A "Sophisticated" Question. Application of the Sophisticated User Defense Under Ohio Law.

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You would expect there to a relatively simple answer to a question of whether a defense that has its origins in the Restatement (Second) of Torts is recognized by Ohio product liability law. However, the contours of the sophisticated user defense continue to present challenges to Ohio practitioners.

The first problem is one of nomenclature. The sophisticated user defense goes by a bewildering number of aliases, including the "sophisticated purchaser defense," the "sophisticated intermediary defense," the "sophisticated user doctrine," and the "bulk purchaser defense." *See, e.g.,* Mary-Christine Sungalia & Kevin C. Mayer*, Limiting Manufacturers' Duty to Warn: The Sophisticated User and Purchaser Doctrines*, 76 Def. Counsel J. 196 (2009); Jeffrey W. Kemp, and Lindsy Nicole Alleman *The Bulk Supplier, Sophisticated User and Learned Intermediary Doctrines Since the Adoption of the Restatement (Third) of Torts*, 26 Rev.Litig. 12860 (2007) (collecting names); Note*: Failures to Warn and the Sophisticated User Defense*, 74 Va.L.Rev. 579 (1988). The differing labels reflect some of the differing fact patterns in which the defense can apply and may, or may not, have legal significance.

Whatever it is called, all version of the doctrine are grounded in section 388 of the Restatement of Torts (Second) which states:

> 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
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> (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
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> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
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> (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," provides the explanation for the sophisticated user defense. It recognizes that products are 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." Some of the factors to consider are the character of the third person (i.e.,

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whether the third person can reasonably be expected to communicate the dangerous characteristics of the product to those who use it) and the magnitude of the risk. 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.

Conceptually, the sophisticated user defense is similar to the learned intermediary doctrine. That doctrine holds that suppliers of pharmaceuticals and medical devices can discharge their duty to warn by providing warnings to a consumer's physician or other health care provider. *See, e.g., Sterling Drug v. Cornish*, 370 F.2d 82, 85 (8th Cir. 1996); *Tracy v. Merrell Dow Pharmaceutical,* 58 Ohio St.3d 147, 569 N.E.2d 875 (1990). Ohio has codified the learned intermediary doctrine. R.C. 2307.76(C). The Ohio Supreme Court has also held that the common law learned intermediary doctrine continues to apply to cases not covered by the statutory language. *Vaccarielo v. Smith & Nephew Richards*, 94 Ohio St.3d 380, 202-Ohio-892, 763 N.E.2d 160. However, Ohio has not codified a sophisticated user defense, and the Ohio Supreme Court has never addressed the defense by any name.

Cases from other courts are conflicting. Federal courts have generally held that Ohio would recognize a sophisticated user defense. *See, e.g., Jacobs v. E.I. du Pont Nemours & Co.*, 67 F.3d 1219, 1238-41 (6th Cir. 1995) (affirming summary judgment for manufacturer of chemical to sophisticated manufacturer under "bulk-supplier/sophisticated intermediary rule"); *Adams v. Union Carbide Co.*, 737 F.2d 1453 (6th Cir. 1984); *Smith v. Walter Best, Inc.*, 927 F.3d 736 (3d Cir. 1990) (applying Ohio law); *Midwest Specialties v. Crown Indus. Prods.*, 940 F. Supp. 1160, 1166 (N.D. 1996) (granting summary judgment to manufacturer and holding that manufacturer was reasonable in relying intermediaries to supply necessary warnings) *aff'd* 142 F.3d 435 (6th Cir. 1998); *Ditto v. Monsanto Co.*, 867 F. Supp. 585, 591-93 (S.D. Ohio 1993) (holding that supplier had no duty to warn employee of sophisticated purchaser of electrical products of dangers of PCBs when it was reasonable to assume purchasers would warn employees of the danger).

Lower Ohio courts have reached mixes results in applying the defense. The clearest pronouncement came in *Doane v. Givaudan Flavors,* 184 Ohio App.3d 26, 2009-Ohio-4989, 919 N.E.2d 290 (1st Dist.). Employees at a flavoring plant sued the manufacturer of a chemical claiming it had caused them to develop a respiratory ailment. The manufacturer argued that it was not liable under the "sophisticated-or-knowledgeable purchaser doctrine," because it had provided warnings to the employer who purchased the product. The court agreed and affirmed summary judgment in favor of the employer, finding that the employer was a sophisticated purchase and could be relied upon to provide the necessary warnings. *Id*. at ¶ 25-28. *See also Vermett v. Fred Christen & Sons Co.*, 138 Ohio App.3d 586, 611, 741 N.E.2d 954 (6th Dist. 2000) (holding that manufacturer is not required to notify an employee of "that which the responsible party, the employer, was already aware.")

However, the decisions are not completely uniform. In *Eastman v. Stanley Works*¸180 Ohio App.3d 844, 2009-Ohio-634, 907 N.E.2d 768, (10th Dist.), the court commented that the Ohio Supreme Court has never addressed the sophisticated purchaser defense, and the court seemed to question its validity. *Id*. at ¶ 49-51. The court held that the trial court did not err in refusing to give a sophisticated user instruction to the jury, and noted the important limitation that the doctrine had never been applied to claims based on anything other than a failure to warn, and that the sophisticated user had never been found to be an employee himself. Other decisions can perhaps be read as finding that the defense was not applicable under the specific facts of the case, rather than a rejection of the defense entirely.

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Cf. Adkins v. GAF Corp., 923 F.3d 1225, 1229-31 (6th Cir. 1990) (holding that where supplier had knowledge of employer's operations and can have provided more effective warning on product itself, fact issue existed whether supplier had provided adequate warning); *Roberts v. George Hamilton Co.*, 7th Dist. Jefferson No. 99 JE 26, 2000 Ohio App. LEXIS 2981, *10 (June 30, 2000) (suggesting that "learned intermediary" doctrine may only apply in medical setting and that it was not reasonable for asbestos distributor to rely on employer to provide warnings); *Steinke v. Kock Fules, Inc.*, 78 Ohio App.3d 791, 795-96, 605 N.E.2d 1341, (10th Dist. 1992) (discussing knowledgeable purchaser doctrine but affirming jury verdict finding that it was not reasonable for fuel manufacturer to rely on Ohio Department of Transportation to warn employees). Nevertheless, the issue is sufficiently unsettled that one federal district court transferred a case to Ohio for decision by an Ohio court rather than resolve the issue itself. *Gorrell v. Goodyear Tire & Rubber Co.*, No. 2:12-60179, 2014 U.S. Dist. LEXIS 168977 (E.D.Pa. Oct. 10, 2014).

So, what can we take away from these unsettled precedents? First, in cases where a product is distributed to someone other than the end user, the potential application of a sophisticated user defense should be considered. Choice-of-law issues should also be examined to determine whether the law of another jurisdiction that more clearly recognizes the defense, or alternatively rejects it entirely, may be applicable. Finally, if the defense could be applicable, counsel for the manufacturer should work to develop a factual record establishing that it was reasonable for the manufacturer to rely on the intermediaries to provide the necessary warnings to the plaintiff. These steps will help you to present a sophisticated defense.

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