"You Can't Claim I Didn't Warn You"[1]: The Sophisticated User Defense May Continue Its Comeback in Silica Litigation

By Thomas J. Tobin, Esq.

and Kara B. Persson, Esq.

Thomas J. Tobin is a Partner at Gordon & Rees, LLP, practicing throughout California, primarily out of the firm's Southern California offices. He specializes in defending clients faced with claims of personal injury, property and/or business damage from alleged exposure to silica, toxic chemicals, pesticides, and other hazardous substances. He has been a Contributing Editor in a number of HarrisMartin publications and a presenter in some of its national conferences.

Kara Persson is a Senior Associate at Gordon & Rees, LLP, practicing throughout California, primarily out of the firm's Los Angeles and San Diego offices. She specializes in representing clients in cases involving claims of products liability, including alleged exposure to silica, benzene, asbestos, pesticides, and numerous other hazardous substances.

I. Introduction

Warnings appear everywhere — even a *Washington Post* writer considered adding these headers to an article: "Do not use newspaper as a flotation device. Newspaper may be harmful if taken internally."[2] Fortunately for the wary manufacturer, there are limits to the seemingly endless obligation to warn users. The sophisticated user defense is one of those limits.

As the failure to warn theory in strict products liability has evolved in toxic tort and occupational exposure cases, the sophisticated user theory has had its peaks and valleys as a defense nationwide. It once again surfaced prominently in California Court with the case of *Johnson v. American Standard*,[3] which is now pending decision by the California Supreme Court. In this article, we will chronicle these recent events, provide a primer on the sophisticated user defense, and discuss how the upcoming decision will affect pending silica matters and other toxic tort litigation. Should the California Supreme Court uphold the Court of Appeals' decision in *Johnson*, the decision will send a firm signal to lower courts in California and perhaps other states that the defense remains a viable dispositive instrument in pre-trial phases of litigation.

II. A Brief History of the Sophisticated User Defense

The sophisticated user defense has long existed as one of the equitable and logical boundaries of the failure to warn claim. Failure to warn a person of a product's dangerous propensities requires, as its natural premise, that such a warning be reasonably necessary. If the injured party knew or reasonably could have been expected to know about the product's injury-causing potential, then the manufacturer, distributor, or other upstream supplier has no duty to warn.[4]

This notion applies whether the user can be described as having "sophisticated" expertise or whether the matter is one of common knowledge. Thus, in one California case, the Court of Appeal rejected the notion that slingshots required a warning that they can be dangerous. "Is the potential danger of a slingshot generally known? Ever since David slew Goliath young and old alike have known that slingshots can be dangerous and deadly."[5] In other words, if a product's dangerous propensities are already known or should be known by the user, the manufacturer cannot be charged with failing to provide what would be a redundant warning. Or, as Comment K to section 388 of the Restatement Second of Torts puts it,

> One who supplies a chattel to others to use for any purpose is under a duty to exercise reasonable care to inform them of its dangerous character … if, but only if, he has no reason to expect that those for whose use the chattel is supplied will discover its condition and realize the danger involved.

In the case where the hazard is one of common knowledge, as with the slingshot in *Bojorquez*, there is little need to inquire into the expertise of the injured user. The sophisticated user doctrine arises where the danger might not be one known by the public generally, but would be known by a more knowledgeable and experienced party. In these cases, the level of expertise of the user is relevant and even dispositive.

Thus, under the sophisticated user doctrine, manufacturers of natural gas pipe and pipe connectors did not have a duty to warn the Nebraska Natural Gas Company of the dangers of using plastic pipe with metal com-

pression couplings.[6] Constructors of a portion of the Pennsylvania Turnpike were similarly held to be sophisticated about the use of dynamite to blast rock, such that the dynamite manufacturers were not under a duty to warn a construction worker that a newly-drilled hole would be hot enough to cause the dynamite to detonate.[7] The U.S. Air Force was also held to be knowledgeable enough about the potential dangers of exposure to chemicals used to clean jet engine parts such that its employees could not hold the chemical manufacturers liable for failure to warn.[8] To quote the language of the Court of Appeals in the *Johnson* case, "These are but examples. The cases are many."[9]

Most jurisdictions have adopted some form of the sophisticated user defense. Indeed, although *Johnson* is the first case in which a California court has squarely confronted the theory under the rubric of "sophisticated user," it is arguably not the first time it has condoned its rationale. In *Fierro v. International Harvester*,[10] plaintiff sued the manufacturer of a "skeleton vehicle," which is a truck consisting of only an engine, cab, and chassis, suitable for customizing by others, and which plaintiff's decedent's employer modified to add a refrigerator unit. Plaintiff argued the manufacturer of the truck should have warned: (1) that attaching a power cable from the refrigerator unit to the battery might create a fire hazard; and (2) that the body installed on the chassis should be designed to protect the fuel tanks from impact.[11] The Court of Appeals rejected both theories, stating that "a sophisticated organization … does not have to be told that gasoline is volatile and that sparks from … friction can cause ignition."[12]

Given that the sophisticated user defense comes up so frequently in occupational injury cases, its relevance to occupational exposure litigation seems obvious. Indeed, relying on *Fierro*, one federal court found that California would apply the sophisticated user doctrine in the asbestos context.[13] Thus, the *Johnson* case is operating against a considerable background of prior litigation, both across the country and within California.

III. A Synopsis of *Johnson v. American Standard*

Plaintiff William Johnson is an EPA-certified HVAC technician who repaired commercial air conditioning systems.[14] He sued the manufacturers of the mechanical components (one of which was American Standard), as well as chemical manufacturers and chemical suppliers, claiming he was injured by the phosgene gas created during ordinary maintenance and repair of commercial air conditioners.[15] Each of his causes of action for negligence, strict liability for failure to warn, and strict liability for design defect, against American Standard, was premised on the theory that American Standard knew that phosgene gas would be created when its equipment was serviced, but failed to provide an adequate warning.[16]

American Standard moved for summary judgment on the sophisticated user defense.[17] Relying on Bojorquez and Fierro, it argued it had no duty to warn because the risk of injury by phosgene gas was known to HVAC installers and repairers. The trial court agreed and granted summary judgment in its favor.[18]

On appeal, plaintiff argued that the sophisticated user doctrine is not, and should not become, part of California law. Citing the Restatement, the numerous decisions from other jurisdictions, as well as *Bojorquez* and *Fierro*, the court disagreed. "[In] our view, it is a natural outgrowth of the rule that there is no duty to warn of known risks or obvious dangers."[19] Moreover, citing *Fierro*, the Court of Appeals opined that not only should the doctrine be a part of California law, it arguably already is. "[I]t may fairly be argued that the sophisticated user doctrine has been applied [in California], albeit without being named."[20] Thus, the Court of Appeals saw its role as merely confirming the state of California law, rather than adopting a wholesale change.

Reviewing the evidence submitted on summary judgment, the court went on to find American Standard presented sufficient evidence of sophistication to support application of the defense. American Standard appears to have relied on a "should have known" theory, arguing that it reasonably could have expected plaintiff to know of the dangers of phosgene gas, even if plaintiff claimed ignorance. Its evidence included information about the EPA certification exam, a declaration from its operations manager stating that "the notion that phosgene can be produced when brazing … is widely known among HVAC technicians," the MSDS for the particular refrigerant at issue, and the Title 8 requirement that employers retain the MSDS for hazardous substances used at work.[21] Plaintiff relied on deposition testimony of co-workers and on his own testimony that he did not know the hazards of phosgene gas.

The Court of Appeals found plaintiff's evidence did not create a triable issue of material fact, since plaintiff's actual knowledge was not the issue. Rather, the question was whether "American Standard could reasonably expect that HVAC technicians would know of the risk" of phosgene gas. In other words, in the Court of Appeals' view, the sophisticated user doctrine relies on what the defendant reasonably believed the user would know, not what the plaintiff actually knew. Since plaintiff's evidence did not address the former question, the Court of Appeals found the trial court appropriately granted summary judgment.

Less than three months after the Court of Appeals' decision, the California Supreme Court granted review to address two questions—whether the sophisticated user doctrine applies in California, and if it applies, whether it applies under the facts presented in *Johnson*.[22] As of the writing of this article, the case is fully briefed, but oral argument has not yet been scheduled.

IV. To Affirm or Not to Affirm, That is the Question

Whether the California Supreme Court will uphold or reverse the appellate court is a question few would be so bold as to predict. Simply put, the Court has grounds to go

either way. Nevertheless, given the fact that the California Supreme Court granted review, it is an issue of legal significance and one that warrants further discussion.

If the Court affirms the appellate court's formulation of the sophisticated user defense, it will confirm a meaningful victory for the manufacturers of products used in the workplace. Henceforth, such manufacturers would possess the ability to avoid liability on proof that the employer of the injured plaintiff in an occupational exposure case knew or should have known of the product's potential hazards. In California, this defense will harmonize with workers' compensation exclusivity such that a plaintiff's main recourse for workplace injuries like the one in *Johnson* becomes the Workers' Compensation system.

Of course, the Supreme Court may not adopt the appellate court's opinion wholesale. However, there are several issues the Court may choose to address here, even if it finds the appellate court correctly held that the sophisticated user doctrine exists in California. Some issues merit clarification even if the ultimate outcome remains the same. These areas include:

- *Burden of Proof*

One issue not squarely addressed by the Court of Appeals is the issue of burden of proof. Is it plaintiff's burden as part of his case in chief to show a lack of knowledge of the hazard at issue, thus creating a duty to warn? If so, then plaintiff must allege and prove a lack of awareness. Or is the sophisticated user doctrine an affirmative defense? If so, then it is the defendant's burden to plead and prove the sophistication of the users of the end-product.

The California appellate court did not explicitly address this question, but it seems to have assumed the doctrine is an affirmative defense, meaning the burden to prove sophistication lies with the defendant. At least one other court, however, has squarely held that "the user's ignorance of danger was one on which plaintiff had the burden of proof."[23] Thus, this is an issue for potential clarification or modification.

A related question is what evidence is sufficient to prove the requisite sophistication. The Supreme Court may not agree that a declaration from defendant's employee and evidence of the topics of the EPA certification examination constitute sufficient evidence of knowledge, or it may simply provide additional rules to guide lower courts in making similar determinations of user sophistication.

- *The Issue of Knowledge*

The California Court of Appeal rejected plaintiff's evidence that he, and other HVAC technicians with whom he worked, were ignorant of the potential dangers of phosgene gas, because "actual knowledge" of plaintiff or his co-workers was irrelevant.[24] Whether American Standard knew about HVAC technicians' sophistication at the time it created its warnings was not addressed. In other words, in the Court's formulation of the defense, neither the actual knowledge of the user, nor the actual knowledge of the supplier, matter.

This is an issue on which the California Supreme Court may modify the lower court without reversing. If the Court adopts the appellate court's characterization, then the doctrine becomes one of broad application. Like American Standard, supplier and manufacturer defendants will be able to substantiate the defense with evidence of what members of a profession should know without having to prove what the plaintiff actually knew. This broader test would render all kinds of evidence — evidence like professional exams and training materials — relevant to the issue of sophistication, making proof of sophistication easier for supplier defendants.

On the other hand, if the Supreme Court were to make actual knowledge of the plaintiff relevant, the doctrine becomes much more narrower, and effectively makes it almost impossible for a defendant to succeed on summary judgment. Once the plaintiff's actual knowledge is made relevant, the plaintiff can successfully defeat a summary judgment motion with a declaration or deposition testimony stating plaintiff did not know about the hazard at issue. Since actual knowledge of a person is extraordinarily difficult for anyone other than that person to prove, making plaintiff's actual knowledge material would likely eviscerate the defense altogether.

- *Duty or Causation*

Another of the many questions the California Supreme Court may address is which of the elements of a failure to warn claim is negated by sophistication. Some courts have held that it is a duty issue — that is, a supplier defendant simply has no duty to warn someone who already knows of a particular danger.[25] Other courts have held that it is a causation issue — that where a plaintiff knew about a hazard, the lack of a warning could not have been the proximate cause of injury, since the plaintiff already knew the danger and acted despite it.[26]

Whenever review is granted, the potential for reversal exists. It is hard to envision the Supreme Court rejecting the sophisticated user doctrine outright, however, even if it reverses the lower court here. The defense's broad acceptance in other jurisdictions, and formal recognition in the Restatement, make total elimination of the defense in California seem unlikely.

And even if the Supreme Court does reject the sophisticated user defense, that does not mean evidence of sophistication becomes irrelevant. California law makes a supplier's knowledge of a particular hazard an element of a failure to warn claim. Relying on this requirement, supplier defendants may yet be able to employ evidence of the user's sophistication as relevant to the reasonableness of a particular warning. Also, defendants may be able to revive the issue of sophistication in the context of the causation issue. If a defendant can prove that a plaintiff was warned of a particular danger in other contexts — such as during a training session or in an MSDS — the defendant should be

able to argue that an additional warning on a label or in literature would have had no appreciable effect on plaintiff's actions and therefore could not have prevented plaintiff's injury.

V. Potential Effect in Silica Litigation

Should the Supreme Court affirm the appellate court's formulation of the sophisticated user doctrine, the defense will have particular applicability in silica litigation.

First, most silica cases present ample evidence of sophistication on the part of the employer. Federal and state regulations impose specific obligations on employers making use of products containing potentially injury-causing materials. For example, Title 29 of the Code of Federal Regulations requires employers to be familiar with and to disseminate information to their employees regarding hazardous materials in the workplace.[27] California occupational safety regulations have similar requirements.[28] These "risk ameliorating" provisions are precisely the sort of regulatory safety obligations which have prompted invocation of the sophisticated user doctrine.[29] Fulfillment of those obligations generally creates evidence — including records of safety meetings and written safety information — that might support a finding of sophistication.

Second, the bar for proving sophistication in most silica cases is fairly low, allowing most defendants the opportunity to rely on the defense. The greater portion of plaintiffs alleging injury from silica-containing products claim to have suffered lung injury from inhaling silica dust. This is a less technical and more obvious alleged defect than in many occupational exposure cases, where the allegation of defect may pertain to a latent and highly obscure product whose mechanisms are only understood by the most educated specialists. Indeed, one might say that the alleged hazards in most silica cases are almost a matter of common sense — most reasonable people understand that inhaling dust is bad for the lungs, and this has been a recognized work hazard for decades, even centuries by some counts. Therefore, defendants in most silica cases should be able to prove sophistication with less evidence than might be required in other cases where the sophisticated user defense has been applied. As a result, a positive ruling in *Johnson* will be of particular benefit to defendants in silica litigation.

In silica cases, given the simplicity of the products and the limited and even common-sense knowledge required to understand their potential dangers, affirming the *Johnson* decision would invigorate the defense in the silica setting.

VI. Conclusion

The pending *Johnson* decision will have broad implications not only in California, but nationwide. It is of significant importance to manufacturers of products used in California workplaces and one that will shape future litigation, especially in those matters where the necessary threshold for proving sophistication is fairly low. In silica cases, given the simplicity of the products and the limited and even common-sense knowledge required to understand their potential dangers, affirming the *Johnson* decision would invigorate the defense in the silica setting.

Footnotes

1 D. Sedaris, Me Talk Pretty One Day (Back Bay 2001) 216.
2 P. Carlson, "Hey, Don't Say They Didn't Warn You . . .", Washington Post (September 1, 2006) C:1
3 133 Cal.App.4th 496 (petition for review granted).
4 See, e.g., *Selma Pressure Treating Co., Inc. v. Superior Court* (1990) 221 Cal.App.3d 1601.
5 *Bojorquez v. House of Toys, Inc.* (1976) 62 Cal.App.3d 930.
6 *Strong v. E.I. DuPont de Nemours Co., Inc.* (8th Cir. 1981) 667 F.2d 682 (Nebraska law).
7 *Hopkins v. E.I. DuPont de Nemours & Co.* (3rd Cir. 1954) 212 F.2d 623 (Pennsylvania law).
8 *Akin v. Ashland Chemical Co.* (10th Cir. 1998) 156 F.3d 1030 (Oklahoma law).
9 *Johnson*, supra, 133 Cal.App.4th at p. 867.
10 127 Cal.App.3d 862 (1982).
11 127 Cal.App. 3d at p. 866.
12 Ibid.
13 *In re Related Asbestos Cases* (N.D. Cal. 1982) 543 F.Supp. 1142.
14 133 Cal.App.4th at p. 865.
15 Ibid.
16 Ibid.
17 Ibid.
18 Ibid.
19 Id. at p. 867.
20 Ibid.
21 Id. at pp. 868-869.
22 *Johnson v. American Standard, Inc.* (Jan. 4, 2006) 38 Cal.Rptr.3d 609.
23 Hopkins, supra, 212 F.2d at p. 626.
24 Johnson, supra, 133 Cal.App.4th at p. 871.
25 *E.g. Thibodaux v. McWane Cast Iron Pipe Co.* (5th Cir. 1967) 381 F.2d 491.
26 *E.g. Strong, supra*, 667 F.2d at p. 688; *In re Related Asbestos Cases, supra*, 543 F.Supp. at p. 1151.
27 See 29 C.F.R. §§ 1910.1200, et seq.
28 See Cal. Code Regs., tit. 8, § 5194(b)(1).
29 See, e.g., *Bergfeld v. Unimin Corp.* (N.D. Iowa 2002) 226 F.Supp.2d 970, 978.