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PRODUCTS LIABILITY AND THE CHEMICAL MANUFACTURER: LIMITATIONS ON THE DUTY TO WARN

RICHARD O. FAULK*

Introduction

In the last decade, the principles of strict liability have been expanded to encompass virtually every type of injury caused by a manufacturer's product. Indeed, at least one state has effectively imposed absolute liability, under which a manufacturer is liable for all harm caused by its product, regardless of whether the injury was foreseeable at the time of manufacture.¹ When the product is an identifiable object, such as an automobile or a household tool, conduct-related defenses, such as misuse, voluntary assumption of the risk, and contributory negligence, may apply. In the case of industrial chemicals, however, additional considerations are important. Although they are not "affirmative defenses," they may serve to excuse or qualify the duty to warn of product hazards.

This article will examine two issues that, for the most part, are unique to chemical litigation. Each is derived from manufacturers' marketing procedures. "Sophisticated user" considerations apply when the chemical is marketed through knowledgeable intermediaries, or is sold directly to persons who are aware of the dangers associated with product use. "Bulk seller" issues arise in cases in which the product is sold en masse through distributors, who are then responsible for separating the chemical into containers for individual customers. In these instances, many courts have eliminated or qualified the manufacturer's duty to warn, citing the severe practical burdens inherent in identifying and communicating with remote users. Such limitations on the

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1. See *Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982). As late as summer, 1984, *Beshada* stood at the extreme of modern products liability, having moved past the traditional standards of section 402A of the *Restatement (Second) of Torts*, and followed progressive theories proposed by Wade and Keeton. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973); Keeton, *Products Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973). *Beshada's* "absolute liability" was criticized, however, by both judges and commentators, see, e.g., *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288, 298-99 (N.H. 1983); *Feldman v. Lederle Labs.*, 189 N.J. Super. 424, 460 A.2d 203 (N.J. Super. Ct. App. Div. 1983); Faulk, "*Absolute Liability*": *Historical Perspectives and Political Alternatives*, 37 OKLA. L. REV. 569 (1984); Powers, *The Persistence of Fault in Strict Products Liability*, 61 TEX. L. REV. 777 (1983), and has recently been "restricted to the facts which gave rise to its holding." *Feldman v. Lederle Labs.*, 479 A.2d 374, 388 (N.J. 1984). Significantly, Dean Wade has now disassociated himself from Dean Keeton's theories, asserting his belief that post-manufacturer liability should be judged by negligence standards, rather than by strict liability. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 760-62 (1983).

manufacturer's duty to warn are consistent with traditional strict liability goals and foster industrial safety concerns.

The Sophisticated User

"Sophisticated user" considerations generally apply when a manufacturer sells a chemical product to a distributor or a customer who either knows or should know the dangers associated with chemical use. Since many chemical suits involve employees of product customers, these considerations may prove especially important in actions involving sophisticated employers. In these cases, the employer's knowledge may significantly affect the manufacturer's duty to warn.

The primary source of the "sophisticated user" issue is section 388 of the *Restatement (Second) of Torts*,² which provides:

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 this section elaborates on the relevance of purchaser sophistication:

There is necessarily some chance that information given to the third person will not be communicated by him to those who are to use the chattel. This chance varies with the circumstances existing at the time the chattel is turned over to the third person, or permission is given to him to allow others to use it. These circumstances include the known or knowable character of the third person and may also include the purpose for which the chattel is given. *Modern*

2. RESTATEMENT (SECOND) OF TORTS § 388 (1965) (emphasis added). This section generally governs warning obligations under both strict liability and negligence. *See, e.g.,* Manning v. Ashland Oil Co., 721 F.2d 192 (7th Cir. 1983); Mayberry v. Akron Rubber Mach. Corp., 483 F. Supp. 407 (N.D. Okla. 1979); Shell Oil Co. v. Gutierrez, 119 Ariz. 426, 581 P.2d 271 (Ct. App. 1978). *But see* Whitehead v. St. Joe Lead Co., 729 F.2d 238 (3d Cir. 1984). Such holdings are consistent with decisions that recognize the relevance of blameworthy conduct in products liability actions based on warning deficiencies. *See, e.g.,* Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). *See generally* RESTATEMENT (SECOND) OF TORTS, § 402A, comment j (1965); Powers, *supra* note 1.

*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.*³

Strictly speaking, this section does not set forth an “affirmative defense” to liability. Rather, it defines the scope of a manufacturer’s duty to warn of product hazards. According to section 388 and its comments, the extent of a manufacturer’s duty to warn is variable, depending upon the purchaser’s expertise in product use. Thus cases involving sophisticated purchasers make the plaintiff’s burden of proof more stringent. In such actions, the plaintiff must prove not only that the warning that reached him was inadequate but also that the manufacturer had no reason to believe that its customer would realize the dangers of the product. Viewed in this perspective, the plaintiff’s burden of proof is significantly increased.⁴

The relevance of purchaser sophistication was first developed in cases involving prescription drugs. In those cases, physicians who distributed or administered potentially harmful medicines were held to be “learned intermediaries.”⁵ The drug manufacturer’s duty to warn was limited to a warning adequate to advise the *physician* of the risks associated with the drug; once such a warning was given, the manufacturer was absolved of responsibility to patients injured by the physician’s neglect.⁶ Such cases recognized that the manufacturer’s duty to warn was not absolute; rather, it depended on the foreseeable risk inherent in the marketing process.⁷ As a matter of social policy, courts recognized that a manufacturer should be able to reasonably rely on sophisticated purchasers to discharge their independent duties to protect consumers.⁸

3. RESTATEMENT (SECOND) OF TORTS § 388, comment n, at 308 (1965) (emphasis added).

4. See *Manning v. Ashland Oil Co.*, 721 F.2d 192, 194 (7th Cir. 1983).

5. See, e.g., *Timm v. Upjohn Co.*, 624 F.2d 536, 538 (5th Cir. 1980). The phrase “informed intermediary” has also been used. See *Lindsay v. Ortho Pharm. Corp.*, 637 F.2d 87 (2d Cir. 1980).

6. See *Brochu v. Ortho Pharm. Corp.*, 642 F.2d 652 (1st Cir. 1981); *Lindsay v. Ortho Pharm. Corp.*, 637 F.2d 87 (2d Cir. 1980); *Timm v. Upjohn Co.*, 624 F.2d 536 (5th Cir. 1980); *Givens v. Lederle*, 556 F.2d 1341 (5th Cir. 1977); *Reyes v. Wyeth Labs.*, 498 F.2d 1264 (5th Cir.), cert. denied, 419 U.S. 1096 (1974); *Davis v. Wyeth Labs., Inc.*, 399 F.2d 121 (9th Cir. 1968); *Sterling Drug, Inc. v. Cornish*, 370 F.2d 82 (8th Cir. 1966); *Ortho Pharm. Corp. v. Chapman*, 180 Ind. App. 33, 388 N.E.2d 541 (1979); *Hines v. St. Joseph’s Hosp.*, 86 N.M. 763, 528 P.2d 1075 (1974); *Wolfgruber v. Upjohn Co.*, 72 A.D.2d 59, 423 N.Y.S.2d 95 (1979); *McKee v. Moore*, 648 P.2d 21 (Okla. 1982); *McEwen v. Ortho Pharm. Corp.*, 270 Or. 375, 528 P.2d 522 (1974); *Leibowitz v. Ortho Pharm. Corp.*, 224 Pa. Super. 418, 307 A.2d 449 (1973); *Terhune v. A.H. Robins Co.*, 90 Wash. 2d 9, 577 P.2d 975 (1978).

7. See, e.g., *Cunningham v. Charles Pfizer & Co.*, 532 P.2d 1377 (Okla. 1974) (mass marketer of polio vaccine held responsible for polio contraction where marketing and inoculation procedures did not necessarily involve physician’s screening of individual patients). See generally Twerski, Weinstein, Donoho & Piehler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 501 (1976); Merrill, *Compensating for Prescription Drug Injuries*, 59 VA. L. REV. 1 (1973).

8. See, e.g., *McKee v. Moore*, 648 P.2d 21, 24-25 (Okla. 1982), wherein the court stated: It is the physician’s duty to inform himself of the qualities and characteristics of

The "learned intermediary" limitation was not restricted to medical contexts, however. Through section 388 of the *Restatement*, it encompassed virtually the entire range of professional and industrial products, ranging from professional hair care⁹ to industrial chemicals and instruments.¹⁰ In these cases, the courts generally limited the manufacturer's warning obligation to warnings sufficient to apprise a sophisticated user of product dangers. Indeed, some courts essentially held the manufacturer's failure to warn *irrelevant* when it was shown that the purchaser was familiar with product dangers.¹¹

One of the earliest nonmedical considerations of user sophistication was in *Marker v. Universal Oil Products Co.*,¹² a decision construing Oklahoma law. In *Marker*, a refinery employee was asphyxiated by carbon monoxide gas. The widow sued the manufacturer of a catalytic polymerization unit in which the decedent was working. She alleged that the manufacturer was liable for failing to warn the decedent of the danger of entering the unit when hot catalyst had been placed inside. At trial, the manufacturer established that the decedent's employer was fully aware of the danger of asphyxiation. Based on this evidence, the trial court directed a verdict for the manufacturer. On appeal, the Tenth Circuit affirmed. The court reasoned that since the creation of the dangerous condition was equally within the technical knowledge of both the manufacturer and the employer, the manufacturer had no duty to warn the employer.¹³ The court further stated:

The duty to "exercise reasonable care" in supplying information regarding the creation is placed upon the supplier by Section 388 [of the *Restatement*] and if he has done so, he is not subject to liability, *even though the information never reaches those for whose use the chattel is supplied*. Under the circumstances of this case, it is beyond question that defendant [manufacturer] owed to

those products which he administers or prescribes for use of his patient, and to exercise his judgment, based upon his knowledge of the patient as well as the product. . . . Thus, if the product is properly labeled and carries the necessary instructions and warnings to fully apprise the physician of the proper procedures for use and the dangers involved, *the manufacturer may reasonably assume that the physician will exercise an informed judgment in the best interest of the patient*.

(Emphasis added). See also *Terhune v. A.H. Robins Co.*, 90 Wash. 2d 9, 577 P.2d 975 (1978).

9. See, e.g., *Helene Curtis Indus., Inc. v. Pruitt*, 385 F.2d 841 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968) (professional hair bleach).

10. See *Brown v. Link Belt Div. of FMC Corp.*, 666 F.2d 110 (5th Cir. 1982) (crane on offshore drilling platform); *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457 (5th Cir. 1976) (barge stripping operations); *Jacobson v. Colorado Fuel & Iron Corp.*, 409 F.2d 1263 (9th Cir. 1969) (high-pressure cable tightening device); *Parkinson v. California Co.*, 255 F.2d 265 (10th Cir. 1958) (propane gas storage); *Marker v. Universal Oil Prod. Co.*, 250 F.2d 603 (10th Cir. 1957) (catalytic polymerization unit); *Hopkins v. E.I. duPont de Nemours & Co.*, 212 F.2d 623 (3d Cir. 1954) (blasting); *Mayberry v. Akron Rubber Mach. Corp.*, 483 F. Supp. 407 (N.D. Okla. 1979) (rubber products sold for industrial use).

11. See, e.g., *Jacobson v. Colorado Fuel & Iron Corp.*, 409 F.2d 1263 (9th Cir. 1969) (manufacturer of high-pressure cable-tightening device had no duty to warn purchaser of dangers already known by purchaser's supervisory personnel).

12. 250 F.2d 603 (10th Cir. 1957).

13. *Id.* at 606 (emphasis added).

Tidewater [the employer] no duty to instruct it as to fundamental formulae and the possibility of danger in the misuse of the polymerization unit and *it had the right to rely on Tidewater to protect its own employees from harm.*¹⁴

Other federal circuits have followed *Marker's* rationale. For example, in *Helene Curtis Industries, Inc. v. Pruitt*.¹⁵ a layman purchased professional hair-bleaching products from a beauty salon and applied them to plaintiff's hair at her home. The products clearly stated that they were for "Professional Use Only." As a result of the application, plaintiff's scalp was severely burned, and she sued the manufacturer in strict liability. Although the trial court rendered judgment in her favor, the Fifth Circuit reversed and remanded, holding that the manufacturer could not be held responsible for injuries resulting from nonprofessional use. In so ruling, the court stated that the directions on the products had to be adequate only for a professional's use.¹⁶

Marker and *Pruitt* are consistent with the holdings of many other cases. In *Littlehale v. E. I. duPont de Nemours & Co.*,¹⁷ Judge Tenny stated:

[T]here is ordinarily no duty to give warning to members of a profession against generally known risks. There need be no warning to one in a particular trade or profession against a danger generally known to that trade or profession *If no warning is required to be given by the manufacturer to a purchaser who is well aware of the inherent dangers of the product, there is no duty on the part of the manufacturer to warn an employee of that purchaser.*¹⁸

The Third,¹⁹ the Fourth,²⁰ the Sixth,²¹ the Seventh,²² and the Ninth²³ circuits have also accepted this reasoning, as well as several states.²⁴

14. *Id.* at 607 (emphasis added).

15. 385 F.2d 841 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968).

16. 385 F.2d at 858 (emphasis added).

17. 268 F. Supp. 791 (S.D.N.Y. 1966), *aff'd*, 380 F.2d 274 (2d Cir. 1967).

18. 268 F. Supp. at 799 (emphasis added).

19. *Dougherty v. Hooker Chem. Corp.*, 540 F.2d 174 (3d Cir. 1976) (Pennsylvania law); *Bertone v. Turco Products, Inc.*, 252 F.2d 726 (3d Cir. 1958) (New Jersey law); *Hopkins v. E.I. duPont de Nemours & Co.*, 212 F.2d 623 (3d Cir. 1953), *cert. denied*, 348 U.S. 872 (1954) (Pennsylvania law). *Cf. Whitehead v. St. Joe Lead Co.*, 729 F.2d 238 (3d Cir. 1984) (holding "sophisticated user" considerations to be questions of fact under New Jersey law).

20. *Marshall v. H.K. Ferguson Co.*, 623 F.2d 882 (4th Cir. 1980) (Virginia law).

21. *Adams v. Union Carbide Corp.*, 737 F.2d 1453 (6th Cir. 1984) (Ohio law); *Weekes v. Michigan Chrome & Chem. Co.*, 352 F.2d 603 (6th Cir. 1965) (Michigan law).

22. *Gonzalez v. Volvo of Am. Corp.*, 752 F.2d 295 (7th Cir. 1985) (Indiana law); *McKay v. Upton-Walton Co.*, 317 F.2d 826 (7th Cir. 1963) (Illinois law).

23. *Jacobson v. Colorado Fuel & Iron Corp.*, 409 F.2d 1263 (9th Cir. 1969) (Montana law). *But cf. Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809 (9th Cir. 1974) (Montana law) (holding that individual duty to warn may arise where product is used by employees outside the supervision of technical personnel).

24. *See Fierro v. International Harvester Co.*, 127 Cal. App. 3d 862, 179 Cal. Rptr. 923 (1982); *May v. Allied Chlorine & Chem. Prod., Inc.*, 168 So. 2d 784 (Fla. Dist. Ct. App. 1964);

Some decisions that recognize the relevance of "sophisticated user" arguments characterize the issue as a question of fact. For example, in *Whitehead v. St. Joe Lead Co.*,²⁵ the Third Circuit held that employer sophistication did not, under the record of the case, preclude manufacturer liability as a matter of law. Since, under New Jersey law, knowledge of the risk of an employer's failure to warn is imputed to the manufacturer,²⁶ the court held that the "probable effect of any warning to a knowledgeable buyer simply presents a question of fact concerning proximate causation for the jury."²⁷ Although the court recognized that other states had decided the issue as a matter of law, it concluded that New Jersey law, as well as the case record, prohibited such a result.²⁸ Significantly, however, the *Whitehead* court did not hold user sophistication irrelevant in strict liability actions; rather, it merely assigned it as a "factor" for the jury's consideration in causation.²⁹

Cases that have rejected "sophisticated user" arguments have involved marketing practices substantially different from those used in the chemical industry. For example, in *Siabie v. Symons Corp.*,³⁰ the court held that a manufacturer was not protected from strict liability by warning the plaintiff's employer of support rod dangers. Nevertheless, the court recognized that a different result might be appropriate in cases where the warning difficulties were "immense."³¹ As an example, the court suggested that such a situation might include cases "where toxic liquids are delivered in large quantities and

Jones v. Hittle Serv. Co., 219 Kan. 627, 549 P.2d 1383 (1976); West v. Hydro-Test, Inc., 196 So. 2d 598 (La. Ct. App. 1967); Fabbri Family Foods, Inc. v. United Canning Corp., 90 Mich. App. 80, 280 N.W.2d 877 (1979); Alm v. Aluminum Co. of Am., 687 S.W.2d 374 (Tex. Civ. App. 1985); Reed v. Pennwalt Corp., 22 Wash. App. 718, 591 P.2d 478 (1979).

25. 729 F.2d 238 (3d Cir. 1984).

26. See Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 451 A.2d 179 (1982); Freund v. Cellofilm Prop., Inc., 87 N.J. 229, 432 A.2d 925 (1981).

27. *Whitehead*, 729 F.2d at 253 (quoting Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 402, 451 A.2d 179, 187 (1982)).

28. The court held that under New Jersey law, section 388 of the *Restatement* was inapplicable to strict liability actions:

Unlike Restatement (Second) Section 402A, Section 388 imposes liability on suppliers for the *negligent* failure to warn foreseeable users of a product's dangerous condition. . . . The only meaningful distinction between those sections, the [New Jersey Supreme Court] has held, is that under Section 388, knowledge of a product's dangerous propensities without a warning is not imputed to the manufacturer.

Whitehead, 729 F.2d at 249 (emphasis added). See also Campos v. Firestone Tire & Rubber Co., 98 N.J. 198, 485 A.2d 305 (1984). By this analysis, the *Whitehead* court diluted the precedential effect of cases from other jurisdictions, which had relied on section 388 for both strict liability and negligence. Of course, despite New Jersey's professed allegiance to section 402A, recent developments indicate actual reliance on the academic proposals of Wade and Keeton, rather than the *Restatement*. See generally Faulk, *supra* note 1.

29. New Jersey has an extremely broad perspective regarding jury issues in product liability actions, apparently allowing juries to find a "defect" merely upon a finding that a product's risks outweigh its utilities. See O'Brien v. Muskin Corp., 94 N.J. 169, 463 A.2d 298 (1983).

30. 221 N.W.2d 50 (N.D. 1974).

31. *Id.* at 57.

used by many persons in small quantities.”³² Other decisions imposing manufacturer liability, such as *Borel v. Fibreboard Paper Products Corp.*,³³ are similarly distinguishable. In *Borel* there was no suggestion that the asbestos insulation contractors knew or should have known of the dangers.³⁴

It should be noted that “sophisticated user” considerations are not inconsistent with traditional strict liability justifications. According to these rationales, manufacturers are in a better position to bear the costs of injury by reflecting the losses in product costs. Supposedly, such manufacturers can insure against liability and incorporate premium costs in the price of the product.³⁵ In a “sophisticated user” context, however, the user is commonly a manufacturer itself, or a specialized service organization. To the extent the user is a manufacturer, it can incorporate costs just as easily as the original producer. The same can be said of special service businesses, such as painters or sandblasters. Injuries sustained during the course of the user’s activities are legitimate costs of business operations. To allow injured parties to reach the original producer in such situations allows intermediaries to evade losses for which they may be directly responsible without yielding corresponding public benefits.

According to another traditional justification, imposition of strict liability provides manufacturers with incentive to research and eliminate hazards.³⁶ Despite this admirable goal, the best warnings are wholly ineffective when

32. *Id.*

33. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

34. The Fifth Circuit has expressly recognized this distinction. See *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 466 (5th Cir. 1976). See also *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809 (9th Cir. 1974) (sophisticated user considerations inapplicable in painting trade, where use is not typically supervised by technical personnel and product is marketed in manner where warnings can easily be given).

35. See RESTATEMENT (SECOND) OF TORTS § 402A, comment c (1965):

On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

The cases have generally accepted this justification without reexamination. See, e.g., *Sindell v. Abbott Labs., Inc.*, 26 Cal. 3d 588, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144 (1980), *cert. denied*, 449 U.S. 912 (1981); *Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 447 A.2d 539, 547 (1982). Recent commentators, however, have criticized its inflexibility. See, e.g., Powers, *supra* note 1, at 812-13; Faulk, *supra* note 1, at 576-77; Page, *Generic Product Risks: The Case Against Comment k and for Strict Tort Liability*, 58 N.Y.U. L. REV. 853, 877-79 (1983); Henderson, *Coping with the Time Dimension in Products Liability*, 69 CALIF. L. REV. 919, 942-44 (1981).

36. See, e.g., *Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 447 A.2d 539, 547 (1982); *First Nat’l Bank v. Nor-Am Agric. Prod., Inc.*, 88 N.M. 74, 537 P.2d 682, 695 (1975); Phillips

they are not communicated to customers and employees. Considering the relative opportunities of the manufacturer and the user to communicate warnings, the user is clearly in a better position to prevent injuries. Although it may be nearly impossible for a manufacturer to individually warn each person who might be expected to work with its product, the sophisticated employer or distributor is in an ideal position to discharge this burden. Thus, to the extent that accident prevention is a goal of strict liability, that goal is best served by casting responsibility on the party most able to ensure its success—the sophisticated intermediary.

As can be gleaned from the foregoing discussion, neither economic nor personal welfare is promoted by ignoring user sophistication as a factor in strict liability. In conformity with this conclusion, the courts have generally excused a manufacturer from liability if its customer either knew, or in the exercise of ordinary prudence, should have known of product dangers. Legislative product liability initiatives have also recognized this principle.³⁷ This reasoning is particularly appropriate in actions involving toxic chemicals, since, as a general rule, such chemicals are marketed through a network of sophisticated distributors who, in turn, sell to knowledgeable industrial consumers. In such cases, the plaintiff's burden of proof increases as he climbs the marketing ladder, and each successive step depends on the degree and accuracy of communication between the marketing parties. This result is consistent with the commercial realities of the chemical marketplace, and it promotes industrial safety.

The Bulk Seller

Under present marketing practices, many chemical manufacturers sell substances in large quantities to distributors, who then repackage chemicals

v. Kimwood Mach. Co., 269 Or. 485, 499, 525 P.2d 1033, 1041-42 (1974). Abstract allegiance to this justification has also been questioned. See, e.g., Powers, *supra* note 1; Faulk, *supra* note 1; Page, *supra* note 35, at 880-81; Henderson, *supra* note 35, at 952-53; Schwartz, *The Post Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. REV. 892, 904 (1983).

37. See S. 100, 99th Cong., 1st Sess. (1985). Section 6(d) of this proposed federal "Product Liability Act" provides:

Where warnings or instructions are required under subsection (b) or (c), such warnings and instructions shall be given to the product user, unless:

(1) in light of the practical and economic difficulties of giving the warnings or instructions directly to the product user, the likelihood that the product would cause harm of the type alleged by the claimant, and the probable seriousness of that harm, a reasonably prudent person would have given such warnings or instructions to a third person, including an employer, who could be expected to take action to avoid the product user's harm or to assure that the risk of harm is explained to the product user; or

(2) the product is one which may be legally used only by or under the supervision of a using or supervising expert, in which case the manufacturer shall act with reasonable prudence to warn or instruct the expert.

See also UNIF. PRODUCT LIABILITY ACT, § 104(c)(5), 44 Fed. Reg. 62,714 (1980).

into smaller containers for sale. When generic chemicals are involved, such as acetone, benzene, methyl ethyl ketone, toluene, or xylene, the distributor may commingle the products of various manufacturers in common storage tanks, thus precluding identification of any particular manufacturer's product. Although the various manufacturers may furnish labels to the distributor, the presence of a particular manufacturer's label on a barrel does not necessarily mean that any of its product is inside. After considering these procedures, many courts have restricted the duties of "bulk seller" manufacturers. Under these holdings, the manufacturer's duty to warn may extend only to its distributor and need only be adequate to apprise an industrial user of the danger.

Like sophisticated user considerations, bulk seller principles are not actually matters of affirmative defense. Rather, they simply describe the scope of the manufacturer's duties and define the plaintiff's burden of proof. This was illustrated in *Morris v. Shell Oil Co.*³⁸ In *Morris* the plaintiff developed dermatitis after using a solvent originally manufactured by Shell. The solvent was sold through a distributor, who purchased it in bulk by tank-car from Shell. The distributor separated the chemical into separate five-gallon drums for distribution. Although the plaintiff established that the distributor did not warn its customers of the solvent's dangers, the record was silent regarding whether Shell had warned its distributor. In reviewing the matter, the *Morris* court acknowledged that Shell, as a bulk supplier, had a duty to warn its distributor of the dangers, but that the plaintiff had the burden of proving that no warning had been given. Since the plaintiff failed to adduce evidence that Shell failed to warn, she failed to sustain her burden of proof and could not recover.³⁹

The *Morris* case illustrates the importance of recognizing that bulk seller considerations affect the plaintiff's burden of proof, rather than provide an affirmative defense. If viewed as an affirmative defense, the bulk seller principle would require a manufacturer to prove the validity of its marketing practices, as well as the fact that an adequate warning was communicated. Such requirements are wholly improper and place the defendant at a severe tactical disadvantage. It is not the defendant who must prove his warnings adequate; rather, the plaintiff must show that under the practices existing in the marketplace, the manufacturer's warning to its distributor was *inadequate* to apprise it of product risks. Properly considered, bulk seller considerations are not purely defensive; they are a part of the factual environment of the plaintiff's case and define the duty that must have been breached to allow recovery. Such arguments are not merely semantical; as seen in *Moore*, proper placement of the burden of proof may be dispositive.

With this perspective established, it is appropriate to consider the extent to which the courts have abrogated or qualified a bulk seller's duty to warn. One of the most recent decisions regarding this issue is *Groll v. Shell Oil*

38. 467 S.W.2d 39 (Mo. 1971).

39. *Id.*

Co.⁴⁰ In *Groll* the plaintiff was burned when he used lighter fluid to ignite logs in his fireplace. The fluid was manufactured by Shell and was sold in bulk to a distributor. The distributor then placed the fluid into labeled containers for sale. In affirming a judgment for Shell, the appellate court held that if the manufacturer adequately warns its distributor of product hazards, the manufacturer is absolved from responsibility at the time of the bulk sale.⁴¹ In support of its ruling, the court noted that to hold otherwise would impose an onerous burden on the bulk sales manufacturer "to inspect the labeling of repackaged products, and to enforce the distribution of warnings by its distributors."⁴² The reasoning of the *Groll* court is consistent with various other decisions holding that, as a matter of law, a bulk seller has no duty to warn the customers of an adequately informed vendee.⁴³

In other jurisdictions, the courts have adopted a broader perspective. Viewing the *Restatement* broadly, these courts have held that communicating product information to a distributor does not necessarily discharge the bulk seller from liability. According to these decisions, the bulk seller's duty is controlled by a variety of factors, such as the extent of the manufacturer's contact with ultimate users, the relative burden of enforcing distributor warnings, the reliability of the distributor, and the danger presented by the product.⁴⁴

Despite this relatively broad perspective, no court has yet ruled that a bulk seller has an absolute, nondelegable duty to warn ultimate users. The absence of such holdings seems to indicate judicial recognition of marketplace reality and a desire toward allocating risks to parties best able to prevent the harm. Such a trend is strongly suggested by the dilution of common law distinctions between defenses to strict liability and negligence. A growing number of jurisdictions now recognize contributory negligence as a defense to strict products liability and have incorporated strict liability into comparative causation systems.⁴⁵ Currently pending federal product liability legislation also

40. 148 Cal. App. 3d 444, 196 Cal. Rptr. 52 (1983).

41. *Id.* at 450, 196 Cal. Rptr. at 55.

42. *Id.*

43. See *Berg v. Underwood's Hair Adaption Process, Inc.*, 751 F.2d 136 (2d Cir. 1984); *Manning v. Ashland Oil Co.*, 721 F.2d 192 (7th Cir. 1983); *Parkinson v. California Co.*, 255 F.2d 265 (10th Cir. 1958); *Shell Oil Co. v. Harrison*, 425 So. 2d 67 (Fla. Dist. Ct. App. 1982); *Zunck v. Gulf Oil Corp.*, 224 So. 2d 386 (Fla. Dist. Ct. App. 1969); *Jones v. Hittle Serv., Inc.*, 219 Kan. 627, 549 P.2d 1383 (1976); *Younger v. Dow Corning Corp.*, 202 Kan. 674, 451 P.2d 177 (1969); *Hill v. Wilmington Chem. Corp.*, 279 Minn. 336, 156 N.W.2d 898 (1968); *Reed v. Pennwalt Corp.*, 22 Wash. App. 718, 591 P.2d 478 (1979).

44. See *Bryant v. Technical Res. Co.*, 654 F.2d 1337 (9th Cir. 1981); *Suchomajcz v. Hummel Chem. Co.*, 524 F.2d 19 (3d Cir. 1975); *Shell Oil Co. v. Gutierrez*, 119 Ariz. 426, 581 P.2d 271 (Ct. App. 1978); *Pepper v. Selig Chem. Indus.*, 161 Ga. App. 548, 288 S.E.2d 693 (1982). These authorities, however, generally reflect the facts under review and do not reject the traditional rule that, on a proper record, issues of "foreseeability" and "knowledge" may be decided as a matter of law. See, e.g., *Manning v. Ashland Oil Co.*, 721 F.2d 192, 196 (7th Cir. 1983).

45. See *Murray v. Fairbanks Morse*, 610 F.2d 149 (3d Cir. 1979) (Virgin Islands); *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129 (9th Cir. 1979) (federal admiralty jurisdiction); *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975) (Mississippi law); *Trust Corp. v. Piper Aircraft Corp.*, 506 F. Supp. 1093 (D. Mont. 1981); *Stueve v. American*

proposes apportionment according to percentage of responsibility.⁴⁶ Specifically, the legislation absolves manufacturers from liability if the immediate vendee is adequately informed and further communications with the actual claimant were not feasible.⁴⁷

These decisions and proposals recognize that public policy does not necessarily coincide with manufacturer liability, particularly when the marketplace provides other parties with greater opportunities to prevent the loss. As the Texas Supreme Court recently stated in *Duncan v. Cessna Aircraft Co.*⁴⁸: "The failure to allocate accident costs in proportion to the parties' relative abilities to prevent or reduce those costs is economically inefficient. . . . *An ideal tort system should impose responsibility on the parties according to their abilities to prevent the harm.*"⁴⁹

Such reasoning properly reconciles the goals of particular plaintiffs and the public at large. As developed earlier, strict liability traditionally has been based upon economic and safety considerations. According to those justifications, strict manufacturer liability imposes responsibility on the party best able to bear the loss and provides an incentive for production of safer products.⁵⁰ In generic chemical cases, however, these traditional justifications are extremely

Honda Motors Co., 457 F. Supp. 740 (D. Kan. 1978); Sun Valley Airlines, Inc. v. AVCO Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976); Butand v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Kaneko v. Hilo Coast Processing, 65 Hawaii 447, 654 P.2d 343 (1982); Kennedy v. City of Sawyer, 4 Kan. App. 2d 545, 608 P.2d 1379 (1980); Bell v. Jet Wheel Blast Div., 462 So. 2d 166 (La. 1985); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979); Sandford v. Chevrolet Div. of Gen. Motors, 292 Or. 590, 642 P.2d 624 (1982); Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984); Star Furn. Co. v. Pulaski Furn. Co., 297 S.E.2d 854 (W. Va. 1982); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). Cf. Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981) (remarking favorably of loss allocation in strict liability actions, without ruling on the issue).

46. S. 100, *supra* note 37, § 9(c) provides for assignment of responsibility to the plaintiff upon a finding of "misuse." Significantly, section 9(c) broadly defines "misuse" to encompass most aspects of contributory negligence, as well as a distributor's failure to instruct its customers in safe product use:

Misuse shall be considered to occur when a product is used for a purpose or in a manner which is not consistent with the reasonably anticipated conduct of users, which may include use for a purpose or in a manner which is not consistent with adequate warnings or instructions available to the user or failure of a person who would reasonably be expected to train another person or otherwise provide for the safe use of the product and who does not train or provide for the safe use of the product.

Upon such a finding, comparative responsibility would be invoked under section 9. See also UNIF. PRODUCT LIABILITY ACT, §§ 111, 112(c), 44 Fed. Reg. 62,714 (1980).

47. See S. 100, *supra* note 37, § 6(d). See also UNIF. PRODUCT LIABILITY ACT, § 104(c)(5), 44 Fed. Reg. 62,714 (1980).

48. 665 S.W.2d 414 (Tex. 1984).

49. *Id.* at 218-19 (emphasis added).

50. See *Sioble v. Symons Corp.*, 221 N.W.2d 50 (N.D. 1974).

short-sighted. When a bulk seller is held ultimately liable despite its inability to enforce warning communications by its distributor, the practical effect is merely a more expensive product without any meaningful assurance of improved public safety. While this may accommodate the interests of particular plaintiffs in obtaining *compensation*, it actually frustrates the greater public interest in *prevention*. If preventing future injury is a paramount consideration in allocating losses in product liability litigation, then damages should not be arbitrarily assigned; rather, damages should be apportioned according to each party's relative opportunity and ability to prevent injuries. Such apportionment accommodates compensation needs while simultaneously providing the maximum incentive to reduce future losses.

Conclusion

The issues examined in this article present new challenges to the traditional justifications for strict manufacturer liability. Unlike most products, generic chemicals are marketed to sophisticated industrial distributors and users. These customers generally are fully aware of product dangers and have a greater opportunity to prevent injuries than a remote manufacturer. In circumstances involving bulk sales, the manufacturer's connection becomes even more attenuated. Since distributor storage, barrelling, and sales are beyond the scope of a manufacturer's control, an adequate warning to the distributor may discharge manufacturer liability.

Contrary to current perceptions, these considerations are not matters of affirmative defense; rather, they merely define the scope of a manufacturer's duty to warn. The plaintiff retains the burden of proving that the manufacturer has breached its duty. In order to hold the manufacturer liable, he must prove that the manufacturer had no reason to believe that its distributor or users were aware of product hazards. This burden recognizes communication limitations inherent in the marketing process and places liability upon the parties best able to prevent future injuries.

As a matter of social policy, such a result serves the public interest. If, as most jurisdictions now recognize, strict liability is necessary to facilitate the compensation of parties injured by dangerous products, such liability should not be indiscriminately imposed. Rather, liability should be allocated to encourage overall industrial safety and to ensure the diligence of *all* involved parties in working toward that goal. Given the dangers associated with industrial chemicals, such allocation is not only reasonable but a public necessity.