Enough is Enough: The Duty Problem with Liability Claims against One Manufacturer for Failing to Warn about Another Manufacturer’s Product

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ENOUGH IS ENOUGH

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As the title of this article indicates, the author strongly advocates that product liability law goes too far when it imposes a “duty” to warn or instruct about another manufacturer’s products, even though a third party might use those products in connection with the manufacturer’s own product. Nevertheless, asbestos plaintiffs make such claims across this country against equipment defendants (such as pump and valve manufacturers) for alleged asbestos-containing products affixed to the finished product of the defendants (such as asbestos containing flange gaskets and external insulation)—products neither made, sold, specified nor recommended by the manufacturers of the equipment.

Clearly, a “duty” to warn may exist for an unreasonably dangerous product. However, to argue that the absence of a warning for defects in other products (i.e., the external insulation) somehow makes unaltered, completed equipment defective is nothing less than “semantic nonsense” (Garman v. American Clipper Corp., 117 Cal.)

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Sneak Preview

“When You Know the Trial Won’t Go Well: Involving Appellate Counsel Before the Disastrous Verdict.” Those of you who saw Walter debate Todd Smith (the 2004–05 President of ATLA) at the October DRI Annual Meeting on the need for civil justice reform legislation already know what a thoughtful and entertaining speaker he is.

The seminar will also feature Sonya Hamlin, an author, consultant and pioneer in the field of courtroom communication. Sonya, whose publications include the landmark *What Makes Juries Listen* and the updated edition, *What Makes Juries Listen Today*? will speak on how to address the Gen-Xers and Gen-Yers on today’s jury. Sonya will provide practical communications methods that even seasoned trial lawyers will find useful in persuading juries.

Mickey Mills, perhaps the most well-known mediator of big-dollar, high-profile environmental and toxic tort cases in the country, will speak on what’s important in mediating those cases. Today, almost every case ends up in mediation, and Mickey has a wealth of experience to offer in his own inimitable style.

Dr. David Weill is a noted pulmonary medicine specialist and professor at the University of Colorado’s Health Sciences Center, Division of Pulmonary Medicine and Critical Care as well as the Lung Transplant Program. Dr. Weill will speak on the emerging medical issues related to silica exposure and lung cancer. This is cutting-edge science for lawyers involved in silica or mixed dust cases.

Our demonstrative programs will include multiple simulated courtroom presentations that will provide practical, “how-to” techniques on the presentation of sometimes difficult and abstract scientific evidence. These demonstrations are designed to sharpen the trial practice skills of both experienced and novice trial lawyers.

Mark Lanier is a Texas plaintiff’s lawyer who many of you already know (or know of). Mark was recently named by the *American Lawyer* as one of the top 45 attorneys in the nation under the age of 45. Mark has obtained several verdicts in excess of $100 million, and he will square off with defense attorney Larry Riff of Steptoe & Johnson with demonstrative opening statements before a live mock jury panel in a toxic tort case demonstration. Angela Abel of DecisionQuest will handle the mock jury panel as well as provide real-time electronic analysis of the opening statements and a critique of the lawyers.

The following day, Lanier and Riff will be joined by Gary Bezet of Kean Miller and Ricky Raven of Thompson & Knight to offer demonstrative direct and cross-examinations of defense experts. The defense experts in this mock toxic tort case will include Dr. Mark Bayer—an M.D. Toxicologist who is Chief of the Division of Medical Toxicology at the University of Connecticut School of Medicine—and Dr. Darwin Labarthe—a world-recognized M.D. epidemiologist now with the Center for Disease Control and Prevention in Atlanta. Ms. Abel will return to moderate a critique of the direct and cross-examinations with...
the experts, consultants and lawyers as well as with the audience. Drs. Bayer and LaBarthe will also speak on more than just the basics of toxicology and epidemiology, their respective areas of expertise.

Rick Sarver of Barrasso Usdin Kupperman Freeman & Sarver in New Orleans will provide an overview of the welding rod litigation that is sweeping the country. Rick will discuss some of the legal and scientific issues in that litigation such as the difference between Manganism and Parkinson’s disease.

Morgan Copeland of Vinson & Elkins, who was lead defense counsel in a huge pipeline rupture case that the National Law Journal called the “nation's top environmental/toxic tort defense victory” of 1997, will speak on the many legal and strategic issues involved in handling mass disaster litigation.

Penelope E. Codrington of Porzio Bromberg & Newman PC in Morristown, New Jersey will discuss the interplay between environmental litigation and related toxic tort cases.

Victoria L. Orze of Hinshaw & Culbertson’s Phoenix office and former General Counsel of Attorneys Liability Protection Society Inc. (ALPS), will talk about the ethical obligations and traps in multiple client representation.

As always, we will have a useful update on recent toxic tort and environmental case law. Kevin Clark of Lightfoot Franklin & White in Birmingham, Alabama will bring you up to speed on important recent decisions in the field.

For those of you with clients who are members of the American Chemistry Council, the ACC Tort Litigation Group will again hold its Spring 2005 meeting in connection with our seminar.

I think this preview shows that we have brought together some of the leading authorities on the hottest topics in our practice for this seminar. We look forward to seeing you in New Orleans this March for a great seminar.
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App. 3d 634, 638 (Cal. Ct. App. 1981)). It is not the product supplied by the defendant (equipment) but the product used in connection with the equipment (external insulation, flange gaskets) that may be defective for lack of warnings (See Blackwell v. Phelps Dodge Corp., 157 Cal. App. 3d 372, 378 (Cal. Ct. App. 1984)). Therefore, regardless of whether phrased in strict liability, warranty or negligence terms, defense counsel must ensure that the plaintiffs and courts do not permit boundless, ludicrous duties.

In this article, we will explore the concept of duty and its role in warnings claims. Next, we will look at several popular arguments put forth by plaintiffs in an attempt to impose a duty to warn with respect to another’s products that are used in connection with the defendant manufacturer’s product. Finally, we will evaluate counter-arguments and discuss a suggested defense strategy for eliminating the need for lengthy, costly defense of these absurd claims.

The Concept of “Duty”

In general terms, “duty” is a question of whether one party is so particularly situated in relation to another as to create a legal obligation for the benefit of the other (W. Page Keeton et al., Prosser & Keeton on Torts §53 (5th ed. 1984)). The concept of duty is firmly rooted in our law and remains an essential means of limiting a party’s legal responsibility. It is no surprise then that the analysis of the existence of a duty is so hard to confine to a simple formula. As observed by Dean Prosser, as our ideas of human relations change, the law as to duties changes with them (Prosser, Palggraf Revisited, 52 Mich. L. Rev. 1, 12–15 (1953)).

In recent years, the role of public policy as an influence upon the definition of human relations has greatly increased. As a result, in deciding questions of duty, courts across this country have considered such issues of public policy (overtly and off the record) as convenience, capacity to bear the loss, prevention of future harm, moral blame, changing social conditions, forseeability, certainty of injury and many others. (See, e.g., Vu v. Singer Co., 538 F. Supp. 26, 29 (N.D. Cal. 1981)). Thus, we must make a conscious effort to see that law is decided in a manner that achieves desirable social results.

Nature of Warning Claims

Among the three fundamental products liability defect claims, marketing or warning defects claims continue to offer furtive ground for the creative and artful pleader. Unfortunately, legal theorists and scholars have largely ignored warnings issues and the legal landscape has suffered as a result. The price of this unchecked artistic license, as described by Professors James A. Henderson and Aaron D. Twerski, two leading products liability theorists, is that “[f]ar too many frivolous failure-to-warn cases survive appellate review. The absence of principled standards has fostered an atmosphere of lawlessness” (Henderson & Twerski, Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn, 65 N.Y.U. L. Rev. 265, 269 (1990)). It is noteworthy that Henderson and Twerski also served as the reporters for the Restatement (Third) of Torts: Products Liability.

Whether defined by case law or statute, phrased in strict liability, warranty, or negligence terms, warnings claims are usually analyzed under a quasi-negligence standard for the imposition of liability (See, e.g., Douglas R. Richmond, Renewed Look at the Duty to Warn and Affirmative Defenses, 61 Def. Couns. J. 205, 207-8 (1994); James T. O’Reilly, Product Warnings: Defects and Hazards, 6.02(A)-(B) (2d ed. 1999). Thus, the threshold inquiry for a warnings claim is the existence of a legal duty on the part of the manufacturer to warn of a danger.

Further, most states, including Texas, Illinois, California, Michigan, Ohio, Mississippi, New York, Minnesota and Massachusetts, hold that the existence of a duty to warn is solely a question of law for the court to decide (See generally O’Reilly, supra, at 6.02(A); 63A Am. J. Juris. 2d. Prod. L. 1216 (1997 & Supp. 1999)). This should hold true regardless of whether the claimant has brought the claim sounding in strict liability, negligence or warranty (See, e.g., Brown Forman Corp. v. Brune, 893 S.W.2d 640, 644 (Tex. App.—Corpus Christi 1995, writ denied).

Judicial Treatment of Warnings Claims with Respect to Another’s Products

It seems axiomatic that a manufacturer has no duty to warn of the dangers of a defective product that it did not manufacture, design or place into
strict liability and negligence claims because exposure limited to asbestos parts of another manufacturer); Spencer v. Ford Motor Co., 367 N.W.2d 393, 396 (Mich. Ct. App. 1985)(vehicle manufacturer not liable for defective wheel rim component added after sale); Mitchell v. Sky Climber, Inc., 487 N.E.2d 1374, 1376 (Mass. 1986)(manufacturer of lift motor had no duty to warn about rigging used with scaffolding of another manufacturer); Kaloz v. Risco, 466 N.Y.S.2d 218, 220 (N.Y. Sup. Ct. 1983) (refusing to require a warning as to a conjunctive product made by another even though such other product may be a sine qua non to the use of the first); Rastelli v. Goodyear Tire & Rubber Co., 591 N.E.2d 222, 225–26 (N.Y. 1992)(declining to hold that one manufacturer has a duty to warn about another manufacturer’s product when the first manufacturer produces a sound product that is compatible for use with a defective product of the other manufacturer); Fricke v. Owens-Corning Fiberglass Corp., 618 So. 2d 473 (La. App. 4 Cir. 1993) (declining to hold a manufacturer responsible for alleged inadequate warnings about a product it neither manufactured nor sold); Niemann v. McDonnel Douglas Corp., 721 F. Supp. 1019, 1030 (S.D. Ill. 1989)(airplane manufacturer had no duty to warn about replacement asbestos chafing strips used in the engines that it did not manufacture); Ford Motor Co. v. Wood, 703 A.2d 1315, 1330 (Md. Ct. Spec. App. 1998)(no duty to warn for replacement asbestos brake and clutch parts that Ford did not make, market or supply). For example, in Baughman v. General Motors Corp., 780 F.2d 1131, 1133 (4th Cir. 1986), the plaintiff was injured by the explosive separation of a multi-piece rim that had been installed, as a replacement part, on a truck manufactured by defendant. GM neither designed nor manufactured the rim. In affirming summary judgment in favor of GM, the court indicated that accepting the plaintiff’s position would require GM to test all possible replacement parts made by any manufacturer to determine their safety and to warn against the use of certain replacement parts. “If the law were to impose such a duty, the burden upon a manufacturer would be excessive. While the manufacturer can be fairly charged with testing and warning of dangers associated with components it decides to incorporate into its own product, it cannot be charged with testing and warning against any of a myriad of replacement parts supplied by any number of manufacturers” (id. at 1133).

Fortunately, the courts in the above-cited cases recognized the potential for creating a boundless duty to warn persons allegedly injured by another manufacturer’s products. The author submits that to hold otherwise would make all manufacturers the guarantors not only of their own products, but also of each and every product that could conceivably be used in connection with or in the vicinity of their product. Should the law with respect to warnings be allowed to get this far out of control, the ability to successfully defend such claims seems a near impossibility. Can’t you just see a smoker with lung cancer suing manufacturers of matches and lighters for failing to warn that smoking cigarettes is dangerous to their health? Perhaps this analysis would be differ-
Creative “Spin” Used to Argue for the Existence of A Duty

Apparently aware of the overwhelming weight of authority and logic, plaintiffs may attempt one or more arguments in an attempted end-run around the non-existent duty to warn for another’s products. Two examples of such arguments are examined below.

First, plaintiffs may argue that a distinction exists between their claim based on “conduct” and their claim based on “product.” This is a distinction without merit and plaintiffs should be hard pressed to cite authority for the proposition that a manufacturer may not have a duty to warn of dangers regarding a product it did not manufacturer (i.e., strict liability claim), but does have the very same duty for purposes of a negligence claim, primarily on grounds of foreseeability. Indeed, federal courts applying Texas law have rejected such tactics by litigants bringing product liability claims.

In one such case, a plaintiff attempted to avoid application of the learned intermediary doctrine by attempting to characterize his product liability claim as a deceptive trade practices claim. “The gravamen of all of Plaintiffs’ causes of action, including misrepresentation and violation of the DTPA, is that Wyeth failed to adequately warn of or disclose the severity of Norplant’s side effects. Therefore, the learned intermediary doctrine applies to all of Plaintiff’s causes of action…If the doctrine could be avoided by casting what is essentially a failure to warn claim under a different cause of action such as violation of the DTPA or a claim for misrepresentation, then the doctrine would be rendered meaningless” (In re: Norplant Contraceptive Prods. Liab. Litig., 955 F. Supp. 700, 709 (E.D. Tex. 1997), aff’d, 165 F.3d 374 (5th Cir. 1999); see also Sanchez v. Liggett & Myers, Inc., 187 F.3d 486, 491 (5th Cir. 1999)). Thus, both law and logic compel the rejection of any attempt by plaintiffs to recast their products liability warnings claims as negligence claims to avoid the non-existent duty with regard to another’s products.

Second, plaintiffs may argue that another manufacturer’s products affixed to or used with the equipment by a third party after distribution of the equipment are “components” of the equipment (i.e., the flange gaskets and external insulation were required for the equipment to function properly). Again, using basic rules of construction and established product liability precedent, this argument should be easily discredited.

According to its ordinary, plain-English meaning, the term “component” is “a constituent element, as of a system” (American Heritage Dictionary of the English Language (4th ed., 2000)). Texas courts, like others, limit the definition of component to those parts of a finished product that are integrated into the finished product before the finished product is placed into the stream of commerce. For example, in the Walton case discussed earlier, the court expressly held that nylon strap rigging was not a component of the crane where the crane manufacturer did not supply its crane with any rigging, but rather, the rigging was affixed to the crane after it left the crane manufacturer’s control (See also Bostrom Seating Inc. v. Crane Carrier Co., 140 S.W.3d 681 (Tex. 2004))(seat installed in garbage truck prior to truck’s distribution was component of truck); Smith v. Aqua-Flo, Inc., 23 S.W.3d 473, 479–80 (Tex. App.—Houston [1st Dist] 2000, pet. denied)(water pump was “component” of spa pool); Molina v. Kelco Tool & Dye, Inc., 904 S.W.2d 857, 861 (Tex. App.—Houston [1stDist] 1995, writ denied)(molding die integrated into punch press prior to distribution was “component” of press). Based on the above, unless plaintiffs can present evidence that a piece of equipment was distributed with exterior insulation and/or flange gaskets integrated in or attached to the equipment, such products should never be held to be a “component” of the equipment since they left the factory in exactly the condition contemplated by the ultimate consumer (without insulation or flange gaskets).

Public Policy Must be Addressed for the “Duty” Analysis

As we discussed above, public policy plays an important role in defining the concept of duty. Social, economic and political questions and their applicability to the facts at hand must be taken into consideration in the determination of the existence of a duty to warn. Longstanding principles of public policy underlying products liability dictate that responsibility for a
product's danger rests with companies in the chain of distribution of that product, and responsibility for the safety of the workplace rests with the employer. “[P]ublic 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 …” (Barham v. Turner Construction Co. of Texas, 803 S.W.2d 731, 738 (Tex. App.—Texarkana 1981, writ ref’d n.r.e.); Sells v. Six Flags Over Texas, Inc., 1997 WL 527320, at *3 (N.D. Tex. Aug. 14, 1997) (recognizing that “policy considerations that inform strict liability principles seek to encourage the responsible manufacture and design of products” and therefore declining to impose strict liability on defendant that did not sell, manufacture or design product)).

Accordingly, fundamental principles of public policy require that plaintiffs’ novel and far-fetched theory of duty in warnings/marketing defect claims be rejected. Manufacturers cannot be expected to determine the relative hazards of various products that they do not manufacture or sell and have not had the opportunity to inspect, test and evaluate, much less warn consumers about using such products. Moreover, if adopted by the law, such a duty would lead to more legal and business chaos—every product supplier would be required to warn of the foreseeable dangers of numerous other manufacturers’ products used at a jobsite. The result?—an extraordinary and confusing proliferation of warnings, arguably removing any meaningful benefit to the product user.

**Defensive Strategy for Warnings Claims**

Given that most states properly treat the existence of duty as a question of law, the author submits that a traditional motion for summary judgment (as opposed to no-evidence) on the duty issue should be filed as early in a case as possible, perhaps along with the answer. Using this type of motion avoids any procedural requirement of “adequate time for discovery” and offers an opportunity to be in control of the arguments and law to which the plaintiffs must respond.

Recently trial courts in Texas and California have granted summary judgments in favor of equipment manufacturers, holding that they had no duty to warn of alleged hazards of asbestos-containing products, manufactured, designed, supplied and affixed to the equipment by unrelated third parties, after the equipment left the manufacturers’ control (e.g., Harry and Janet Simkins v. Alfa Laval, Inc., et al., Cause No. CC-03-02935-B, County Court at Law No. 2, Dallas County, Texas, May 5, 2004; Mary Nolen, et al. v. A.W. Chesterton Co., et al., Cause No. 153-200843-03, 153rd Judicial District Court, Tarrant County, Texas, June 17, 2004; George and Ruth LaChapelle v. American Standard, Inc, et al., Case No. BC 303899, Superior Court of California, Los Angeles County, April 26, 2004; Ernesto and Maria Escamilla v. American Standard, Inc., et al., Case No. BC 303900, Superior Court of California, Los Angeles County, May 11, 2004). For example, in Nolen, the plaintiff claimed exposure to asbestos-containing products installed on and around defendant manufacturers’ valves and pumps. The court rejected the plaintiff’s duty arguments and granted summary judgment in favor of the equipment manufacturers.

**Conclusion**

Regardless of how artfully pled, law and public policy prohibit the imposition of a legal duty to warn or instruct for the defects in other manufacturers’ products. This follows from the simple fact that a manufacturer of a completed product is not legally the designer, manufacturer or marketer of the numerous other products that may be used in connection with the manufacturer’s product. Particularly in toxic tort litigation with warnings claims for external insulation and flange gaskets that are brought against equipment manufacturers, it is not an unreasonably dangerous condition or feature of the equipment itself that caused any alleged injury. Plaintiffs’ theories to the contrary would place a heavy, unjustified burden on manufacturers. These absurd claims can and should be effectively dealt with using a well-drafted traditional motion for summary judgment on the sole issue of legal duty. This strategy will allow a manufacturer to properly frame the issue for the court and require the plaintiffs to respond to the overwhelming weight of authority against their theories to find the existence of a duty. Moreover, this approach should anchor the motion to the law, without the need for consideration of facts and mountains of irrelevant evidentiary exhibits.
The “Sophisticated User” and “Bulk Supplier” Defenses: Duty and Causation Issues

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Many toxic tort plaintiffs sue the suppliers of the chemical or chemicals alleged to have caused their injury or death, either in addition to or instead of their current or former employer. These cases are usually based in negligence and/or strict products liability and premised on a failure to warn. Often, however, the plaintiff’s employer is a refinery or chemical plant operator, who knew or should have known as much as the companies that supplied the chemicals at issue and was certainly in a better position to warn its employees about the potential hazards of those chemicals. Moreover, because the chemicals are often supplied in bulk by pipeline, barge or tank truck, it is impractical for the manufacturer or supplier to communicate warnings directly to the end-user.

The existence of a legal duty and causation are two required elements in any negligence or strict liability claim based on the alleged failure of the product supplier to adequately warn of hazards associated with the chemicals at issue, how could a chemical supplier’s failure to convey redundant information already known by the plaintiff’s employer have been a cause-in-fact of the plaintiff’s claimed injury? These duty and causation questions will be addressed separately below.

Duty

The logical starting point in the duty analysis is consideration of the legal basis for imposing a duty to warn.

In any situation where there is a duty to warn, the warning is required in order to impart special knowledge. If that special knowledge already exists, further information is not necessary. Munoz v. Gulf Oil Co., 732 S.W.2d 62, 66 (Tex. App.—Houston [14th Dist.] 1987, writ ref’d n.r.e.) (emphasis added) (affirming summary judgment for supplier defendants because they sold propane to a sophisticated, commercial distributor who possessed the same knowledge as the sellers).

Given the specialized knowledge possessed by the industrial employer and such employer’s relationship with its employees, for purposes of determining the locus of a duty to warn, the situation is analogous to that of doctor-patient in the pharmaceutical context. It is appropriate, therefore, to apply the same principles in the industrial workplace setting. This is the origin of what has become known as

The “Sophisticated User” and “Bulk Supplier” defense to both negligence and strict liability warning claims. The sophisticated user defense is akin to the “learned intermediary” defense which was developed in pharmaceutical cases. The learned intermediary defense provides that the pharmaceutical manufacturer does not have a duty to warn the end-user of the drug or medical device, but only has a duty to warn the end-user’s physician, a “learned intermediary.” Alm v. Aluminum Co. of Amer., 717 S.W.2d 588, 592 (Tex. 1986); McCombs v. Synthes, 587 S.E.2d 594 (Georgia 2003); Lacy v. G.D. Searle & Co., 567 A.2d 398 (Delaware 1989); Bean v. Baxter Healthcare Corp., 965 S.W.2d 656 (Tex. App.—Houston [14th Dist.] 1988). If the manufacturer informs the doctor of the potential dangers, it has satisfied its duty to the end-user. Mauldin v. Upjohn Co., 697 F.2d 644, 647 (5th Cir. 1983), cert. denied, 464 U.S. 848 (1983); see also Cooper v. Bower, 610 S.W.2d 825, 830–31 (Tex. Civ. App.—Tyler 1980, no writ).

A number of courts have recognized, in some form, a “sophisticated user” defense to both negligence and strict liability warning claims. The sophisticated user defense is akin to the “learned intermediary” defense which was developed in pharmaceutical cases. The learned intermediary defense provides that the pharmaceutical manufacturer does not have a duty to warn the end-user of the drug or medical device, but only has a duty to warn the end-user’s physician, a “learned intermediary.” Alm v. Aluminum Co. of Amer., 717 S.W.2d 588, 592 (Tex. 1986); McCombs v. Synthes, 587 S.E.2d 594 (Georgia 2003); Lacy v. G.D. Searle & Co., 567 A.2d 398 (Delaware 1989); Bean v. Baxter Healthcare Corp., 965 S.W.2d 656 (Tex. App.—Houston [14th Dist.] 1988). If the manufacturer informs the doctor of the potential dangers, it has satisfied its duty to the end-user. Mauldin v. Upjohn Co., 697 F.2d 644, 647 (5th Cir. 1983), cert. denied, 464 U.S. 848 (1983); see also Cooper v. Bower, 610 S.W.2d 825, 830–31 (Tex. Civ. App.—Tyler 1980, no writ).

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the sophisticated user defense. See Smith v. Walter C. Best, Inc., 927 F.2d 736, 741 (3d Cir. 1990) (employer has the duty to provide its employees with a safe working environment and employer has control over the working environment; supplier has no real ability to enforce safety measures); see also Wood v. Phillips Petroleum Co., 195 S.W.3d 870, 874 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (“[P]rotecting workers from the ill effects of benzene exposure could be accomplished, if at all, only by minimizing such exposure with engineering controls (such as devices to keep benzene contained and work areas well ventilated), personal protective and respiratory equipment, and environmental and medical monitoring.”); Phillips v. A.P. Green Refractories Co., 630 A.2d 874, 883 (Pa. Super. Ct. 1993) (the employer was “in the best position to warn the workers by providing safety through the use of air monitoring devices and respirators and to monitor the use of the equipment”).

In toxic tort cases involving workplace exposure to solvents or other chemicals, most courts that have utilized a sophisticated user “defense” analysis have focused on the duty issue. In the duty analysis, the focus is whether the chemical manufacturer’s duty to warn is discharged, either because the supplier provided an adequate warning to the plaintiff’s employer or because the plaintiff’s employer knew of the potential hazards of the chemical even without a warning from the manufacturer. Courts have differed as to whether the supplier must prove that, at the time of the product sale, it had ascertained that the employer was “sophisticated” or, alternatively, whether retrospective proof of the employer’s “sophistication” is sufficient, regardless of whether the supplier can demonstrate that it knew about, and relied upon, the fact that the employer possessed specialized knowledge at the time of the sale.

As set out above, one line of authority requires proof that the supplier reasonably relied on the employer to pass on to the end-user the warning information that the employer already possessed. O’Neal v. Celanese Corp., 10 F.3d 249 (4th Cir. 1993) (Maryland law); Adams v. Union Carbide Corp., 737 F.2d 1453, 1457 (6th Cir.), cert. denied, 469 U.S. 1062 (1984) (Ohio law); Purvis v. PPG Indus., 502 So. 2d 714, 720–21 ( Ala. 1987); Swan v. I.P., Inc., 613 So.2d 846 (Miss. 1993) (en banc); Phillips, 630 A.2d at 883–84; Alim, 717 S.W.2d at 592; Tasa v. GTE Products Corp., 438 N.W.2d 625 (Mich. App. 1988); Walter C. Best, Inc., 927 F.2d at 740–44 (3d Cir. 1990) (Ohio law). These decisions, which generally rely on §388 of the Restatement (Second) of Torts, require a showing of subjective knowledge on the part of the supplier that the intermediary was knowledgeable about the potential hazards and likely to communicate such information to the end-user.

Another line of authority holds that the duty is discharged once the supplier defendant shows that it either actually warned the employer or that the employer was already knowledgeable or “sophisticated” about potential hazards of the chemicals. Curtis v. M&$S Petroleum, Inc., 174 F.3d 661 (5th Cir. 1999) (supplier actually warned employer); Akin v. Ashland Chemical Co., 156 F.3d 1030 (10th Cir. 1998), cert. denied, 119 S.Ct. 1756 (1999); Davis v. Avondale Indus., Inc., 975 F.2d 169 (5th Cir. 1992) (Louisiana law) (citing City of Jackson v. Ball, 562 So.2d 1267, 1270 (Miss. 1990)); Cook v. Branick Mfg., Inc., 736 F.2d 1442 (11th Cir. 1984) (supplier discharged duty by warning the employer); Younger v. Dow Corning Corp., 451 F.2d 177 (Kan. 1969) (manufacturer warned immediate vendee); Higgins v. E.I. DuPont de Nemours & Co., 671 F. Supp. 1055, 1058–59 (D. Md. 1987); Morserberger v. Uniking Conveyor Corp., 647 F. Supp. 1297, 1299 (W.D. Va. 1986) (“in Virginia a manufacturer owes no §388(c) duty to warn an employee of a knowledge-able industrial purchaser”). Many of these decisions discuss the fact that the defense has its roots in the Restatement (Second) of Torts, although they do not analyze the defense in terms of the reasonableness of the supplier’s reliance as seen in the Restatement. These cases do not focus on whether the warnings actually reached the end-user or whether it was reasonable for the supplier to believe that the third-party employer would warn the end-user.

**The Restatement Approach—Was the Supplier’s Reliance on the Intermediary Reasonable?**

In analyzing a product supplier’s obligation to warn users of hazards associated with its product, section 388 of the Restatement focuses on the reasonableness of the seller’s conduct, rather than the intermediary’s knowledge, providing:

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 this dangerous condition or of the facts which make it likely to be dangerous.

Restatement (Second) of Torts §388 (1965). (Emphasis added). Comment n to §388 allows the seller to discharge its duty to warn by providing necessary information about the dangers of the product to a third person upon whom it can reasonably rely to communicate the information to ultimate users of the product. Under §388, the seller is liable if the user is uninformed as to potential dangers of a product and the seller fails to use reasonable care to inform the user of those dangers. The question under comment n is whether reliance on the third party to pass on warnings is reasonable. Factors used in determining whether the reliance is reasonable include the known or knowable character of the third party, the duties or normal procedures imposed on the third party, the magnitude of possible harm to the plaintiff and the burden placed on the supplier itself to warn the end-users. Several decisions have applied a detailed analysis of these factors and held that the supplier satisfied its duty by warning the plaintiff’s employer. O’Neal, 10 F.3d at 252; Smith, 927 F.2d at 740–44; Phillips, 630 A.2d at 881–82; Seibel v. Symons Corp., 221 N.W.2d 50 (N.D. 1974) (applying factors and holding manufacturer liable); Alm, 717 S.W.2d at 595 (“The issue in every case is whether the original manufacturer has a reasonable assurance that its warning will reach those endangered by the use of its product.”); Tasca, 438 N.W.2d at 628.

The analysis of whether the supplier was reasonable to rely upon the purchaser to communicate warnings to the end-user is complicated because, in many toxic tort cases, the seller supplied products to plants or refineries decades before the suit is filed. Adducing evidence of the purchaser’s state of knowledge at a point in time decades prior to suit presents a challenge that can be insurmountable for a product supplier. Under the Restatement’s “reasonable reliance” approach, the defendant supplier is required to show not only that the purchaser, in fact, was knowledgeable about the product’s hazards at the time of sale, but also that the supplier had a subjective awareness of such knowledge at the time of sale. This can be an impossible burden when the products were supplied to the plant or refinery in the 1950s or 1960s, and records and witnesses that would have established such subjective awareness are no longer available.

### The “No Ascertainment” Duty Approach: Was the Intermediary Knowledgeable?

In Akin v. Ashland Chemical Co., 156 F.3d 1030 (10th Cir. 1998), cert. denied, 119 S.Ct. 1756 (1999), the Eleventh Circuit Court of Appeals, applying Oklahoma law, held as a matter of law that there was “no duty to warn a purchaser as knowledgeable as the U.S. Air Force of the potential dangers of low-level chemical [benzene] exposure.” The Akin court relied in part upon Duane v. Oklahoma Gas & Elec. Co., 833 P.2d 284, 286 (Okla. 1992), which held that “there is no duty on a manufacturer or seller to warn...a knowledgeable user of the product dangers associated therewith.” (Duane also held that if there is no duty to warn a purchaser who is well aware of the dangers of the product, it follows that there is no duty to warn an employee of the purchaser. Id. at 287).

The plaintiffs in Akin argued that the U.S. Air Force did not actually know of the risks associated with benzene exposure. The Court held that Oklahoma law imposed a “should have known standard” and that, as a matter of law, the U.S. Air Force should have known of the risks. Therefore, the supplier’s duty to warn purchasers was discharged if the purchasers were aware, or should have been aware, of the potential dangers of the product.

Under the “no ascertainment” sophisticated user duty analysis, the seller’s duty to warn the ultimate user (usually the employee) is discharged when the seller provides an adequate warning to the intermediary or if the intermediary is already knowledgeable,
in which case the warnings would be redundant. *Akin*, 156 F.3d 1030; see also *Davis*, 975 F.2d at 174 (“the product manufacturer owes no duty to the employee of a purchaser if the manufacturer provides an adequate warning of any inherent dangers to the purchaser or if the purchaser has knowledge of those dangers and the duty to warn its employees thereof”). The *Akin* approach provides a bright-line test in determining whether a chemical supplier is liable to a plaintiff-employee for failure to warn of the dangerous propensities of its products to the plaintiff’s employer—if the employer was, or should have been, knowledgeable, the supplier is not liable for any failure to warn; if the employer was not, and should not have been, knowledgeable, the supplier may be liable.

In the recent Texas decision of *Humble Sand v. Gomez*, 146 S.W.3d 170 (Tex. 2004), where the fact that a warning would have reached the end-user was essentially stipulated, the Texas Supreme Court remanded the case to the trial court for an analysis of the factors that it held would determine whether a duty existed. (Similarly, in *Humble Sand*, there was no issue concerning whether the plaintiff would have seen and understood an adequate warning and, therefore, would have suffered no injury. *Id.* at 170). Accordingly, there was an established causal connection between the plaintiff’s failure to receive an adequate warning and his injury.

In doing so, the court explained that it shifted the burden of establishing a legal duty in the sophisticated user context to the defendant, holding that:

The issue…is whether the original manufacturer has a reasonable assurance that its warning will reach those endangered by the use of its product . . . . We think the burden should have been on Humble [the supplier] to show that the warning Gomez [plaintiff] contends [the suppliers should have given] would not have been effectual. This is appropriate, even though proof of duty is usually the plaintiff’s responsibility, for several reasons. First, in most circumstances a supplier’s duty to warn is simply assumed; the availability of the warning to end users is not in question. *Circumstances in which that assumption is not warranted, as when the sales are in bulk or there is an intermediary who should have the duty to warn, seem more the exception than the rule.* (Emphasis added)

(Note that, in several places, the *Humble Sand* court made it clear that the bulk supply situation could be distinguished and excepted from the normal duty to warn.) Interestingly, the plaintiff in *Humble Sand* contended that it is never reasonable to excuse a supplier from providing warnings to the ultimate user of its product whenever it is feasible. The Texas Supreme Court rejected that argument, holding that, even under circumstances where it is feasible to provide a warning such as in the *Humble Sand* case, there may still be no duty on the supplier to do so. The Supreme Court, responding to a dissenting opinion, made it clear that it was not suggesting “that a supplier has any duty to investigate his customer’s operations to avoid liability.” In fact, the majority noted that:

To require Humble [the supplier] and each other plant supplier to investigate every customer’s own appreciation of the dangers of abrasive blasting would be impractical if not entirely impossible. *Comment n* [Restatement (Second) of Torts §388 (1965)] imposes no such duty to investigate.

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The idea that product suppliers must investigate every customer’s awareness of dangers and tailor a warning to fit each one is certainly impractical, as we have explained, and radical at least in the sense that the dissent offers no authority in support of a general duty to investigate customers. See also, *Mays v. Ciba-Geigy Corp.*, 661 P.2d 348 (Kan. 1983) (noting that requirement of manufacturers and suppliers to instruct industrial employees on proper uses of products which are used in a myriad of specialized processes and with other types of products would impose an impossible burden); *Phillips*, 630 A.2d at 881 (“it would be prohibitively expensive and unduly burdensome to require suppliers to orally warn each worker”); *Marker v. Universal Oil Prod. Co.*, 250 F.2d 603 (10th Cir. 1957) (employer-purchaser is in a far better position to provide such instruction).

The “no ascertainment duty” approach places the burden of providing special knowledge about the hazards of a chemical where it should be most effective; that is, on the employer who has full knowledge of workplace conditions and controls the use of the chemicals involved and the capabilities and circumstances of the end-user employees.
Bulk Supplier Doctrine

As noted by the Texas Supreme Court in the Humble Sand case, one of the few exceptions to the normal duty to warn placed on a product supplier is when the product is supplied in bulk. The “bulk supplier” doctrine provides that one who sells a product in bulk to another, who in turn provides the product to end-users (whether employees or the public) is required only to provide adequate warnings regarding potential hazards of the product to the immediate distributor and not to each individual consumer. The underlying assumption of this doctrine is that the seller may rely on an informed distributor to communicate warnings to the consumer. However, the bulk seller’s reliance on the intermediary must be reasonable. The bulk seller fulfills its duty to the ultimate consumer only if it ascertains that the distributor to whom it sells is adequately trained, familiar with the propensities of the product and capable of passing this knowledge on to the consumer. The policy rationale for the bulk supplier doctrine is that a supplier of a product in bulk has no way to determine who the ultimate purchaser or user may be and no practical method of communicating warnings to the end-users. Little v. Liquid Air Corp., 952 F.2d 841, 850 (5th Cir. 1992) (Miss. law) (citing Jones v. Hittle Serv., Inc., 549 P.2d 1383 (Kan. 1976)): Alm, 717 S.W.2d at 592 (Tex. 1986); Smith, 927 F.2d at 740; Beans v. Entex, Inc., 744 S.W.2d 323 (Tex.App.—Houston [1st Dist.] 1988, writ denied). For example, when the product at issue is a liquid or gaseous chemical delivered in large tank trucks, barges or by pipeline, there is no package likely to reach the end-user on which to place a warning or instructions for safe use.

In Wood v. Phillips Petroleum Co., 119 S.W.3d 870, 874 (Tex. App.—Houston [14th Dist.] 2003, pet. denied), the court recognized that in the instance of a bulk supplier, who has no package on which to place a warning, the supplier may satisfy the duty to warn ultimate users of its product by proving that the intermediary to whom the supplier sold its product was a sophisticated user, meaning that it is “adequately trained and warned, familiar with the propensities of the product and its safe use, and capable of passing its knowledge on to users in a warning” (Citing Alm, 717 S.W.2d at 591–92 (Tex. 1986)). The Wood court noted that:

[P]rotecting workers from the ill effects of benzene exposure could be accomplished, if at all, only by minimizing such exposure with engineering controls (such as devices to keep benzene contained and work areas well ventilated), personal protective and respiratory equipment, and environmental and medical monitoring.

The Wood court then reasoned that because the evidence in the case demonstrated that the need for precautions regarding the use of benzene “was well understood by Monsanto [the employer] during the years [the plaintiff’s deceased] worked there” the supplier defendants “had no duty to instruct Monsanto on these matters…” Id. at 185.

The bulk supplier approach (like the broader sophisticated user doctrine) is supported by the employer-employee relationship because the employer has a common law and statutory duty to maintain a safe workplace for its employees, including the duty to provide warning of dangers present in the workplace. Occupational Safety and Health Act of 1970, §5, 29 U.S.C. §654 (1982) (employer is required to provide place of employment free from recognized hazards); Goodbar v. Whitehead Bros., 591 F. Supp. 552, 559 (W.D.Va. 1984), aff’d sub nom., Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985) (finding critical the Restatement’s commentary that “modern 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”).

Causation

The typical toxic tort case against a product supplier lends itself to a sophisticated user causation analysis (no cause-in-fact) as well. Regardless of whether the duty is described through the Restatement or “no ascertainment” framework, a defendant supplier should always be able to argue that whether or not the supplier satisfied the duty to warn, any failure to warn was not a cause-in-fact of the plaintiff’s injury. By analogy, pharmaceutical cases applying the “learned intermediary” doctrine have held that the causal connection between a seller’s failure to adequately warn and the patient’s injury may be severed where a learned intermediary had prior, independent knowledge of the hazards of the product. In those cases, the seller’s failure to warn is not considered a proximate cause of the patient’s harm. The argument should be very similar for a supplier of products to a knowledgeable purchaser.
supplier had a duty to warn and breached that duty by failing to warn, the plaintiff still must prove that the supplier's failure was a proximate or producing cause of the plaintiff's injury in order to recover for negligence and product liability failure to warn claims. *McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1044 (2d Cir. 1995)* (to sustain a verdict in a failure to warn case, defendant's failure to warn must be a proximate cause of plaintiff's injury); *Scronce v. Howard Bros. Discount Stores, 679 F.2d 1204, 1205–06 (5th Cir. 1982)* (causation is an essential element in a failure to warn claim); *Ramirez v. Komori Amer. Corp., 1999 U.S. Dist. LEXIS 4300, *23 (S.D.N.Y. 1999, n.w.h.) (plaintiff's failure to warn claim may be properly dismissed unless the plaintiff can prove causation; that is, plaintiff must show that manufacturer's warning would not have been superfluous considering plaintiff's existing actual knowledge of product dangers).

Both proximate and producing cause require proof that the defendant's conduct was a cause-in-fact of the plaintiff's injury. The supplier's failure to warn a sophisticated purchaser cannot be the cause-in-fact of the employee's injury because the knowledgeable purchaser did not warn the end-user, even though it had the warning information. *Cimino v. Raymark Indus., Inc., 151 F.3d 297, 331 (5th Cir. 1998)* (applying Texas law to hold that manufacturer's failure to warn sophisticated user is immaterial and not legal cause of plaintiff's harm when sophisticated user is fully knowledgeable of product's relevant risks); see also, *Strong v. E.I. DuPont de Nemours Co., Inc., 667 F.2d 682, 688 (8th Cir. 1981)* (despite deficient warnings by the manufacturer, if a user [here, a natural gas company] is “fully aware of the danger which a warning would alert him or her of, then the lack of warning is not the proximate cause of the injury”); see also, *Nelson v. Brunswick Corp., 503 F.2d 376, 379–80 (9th Cir. 1974)*.

In *Wood, 195 S.W.3d at 874–75*, the court addressed the causation issue as well as the duty issue, holding that, presuming the purchaser-employer already had the special knowledge about which it could have been warned, any insufficiency in warning or failure to warn, as a matter of law, cannot be a cause-in-fact of the plaintiff's injury. This rule of law is true, even if the supplier defendant provided no warning or an insufficient warning to the employer and even if the defendant did not ascertain the employer's level of knowledge at the time of sale. *Id.*

The public policy considerations inherent in duty issues are irrelevant to whether conduct was, as a factual matter, a cause of the claimed injury. Either the supplier's conduct caused the harm or it did not. In some cases, defendant suppliers have argued that the failure to warn was not the sole proximate cause of the plaintiff's injury, or, alternatively, that the employer's conduct was a superseding cause. These arguments have had little success. See *Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481, 493–96 (3rd Cir. 1984)* (“the sole proximate cause defense...is particularly difficult to demonstrate in a failure to warn context, for one must show that the third party's conduct in some way negates the proposition that plaintiffs would have avoided injury had they been appropriately warned” and “only where the third party's action is so extraordinary as to have not been reasonably foreseeable might such an action constitute a superseding cause”); see also *Billiar v. Minnesota & Mfg. Co., 623 F.2d 240 (2nd Cir. 1980)*.

**Conclusion**

Counsel representing a chemical manufacturer or supplier in a case involving claimed occupational exposure to chemicals at a workplace controlled by a sophisticated or knowledgeable intermediary, such as an employer, should be aware that under the relevant jurisdiction's law, the supplier defendant may be able to assert: (1) that its duty to warn the end-user was satisfied by providing adequate warning to the intermediary who had the duty to warn the end-user; (2) that it had no duty to warn either the end-user or the intermediary of the potential hazards of its product because the intermediary was knowledgeable of those hazards, as a result of information received from another source; and/or (3) that any failure to adequately warn the intermediary was not a cause-in-fact of the end-user plaintiff's claimed injury. These defensive matters may, in some instances, be raised by summary judgment motion. In the event those motions are denied, the supplier defendant should be entitled to jury questions and/or instructions on these defenses.

There are a couple of practice pointers that may be helpful in asserting a sophisticated user defense on behalf of a chemical supplier defendant. First, the existence of a duty to warn
of dangers or instruct on the safe use of a product is a question of law. See Am. Tobacco Co. v. Grinnell, 951 S.W.2d 420, 426 (Tex. 1997). In addition, remember that a supplier defendant is usually not attempting to blame the plaintiff’s employer for the plaintiff’s injury. In fact, in most cases, either because the employer exercised all reasonable care in protecting its workers and/or because the disease suffered by the employee-plaintiff is not one known to be caused by the chemical at issue, there is no evidence that the plaintiff’s injury is in any way related to chemical exposure. When appropriate, I suggest including a footnote statement in the body of the motion for summary judgment along the following lines: 

This motion is not intended to suggest that [Employer] was in any way negligent, or that any act or omission by [Employer] was in any way responsible for any harm to the Plaintiff. In fact, the evidence in this case demonstrates that, notwithstanding Plaintiffs’ allegations, Mr. [Plaintiff] did not have an occupationally induced disease, and that [Employer’s] knowledge and conduct dating back many years before Mr. [Plaintiff] started work at [Employer’s plant] exceeded generally accepted standards of occupational and industrial health, knowledge, and practice.

or

The bulk supplier defendants neither adopt nor agree with the allegations made by plaintiffs regarding the conduct of the premises owners or the cause of the plaintiffs’ injuries. In fact, based upon substantial evidence adduced in this case and others, plaintiffs’ allegations with regard to both the conduct of the premises owners and the cause of the plaintiffs’ injuries are demonstrably untrue.

The plaintiff’s employer can be of invaluable assistance in developing the evidence necessary to show that it was sophisticated regarding the knowable hazards of the chemicals handled by its employees and took all appropriate precautions in that regard. That is evidence the employer should want to make available in light of its common law and statutory duties to maintain a safe workplace for its employees. It will not benefit your supplier client or the employer if there is an incorrect appearance that the supplier defendants are attempting to make a case against the employer.
Recent Developments in the Texas Asbestos MDL

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While debates continue on efforts to adopt sweeping reform to address the asbestos litigation crisis, some states have managed to push various reform measures through their own legislatures. Given the vast number of asbestos cases pending in Texas and what has often been viewed as widespread abuse of the process by the plaintiffs’ bar, states across the nation are watching with great interest as Texas puts its tort reform legislation into practice.

This article is not meant to be an exhaustive discussion of the workings of the Texas tort reform bill, but is meant to merely highlight some of the more significant aspects of the legislation as it is being implemented in Texas. Specifically, this article will address how the legislation—and, in particular, the “MDL Order” that has been adopted in response to the legislation—has impacted some of the standard practices and abuses in Texas courts.

Introduction

In the spring of 2003, the Texas legislature passed a comprehensive tort reform measure affecting many areas of Texas civil procedure. The bill, often called “HB 4,” contained a provision that established a Judicial Panel on Multi-District Litigation (“Panel”). The Panel was created to decide, if petitioned, whether a single judge should be appointed for pretrial matters for cases with similar facts filed after September 1, 2003. In response to a motion filed by the Union Carbide Corporation, the Panel ruled that a single judge should be appointed to preside over all pretrial matters in asbestos cases. The appointment of MDL judges is made by the Chief Justice of the Texas Supreme Court. The then-Chief Justice Tom Phillips appointed Judge Mark Davidson of Houston to preside over all asbestos cases.

Judge Davidson is a republican sitting on the bench in the 11th Judicial District of Harris County, Texas. In the months following his appointment, Judge Davidson worked with both the asbestos plaintiff and defense bars to draft master discovery requests and a case management order to govern all MDL cases. The resulting Order, signed into effect on July 29, 2004, outlines discovery and procedural requirements for the parties, replacing the patchwork of “In Re: Asbestos” standing orders across the state. Thus, the wide variation in local rules and procedures from county to county—many of which that were drafted in the early 1990s and do not address the current trends of asbestos litigation—have been replaced with a single coherent case management order for all cases.

Many asbestos cases not included in Union Carbide’s original motion were moved to the MDL throughout the spring and early summer of 2004. These tag-along cases were transferred as arising from similar facts in accordance with the newly established procedures. By the time Judge Davidson signed the Order, there were approximately 450 cases pending in the MDL. But the Order, unprecedented in its detail, appears to have motivated defendants to transfer almost all eligible cases. There are currently 1,078 cases pending in the asbestos MDL, involving an untold number of plaintiffs.

As cases filed before September 1, 2003 work through the system, the MDL will take an increasingly large role in governing how asbestos cases are litigated in Texas. Although still in its infancy, it is already clear that the MDL Order will bring substantial changes to Texas asbestos litigation.

The MDL Order

The MDL Order places malignancy and non-malignancy claims on different tracks for working the case up. A “fast track” also has been established for in extremis cases. (It should be noted that out-of-state plaintiffs who

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The Order requires each defendant to answer general interrogatories and requests for production, and includes specific discovery requests for the various types of defendants in asbestos litigation (i.e., product, contractor, employer, premises, equipment manufacturer, general negligence, etc.). This very specific discovery will require many defendants to provide more detailed discovery responses than previously produced in Texas. Many newer defendants, who have yet to file substantial discovery in other jurisdictions, will likely find themselves conducting extensive document reviews, facility inspections, and employee interviews to gather the required information. For example, defense counsel may now need to meet with new types of departments or individuals to respond to several of the 41 general requests for production. These requests include the production of all binders and final transaction documents for sales, distribution, indemnity agreements, and corporate acquisitions. The discovery also forces defendants to take a firm position on several issues. For example, there are 18 general interrogatories to defendants, including questions as to whether it was foreseeable that the product produced, sold, or distributed might be removed, stripped, ripped off, or replaced at some time after installation.

The Order likewise places substantial discovery requirements on plaintiffs, including when it must be produced. Until a case has met all the requirements of the Order, it cannot be certified for remand to the trial court. Further, depending on whether it is a malignancy or non-malignancy case, it cannot be set for trial less than 180 days and 90 days after certification, respectively. This time period allows expert discovery and pretrial motions to be filed and heard before the trial date. Currently, it is not uncommon to have a court move hearings on motions for summary judgment or forum non conveniens to the pretrial hearing the morning of trial. This requires defendants to work up a case for trial even though they may win a summary judgment. And as practical matter, a forum non conveniens motion does not carry much weight the morning of trial if the case is already worked up and ready for trial. It also is not uncommon for expert and even fact witness discovery to take place on the eve of or during trial. The Order addresses these situations and they should no longer occur absent good cause.

The Order also logically organizes other areas of the litigation. For example, fact witnesses must be deposed before expert witnesses absent good cause, and plaintiff’s experts must be deposed before defense experts in the same area of expertise.

In addition to the procedural deadlines and requirements, the Order also impacts how MDL cases will be litigated. The Order places an emphasis on the use of telephone hearings to resolve conflicts, which will eliminate travel time and expenses for routine hearings. Another part of the Order expected to have a significant impact is the explicit statement that alternative dispute resolution is not required in asbestos cases. Many courts currently require mediation of asbestos cases before they can be heard for trial. As many defendants have longstanding relationships with the plaintiff firms, mandatory mediation is often merely a pro forma exercise and a waste of time and money.

Another issue of note addressed in the Order is a provision allowing non-Texas lawyers to cover out-of-state depositions without having first filed a motion to appear pro hac vice. This is important as Texas pro hac vice rules became substantially more cumbersome following the passage of House Bill 462 in the spring of 2003. In appraising the new rules, many defense lawyers had voiced concern that sending local counsel to an out-of-state deposition could be problematic if plaintiff’s counsel objected that the local lawyer did not hold a Texas license. The worry was that plaintiff’s counsel could prevent the lawyer from asking questions by arguing that allowing them to cross-examine the witness would be the unauthorized practice of law. The language of the Order allowing non-Texas lawyers to attend out-of-state depositions will prevent this from occurring.

The Order contains deadlines that will move asbestos cases along. It does not allow plaintiffs to file cases and stonewall on producing discovery or witnesses for deposition. It also does not allow cases to linger for years even if only some or most of discovery is complete. Because of this, many defendants may be surprised how quickly cases work through the system.
What the Future May Hold

Only some of the changes brought by the MDL are mentioned here. Still others not apparent on the face of the Order will become apparent in time, as MDL cases begin to work their way through the court system. We will also have a better idea how the cases will be litigated on a practical level as Judge Davidson makes rulings on issues that will impact all the cases, such as admissibility of experts and expert testimony, and motions in limine.

Judge Davidson has set Daimler Chrysler Corporation’s Havner Motion to Strike Expert Testimony That Friction Products Cause Asbestos, Lung Cancer and Mesothelioma for hearing on November 22–23, 2004. Thus, by the time this article appears we may already have a ruling that will substantially affect the way all the cases in the MDL are defended. Judge Davidson has also stated he intends to ask the regional presiding judge to appoint him as trial judge for the first asbestos case to be remanded for trial. This trial, when it happens, should provide yet more certainty on how the court will rule in asbestos cases. In addition to the guidance provided to the parties in the Order, Judge Davidson has posted his local rules on the Internet at http://www.justex.net/civil/11/proc11.htm. Titled “The Rockin’ Rules of the Eleventh District Court,” the post is clever and provides a clear picture of Judge Davidson’s expectations of lawyers that practice in his court.

Conclusion

It is clear that the intent and purpose underlying the Texas asbestos tort reform legislation has been taken very seriously, and the MDL Order has already had—and will continue to have—a tremendous impact on the course of asbestos litigation in the state. Although the reform measures may not stem the tide of asbestos lawsuits, at least in the immediate future, it will have the effect of “leveling the playing field” for litigants and preventing the discovery abuses and “unfair surprise” that has caused headaches for defendants and defense lawyers for so many years.
Mold cases blend theories of toxic tort and construction defect. By emphasizing the construction defect side of the case, defendants can simplify their evidence and arguments, thereby increasing the likelihood of success. This approach worked for the authors of this article in a recent mold case, when we successfully defended a window supplier against a personal injury and property damage lawsuit related to mold in a home. Our case was significant because it was one of the first jury trials in the state of Kansas involving allegations of personal injuries resulting from mold exposure in a home.

In mold cases, plaintiffs often emphasize complex medical opinions, exposure analyses, and testing methodology. Rather than emphasizing these points, defendants should focus on the simple and more direct facts related to the building—did it leak and, if so, why? By keeping the evidence simple and short, defendants have an advantage over plaintiffs’ complicated causation analyses. Once the jury sees the case as a construction issue, it makes the message easier to understand. It also allows the jury to use its collective common sense and experience as homeowners to reach its decision.

Physical evidence also reinforces the construction side of the case. Whether it is a commercial building or a residence, defendants can win mold cases by emphasizing the construction defect side of the case.

**Facts of the Case**

The case we tried and won is similar to most mold cases involving a home. The plaintiffs, a Kansas family of five, alleged that they were forced to move from their home because mold was making them sick. Plaintiffs claimed that their house had suffered numerous and continuous leaks since its construction in 1995. For five years, plaintiffs looked to their builder to repair the problems, and in 2000 the builder notified our client, the window supplier, of the alleged problems with the windows. As an accommodation to the builder, the window supplier agreed to replace the windows. During the window replacement process, the homeowners discovered mold. Six months later, the family hired a mold testing consultant. Within three days of receiving the verbal recommendation of their consultant, the family vacated the house.

Before the plaintiff-homeowners filed their lawsuit, the builder agreed to buy back the house. The homeowners then sued both the builder and the window supplier. The homeowners complained the mold caused their numerous illnesses, including cognitive impairment, fibromyalgia, neurological complaints, gastrointestinal complaints, fatigue, asthma, allergies, and pneumonia. The homeowners also alleged property damage to their personal belongings, and consequential damages from leaving their home. Plaintiffs’ legal theories included both negligence and strict products liability. Weeks before the scheduled trial date, the builder settled a second time, leaving the window manufacturer as the sole remaining defendant.

Before trial, summary judgment was granted on plaintiffs’ property damage claim, plaintiffs’ products liability claim, and several of plaintiffs’ more serious medical claims. First, as with many mold cases, plaintiffs had a statute of limitations problem. The court applied the Kansas discovery rule, which begins the statute of limitations period at the time the wrongful conduct causes substantial injury or when the fact of injury becomes reasonably ascertainable to the injured party. We successfully asserted that plaintiffs knew of their property damage claims more than two years prior to their filing of the lawsuit. The court, however, ruled that the date on

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which plaintiffs knew or could reasonably ascertain their personal injury claims was a fact question to be submitted to the jury.

In addition to winning dismissal of a portion of the plaintiffs’ negligence claim, we also won outright dismissal of plaintiffs’ products liability claim on summary judgment. We argued that plaintiffs had failed to support their claims with expert testimony. The court agreed, finding that plaintiffs had not made a prima facie showing that the windows were unreasonably dangerous. Further, the court severely limited plaintiffs’ medical claims only to an exacerbation of asthma and allergies, dismissing the cognitive impairment and neurological allegations.

How to Make It a Construction Defect Case

In order to emphasize the construction side of a mold case, we used a few simple techniques. First, we focused on the facts regarding the house leaks; second, we kept the medical evidence simple and short; third, we showed the jury the physical evidence, the original windows from the home; last, we emphasized the common sense approach to every allegation, relying on the jurors’ experiences. These techniques shifted the emphasis from plaintiffs’ preferred toxic tort focus to our simpler construction defect focus.

Focus on Leaks

We focused the majority of our defense on the nature of the leaks. Mold plaintiffs often attempt to scare juries with bold assertions that mold is insidious and dangerous, forcing families from their homes. Plaintiffs want to minimize evidence on construction defects to this: “Windows leaked, caused mold.” To shift the focus, it is helpful to draw out the details of the leaks.

We shifted the focus by examining plaintiffs on how the leaks occurred, when they occurred, what plaintiffs did in response to each leak, and what action the builder took in response. We identified and emphasized leaks in the home unrelated to the windows. (Notably, there were several leaks that could not have come from the windows.) We also focused on one dining room window that plaintiffs admitted leaked far more than any other window. Our witness identified a pitched roof directly above this window, which likely forced water behind the minimal flashing above this window. Even the builder agreed that roof flashing could have been the problem, admitting that he asked one of our client’s employees to help with the correction of that problem.

Focusing on the leaks served two critical purposes. First, it highlighted plaintiffs’ neglect in failing to seek independent advice regarding the leaks; second, it emphasized the builder’s apparent inability to repair the leaks. Because Kansas is a comparative fault jurisdiction, this evidence supported our argument that the builder was primarily responsible for the leaks. Moreover, it showed how unreasonable plaintiffs were in relying upon the ineffective builder for five years to fix the leaks. This allowed an apportionment of fault to the plaintiffs themselves.

Medical Evidence: Keep it Simple, Keep it Short

The axiom “Keep it simple, keep it short” can benefit defendants on medical evidence in mold cases. In order to win on personal injury, plaintiffs have to present a complex toxic tort exposure analysis. This entails presenting medical opinions, exposure analysis, and testing methodology. First, they have to convince the jury that mold is either itself a toxin, or capable of producing a toxin. Here, plaintiffs’ experts will introduce new terminology such as *stachybotrys chartarum* and *aspergillus niger* and new technology such as mycotoxin testing. Serious questions can be raised as to whether the testing techniques are even generally accepted in the medical community, thereby laying the groundwork for a challenge to the experts’ opinions and perhaps an issue on appeal in the event of an unfortunate result. Next, plaintiffs will have to show general causation, that a particular dose of the toxin is capable of causing a disease. Then plaintiffs will have to show that they actually received that dose of toxin for a sufficient duration. For plaintiffs, this step can be convoluted if mold is only found inside the walls, and not in the indoor air. Plaintiffs will then need to prove an ascertainable medical illness. Finally, plaintiffs should exclude other known causes of the same illness. These are the elements of most toxic tort cases. Defendants have an advantage because of the numerous hurdles plaintiffs must overcome to make a prima facie case.

In our case, plaintiffs presented two retained experts, Dr. Eckhardt Johanning of Syracuse, New York, and Ms. Susan Flappan, of Lenexa, Kansas, to prove those elements. Ms. Flappan, a certified industrial hygienist, testified about indoor and outdoor air that he conducted in the home. Ms.
Flappan not only did the testing, she also performed the microscopic laboratory analysis. Ms. Flappan explained how she only found stachybotrys spores in surface samples and in the air inside the wall cavities. Dr. Johanning then testified about the mycotoxin testing that he instructed Ms. Flappan to conduct, the testing methodology that included a dilution factor analysis in order to determine the toxicity in the air, and the qualifications of the German meat packing laboratory that reported the results. Dr. Johanning also described the results of the IgG, IgE, and IgA blood tests that he ordered. Based on his review of the test results and medical records, Dr. Johanning then opined that plaintiffs’ preexisting asthma and allergies were made worse as a result of their exposure to mold in their home. Plaintiffs did not exclude other known causes of their injuries.

To make it more simple, we presented evidence of how often plaintiffs visited their doctors before, during, and after they lived in the home. We then examined plaintiffs’ treating allergist regarding the triggers for plaintiffs’ asthma and allergies, and whether they routinely followed his advice and treatment regimen. The allergist also testified to his advice to refrain from having animals in the house or around the children. Plaintiffs confirmed that at various times, they had owned three dogs, two sheep, ducks, birds, a ferret, and a pet rat. Finally, the allergist testified to the risk factors involved in plaintiffs’ subsequent decision to move into a 110-year-old farmhouse, with three barns on the property, and their purchase and care of three horses. Plaintiffs therefore had voluntarily exposed themselves to known allergens. This lessened the impact of plaintiffs’ expert causation opinions on exacerbation of asthma and allergies.

Keeping the jury focused on more plausible explanations for plaintiffs’ symptoms, rather than the convoluted theories presented by plaintiffs’ experts was critical to the outcome of the trial.

**Real or Demonstrative Exhibits**

No single witness spoke louder than the five original windows that were kept in the courtroom throughout the trial. The jurors wanted to see the windows. Instead of photographs or drawings, the jurors were able to look at all sides of the windows while our client’s employee pointed to the absence of water stains, much less any evidence of mold or deterioration. Moreover, they observed the physical effort necessary to move the windows around while the defense witness testified how solid these windows were made. They had no rot or mold. Physical exhibits spoke louder than words and were the best witnesses in the trial.

**Emphasize Common Sense**

We emphasized common sense throughout the trial and explained how the windows were made. We explained when and how we sold the windows to the builder. We first learned of a problem five years after the windows were installed and took care of the customer complaint as a business should. Plaintiffs attempted to use our client’s replacement of the windows as an admission of liability or defect. While we had legal cause to exclude this as impermissible evidence of remedial conduct, we instead used the window replacement to show the jury that we responsibly handled the customer complaint. This served to reduce the emphasis on the alleged defect and increase the emphasis on plaintiffs’ failure to exercise reasonable care in maintaining their home. Once we knew of the problem, we took care of it. By repeating this mantra, the jury viewed our client’s replacement of the windows as a reasonable business decision. Conversely, the jury viewed plaintiffs’ failure to contact our client for five years as unreasonable.

**Why Should You Emphasize the Construction Side of Mold Cases**

The jury found our client, the window supplier, not liable for plaintiff’s claims. By focusing on the construction side of our mold case, we were able to simplify the message for the jury. It allowed us to argue to the jurors that they should use their common sense regarding the claimed leaks. Most jurors owned homes and understood that no home is perfect—leaks occur. We argued that no reasonable person would watch leaks happen in their home and continue to complain to the same builder for five years with no improvement, without taking further steps. The message worked and the jurors apportioned fault to the builder and plaintiffs.

Forcing plaintiffs to make complex arguments to the jury high-
lighted our simple themes. Plaintiffs’ case necessarily required novel scientific theories and convoluted exposure analyses. Keeping it short simplified our message to the jury.

**Conclusion**

Mold cases are usually a blend of construction defect and toxic tort. By emphasizing the construction defect side of the case, defendants can simplify the evidence and arguments. This approach worked in our favor in this case. We examined plaintiffs’ claims of building leaks and their response to them. We used common sense and physical evidence to provide the jury with a more plausible explanation for plaintiffs’ claims. Instead of responding to all of plaintiffs’ toxic exposure analysis, we argued the far simpler explanation for plaintiffs’ allergies and asthma. By keeping our message simple and short, and by emphasizing the construction side of the case, we were able to win our client’s case. It was a simple approach that worked.