*, 859 F.2d 1224, 1225 (5th Cir. 1988) ("A manufacturer's duty to warn is limited 'where the purchaser or the user has certain knowledge or sophistication, professionally or otherwise, in regard to the product.'") (quoting *American Mutual Liab. Ins. Co. v. Firestone & Rubber Co.*, 799 F.2d 993, 994 (5th Cir. 1986)).

[6]However, at least one court has extended the exception to nicotine patches available by prescription. *Edwards*, 933 P.2d at 301.

In many instances, the sophisticated user doctrine may require that the manufacturer tailor its warning to the knowledge or experience of the expected user. *See Koonce v. Quaker Safety Prod. & Mfg. Co.*, 798 F.2d 700, 716 (5th Cir. 1986); *see also Pavlides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338 (5th Cir. 1984) (finding that the manufacturer of a product marketed exclusively for use by experienced professional may tailor its warning accordingly). For example, if a manufacturer markets a product solely for use in a particular industry, the manufacturer may potentially use industry jargon or technical language that would be unfamiliar to the general public. *See Smith v. Louisville Ladder Co.*, 237 F.3d 515, 521 (5th Cir. 2001) ("[A] supplier may rely on the professional expertise of the user in tailoring its warning.").

In other instances, the sophisticated user doctrine may require *no* warning at all. This would particularly hold true in situations where the manufacturer has purposely and successfully limited its marketing of its product to professionals. *See McGarvey v. G.I. Joe Septic Svc., Inc.*, 679 A.2d 733, 743 (N.J. Super. Ct. 1996) (noting that, in such cases, "the manufacturer's duty 'is owed only to the reasonably-anticipated sophisticated user, not the untrained interloper.'") (citations omitted); *see also Bock v. General Motors Corp.*, 637 N.W.2d 825, 830 (Mich. App. 2001).

Likewise, the sophisticated user doctrine requires *no* warning where the user, by his sophistication, should already be aware of the potential danger. *See, e.g., Crook v. Kaneb Pipe Line Operating P'ship*, 231 F.3d 1098, 1102 (8th Cir. 2000); *House*, 886 P.2d at 549. For example:

- A saw manufacturer owes no duty to warn an experienced carpenter of the danger associated with use of an ungrounded tool. *Ducote v. Liberty Mutual Ins. Co.*, 451 So.2d 1211, 1215 (La. App. 1984).

- A manufacturer of a seat cover owes no duty to warn an experienced installer of any danger associated with the manual assembly of seat cover onto a seat frame. *Welch v. Technotrim, Inc.*, 778 So.2d 728, 734 (La. App. 2001).

In this respect, the sophisticated user doctrine dovetails into the common knowledge and actual knowledge doctrines. *See supra* Sections B & C.

Determining the user's sophistication requires an objective analysis. The user's *actual* knowledge—or lack thereof—does not establish the extent to which a manufacturer should have provided a warning. Rather, the touchstone is what the "community" to which the user belongs "generally knows" about the product. *See House*, 886 P.2d at 549. "[A] sophisticated user possesses more than a general knowledge of the product and how it is used." *Hennegan v. Cooper/T. Smith Stevedoring Co.*, 837 So.2d 96, 100 (La. App. 2003) (quoting *Asbestos v. Bordelon, Inc.*, 726 So.2d 926, 950 (La. App. 1998)).

F. Sophisticated Intermediary

Another flavor of the sophisticated user doctrine is the sophisticated intermediary or sophisticated purchaser doctrine. As its name implies, this doctrine is implicated in cases involving an intermediary. For example, manufacturer A supplies a product to employer B, employer B allows employee C to use or be exposed to the product, employee C is injured as a result, and employee C claims that manufacturer A should be liable to employee C for manufacturer A's failure to warn employee C of the danger.

Like the sophisticated user doctrine, the sophisticated intermediary doctrine potentially applies where the manufacturer can demonstrate that a sophisticated intermediary, which already knew or arguably should have known of the danger, could have communicated warnings of the danger to the ultimate user. *See O'Neal v. Celanese Corp.*, 10 F.3d 249, 252 (4th Cir. 1993) (holding that sophisticated intermediary defense was available where the seller of salvaged equipment coated with lead-based paint could reasonably assume that a salvage company would recognize obvious hazards associated with a salvage operation, including the possibility that a red-colored substance might be red paint, and that the salvage company would take reasonable precautions to protect its employees).

However, courts have used different approaches to determine whether an intermediary is "sophisticated." The majority of courts appear to apply an objective standard, asking whether the intermediary knew or *reasonably should have known* about the dangers in the product. Other courts take a more narrow approach, applying an objective standard that asks only whether the intermediary *actually knew* about the dangers in the product. *See, e.g., U.S. Silica Co. v. Tompkins*, 92 S.W.3d 605 (Tex. App.—Beaumont 2002, no pet.); *Humble Sand & Gravel, Inc. v. Gomez*, 48 S.W.3d 487 (Tex. App.—Texarkana 2001, pet. granted).

Moreover, even after determining that an intermediary is "sophisticated," courts have used different approaches in deciding the extent to which the sophisticated intermediary doctrine obviates any duty to warn. In many cases, the courts determine only whether the intermediary is in fact "sophisticated," and if so, these courts conclude, almost as a given, that the manufacturer owes no duty to warn the end user. *See Fleck v. Titan Tire*, 177 F. Supp.2d 605, 618 (E.D. Mich. 2001) ("[W]hen the purchaser of the product is a sophisticated user, the manufacturer may reasonably rely upon the purchaser to warn the ultimate user and is relieved of the duty to warn the user directly."); *see also Mills v. Curioni*, 238 F. Supp. 876, 894 (E.D. Mich. 2002); *Morgan v. Brush Wellman, Inc.*, 165 F. Supp.2d 704, 718 (E.D. Tenn. 2001); *Midwest Specialities, Inc. v. Crown Industrial Prods. Co.*, 940 F. Supp. 1160, 1166 (N.D. Ohio 1996); *Cipri v. Bellingham Frozen Foods, Inc.*, 596 N.W.2d 620, 629 (Mich. App. 1999). This result frequently occurs in cases in which the plaintiff is an employee of the sophisticated intermediary.

In other cases, the courts focus on the reasonableness of the manufacturer's conduct to determine whether the manufacturer can avail itself of the sophisticated intermediary defense. These courts reason that the sophistication of the intermediary—or lack thereof—is merely one factor in weighing the reasonableness of the manufacturer's actions. *See, e.g., Ritchie v. Glidden Co.*, 242 F.3d 715, 724 (7th Cir. 2001). Other factors that these courts have considered relevant in their analysis include (a) the danger presented by the product; (b) the purpose for which the product is used; (c) the form of any warnings given; (d) the reliability of the intermediary as a conduit of information to the end users; (e) the magnitude of the risk involved if the intermediary does not pass on the warning; and (f) the burden placed on the manufacturer by requiring that it directly warn the end users, including the feasibility of providing a warning. *See, e.g., Adkins v. GAF Corp.,* 923 F.2d 1225 (6th Cir. 1991); *O'Neal*, 10 F.3d at 252; *Kalinkowski v. E.I. Du Pont de Nemours,* 851 F. Supp. 149, 157-58 (E.D. Pa. 1994); *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 163 (Ind. App. 1997).

Perhaps the most prevalent invocation of the sophisticated intermediary doctrine has been in cases in which the plaintiff has developed silicosis as a result of exposure to silica sand at the workplace. For the most part, with the exception of a couple of Texas cases, *see U.S. Silica Co.*, 92 S.W.3d at 609-10; *Humble Sand & Gravel, Inc.*, 48 S.W.3d at 497, the courts have uniformly applied the sophisticated intermediary doctrine and held that the supplier of silica sand owes no duty to warn an intermediary's employees of the dangers associated with exposure to silica dust. Some examples of these cases:

- *Gray v. Badger Mining Corp.*, 664 N.W.2d 881 (Minn. App. 2003)—In *Gray*, a foundry worker who had contracted silicosis brought a products liability action against Badger Mining, a bulk supplier of silica sand, alleging that the supplier had failed to warn him of the dangers of breathing silica dust. In analyzing whether the sophisticated intermediary doctrine applied, the court noted that the plaintiff's employer—a foundry that used silica sand—was a sophisticated user because it knew or should have known of the dangers associated with silica sand. *Id.* at 887. The foundry was in the best position to warn its employees of the danger because the supplier provided the sand to the foundry in bulk, where it was placed in the foundry's containers. *Id.* at 886. Accordingly, because Badger Mining supplied the sand in bulk to a sophisticated intermediary, Badger Mining had no duty to warn the end user. *Id.*

- *Bergfeld v. Unimin Corp.*, 319 F.3d 350 (8th Cir. 2003)—In *Bergfeld*, a foundry worker who had developed silicosis brought an action against the bulk supplier of silica sand to the worker's employer, a foundry that used the sand in making molds. Applying Iowa law, the court held that the supplier had no duty to warn either the foundry or the foundry's employees about the risk of

developing silicosis because the foundry was a sophisticated purchaser with generalized foundry industry knowledge relating to the dangers associated with silica sand even though the foundry did not adopt an industry-recommended standard addressing exposure to silica dust. The court noted that the fact that the foundry "chose not to adopt the NIOSH recommended standard is insufficient to rebut the substantial evidence of the company's knowledge of that standard." *Id.* at 354.

- *Smith v. Walter C. Best, Inc.*, 927 F.2d 736 (3d Cir. 1990)—In *Smith*, the court held, under Ohio law, that a silica sand supplier had no duty to warn a foundry's employee because the supplier delivered the sand in bulk, the injured employee did not personally receive the deliveries, and the foundry was in a better position to convey warnings to its employees. *Id.* at 740. Moreover, the court held that it was reasonable for the supplier to rely on the foundry's knowledge of the danger, given the regulations governing the sand, the state of common medical knowledge and the foundry's membership in the Industrial Health Foundation which provided information about silicosis. *Id.* at 741.

- *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552 (W.D. Va. 1984), *aff'd sub. nom. Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985)—In *Goodbar*, the court granted summary judgment to silica sand suppliers under the sophisticated intermediary doctrine. The court noted that the foundry industry knew about silicosis back in the 1930s. *Id.* at 562. Further, because the foundry's vice president was an active member of the American Foundrymen's Society (AFS), which disseminated much information about silicosis, the court imputed the AFS's knowledge to the foundry. *Id.* at 562-63. The court emphasized that the silica sand suppliers could reasonably assume that the foundry would make proper use of its knowledge and, thus, that the suppliers did not have any duty to warn. *Id.* at 565.

- *Haase v. Badger Mining Corp.*, 2003 WL 21800493 (Wis. App. Aug. 6, 2003)—In *Haase*, the court found that a foundry was a sophisticated intermediary because it had acquired extensive knowledge of the danger of inhaling silica dust. *Id.* at *6. The court based this finding on the fact that the foundry had been in business for more that 120 years, its managers were members of the American Foundrymen's Society and had attended meetings where they received literature about silica dust hazards, and the foundry had devoted significant time to keeping abreast of industry safety standards and government regulations. *Id.* As a result, the court concluded that the silica sand supplier could reasonably expect the foundry to institute the necessary safety precautions based on its own specific use of the silica sand. Thus, the

court held that the supplier had no duty to provide either the foundry or the foundry's workers with warnings regarding silicosis. *Id.*

- *Cowart v. Avondale Indus., Inc.*, 792 So.2d 73 (La. App. 2001)—In *Cowart*, the court held that the employer, a foundry using silica sand for sandblasting, was a sophisticated user that presumably knew the dangers in the use of sand in sandblasting because of its familiarity with both the product and the OSHA regulations governing its use. *Id.* at 76. The court noted that the supplier had no control over how the foundry conducted its sandblasting operations, nor did the supplier have any practical means of conveying any warning to the individual sandblasters. *Id.* Accordingly, the court concluded that the supplier had no duty to warn either the foundry or its employees. *Id.* at 77.

Each of these silica cases purports to apply the sophisticated intermediary doctrine, but they borrow heavily from the bulk supplier doctrine. *See supra* Section G.

G. Bulk Suppliers and Raw Material Suppliers

In the 1970s, "mass tort" lawsuits over asbestos or chemical exposure began to proliferate. These cases forced courts to examine whether sellers of raw materials were subject to liability where their raw materials were used in fabricating other products that caused injury. Initially, the Restatement declined to take a position on this question, due to the scarcity of case law on the subject.[7] Ultimately, however, most jurisdictions adopted a version of the "bulk supplier" doctrine or "raw material supplier defense," and the most recent version of the Restatement of Torts has now incorporated the bulk supplier doctrine as part of its section on "component parts." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. a (2000). *See In re Silicone Gel Breast Implants Prod. Liab. Litig.*, 996 F. Supp. 1110, 1113 (N.D. Ala. 1997) (bulk supplier doctrine "has apparently been adopted in all states in which the question has been presented").

Although the bulk supplier and raw material supplier doctrines were originally separate, they have now largely merged. *See In re Silicone Gel Breast Implants*, 996 F. Supp. at 1113. The bulk supplier doctrine applies when a product is sold in bulk to purchasers who then repackage the product for sale to the consumer. *Adams v. Union Carbide Corp.*, 737 F.2d 1453 (6th Cir.), *cert. denied*, 469 U.S. 1062 (1984). Whether an item has been sold "in bulk" is a question of fact, and may depend on the size of the container in which the product is sold. *See Ditto v. Monsanto Co.*, 867 F. Supp. 585, 592 (N.D. Ohio 1993) (noting that bulk supplier doctrine applies to shipments in containers smaller than tank cars or trucks, and has been applied to sale of chemical in 50-gallon drums). Courts have invoked the similar

[7] *See Walker v. Stauffer Chemical Corp.*, 19 Cal App3d 669, 673, 96 Cal. Rptr. 803 (1971) (discussing comment to RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

raw material supplier doctrine when raw materials, such as chemicals, sand or fibers, are mixed with other materials in fabricating another product for sale.

Basically, under the bulk supplier doctrine, the supplier has no duty to warn the ultimate consumer of any hazards that may result from integrating the bulk product or raw materials into an intermediate purchaser's product. This is true even if the supplier had knowledge of the intermediate purchaser's intended use and could have foreseen the risk. This is a departure from earlier law, and is premised on the policy that imposing a duty on suppliers to foresee and warn against all uses of their product would be "crushingly burdensome." *Hoffman v. Houghton Chem. Corp.*, 751 N.E.2d 848, 857 (Mass. Sup. Jud. Ct. 2001).

Under the bulk supplier doctrine, the fact that the bulk supplier may have reasonably foreseen the potential risks is irrelevant. Requiring the supplier to warn of all "foreseeable" risks resulting from the integration of bulk materials into a finished product would "force the supplier to retain an expert in every finished product manufacturer's line of business and second-guess the finished product manufacturer whenever any of its employees received any information about any potential problems." *Kealoha v. E.I. du Pont de Nemours & Co.*, 844 F. Supp. 590, 594 (D. Hawaii 1994), *aff'd*, 82 F.3d 894 (9th Cir. 1996). *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. c (2000) ("To impose a duty to warn would require the seller to develop expertise regarding a multitude of different end-products and to investigate the actual use of raw materials by manufacturers over whom the supplier has no control.").[8]

Indeed, the more basic the product, the more impossible such a burden would be. "Suppliers of versatile materials like chains, valves, sand gravel, etc., cannot be expected to become experts in the infinite number of finished products that might conceivably incorporate their multi-use raw materials or components." *In re TMJ Implants Prod. Liab. Litig.*, 97 F.3d 1050, 1057 (8th Cir. 1996). Thus, courts have declined to impose duties on suppliers of various types of raw materials:

- A bulk supplier of raw fibers used in the manufacture of bullet-proof vests had no duty to warn the ultimate user about the level of protection provided by the vests, even though the supplier knew the fibers might be used for the purpose of manufacturing the vests. *House v. Armour of Am., Inc.*, 886 P.2d 542, 5554 (Utah 1994).

[8]Moreover, requiring the supplier to warn of any dangers arising from the integration of its bulk materials into another's product is impractical. The supplier typically "has no package on which to relate his warning." *Munoz v. Gulf Oil Co.*, 732 S.W.2d 62, 66 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

- A Teflon supplier had no duty to warn consumers of the dangers that may result from the use of Teflon in temperomandibular joint implants, as Teflon was not inherently dangerous and was made dangerous only by its incorporation into another's product. *Kealoha v. E.I. DuPont de Nemours & Co.*, 82 F.3d 894 (9th Cir. 1996).

- A silicone supplier had no duty to warn breast implant recipients against the hazards of using silicone in medical devices. *Artiglio v. General Elec. Co.*, 61 Cal. App. 4th 830, 71 Cal. Rptr. 2d 817 (1998).

There are exceptions to the general rule, of course. A supplier may be liable to the ultimate consumer if the supplier exercised "control" over the design of the end-product. In the Restatement, the element of "control" is rephrased as "substantial participation." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5(b) (2000). Thus, a supplier may be liable if it "substantially participates" in the integration of raw materials or bulk products into another product. *Cf. Walker v. Stauffer Chemical Corp.*, 19 Cal. App. 3d 669, 674, 96 Cal. Rptr. 803 (1971) (holding, in a case where the plaintiff was injured by an explosion of a can of drain cleaner which contained sulfuric acid, that the supplier did not have a duty to the plaintiff because, among other things, the supplier did not have "control over the subsequent compounding, packaging or marketing" of the drain cleaner); *see also infra* Section H (discussing the "substantial participation" exception in connection with the component supplier doctrine).

One of the factors that courts may consider in applying the bulk supplier doctrine is whether the bulk product was itself "inherently defective or unreasonably dangerous." *In re Silicone Gel Breast Implants*, 996 F. Supp. at 1114. These are two different questions. Clearly, a supplier remains liable if the bulk product or raw material is "defective in itself." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5(a) (2000). A defective product is *not* one that is inherently dangerous by nature, such as benzene; rather, it is a product that is rendered dangerous by a manufacturing defect or design defect—or in the case of raw materials, by spoilage or contamination. *See id.* § 5 cmt. b; *see also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. p (1965) (supplier who sells raw beans contaminated with arsenic or some other poison should not be relieved of liability).

With respect to inherently hazardous raw materials such as benzene, the analysis is slightly different. Subject to any other exceptions, the supplier has a duty to warn of the hazards in its inherently hazardous materials, but it may satisfy its duty by providing warnings to the *intermediate* purchaser, who then has the responsibility of conveying the warnings to subsequent purchasers or the consumer. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. b (2000) ("The component seller is required to provide instructions and warnings regarding risks associated with the use of the component

product"); *see also Groll v. Shell Oil Co.*, 148 Cal. App.3d 444, 449, 196 Cal. Rptr. 52 (1983).[9]

If the hazards of a material are known to the intermediate purchaser, then the supplier may not even have a duty to warn about these known hazards. *See Ditto v. Monsanto Co.*, 867 F. Supp. 585 (N.D. Ohio 1993) (where employee of electric transformer servicing company allegedly contracted leukemia from exposure to PCB-containing fluids in electrical transformers, and employer was well aware of the hazards of PCBs, supplier of PCB dielectric fluids did not have a duty to warn worker of hazards of the PCBs); *see also Wood v. Phillips Petroleum Co.*, 2003 WL 22077294 (Tex. App.—Houston [14th Dist.] Sept. 9, 2003, no pet. h.) (slip op.). However, the bulk supplier may bear the burden of proving that the intermediate seller is "adequately trained and warned, familiar with the propensities of the product and its safe use, and capable of passing its knowledge on to users in a warning." *Alm v. Aluminum Co. of America*, 717 S.W.2d 588, 591-92 (Tex. 1986).

Not surprisingly, some courts applying the bulk supplier doctrine have inquired whether the intermediate purchaser was a "sophisticated" buyer, thus mingling the bulk supplier doctrine with the sophisticated intermediary doctrine. *See, e.g., In re Silicone Gel Breast Implants*, 996 F. Supp. at 1114-15; *cf.* Section F (sophisticated intermediary doctrine).

H. Component Part Supplier

Under the component supplier doctrine, a manufacturer of a component part generally has no duty to warn of hazards that may arise from the integration of its part into a larger system or product.[10] As an extremely broad example of this doctrine, a manufacturer of a screw or wire need not warn end users about the hazards that may arise from integrating the screw or wire into a hair dryer.[11] The Restatement defines the component supplier doctrine as follows:

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[9]Whether the supplier owes a duty to warn the intermediate purchaser may depend on whether the supplier knows, or should have known, of the inherently dangerous risks in its bulk product. *See, e.g., Stuckey v. Northern Propane Gas Co.*, 874 F.2d 1563, 1568 (11th Cir. 1989) (propane gas supplier had knowledge of ultimate consumer's use of gas, and therefore had a duty to warn that the odorant in its gas could fade); *Andrulonis v. U.S.*, 924 F.2d 1210 (2d Cir. 1991) (government that supplied sample rabies researcher knew that research would put the virus into aerosol form and should have known about the risk of aerosolizing the virus, so had a duty to give warnings about the hazard).

[10]The component part doctrine is closely related to the bulk supplier doctrine, and many of the concepts are so similar that they need not be repeated here. Indeed, the Restatement consolidates both doctrines under Section 5.

[11]This section deals only with the duty to warn of hazards arising from the integration of a component part *into another product.* The component part manufacturer may still be liable for failing to warn the intermediate purchaser of known dangers associated with its *own* component.

> One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or property caused by a product into which the component is integrated if: (a) the component is defective in itself, as defined in this Chapter, and the defect causes the harm; or (b)(1) the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and (b)(2) the integration of the component causes the product to be defective, as defined in this Chapter; and (b)(3) the defect in the product causes the harm.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 (2000).

The policy underlying the component part supplier doctrine, as with the bulk supplier doctrine, is that a component supplier cannot be expected to have meaningful knowledge about the way in which its component part may be integrated into someone else's system or product. Requiring such knowledge would be prohibitively expensive, particularly if the component part—such as a switch or lamp socket—might be used in thousands of different applications. *See id.* § 5 cmt. a. The component part supplier cannot reasonably be required to hire personnel, including experts, to figure out all the different ways that purchasers might use its component parts—and to develop warnings about those uses. *See Frazier v. Materials Transp. Co.*, 609 F. Supp. 933, 935 (D.Pa.1985) ("Suppliers of component parts, no matter how small or insignificant, should not be held to inquire into their ultimate use and foresee all possible applications in order to satisfy a duty to warn of potential danger associated with the finished product."); *see also Searls v. Doe*, 505 N.E.2d 287, 289 (Ohio App. 1986).

Moreover, as with bulk suppliers or suppliers of raw materials, requiring component part suppliers to give warnings about finished products would be unfair because it would make suppliers responsible for products that they had no role in developing and over which they have no control. *See, e.g., Crossfield v. Quality Control Equipment Co.*, 1 F.3d 701, 704 (8th Cir. 1993).

As with the bulk supplier rule, there are several exceptions to the component part doctrine. First, a component part manufacturer may be liable under a failure to warn theory if the component part *itself* is defective. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5(a) (2000). In other words, if a manufacturer sells a component that is itself unreasonably dangerous, and this component is incorporated into a product that injures a user, then the component part manufacturer may be liable for the injury resulting from its unreasonably dangerous component part. *See Burbage v. Boiler Eng'g & Supply Co.*, 249 A.2d 563 (Pa. 1969) (defective replacement valve in boiler).

However, by definition, this exception only applies when the component part is itself defective. A component part supplier owes no duty to warn when another party integrates

its non-defective component part into another product in a way that makes the ultimate product unreasonably dangerous. *See Crossfield*, 1 F.3d at 704 ("[T]he dangerousness of this system came from the design of the machine, not from the chain alone. . . . [T]he primary duty was owed by the designer of the machine, not the supplier of only one component part, in itself a non-defective element."). As the Restatement explains: "[W]hen a sophisticated buyer integrates a component into another product, the component seller owes no duty to warn either the immediate buyer or ultimate consumers of dangers arising because the component is unsuited for the special purpose to which the buyer puts it." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. b (2000).

Another exception to the component supplier doctrine is the "substantial participation" rule. A component part manufacturer who "substantially participates" in integrating a component part into another's product may be liable to the end user where the component part causes the product to become defective in a way that injures the user. *Id.* § 5(b). This exception reflects case law holding that a component part manufacturer is not liable for hazards resulting from the integration of its component part into another's product unless the component part manufacturer exercised some "control" over the integration. *See, e.g.*, *Trevino v. Yamaha Motor Corp.*, 882 F.2d 182, 184-86 (5th Cir. 1989) (supplier that lacked control over design of finished product was not liable).[12]

The Restatement attempts to describe what may constitute "substantial participation," stating that this may be shown if "[t]he manufacturer or assembler of the integrated product . . . invite[s] the component seller to design a component that will perform specifically as part of the integrated product or to assist in modifying the design of the integrated product to accept the seller's component," or if the seller plays "a substantial role in deciding which component best serves the requirements of the integrated product." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. e (2000). By comparison, the Restatement also describes the kind of conduct that does *not* constitute substantial participation:

> A component seller who simply designs a component to its buyer's specifications, and does not substantially participate in the integration of the component into the design of the product, is not liable . . . . Moreover, providing mechanical or technical services or advice concerning a component part does not, by itself, constitute substantial participation that would subject the component supplier to liability.

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[12]The integration of the component itself must be the cause of the harm: "[t]he mere fact that the component seller substantially participates in the integration of the component into the design of a product does not subject the seller to liability unless the integration causes the product to be defective and the resulting defect causes the plaintiff's harm." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. f. (2000).

Id.

As the Restatement explains, recommendations and technical support are not substantial participation. The Restatement specifically illustrates the distinction between substantial participation and insubstantial participation:

> ABC Chemical Co. sells plastic resins in bulk. XYZ Hot Water Heater Manufacturing Co. informs ABC that XYZ wishes to purchase resin for use in making its hot-water heaters and specifies resin that can withstand heat up to 212º Fahrenheit. ABC recommends that XYZ use a certain type of resin which, in ABC's testing under specified laboratory conditions, including thickness of one-quarter inch or more, was shown to be capable of withstanding temperatures in excess of 212º Fahrenheit. ABC explains these conditions to XYZ. ABC also provides XYZ with technical support and general processing advice. XYZ purchases the recommended resin from ABC and decides upon design and processing parameters, molds the resin into a plastic part, and combines the part with other materials and parts to produce hot-water heaters. XYZ tests its hot-water heaters for safety and durability and formulates instructions and warnings to accompany them. An XYZ hot-water heater subsequently fails because the plastic walls specified by its design, one-eighth inch thick, are too thin to withstand the stress imposed by its normal operating temperatures, resulting in an injury to a homeowner. ABC is not liable to the homeowner. The resin sold by ABC was not in itself defective. ABC did not substantially participate in the design, manufacture or assembly of the hot-water heater.

Id. illustration 6.

Notwithstanding the component supplier doctrine, some courts will occasionally find a way to impose liability where the policies underlying the component supplier doctrine are not strongly implicated. For instance, a few courts have imposed liability on component part sellers—even in the absence of substantial participation—if the component part has only one conceivable use. *See, e.g., Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 117-19 (3d Cir. 1992) (finding a manufacturer of a replacement pool liner liable for failing to attach warning labels advising of the dangers of diving into a shallow pool because a pool liner has only a single use and the manufacturer could have foreseen the danger of failing to attach warning labels), *cert. denied sub nom. Doughboy Recreational Inc. v. Fleck*, 507 U.S. 1005, 113 S. Ct. 1645 (1993).

But in most instances, common sense will prevail over lunacy. Where a component part supplier does not itself substantially participate in integrating its component into a larger

product, the manufacturer of the larger product—and not the component supplier—should bear the responsibility for conveying adequate warnings to the ultimate user.

Conclusion

To think that a manufacturer or supplier *always* owes a duty to warn users of *all* foreseeable dangers in a product is simply incorrect. Certainly, a manufacturer or supplier *generally* owes a duty to warn users of the foreseeable dangers in its product. But even this general rule is subject to a variety of exceptions. The exceptions to this general rule go by several names—the common knowledge doctrine, the sophisticated user doctrine, the component supplier doctrine, etc. Essentially, though, these exceptions reflect a simple common sense notion that manufacturers and suppliers need have not go to ridiculous extremes in placing warnings on their products. Products liability law simply does not require that a manufacturer or supplier make a silly, useless or impractical warning.