The Sophisticated User Defense as applied to product liability and premises liability cases.

Product liability claims are based upon the general allegation that a product is defective. A product can be defective by means of a manufacturing defect, a design defect or by failing to provide sufficient warning. Product liability claims can be raised as claims of negligence, breach of warranty or strict liability. In each such claim, a plaintiff has the burden of proving that 1) there was a defect in the product, 2) the defect caused the injuries or damages complained of, and 3) the defect existed at the time the product left the supplier’s possession.

In response, defendants are entitled to a variety of defenses. In some cases, a defendant can argue that, in spite of the fact that there was a defect in the product which caused damage or injury to the plaintiff, it had no duty to warn of the hazardous condition because the user of the product was a “sophisticated user” of the product.

The duty to warn arises only when a seller knows or has reason to know that a product is likely to be dangerous when used in a foreseeable manner. Underly v. Advance Mach. Co., 605 N.E.2d 1186 (Ind. Ct. App. 1993). On pain of strict liability in tort, a seller must warn a purchaser or user if: (1) the product has dangerous propensities, (2) the seller has greater knowledge than the buyer of the risk of harm from those propensities, and (3) the seller knows, or should know, that unless the seller warns the buyer of that risk, the buyer will suffer harm. Bates v. Richland Sales Corp., 2004 WL 103499 (Ill. App. Ct. 2004).

In some jurisdictions, however, a product supplier may rely on the professional expertise of the user and tailor its warnings accordingly. Koonce v. Quaker Safety Prods. & Mfg. Co., 798 F.2d 700 (5th Cir. Tex); House v. Armour of America, Inc., 886 P.2d 542 (Utah Ct. App. 1996). This is commonly referred to as the sophisticated user defense.

In order to avoid liability based upon the defense that the injured party is a sophisticated user, the defendant must show that the ultimate user possesses special knowledge, sophistication or expertise to such an extent that the user’s knowledge of the potential danger with the product is equal to having prior notice of that danger. House, 929 P.2d at 340. This standard does not require that the defendant show that the specific user knew of the danger, but rather that the community to which the user belongs generally knows about the danger. Id. Therefore, it is sufficient for a defendant to show that based upon the user’s special expertise and circumstances, the supplier reasonably could have believed that the user knew of the danger. Id. When the foreseeable users of a product have special training, a supplier has no duty to warn of risks that should be obvious to them, even if persons without such training would not appreciate the risks. Humble Sand & Gravel, Inc. v. Gomez, 146 S.W.3d 170 (Tex. 2004)

The sophistication or knowledge of a user or purchaser of a product generally refers to a user’s actual knowledge, as opposed to imputed knowledge of product-related dangers.
Andrulonis v. United States, 924 F.2d 1210 (2nd Cir. NY), vacated on other grounds, remanded 502 U.S. 801, and reinstated 952 F.2d 652, cert. denied.

The sophisticated user defense allows a manufacturer or seller to avoid liability in the event that a person subsequently suffers injury or damages as a result of a hazardous condition of the product. There is a large number of cases which arise out of incidents where the sophisticated purchaser subsequently passes that product on to other individuals who become the ultimate users of the product. In those cases, often the end user of the product has none of the training or expertise which would qualify them as a sophisticated user. Nevertheless, often the manufacturer may still avoid liability under the learned intermediary defense, which allows the manufacturer to rely upon the knowledge and sophistication of the purchaser as a learned intermediary between the manufacturer and the product user.

Medical Products

The learned intermediary defense began with prescription drug cases. A manufacturer’s duty to warn of the dangers involved in the use of prescription drugs is generally satisfied by warning physicians rather than the patient who is the ultimate user. The doctor, whose duty it is to prescribe the use of the product to the patient, acts as a learned intermediary between the patient-user and the drug manufacturer.

Obviously, the end users of prescriptions are unlikely to have significant background in the dangers and risks associated with the various medications. Given the need for a prescription from a doctor in order to purchase the pharmaceutical, there is limited ability for the ultimate user to communicate directly with the drug manufacturer. As such, the pharmaceutical manufacturers are entitled to rely upon the physicians who prescribe the drugs to relay the risks associated therewith to the patients who will ultimately use these prescriptions.

Industrial Products

This learned intermediary doctrine has also been extended to the ultimate users of industrial products. Industrial products are those products regularly sold in bulk or in large quantities to purchasers who in turn use those products in their businesses. Frequently these claims will involve a “learned intermediary” defense. With industrial products it is not uncommon that the person injured by an allegedly defective product is not the same individual that purchased the product, but rather the employee of the purchaser. The learned intermediary defense allows manufacturers to rely upon the more sophisticated employers of these individuals to instruct their employees as to the potential hazards and proper uses of the products, rather than imposing a duty to provide adequate warnings directly to each of these ultimate users/employees.

Industrial products often possess an inherent danger in the product, and as a result, they are not frequently sold to the general public. The inherent dangers of the products create
a duty to provide adequate warnings and the claims generally include an allegation of a failure to provide adequate notice of the potential hazards to the employee.

A product manufacturer may discharge its duty to warn of the dangerous nature of its product by relying upon the third party employer to warn the ultimate users of the product. In order for such a shift of liability to be effective, the employer who purchased the product must be knowledgeable and a sophisticated bulk purchaser. In those instances, the manufacturer may discharge its duty to warn by relying upon the purchaser to communicate the dangers associated with the product to the end users of the product. *Baker v. Monsanto Co.*, 962 F. Supp. 1143 (S.D. Ind. 1997).

In order to prove that a manufacturer of an industrial product discharged its duty to warn, it must generally be shown:

1. The product is an industrial product;
2. The purchaser of the product must be knowledgeable about the use and potential hazards of that product thereby rendering that person a learned intermediary or sophisticated user;
3. The purchaser must have received adequate warnings regarding the product's hazards;
4. The content of the warning must be sufficient to provide adequate instructions regarding the safe usage of the product and potential hazards. Whether the warnings are adequate is judged on the ability to comprehend by other similarly educated or experienced purchasers who would be considered learned intermediaries or sophisticated users; and
5. The manufacturer must have reasonable assurance that its warnings will be communicated to the industrial purchaser's employees who are the ultimate users of the product.

**A. Industrial Products**

As the name implies, industrial products are those commonly used in businesses rather than by the general public. They tend to be bulk items or technical equipment used by businesses. Most commonly, the purchaser of the industrial product is the employer of the end user of that product. As a result, the end user often does not have the benefit of access to the original packaging or instructional materials which accompanied the product at the time it left the manufacturer’s hands.

**B. Knowledge of the Industrial Purchaser**

A manufacturer of industrial products cannot simply avoid liability by the mere fact that the product was purchased by an employer, rather than the final user of the product. It must show that the purchaser, either as a result of their experience in their business, through their formal education or other specialized training, has a level of understanding of the potential dangers and hazards of the product to elevate them to a knowledge base that is higher than the average user. Depending on the product at issue, showing that an
individual is a sophisticated user, and thereby able to qualify as a learned intermediary to his or her employees, could be accomplished as easily as providing evidence that he or she has used this or similar products in the past. In more complicated products, it may require a showing of advanced degrees or specific certification.

The exact determination of whether a purchaser is sophisticated varies from state to state and is largely a fact-based determination. For example, under Michigan law, a user is “sophisticated,” and thus can be relied upon by the manufacturer to disseminate information to the ultimate users regarding the dangers associated with the product, if the user is from a class of professionals that are presumed to be experienced in using and handling the product and who are aware of the dangers associated with such product. M.C.L.A. §600.2947; Walker v. Eagle Press & Equip. Co., 408 F.Supp.2d 402 (E.D. Mich. 2005). To sustain a conclusion that no duty was owed to the user because of his professional status in Utah, the court must “find the record evidence to be undisputed that the user actually knew of the danger or that, based on the user’s special expertise and the circumstances of the transaction, the supplier reasonably could have believed that he knew of the danger.” House, 929 P.2d at 345 (quoting Halter v. Waco Scaffolding & Equipment Co., 797 P.2d 790, 794 (Colo. Ct. App. 1990).

C. Warnings of the Potential Hazards of the Product Must be Relayed

Simply showing that a potentially hazardous product was initially sent to an individual who meets the criteria of a sophisticated user does not entirely absolve the duty to warn of the possible dangers. The product must still be accompanied by adequate warnings. The standard, however, of what suffices as an acceptable warning is lessened somewhat when the individual who is the recipient of the warning has a knowledge base which allows him or her to better understand the warning than the average person on the street. When a warning contains highly technical language, the intended audience must have the ability to comprehend that language.

D. The Manufacturer Must Have Reasonable Assurance that its Warnings will be Communicated to the Employees of the Purchaser

The manufacturer must also have reason to believe that the purchaser will then relay the potential hazards and proper use of the product to the end users. Even though these end users may not have the level of sophistication of the purchasers, a manufacturer is entitled to rely upon the purchaser to adequately and accurately relay the information to its employees in many circumstances. In determining whether a manufacturer has a right to rely upon the purchaser as a learned intermediary, several factors can be considered, including:

1. The general duty an employer has to maintain a safe workplace for its employees;
2. The reputation of the employer in regards to safety;
3. The manufacturer’s knowledge of the employer’s safety reputation;
4. Efforts made by the manufacturer to investigate the safety record of the employer;
5. The manufacturer’s prior experience with this employer;
6. The form in which the product is normally delivered to the ultimate user/employee;
7. The manufacturer’s lack of access to the ultimate users of the product, or ability to identify these individuals;
8. The manufacturer’s lack of control over the product on the job site; and
9. The feasibility of providing warnings directly to the end users.

Through the course of discovery, it is important to explore both the employer’s and the employee’s knowledge of the potential hazards and the communications between the two regarding the same. Potential pitfalls arise with not only the standard miscommunications which occur from time to time amongst employers and employees, but the disparity in knowledge or education on the particular dangers can further complicate the communication process. Some areas to probe include: 1) the quality and nature of the communications (whether written or verbal); 2) the frequency of any reminders; and 3) any efforts taken to accommodate for any language barriers.

Any prior experience that either the employer (as learned intermediary), or employee (as the ultimate user) has with the product or similar products is helpful in defeating liability. However, even this is not a foolproof safety mechanism. In U.S. Silica Co. v. Tompkins, 92 S.W.3d 605 (Tex. App. 2002), a sandblasting company, whose primary business was the use of a silica company’s sand product in its sandblasting activities, was not found to be a sophisticated user. The sandblasting company claimed it was unaware of the hazards of sand or the necessity for respiratory devices, and thus, as a result, no such warnings were passed on to its employees.

An exception to the requirement that a manufacturer must have good reason to believe that the purchaser will pass on the warnings to the final intended user arises when the manufacturer sells component parts. When a sophisticated buyer integrates a component into another product, the component seller owes no duty to warn either the immediate buyer or ultimate consumer of dangers arising because the component is unsuited for the special purpose to which the buyer puts it. To impose a duty to warn in such a circumstance would require that the component seller actively participate in the integration process. Restatement (Third) Torts: Products Liability §5; Toshiba Intern. Corp. v Hery, 152 S.W.3d 774 (Tex. App. Texarkana 2004.)

**USE OF THE SOPHISTICATED USER DEFENSE IN PREMISES LIABILITY CASES**

Although the “sophisticated plaintiff” defense is primarily used in products liability cases, it also can and has been raised successfully in premises and construction liability actions brought against landowners and contractors by injured workers whose claims against their employers are barred by workers’ compensation. The rationale underlying
the defense suggests that it can perhaps be applied more widely or even extended as a defense in a premises or construction liability case.

**Application of the Rationale to Premises and Construction Cases**

The sophisticated plaintiff defense developed in the products liability context as an outgrowth of Section 388 of the Restatement Second of Torts, which provides that a supplier is liable for physical harm caused by goods he supplies if he knows or should know that the items are likely to be dangerous, fails to warn of the danger, and “has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition.” The defense focuses on establishing that because of the particular knowledge or skill of the plaintiff, the manufacturer should be able to assume that the plaintiff should have realized the potential danger. This rationale appears to be readily transferable to the premises or construction context essentially in the form of an argument that when the plaintiff is a skilled tradesman, the site owner or general contractor should be able to assume that the plaintiff had knowledge of the potential danger and a higher duty to protect himself from harm.

Generally, a property owner is not liable to employees of an independent contractor for the independent contractor’s negligence. The direct employer of the worker is responsible for project and worksite safety. Two exceptions that create owner liability are when the owner retains control over the work and contractor’s activities, or when the work contracted for is inherently dangerous, above and beyond what is expected in the ordinary course of such work. This second exception is known as the “peculiar harm doctrine,” and applies when a peculiar risk of injury is known to the owner or foreseeable at the time of the contract, and could be deemed a latent condition on the job site. Typical types of claims include common law negligence actions against the property owner and general contractor, allegations of workplace safety statutory violations, such as inadequate lighting or safety training, or the failure to warn of latent conditions or hazards peculiar to the type of work called for in the contract. In these types of cases, a defendant should be able to argue that the duty to warn of an inherently dangerous condition or of a latent condition does not arise if it can be shown that the plaintiff had specialized knowledge or expertise from which he should be charged with knowledge of the danger.

**The Sophisticated Plaintiff Defense as Applied to Premises and Construction Liability**

The following cases are illustrative of how the defense can and has been used in premises liability and construction project liability cases alleging common law negligence or, in some case, statutory violations.

A straightforward application of the defense is seen in *Kendle v. August Bohl Contracting Co. Inc.*, 242 A.D.2d 848, 662 N.Y.S.2d 606 (3d Dept. 1997). In *Kendle*, the court dismissed the case against the premises owner finding that no duty to provide a safe worksite attached in light of the plaintiff's age, intelligence, and many years of experience.
poured concrete and operating a motorized wheelbarrow at a construction site. Additionally, the court concluded that a trench, the alleged defect, was apparent and readily observable by him.

Use of a “sophisticated user” defense to products liability crossed over and provided a more generalized “sophisticated plaintiff” defense of a construction liability case in *Koken v. Auburn Mfg., Inc.*, 2004 WL 1877808, report and recommendation approved by 2004 WL 2358158; 2004 WL 2358194 (D.Me. 2004), aff’d, 426 F.3d 39 (1st Cir. 2005). *Koken* involved a fire that broke out during a construction project due to the welding contractor’s use of a fire blanket that was of a lower rating than one which would have better protected against fires. One contractor responsible for setting up the job site stated that he was unaware of blanket ratings and would not have intentionally purchased the wrong product. He placed the blame on the blanket manufacturer for failure to warn, stating that its marketing materials were ambiguous in describing the blanket’s capabilities, and also on the purchasing agent, on the ground that he was responsible for selecting an appropriate blanket.

The manufacturer’s expert testified that there was no duty to warn a welder with 26 years of experience in using fire blankets. He opined that “a job foreman or superintendent who fails to understand what products his workmen need is not really qualified for his job.” The defendant brought in a welding safety expert who testified that in is 30 years of welding experience, he never knew about the existence of blanket ratings and neither would other welders. The testimony of this “warnings expert” was excluded because he had no basis by which to say the lower rated blanket was insufficient for welding operations such as those taking place on the subject project, or that had the contractor known, he would have used the proper blanket. Although the case against the contractor was not dismissed due to questions of fact, the case illustrates how a property owner may be able to defend against a claim by a subcontractor’s employee, since the owner should be entitled to presume that a worker with specialized training should be responsible for selecting appropriate products and setting up appropriate safety measures.

A good example of a court’s use of the sophisticated plaintiff defense to relieve a defendant of a duty to warn is *Portelli v. I.R. Const. Products Co., Inc.*, 218 Mich. App. 591, 554 NW2d 591 (1996), appeal denied, 456 Mich. 919, 573 NW2d 618 (1998). In *Portelli*, suit was brought against the owner of a building where an independent contractor’s employee was injured while installing air conditioners. The worker alleged a claim against the building owner for failure to warn of a defective access panel. The owner acknowledged that he knew that the latch had had problems catching properly in the past. At the time of the injury, the latch failed and the panel fell onto the plaintiff as he performed his work. The court accepted the “sophisticated plaintiff” defense, holding that the building owner was entitled to assume the worker was competent and skilled at his particular trade in performing his duties and also in incorporating construction materials into the building.

The amount of experience the worker has in the particular profession or trade in which he is engaged when injured is a factor that supports a “sophisticated plaintiff” defense. In
Rosenblatt v. Wagman, 56 A.D.3d 1103, 867 N.Y.S.2d 780 (3d Dept. 2008), a worker brought a Labor Law action against a homeowner when he fell from a ladder. The ladder had been provided to him by the homeowner; however, the owner did not instruct him on how to use it. The homeowner’s exception precluded Labor Law §200 liability requiring an owner or general contractor to provide a safe work site. The negligence claim was also dismissed. The homeowner was awarded summary judgment because the worker acknowledged that he was aware of the dangerous condition of the railing on which he placed the ladder and that this may have been improper placement of it. His knowledge of his actions in doing so were judged subjectively in light of his 25 years of experience in the painting business which includes the use of ladders. The court quoted the general rule that an owner’s duty to provide a safe work site does not impose a requirement “to protect a worker from defects, risks or damages that are readily observable by the reasonable use of the senses, taking into account the age, intelligence and experience of the worker.” See 56 A.D.3d at 1105 (citing Gavigan v. Bunkoff Gen. Contrs., Inc., 247 A.D.2d 750, 669 N.Y.S.2d 69 (3d Dept.)), lv. Denied, 92 N.Y.2d 804 (NY 1998)).

An Oregon case, Brown v. Boise-Cascade Corp., 150 Or. App. 391, 946 P.2d 324 (1997), review denied, 327 Or. 317, 966 P.2d 220 (1998), evaluated the “sophisticated plaintiff” defense in opposition to allegations of statutory violations, common law negligence, and negligence per se. The court held that the owner could be liable for negligence per se for its violation of the Oregon Safe Employment Act (OSEA), which required minimum illumination standards and applied to non-employer owners, but that the Employer Liability Act did not apply to the owner, who did not exercise sufficient control over the work. The court relied on the decision in Esko v. Luvvold, 272 Or. 27, 534 P.2d 510 (1975), where it was reasoned that since the employer and contractor held itself out as a specialist in installing and maintaining utility poles, it should have been able to assess their condition and discover latent risks such as the possibility that the pole would give way, which are situations commonly found in its usual course of business. The owner was entitled to rely on the independent contractor’s expertise to appreciate the risks, especially considering that the landowner did not have any expertise above that of a layperson in utility pole maintenance or actual knowledge of the defect. The painting contractor was liable to provide safety harnesses, railings, and fall protection.

Similarly, in Slack v. Whalen, 327 N.J. Super. 186, 742 A.2d 1017 (2000), the court focused on the subcontractor’s expertise and skill in declining to impose a duty on the property owner. The injured worker was part of a two-man spackling team, who had been working in that capacity for one year before the accident. At the time of the accident, the plaintiff was using ladders and scaffolding which were too short to reach some of the area he needed to spackle. Plaintiff thus climbed into the rafters of the building, standing on a board put there by another of the subcontractor’s employees, which broke and caused him to fall. Since the property owner was unaware of the methods plaintiff was utilizing to spackle the ceiling and knew nothing of the risk of harm plaintiff himself created by climbing into the rafters and board, the risk of harm was not sufficiently foreseeable to justify imposing a duty of reasonable care on the owner, who did not control the manner of the plaintiff’s work, whereas the subcontracting company did. In addition, the court relied in part on the “sophisticated plaintiff” defense,
holding that the owner could reasonably assume that the subcontractor was sufficiently skilled and knowledgeable to assure plaintiff's safety in performing the spackling work, which fell within the subcontractor’s expertise, knowledge, and experience as a professional drywall company. (Additionally, the court held that the owner had no duty to retain an experienced general contractor who would have been responsible for safety oversight on project.)

Courts have also taken the sophistication of the plaintiff into account in assessing a site owner’s responsibility for site conditions. In Scafied v. Trustees Of Union College, 288 A.D.2d 807, 734 N.Y.S.2d 262 (3d. Dept. 2001), the court held that regulations requiring that passageways and working areas at construction sites be kept free of dirt, debris, and obstructions did not apply to open concrete area between equipment trailer and building under construction. McKinney's Labor Law § 241, (6); 12 NYCRR 23-1.7(e)(1, 2). The court dismissed the complaint against a subcontractor because the alleged defect, in light of plaintiff's 25 years of experience as a laborer, his familiarity with the type of stone used on this and other job sites and his admission to having noticed their presence when he “successfully traversed the [area] at least two times earlier that day.” The court found that the thousands of crushed rocks on an open field on the job site was “readily observable” to the plaintiffs.

A “sophisticated plaintiff” defense may also be used to relieve an owner of liability for generally nondelegable duties. The 8th Circuit, applying Nebraska law, in Jordan v NEU Corp., 295 F.3d 828 (8th Cir. 2002), court held that a site owner did not have a nondelegable duty to protect an independent contractor's worker from injuries he sustained when a steel girder fell onto him from a crane, even though the owner retained possession of the premises and the right to take over control of the site in certain situations. This was because the site owner’s employees did not instruct the worker how to perform specific jobs and did not supervise or direct the crane operator in the manner of performing his work. Under Nebraska law, these facts did not impose a nondelegable duty on the owner to warn the plaintiff of the proper use of, and dangers associated with the improper use of, the crane, where the crane operator had been working with cranes for more than 20 years, the rental agreement between the crane’s lessor and worker's employer delegated the duty to maintain the crane to the employer, and when the crane was working when it was delivered, and there was no notice of problems with its use.

Sometimes the defense will be accepted to relieve the defendant from some, but not all of his duties to the plaintiff. Generally, the doctrine will apply when the accident is a result of actions within the control and expertise of the contractor. In most circumstances, the contractor will be in the best position to avoid the accident, since an independent contractor, by definition, is generally responsible for planning and executing the details of contractual performance. Even on a theory of a peculiar risk involved in the job and known to the owner, when the contractor has special skills for which it is hired, it is better equipped to assess and mitigate the risk. An example is found in Peone v. Regulus Stud Mills, Inc., 113 Idaho 374, 724 P.2d 102 (1987), where the risk of falling dead trees should have been assessed and mitigated by a logging contractor and not the owner of the
trees. However, this reasoning may not absolve the general contractor of the duty to warn its employees of the risks.

Extension of the Defense: Imputing Sophistication of the Employer to its Employees

In the product liability context, some courts have held that it is not necessarily the sophistication of the injured plaintiff that matters, but rather the sophistication of the intended end user. For example, in Carrel v. Nat’l Cord & Braid Corp., 447 Mass 431, 852 N.E.2d 100 (2006), the Massachusetts Supreme Judicial Court adopted the “sophisticated user” doctrine as an affirmative defense in failure-to-warn claims in a case involving an accident that occurred when the plaintiff was injured by a bungee cord while participating in a course as part of his Boy Scout training. At trial, the manufacturer of the cord argued that the Boy Scouts and the company directing the course were in the best position to provide warnings and put in place safeguards to counteract dangers. The plaintiff argued that trial judge erred in instructing the jury on the sophisticated user defense, arguing that he was the relevant end user. The SJC rejected this argument, finding that it was the Boy Scouts' level of sophistication that mattered. Extending this to premises liability, the relevant inquiry would not be the sophistication of the particular injured employee, but his employer. Like the Boy Scouts, the plaintiff’s employer would be in the best position to hire and train skilled employees and to ensure that tasks are carried out with the requisite degree of care and expertise.

Some courts have applied the doctrine in this manner. For example, the court in Brown v. Boise, discussed above, held that the owner could not be liable for common law negligence for failure to insure the safety of the painting contractors because assessing and requiring safety measures particular to painting was within the expertise of the painting contractor and not the property owner. Essentially, the independent contractor was responsible as the “sophisticated employer” of the plaintiff. The court found that the owner was entitled to assume that the independent contractor would provide safety measures because by the nature of their job, they hold themselves out to be experts in the business of painting.

A corollary to this extension of the doctrine is that a defendant may also be able to argue that that duty to warn is satisfied if the defendant warned the injured worker’s employer. In Farabaugh v. Pennsylvania Turnpike Com’n, 590 Pa. 46, 911 A.2d 1264 (2006), the Supreme Court of Pennsylvania held that the owner had a duty towards the employee of its contractor to make the premises safe or warn of dangers known to him but not to the contractor, but could insulate himself from liability by warning the contractor, and need not warn the contractor’s employees.