

## **“Failure To Warn” Claims Against Component Parts and Bulk Materials Suppliers - How to Avoid Common Defenses**

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Many claims involving products occur not because of a manufacturing or design defect, but because the product was used improperly. If you have such a claim, consider whether the user received adequate warnings or instructions from the product's manufacturer. If not, you might have a products liability claim against the manufacturer.<sup>1</sup> But a deeper inquiry would also explore whether the manufacturer received adequate warnings from its suppliers. If not, you might also have a products liability claim against a supplier.

A subrogator pursuing a “failure to warn” claim against a supplier should be aware of and consider the defenses that may nullify or discharge a supplier's duty to warn.<sup>2</sup> Three such important defenses are the sophisticated user/intermediary defense, the bulk supplier defense, and the component parts defense all of which involve an intermediary (such as a manufacturer or an employer) between the supplier of the allegedly defective product and the end user of that product. For example, asbestos was supplied in bulk to manufacturers (the intermediaries) of finished goods, which were then used by consumers. Asbestos suppliers were sued by injured persons for failing to warn manufacturers and employers of the dangers of the asbestos.

This article summarizes the law controlling “failure to warn” products claims and application of these three defenses. It then lists several key questions, based on recent case law, that should be included in your toolbox when evaluating whether these defenses would bar your “failure to warn” claim against a supplier.

Dangers inherent in the normal use of a product which are not within the knowledge of, or obvious to, the ordinary user may make an otherwise safe product unreasonably dangerous.<sup>3</sup>

To establish a “failure to warn” claim, a plaintiff must prove: (1) the defendant owed a duty to warn the plaintiff; (2) the lack of warning made the product unreasonably dangerous, hence defective; and (3) the defendant's failure to warn was the proximate cause of the plaintiff's injury.<sup>4</sup>

Before a manufacturer has a duty to warn, it must know of its product's danger or have reason to know of it. A product needs a warning if it is dangerous beyond that which would be contemplated by an ordinary consumer. The test is what precautions a reasonable person would take in presenting the product

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<sup>1</sup> See Conner v. Alfa Laval, 2012 WL 288364, 3 (E.D.Pa. 2012).

<sup>2</sup> See Gray v. Badger, 676 N.W.2d 268, 275 (Minn. 2004).

<sup>3</sup> Home Ins. Co. v. National Tea, 577 So.2d 65, 73 -74 (La. App. 1 Cir. 1990).

<sup>4</sup> Wilson v. Glenro, 2012 WL 1005007, 7 (D.Vt. 2012).

to the public. A “failure to warn” product defect claim may be considered a negligence claim due to its consideration of reasonableness.<sup>5</sup>

Courts may treat the three defenses listed above as separate and distinct.<sup>6</sup> However, the trend in courts is to consider them together.<sup>7</sup> Because they are often analyzed together by the courts, they are considered together in this article.

Under the sophisticated user defense, a manufacturer may not have a duty to warn of a product's dangers if the dangers are obvious or if the product's users are sophisticated and therefore presumed to know about those dangers.<sup>8</sup> For sophisticated users, the manufacturer does not need to prove actual knowledge of the danger, only that the user should have known of the danger.

The sophisticated intermediary defense may apply to situations in which it is impractical for the supplier to provide a warning directly to the end user. This defense may be limited to situations in which the intermediary involved is the injured party's employer or physician.

The bulk supplier defense is a version of the sophisticated intermediary defense. A supplier of a material that is delivered in bulk may discharge its duty to warn the end user by warning the buyer of the material's dangerous condition.

For this defense to apply, the supplied material must not be inherently dangerous; it must be sold in bulk to a sophisticated buyer; the material must be substantially changed during the manufacturing process; and the supplier must have a limited role (or no role) in developing or designing the end product.<sup>9</sup>

A raw material supplier should not be held liable for risks created by a manufacturer's decisions regarding the use of the raw material. Such sellers need not develop expertise about all of their end products, which they do not control. The manufacturers who use the raw material are in a far better position to communicate effective warnings to ultimate users of the products.

Even so, the bulk supplier's reliance on the intermediary manufacturer or employer to warn must be reasonable.<sup>10</sup> The sophisticated user defense focuses on the reasonableness of such reliance (typically by the employer of an injured claimant). The bulk user defense focuses on the burden which would be imposed on the supplier if it were required to warn all users directly of the dangers of its product. Four other factors are considered in determining whether to impose a duty to warn on a supplier: the dangerous condition of the product, the purpose for which the product is used, the form of any warnings given, and the magnitude of the risk involved.<sup>11</sup>

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<sup>5</sup> Nationwide Agribusiness v. SMA, 816 F.Supp.2d 631, 653 (N.D.Iowa 2011).

<sup>6</sup> See Gray, 676 N.W.2d at 275.

<sup>7</sup> Roney v. Gencorp, 654 F.Supp.2d 501, 507 (S.D.W.Va. 2009); but see Nna v. American Standard, 630 F.Supp.2d 115, 127 (D.Mass. 2009) (Under Massachusetts law, the “sophisticated user” defense is a separate and distinct from the “bulk supplier” defense.).

<sup>8</sup> Home, 577 So.2d at 73-74.

<sup>9</sup> Teston v. Valimet, 2009 WL 2653203, 5-6 (Cal. App. 5 Dist. 2009).

<sup>10</sup> Nna, 630 F.Supp.2d at 115; Vondra v. Chevron, 652 F.Supp.2d 999, 1008 (D.Neb. 2009).

<sup>11</sup> Roney, 654 F.Supp.2d at 507.

Under the Restatement Third, the component parts doctrine provides that a components seller is subject to liability (1) if the component is defective and causes the harm, or (2) if the seller of the component substantially participates in the integration of the component into the design of the product and the component's use causes the product to be defective.<sup>12</sup>

The remainder of this article discusses key questions to consider in evaluating application of these defenses to a "failure to warn" claim against an original supplier of a product.

### **When is a warning necessary, i.e, when is a component product defective?**

Raw asbestos is one example of a defective component.<sup>13</sup> The health risks from breathing raw asbestos dust are comparable to those of breathing dust from the manufactured asbestos products.<sup>14</sup> In contrast, basic raw materials such as sand, gravel, and kerosene cannot be defectively designed.<sup>15</sup>

In the Teston case, the manufacturer substantially changed the supplier's raw aluminum powder, creating the risks that resulted in Teston's injuries.<sup>16</sup> The Court ruled that the supplier had no duty to warn because the manufacturer knew of the powder's dangers and because the manufacturer alterations of the powder were based on its own expertise and not on input from the supplier.

### **Is the part in question truly a component part?**

Component parts are multi-use or fungible products which are designed to be incorporated into some other product.<sup>17</sup> If the part is substantially altered by the customer and the manufacturer of the part has no control over the design of that finished product or the warnings on those products, then the parts are more likely to be considered components with no supplier duty to warn.

In the O'Neil case, the suppliers provided manuals with their products (valves and pumps that were insulated by asbestos), which gave them the ability to warn users. They knew exactly how their products would be used, and they had a role in developing those products. The defects occurred when their products were used as intended and the component parts defense was therefore not applicable.

### **What did the supplier know about the intermediary's use of its product?**

In the Glenro case, the court declined to decide whether to adopt certain Restatement language because the supplier did not help the manufacturer select its product for use; it did not advise the manufacturer about integrating its product into the manufacturer's production line; and it did not discuss potential safety hazards with the manufacturer.<sup>18</sup> Plaintiff's expert conceded that the supplier could thus not

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<sup>12</sup> See Wilson, 2012 WL at 9.

<sup>13</sup> Stewart v. Union Carbide, 117 Cal.Rptr.3d 791, 797 (Cal.App. 2 Dist. 2010).

<sup>14</sup> Arena v. Owens-Corning, 63 Cal.App.4th 1178, 1187-1190 (1998).

<sup>15</sup> Maxton v. Western, 136 Cal.Rptr.3d 630 (Cal.App. 2 Dist. 2012).

<sup>16</sup> Teston, 2009 WL at 7.

<sup>17</sup> O'Neil v. Crane, 99 Cal.Rptr.3d 533, 542-543 (Cal. App. 2 Dist. 2009).

<sup>18</sup> Wilson, 2012 WL at 9.

foresee the specific manner in which the manufacturer would use its products. He further conceded that his opinion that the supplier had a duty to warn was based upon his assumption that the supplier knew the exact application for its product. The Court concluded that the supplier had no duty to warn either the manufacturer or the plaintiff.

### **Did the supplier substantially participate in the integration of components into the design of the final products?**

In the Boyle case, Ford supplied unfinished F-800 trucks to GSEE, a company that modified the trucks before selling them to end users.<sup>19</sup> The Court ruled that Ford did not have a duty to warn. Even though Ford had vast financial and automotive technical resources, it was not in the best position to determine the safety device needed. The type of safety device needed depended upon the nature of the completed truck's use. Ford did not actively participate in the integration process. Providing mechanical or technical services or advice concerning a component part does not alone constitute substantial participation that would subject the component supplier to liability.

Substantial participation requires that the supplier have had some control over the decision-making process of the final product or system.<sup>20</sup> Knowledge of the ultimate design by itself does not constitute substantial participation. If the specifications provided by the supplier are obviously unreasonably dangerous and caused the product to be defective, the supplier may be considered to have control over the integrated product and therefore be deemed to have substantially participated.

### **How sophisticated is the customer?**

The Restatement Third of Torts provides that "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."<sup>21</sup>

California has considered the customer's sophistication as a factor in determining whether the component parts doctrine applies. Component sellers are not required to monitor the development of products and systems into which their components are to be integrated or to investigate and evaluate its customer's sophistication before it can sell its component product. Yet the more sophisticated the customer, the harder it would be to establish that the customer should have been warned.

### **Was the supplier's knowledge superior to that of the intermediate purchaser?**

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<sup>19</sup> Boyle v. Ford, 942 A.2d 850, 862 (N.J.Super.A.D. 2008).

<sup>20</sup> Gudmundson v. Del Ozone, 232 P.3d 1059, 1073-1074 (Utah 2010).

<sup>21</sup> O'Neil, 99 Cal.Rptr.3d at 541-542.

If so, then a claimant might argue breach of a duty to warn.<sup>22</sup> In the Garon case, the supplier and the manufacturer each characterized the other as sophisticated, one being a small family-run business and the other having a 400-person laboratory team. The parties presented enough evidence to make the “superior knowledge” dispute a jury question.

**Was the supplier’s reliance on the intermediary reasonable?**

For a supplier to be allowed to rely on the intermediary to warn end users, the supplier’s reliance must have been reasonable.<sup>23</sup>

Several factors are considered in determining whether a supplier’s reliance is reasonable: (1) the dangerous condition of the product; (2) the purpose for which the product is used; (3) the form of any warnings given; (4) the reliability of the third party as a conduit of necessary information about the product; (5) the magnitude of the risk involved; and (6) the burden imposed on the supplier by requiring that he directly warn all users.

**If a warning had been conveyed, would it have prevented the injury?**

A failure to warn must be a substantial factor in causing the injury.<sup>24</sup> A defendant is not liable if the injury would have occurred even if the defendant had issued adequate warnings.

In the Huitt case, plaintiffs were injured while attempting to light a water heater at a construction site. Plaintiffs alleged that natural gas that had accumulated in a water heater closet lacked any odorant, but they failed to establish that they would have been aware of a timely warning about the propensity of new steel pipes to absorb the odorant in natural gas, thereby preventing the accident.

**When pursuing a claim for failure to warn about a component part, consider the component part’s role in causing the accident.**

In the Flores case, a claimant was unable to pursue a duty to warn claim because he presented no evidence that there was any risk involved in integrating supplier’s motor or gearbox into the conveyor belt system where the accident occurred.<sup>25</sup> Plaintiff also did not present any evidence that any such failure to warn was a legal cause of plaintiff’s injury. Even though the buyer may have been unsophisticated, plaintiff could not establish essential elements of his cause of action.

**Did the manufacturer actually provide any warnings?**

Having a sophisticated manufacturer is not enough for a supplier to claim the sophisticated user defense.<sup>26</sup> The supplier must actually pass on warnings in order to discharge any duty to warn.

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<sup>22</sup> Lenzen v. Garon, 2011 WL 5177713, 5 (D.Minn. 2011).

<sup>23</sup> Genereux v. American, 577 F.3d 350 (C.A.1 Mass. 2009).

<sup>24</sup> Huitt v. Southern California Gas Co., 116 Cal.Rptr.3d 453, 468-469 (Cal.App. 5 Dist. 2010).

<sup>25</sup> Flores v. Kaman, 2010 WL 1888710, 8 (Cal.App. 5 Dist. 2010).

<sup>26</sup> Stewart, 117 Cal.Rptr.3d at 797-798.

In the Stewart case, Union Carbide argued that it was entitled to rely on intermediaries to acquire their own knowledge and to provide their own warnings. But Union Carbide did not give any warning and could not therefore rely on the intermediary, even if sophisticated, to pass on or give warnings. Therefore, it could not rely on the sophisticated user defense.

**How can a claimant prove that warnings were inadequate (that is, that they did not discharge any applicable duty to warn)?**

Look for evidence of the manufacturer's ignorance of the dangers of the supplied product.<sup>27</sup>

For example, in the Genereux case, the claimant could not prove that the warnings provided by the supplier were inadequate because there was ample evidence that the manufacturer had substantial knowledge of the product's dangers: the supplier's warning labels, provision of Material Safety Data Sheets ("MSDS"), and the employer's own manuals and procedures for handling the product (beryllium), including consistency with OSHA standards. The court did not focus on the sufficiency of the supplier's labels and MSDAs as warnings. Instead, it determined whether the manufacturer knew of the potential danger of beryllium. Therefore, even if the warnings had been inadequate, that inadequacy would have been irrelevant if the manufacturer already knew the information that adequate warnings would have conveyed.

**CONCLUSION:**

The questions discussed above will bring you a long way in determining the viability of a "failure to warn" claim against a supplier.

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<sup>27</sup> Genereux, 518 F.Supp.2d at 313-317.