Restating the Obvious in Maryland Products Liability Law: The Restatement (Third) of Torts: Products Liability and Failure to Warn Defenses

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RESTATING THE OBVIOUS IN MARYLAND PRODUCTS LIABILITY LAW: THE RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY AND FAILURE TO WARN DEFENSES

Rebecca Korzec†

I. INTRODUCTION

Products liability doctrine has struggled to balance the competing interests of product safety with those of product development and innovation.¹ Manufacturer defenses are at the center of the dynamic and controversial debates in contemporary products liability law.² An increasingly important inquiry centers on the availability of defenses in failure-to-warn cases.³ These defenses include the bulk supplier,

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3. See, e.g., Howard Latin, “Good” Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. Rev. 1193, 1206-57 (1994) (discussing reasons why consumers fail to read, comprehend, remember or follow even “good” warnings). Professor Latin argues that defective warning analysis “raises, in perhaps its most striking form, the fundamental question whether manufacturers or consumers should bear the primary responsibility for accident prevention in product-use settings.” Id. at 1197. For an interesting critique of Professor Latin’s article, see Kenneth Ian Weissman, A “Comment” Parry to Howard Latin’s “Good” Warnings, Bad Products, and Cognitive Limitations, 70 St. John’s L. Rev. 629 (1996). See also 2 American Law Institute, Reporter’s Study: Enterprise Responsibility for Personal Injury—Approaches to Legal and Institutional Change 66 (1991) [hereinafter “ALI Reporter’s Study”] (“Not only is complete safety unachievable, but it is inconsistent with a serious interest in warning issues. This interest presupposes a commitment to individual autonomy—within limits, to letting informed people decide for themselves what products to buy and how to use products.”). American products liability traditionally defines three types of defects: manufacturing defects, design defects and marketing defects (failure to warn). See, e.g., David Fischer, Product Liability—The Meaning of Defect, 39 Mo. L. Rev. 399 (1974).
learned intermediary, and sophisticated user defenses, and flow from the obvious danger rule—the concept being that the duty to warn does not extend to known, patent or obvious dangers.

Typically, these defenses are available in cases involving the sale of goods to knowledgeable consumers or other sophisticated buyers, such as other manufacturers. As a member of the same trade or industry as the ultimate product user, the manufacturer appreciates the dangerous characteristics of its product. Nevertheless, the manufacturer does not have a duty to warn the ultimate product users because these users already possess actual or constructive knowledge of the product’s dangers. For example, an industrial customer may

4. Some courts reject the sophisticated user, learned intermediary and bulk supplier doctrines. See, e.g., Whitehead v. St. Joe Lead Co., 729 F.2d 238, 252-54 (3d Cir. 1984) (refusing to apply the bulk supplier doctrine); Hall v. Ashland Oil Co., 625 F. Supp. 1515, 1519-21 (D. Conn. 1986) (refusing to apply the learned intermediary doctrine to employer-employee relationships). Still other courts hold that whether manufacturers should directly warn ultimate users is a factual question. See McCullock v. H.B. Fuller, 981 F.2d 656, 658 (2d Cir. 1992) (applying Vermont law to hold that a glue manufacturer had a duty to warn book bindery employees directly of dangers of prolonged inhalation of glue vapor); Bryant v. Technical Research Co., 654 F.2d 1337, 1348 (9th Cir. 1981) (holding that bulk suppliers should obtain their distributor’s customer list to provide direct warnings).


6. See Higgins v. E.I. DuPont de Nemours, 671 F. Supp. 1055, 1058-62 (D. Md. 1975) (holding that bulk supplier/sophisticated user defense applied when the manufacturer was DuPont, a knowledgeable industrial purchaser); see also Hall, 625 F. Supp. at 1516 (noting that the defendant raised knowledgeable user exception in a situation involving an industrial customer); Goodbar v. Whitehead Bros., 591 F. Supp. 552, 561 (W.D. Va. 1984) (ruling that under Virginia law, suppliers of silica-containing products did not have a duty to advise employees of dangers when the purchaser-employer clearly knew of the dangers).

7. See generally R. Robert Stomrol & Dina M. Cox, Recent Developments in the Indiana Law of Product Liability, 32 IND. L. REV. 927, 938-42 (1999) (commenting that a manufacturer has no duty to warn the ultimate consumer if the manufacturer can apply the sophisticated user doctrine); Mark M. Hager, Don’t Say I Didn’t Warn You (Even Though I Didn’t): Why the Pro-Defendant Consensus on Warning Law is Wrong, 61 TENN. L. REV. 1125, 1160-61 (1994) (criticizing the sophisticated user doctrine for creating problems of fairness, efficiency, and justice).

purchase the producing manufacturer's product for use in its own manufacturing process. Although aware of the product's dangers, this industrial buyer may, nevertheless, supply the product to its employees without warning them. If the product subsequently injures an employee, that employee frequently will sue both his employer and the producing manufacturer. Consequently, the producing manufacturer or seller will likely defend the user's products liability claim on one of two theories. First, no obligation to warn exists because the injured employee already understood the product's hazards without the necessity of a seller warning or instruction. In the alternative, the original seller may argue that any duty to warn rested with an intervening seller or the employer itself.

In such situations, the learned intermediary, bulk supplier and sophisticated user doctrines provide the manufacturer with a defense in products liability failure-to-warn cases. Fundamentally, these doctrines are premised on basic products liability no-duty rules—manufacturers have no duty to warn professional users and their employees of product risks because these users already comprehend the product risks. Thus, the initial inquiry is whether the purchaser is a sophisticated user or learned intermediary, thereby obviating the duty to warn.

While embracing the generally accepted doctrine that a product user should be warned of latent defects and dangers, the obvious danger rule is premised upon the idea that it would be wasteful to provide instructions or warnings already known by the product user. The obvious danger rule has further support from the Restatement (Third) of Torts: Products Liability ("Restatement (Third)"): 

In general, a product seller is not subject to liability for failing to warn or instruct regarding risks and risk—avoidance measures should be obvious to, or generally known by, foreseeable product users. When a risk is obvious or generally

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10. See infra notes 30-33 and accompanying text.
11. See infra notes 47-54 and accompanying text.
12. See Bartkewich v. Billinger, 247 A.2d 603, 606 (Pa. 1968) (stating "we hardly believe it is anymore necessary to tell an experienced factory worker that he should not put his hand into a machine that is at that moment breaking glass than it would be necessary to tell a zookeeper to keep his head out of a hippopotamus' mouth"). See also Campos v. Firestone Tire & Rubber Co., 485 A.2d 305, 311 (N.J. 1984) (stating that an experienced mechanic should be reminded of tire rim mismatch dangers although he had already experienced a similar injury).
known, the prospective addressee of a warning will or should already know of its existence. Warning of obvious or generally known risk in most instances will not provide an effective additional measure of safety. Furthermore, warnings that deal with obvious or generally known risks may be ignored by users and consumers and may diminish the significance of warnings about non-obvious, not-generally-known risks. Thus requiring warnings of obvious or generally known risks could reduce the efficacy of warnings generally.14

American products liability law does not recognize a duty to warn of obvious dangers. Because the purpose of warnings is to reduce product risks, Professors Henderson and Twerski, the Reporters to the Restatement (Third), have called the “no duty to warn of obvious danger” rule “beyond reproach.”15 If reasonable persons differ on the question of the obviousness of the danger, the issue is for the trier of fact.16 The Restatement (Third) supports this position.17

The bulk supplier, learned intermediary, and sophisticated user defenses raise central issues about the nature and purpose of product warnings. When judges and lawyers treat these defenses as one doctrine, failing to distinguish differences in them, difficulties arise. Consolidating these defenses obscures the significant distinctions between the doctrines because they present completely distinct factual settings. In the case of the bulk supplier and learned intermediary defenses, the duty to instruct or to warn is delegated to an equally knowledgeable, but more directly positioned, warning party. In the case of the sophisticated user defense, no duty to warn exists because the user already appreciates the product dangers.

Significant policy considerations may exist for permitting the manufacturer to fulfill its warning obligations by providing information to its immediate vendee rather than directly to the ultimate user. These rationales, however, deserve cogent and thoughtful articulation. More importantly, as a defense, the doctrine must be clearly distinguished from the plaintiff’s initial obligation to prove a defect. The first setting deals with the delegability of a manufacturer’s duty to warn. As such, the doctrine actually provides a defense. The sophisticated user doctrine, however, implicates the more basic issue of the very existence of a product defect. As a result, this Article argues that this doctrine should not be viewed as a defense at all. Simply stated, the sophisticated user already knows the product danger, obviating

17. Restatement (Third) § 2 cmt. j ("When reasonable minds may differ as to whether the risk was obvious, or generally known, the issue is to be decided by the trier of fact.").
the necessity of a manufacturer warning. These doctrines seem to indi-
cate that the product is not defective for lack of a warning to the
ultimate product user. Nevertheless, it is common to refer to these
doctrines as the learned intermediary, bulk seller, or sophisticated
user "defenses." Because user knowledge goes to the heart of proving
product defect, it should be part of the plaintiff's prima facie case.15

The promulgation of the Restatement (Third)16 mandates a reexam-
nation of basic products liability issues. For example, courts applying
section 402A of the Restatement (Second) of Torts ("Restatement (Second)")
have questioned the validity of these defenses in strict liability, as op-
posed to negligence-based, failure-to-warn cases.20 Analyzing these is-
ues permits a better understanding of whether the Restatement (Third)
improves or clarifies the current standard.

The related defenses of the bulk supplier, the sophisticated user
and the learned intermediary form the topic of discussion in this Arti-
cle because these doctrines cast the competing rights and duties of
product manufacturers, health-care providers, and product users in
sharp contrast. The issuance by the American Law Institute (ALI) of a
Restatement of Products Liability offers an ideal opportunity to reexam-
ine Maryland products liability doctrine.

This Article will examine these warning doctrines from several per-
spectives. Part II presents a historical overview of these issues.21 Part
III examines Maryland law on the duty to warn.22 Part IV discusses the
Restatement (Second)'s adoption of the sophisticated user defense.23 Fi-
ally, Part V evaluates the Restatement (Third)'s contribution to these
failure-to-warn or informational defenses.24

II. HISTORICAL OVERVIEW

The general rule in products liability law is that the product seller
must provide the ultimate user all necessary warnings and instructions
to prevent the product from being defectively dangerous.25 Failure to
warn may be based on either negligence or strict liability.26 Under
either theory, the product seller or manufacturer must warn the ulti-
mate user of product dangers that can cause foreseeable harm.27

18. See generally supra notes 8, 10, 12-13 and accompanying text.
19. See AALJ Wraps Up Products Liability Project, New UCC Article on Licenses Makes
20. See infra Part II.B.
21. See infra Part II.
22. See infra Part III.
23. See infra Part IV.
24. See infra Part V.C.
25. See DeChello v. Johnson Enters., 74 Md. App. 228, 235, 536 A.2d 1203, 1207
26. See Owens-Corning Fiberglass Corp. v. Garrett, 343 Md. 500, 682 A.2d 1143
(1996).
Generally, the duty to warn requires the seller to have actual or constructive knowledge of the product hazards. If the product user also has actual knowledge of such product dangers, the seller has no duty to warn.

A. Duty to Warn in Negligence Actions

Any discussion of these defenses must begin with the landmark case of *Littlehale v. E.I. DuPont de Nemours Co.*, a products liability sophisticated user action brought in negligence rather than in strict liability. In *Littlehale*, the district court concluded that "there need be no warning to one in a particular trade or profession against a danger generally known to that trade or profession." Consequently, absent a duty to warn the product purchaser, there is no duty to warn an employee of that purchaser. The *Littlehale* court based its decision on the language found in comment k to Restatement (Second) section 388, which provides that a manufacturer has no duty to warn product users of dangers if the manufacturer has reason to expect that such product users will discover and comprehend the dangers. In other words, no

29. See generally Latin, supra note 3.
31. Id. at 798.
32. Id. at 799.
33. Section 388 of the Restatement (Second) of Torts ("Restatement (Second)"), entitled "Chattel Known to Be Dangerous for Intended Use," provides:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or had reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.


(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and
duty to warn exists where any potential product dangers are obvious or patent.

B. Distinguishing Negligence-Based and Strict Liability-Based Failure-to-Warn Actions

Failure-to-warn cases, like manufacturing and design defect actions, usually include claims sounding both in negligence and strict liability. Courts continue, however, to debate the question of whether any significant distinction exists between negligence-based and strict liability-based duty to warn actions. Although some courts conclude that a manufacturer’s duty to warn under section 402A of the Restatement (Second) is separate and distinct from its duty to warn under a negligence theory, most jurisdictions maintain that a manufacturer’s duty to warn under either section 388 negligence or section 402A strict liability analysis is substantially identical. These jurisdictions analyze failure-to-warn cases in terms of “reasonableness,” a negligence concept.

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold;

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement (Second) § 402A.


36. Restatement (Second) § 402A.


39. Id.
Analysis of these doctrinal issues must consider whether differences exist between the Restatement (Second)’s negligence and strict liability provisions. As defined by section 388, a manufacturer is liable to an injured product user when “the manufacturer knew or in the exercise of ordinary care should have known” of the potential hazards. By contrast, section 402A provides that a manufacturer is strictly liable for selling a product “in a defective condition unreasonably dangerous to the user or consumer” even though the seller has exercised all possible reasonable care. Comment j of section 402A states that a seller may prevent a product from being unreasonably dangerous by providing directions or warnings. At the same time, comment j also suggests that the manufacturer has a duty to warn only if the manufacturer could reasonably foresee the product’s danger.

Because the language of comment j uses the term “reasonably,” a term that connotes negligence, questions arise as to whether actual substantive differences exist between a manufacturer’s duty to warn under section 388 as opposed to section 402A. In addition, there remains substantial disagreement about whether foreseeability, a negligence requirement, is an element in a strict liability duty to warn case. Many courts have concluded that the two forms of action are essentially identical, in the sense that both are negligence-based. Distinctions exist, however, in the limited availability of strict liability defenses.

C. Determining Manufacturer Liability

Courts employ a variety of approaches in determining manufacturer liability for failure to warn ultimate users of product dangers. These approaches include: the bright-line duty, reasonableness test doctrine and the product-oriented approach.

40. Restatement (Second) § 388.
41. Id. § 402A.
42. Id. § 402A cmt. j.
43. Id.
44. Id.
45. Cedar Falls v. Cedar Falls Cmty. School Dist., 617 N.W.2d 11, 17 (Iowa 2000) (stating that the foreseeability of the harm flowing from the actor’s conduct is used to determine the cause-in-fact component of negligence); Williams v. Baltimore, 359 Md. 101, 143-44, 753 A.2d 41, 64 (2000) (discussing the importance of foreseeability in terms of negligence); Lopez v. Three Rivers Elec. Corp., 26 S.W.3d 151, 156 (Mo. 2000) (stating that foreseeability is used to determine if a duty exists).
1. Bright-Line Duty

Some courts apply the "bright-line duty" test under which a seller has no duty to warn the ultimate user when intermediate purchasers are knowledgeable of the product's dangers. In many respects this approach to the sophisticated user defense is based on a self-evident tort proposition: without a duty, there can be no breach and therefore, no liability. Clearly, this approach focuses on the intermediary's knowledge, rather than on the reasonableness of the manufacturer's conduct.

2. Reasonableness Test

Other courts focus more attention on the factors in comment n, testing the reasonableness of the manufacturer's reliance on the intermediate purchaser as a conduit of product safety information. If, after weighing these factors, it appears that the manufacturer reasonably relied on a knowledgeable intermediate purchaser to convey product safety information to ultimate users, these courts conclude that there is no duty to directly warn ultimate users. Undisputed facts concerning the ultimate purchaser's actual or constructive knowledge

47. See Acoba v. Gen. Tire Corp., 986 P.2d 288, 296 (Haw. 1999) (holding that Arenato Romero was an experienced tire repairman and, in the absence of any evidence to show that he was not knowledgeable of the dangers in the repair and with regard to multi-piece rims, the defendant did not have a duty to warn); Steinbarth v. Otis Elevator Co., 703 N.Y.S.2d 417, 417 (N.Y. 2000) (stating that defendant has no duty to warn a knowledgeable user). But see Kennedy v. Mobay, 84 Md. App. 397, 413, 579 A.2d 1191, 1199 (1990) (adopting a case-by-case approach instead of the bright-line rule).

48. See Restatement (Second) § 4; see also W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 30, at 164 (5th ed. 1984).

49. Cook v. Branick Mfg., Inc., 736 F.2d 1442, 1446 (11th Cir. 1984) (stating that the duty to warn "is discharged by informing the employer of the dangerous condition," and warning each of the employees "then becomes the responsibility of the employer"); Guidry v. Kem Mfg. Co., 693 F.2d 426, 430-31 (5th Cir. 1982); Marshall v. H.K. Ferguson Co., 623 F.2d 882, 886-87 (4th Cir. 1980) (manufacturer of brewing equipment had no duty to warn brewery employee of hazards in the use of the equipment where those hazards were open and obvious to the employer-brewery); Younger v. Dow Corning Corp., 451 P.2d 177, 184 (Kan. 1969) (chemical supplier that warned intermediate purchaser of toxic effects of chemical used in purchaser's manufacturing process had no duty to convey a direct warning to purchaser's employee).

50. See Restatement (Second) § 388 cmt. n. See also infra notes 168-69 and accompanying text for a discussion of the factors found in comment n.

51. See O'Neal v. Celanese Corp., 10 F.3d 249, 251 (4th Cir. 1993) (citing Kennedy, 84 Md. App. 397, 579 A.2d 1191); Goodbar v. Whitehead Bros., 591 F. Supp. 552, 557 (W.D. Va. 1984) (stating that one of the factors that needs to be considered is the reliability of a third party as a conduit of necessary information about the product); Kennedy, 84 Md. App. at 405, 579 A.2d at 1195 (citing Goodbar).

52. See O'Neal, 10 F.3d at 251; Goodbar, 591 F. Supp. at 557; Kennedy, 84 Md. App. at 405, 579 A.2d at 1195.
allow courts to resolve these issues as a matter of law.\(^{53}\) Focusing on the reasonableness of manufacturer conduct in warning users of product dangers blurs the distinction between negligence and strict liability theories in failure-to-warn litigation.\(^{54}\)

3. Product-Oriented Approach

Courts that distinguish between the section 388 negligence approach and the section 402A strict liability approach in failure-to-warn cases highlight the product-oriented approach of strict liability.\(^{55}\) These courts emphasize that strict liability premises its analysis on the condition of the product sold without adequate warnings, rather than on manufacturer conduct.\(^{56}\) This strict liability emphasis on the product as opposed to the reasonableness of the manufacturer’s conduct demonstrates the basic distinction between strict liability and negligence.\(^{57}\) From a strict liability viewpoint, manufacturer conduct is simply irrelevant. The real inquiry is whether the product is in a defective condition because it lacks adequate warnings and instructions.\(^{58}\)

This debate between negligence and strict liability in failure-to-warn cases is part of the continuing need to reconcile competing, legitimate concerns in products liability theory—the consumer’s interest in product safety and the manufacturer’s need for certainty, stability and efficiency. Courts that find no significant distinction between negligent failure to warn and strict liability failure to warn tip the scales in favor of the manufacturer’s interests. In contrast, courts that distinguish between negligence and strict liability arguably elevate the public interest in product safety above marketplace innovation and efficiency. Clearly, the Restatement (Third) states that failure-to-warn cases sound in negligence.\(^{59}\)

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54. See, e.g., Davis, 975 F.2d at 172 (applying Louisiana law, specifically, LA. REV. STAT. ANN. § 9:2800.57 (West 1991)).
55. See Werner v. Upjohn Co., 628 F.2d 848, 858 (4th Cir. 1980).
56. Id. (stating that the distinction between negligence and strict liability disappears when an unavoidably dangerous product is involved).
57. See id.
58. See id.
59. The Restatement (Third) of Torts: Products Liability ("Restatement (Third)") adopts a reasonableness or negligence standard in warning cases. Restatement (Third) § 2(c). A product is considered defective "because of inadequate warnings or instruction if the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller . . . and the omission of the instructions or warnings renders the product not reasonably safe." Id. Therefore, the warning or instruction must alert product users of product risks and inform them of safe product use. Id. § 2(c) cmt. i. The adequacy
D. Manufacturer Defenses in Failure-to-warn Actions

In general, the seller must warn ultimate product users of product risks. In some settings, however, the seller may rely on the buyer to provide a warning. Therefore, the seller either has no duty to warn or the seller can discharge its warning duty by relying on the buyer to warn the ultimate user. Courts have struggled to define whether this presents a legal issue for the court as to the existence of the duty, or a factual question for the trier of fact as to the breach of that duty.

1. Sophisticated User Defense

The sophistication and actual knowledge of anticipated product users may obviate the duty to warn. For example, the manufacturer of a connector plug is under no duty to warn electricians of the hazards associated with such plugs. Similarly, a circuit breaker supplier has no duty to warn a communications company of the dangers of failing to test a switchboard before reactivating it after a flood. Additionally, a gunpowder manufacturer has no duty to warn buyers that the risk of fire decreases if the powder is stored in a boxed container.

2. Bulk Supplier Defense

The bulk supplier defense rests more on concerns of feasibility than knowledge. Normally, the bulk supplier of a chemical product or fluid has no practical way of physically attaching a warning to its product in a manner that will actually reach the ultimate user. As a result, such a supplier must rely on the knowledgeable intermediary purchaser to warn the user. For example, a supplier selling dielectric fluids containing PCBs to an electrical transformer manufacturer has no duty to warn the buyer's employees of the risks associated with fluid handling when the fluids were delivered in bulk to a manufacturer/buyer aware of these product risks. On the other hand, when

of product warnings is tested under a reasonableness standard which assesses the advantages and disadvantages of the warning actually given and other reasonable alternative warnings which might have been given. Id. § 2(c) cmt. a.

66. Id. (quoting Eagle-Picher Indus., Inc. v. Balbos, 326 Md. 179, 219, 604 A.2d 445, 464 (1992)).
the bulk seller of fabric for protective clothing retains control over garment labeling, the seller cannot rely on the buyer/garment manufacturer to warn ultimate consumers. In determining the validity of the bulk supplier defense, courts typically focus on facts and circumstances establishing which party is in the superior position to warn of product dangers.

3. Learned Intermediary Defense

The rule that a learned or sophisticated intermediary enjoys the better position to communicate warnings to the ultimate user first developed in prescription drug cases. More recent cases have recognized limitations on the doctrine. For example, in *Nichols v. McNeilab, Inc.*, a case involving the withdrawal of a prescription drug from the marketplace, the court rejected the manufacturer's learned intermediary defense. The *Nichols* court reasoned that, because the drug was prescribed for intermittent use, patients might not receive actual notice from their physicians in situations involving gaps in medical treatment. Many of the more recent cases arise in the workplace. The trend is to require a warning only to the buyer/employer if that employer has the actual or constructive knowledge necessary to comprehend the product dangers.

E. Application of the Manufacturer Defenses

Cogent application of the manufacturer defenses involves a two-pronged analysis. The first prong considers whether the sophisticated purchaser/bulk supplier defense is available, thus permitting satisfaction of the seller's duty to warn by warning the intermediate purchaser? If the defense is available, the second prong considers the

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70. See, e.g., *Sara Lee v. Homasote Co.*, 719 F. Supp. 417 (D. Md. 1989); see also infra note 153 and accompanying text.


73. Id. at 563.

74. Id. at 564-65.


76. See, e.g., *O'Neal*, 10 F.3d at 252-54; *Scallan*, 11 F.3d at 1252.


78. Id. at 1212.
adequacy of the warning. This two-prong analysis was recently applied in *Baker v. Monsanto* an action brought by Westinghouse employees, whose work responsibilities included repairing transformers. These employees claimed that the repair work exposed them to PCBs manufactured by Monsanto and sold to Westinghouse for use as a transformer lubricant. Monsanto defended by arguing that Westinghouse, as a sophisticated purchaser, was fully aware of PCB hazards. Although the United States District Court for the Southern District of Indiana concluded that Indiana would adopt the "knowledgeable, sophisticated bulk purchaser" doctrine, it held as a matter of law that Monsanto adequately had warned Westinghouse because Westinghouse, as a self-described expert on PCBs, had extensive, independent knowledge of the dangers of PCB exposure.

III. THE MARYLAND EXPERIENCE

Under Maryland law, a manufacturer has two obligations in a failure-to-warn case: (1) a duty to communicate an adequate warning of the dangers involved in the use of the product; and (2) a duty to provide adequate instructions for product use to avoid product dangers.

Under general negligence theory, a manufacturer will be held liable for failing to warn or failing to warn adequately. In strict liability, a product will be found defective if it is unreasonably dangerous without adequate warnings. Under either approach, the primary issue is whether the manufacturer's warning is adequate under the totality of the circumstances. Nonetheless, in Maryland, the analysis applied under either negligence or strict liability is actually the negligence-based analysis found in section 388 of the *Restatement (Second)*.

The starting point in Maryland for failure-to-warn doctrine is *Moran v. Faberge Co.* In *Moran*, the Court of Appeals of Maryland designated section 388 as the foundation for failure-to-warn analysis. The court held that a manufacturer's duty to produce a safe product, accompanied by appropriate warnings and instructions if necessary, is indistinguishable from the general responsibility of every person to

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79. *Id.* at 1213.
81. *Id.* at 1146.
82. *Id.* at 1147.
83. *Id.* at 1159-60.
86. KEETON ET AL., supra note 48, § 96, at 685.
87. Twombly, 221 Md. at 493, 158 A.2d at 119.
88. See Werner v. Upjohn Co., 628 F.2d 848, 858 (4th Cir. 1980).
89. 273 Md. 538, 332 A.2d 11 (1975).
90. *Id.* at 544-45, 332 A.2d at 15-16.
exercise due care in order to avoid unreasonable risk of harm to others.91

Both comment n to section 388 and practical considerations support Maryland case law in recognizing situations where it is either impracticable or unnecessary for manufacturers to warn ultimate users.92 First, intermediate purchasers who supply the product to ultimate users may be as knowledgeable about the nature and extent of product dangers as the initial supplier.93 Second, the product may be supplied in bulk to the intermediate purchaser who ultimately re-packages or re-labels it.94 In these situations, the manufacturer is in no position to warn or to instruct ultimate product users.

A. Obvious Danger in Maryland


Maryland courts have consistently held that only latent product dangers, not patent product dangers, will trigger the warning requirements.95 In Katz v. Arundel-Brooks Concrete Corp.,96 a worker was injured by concrete after the manufacturer had failed to warn of product dangers. The court concluded as a matter of law that "it would be as unreasonable to require every supplier of concrete to warn of its caustic properties, as to require an electric company to warn of the danger of touching uninsulated wires."97

91. Id. at 543, 332 A.2d at 15; see also Twombly, 221 Md. at 476, 158 A.2d at 110; Katz v. Arundel-Brooks Concrete Corp., 220 Md. 200, 151 A.2d 731 (1959).
92. Restatement (Second) § 388 cmt. n.
94. Id. at 62, 578 A.2d at 253 (quoting Higgins v. E.I. DuPont Nemours, 671 F. Supp. 1055, 1062 (D. Md. 1987)).
95. See generally Volkswagen of Am. v. Young, 272 Md. 201, 219-20, 321 A.2d 737, 746-47 (1974) (holding that an automobile manufacturer is liable for a design defect that it could have reasonably foreseen would cause or enhance injuries in a collision, which is neither patent nor obvious to the user, and which actually leads to or enhances the injuries sustained by the user in an automobile accident); Patten v. Logemann Bros. Co., 263 Md. 364, 368-69, 283 A.2d 567, 569-70 (1971) (holding that since injured plaintiff was familiar with the dangers of a paper bailing machine, defendant-manufacturer's failure to provide proper guards was patent rather than latent, and therefore barred recovery); Blankenship v. Morrison Mach. Co., 255 Md. 241, 246-47, 257 A.2d 430, 432-33 (1969) (holding that while Maryland recognizes the latent-patent rule in negligence cases, a plaintiff must be in privity to collect on a breach of warranty claim); Banks v. Iron Hustler Corp., 59 Md. App. 408, 423, 475 A.2d 1243, 1250 (1984) (holding that patent dangers in a product bar the plaintiff from recovering on a theory of negligence).
97. Id. at 204, 151 A.2d at 733; see also Twombly, 221 Md. at 493-94, 158 A.2d at 119 (chemicals in a product could constitute a latent danger depending on knowledge of the product uses); Iron Hustler, 59 Md. App. 408, 475 A.2d 1243.

In Moran v. Faberge, Inc., the court opined that the "duty to produce a safe product, with appropriate warnings and instructions when necessary is no different from the responsibility each of us bears to exercise due care to avoid unreasonable risks of harm to others."\(^98\) Moran measures the reasonableness of such risk by "balancing the probability and seriousness of harm, if care is not exercised, against the costs of taking appropriate precautions."\(^99\) As a general matter, Moran views the costs of warning as so minimal that the balancing process nearly always finds a duty to warn of latent dangers.\(^100\)

Determining the adequacy of warnings generally involves balancing the following factors: (1) the dangerousness of the product; (2) the manner of product use; (3) the manner and form of warnings; (4) the burdens imposed by required warnings; and (5) the likelihood that the particular warning will be communicated to foreseeable product users.\(^101\) The warning need only be reasonable, "not the best possible warning."\(^102\)


Myers v. Montgomery Ward & Co.\(^103\) illustrates many of the problems with the obvious danger rule. Myers involved injuries sustained by the buyer of a lawnmower not equipped with safety devices.\(^104\) The court assumed that if the consumer purchased a dangerous lawnmower with an obvious defect, the lack of a safety device, the consumer must have had adequate information with which to make a rational, reasonable choice. Specifically the court of appeals noted that "the absence of the safety devices was apparent at the time of purchase, and, in a free market, Myers had the choice of buying a mower equipped with them, of buying the mower which he did, or of buying no mower at all."\(^105\)

There are basic deficiencies with this analysis. First, practically speaking, the consumer will not necessarily have a choice between selecting a safe product over a dangerous one. For example, some products, such as prescription drugs may be unavoidably dangerous. Second, although the physical absence of a safety device on a lawnmower may be obvious, the extent of the danger created by the lack of such a safety device may not be evident. Obtaining adequate safety information may be impossible or too expensive for the average con-

\(^{99}\) Id.
\(^{100}\) Id. at 543-44, 332 A.2d at 15.
\(^{101}\) Id. at 543-46, 332 A.2d at 15-16.
\(^{103}\) 253 Md. 282, 252 A.2d 855 (1969).
\(^{104}\) Id. at 285-86, 252 A.2d at 857-58.
\(^{105}\) Id. at 294, 297-98, 252 A.2d 862-64.
Moreover, even the consumer who perceives an abstract danger, may underestimate the actual hazard to him. Further, the dangerous product may harm not only the original buyer, but also innocent bystanders who have no voice in making purchase decisions.

B. Sophisticated Users and Bulk Suppliers

Guided by comment n to Restatement (Second) section 388, federal courts, applying Maryland law, have recognized the sophisticated user, learned intermediary and bulk supplier defenses. Significantly, federal courts applying Maryland law have looked beyond the apparent differences in factual scenarios to recognize marketplace realities and to resolve product defense issues as a matter of law.

Comment n affects both the “sophisticated user” and “bulk supplier” concepts. These defenses are not distinct theories, each must

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106. See generally Malcolm Gladwell, Dow Corning to Quit Silicone Breast-Implant Business, Wash. Post, March 19, 1992, at A1, A12 (discussing Dow Corning’s decision to discontinue the manufacture of breast implant devices in the wake of inadequate scientific information on their safety and expensive government tests which are being conducted to gather further data).

107. See generally Josh Sugarman, Safety; Troubleshooting Violence; Our Traumatized City Can Be a Laboratory For New Solutions, Wash. Post, December 4, 1994, at C1-C3 (advocating the need to incorporate handguns into Washington, D.C.’s products liability laws so that the federal government can oversee that firearms are safe for their intended use and do not cause injury to their users or innocent bystanders).

108. See Timothy D. Lytton, Note, Lawsuits Against the Gun Industry: A Comparative Institutional Analysis, 32 Conn. L. Rev. 1247, 1249-54 (2000) (advocating that the tort system can be reformed to better assist institutions such as markets, legislatures, and administrative agencies in the making of public policies designed to reduce handgun violence); Robert F. Cochran, Jr., Note, Good Whiskey, Drunk Driving and Innocent Bystanders: The Responsibility of Manufacturers of Alcohol and Other Dangerous Hedonic Products For Bystander Injury, 45 S.C.L. Rev. 269, 294-335 (1994) (advocating that courts or legislatures make manufacturers of alcohol and other dangerous products primarily designed for entertainment and enjoyment be subject to liability for injuries caused to innocent bystanders).


110. See generally Singleton, 727 F. Supp. at 218 (using the sophisticated user defense in a suit involving a “blind spot” on a crane); Sara Lee, 719 F. Supp. at 419 (involving a fire in a pickle plant allegedly caused by products developed by defendant); Higgins, 671 F. Supp. at 1056-57 (using the sophisticated user defense in an action involving injuries and death arising from spray paint); Housand, 751 F. Supp. at 541-42 (using the sophisticated user defense in a suit involving a mechanical arm striking an assembly line worker).

be satisfied before a manufacturer may reasonably rely on a third party to convey warnings or instructions to ultimate product users. Rather, the "sophisticated user" and "bulk supplier" defenses constitute separate, yet complementary aspects of the same analysis—the obligation of the initial seller to warn ultimate users when products are supplied through a third-party intermediary. The "sophisticated user" aspect of this inquiry focuses on intermediate purchaser knowledge, while the "bulk supplier" aspect focuses on the feasibility and likelihood of manufacturer communications reaching the ultimate user who receives the product through an intermediate industrial purchaser.


A number of federal cases that have affected the development of Maryland case law deserve special attention. In Goodbar v. Whitehead Bros., foundry workers sued twelve suppliers of silica sand who provided the sand in unpackaged railroad car lots to plaintiffs' employer. The suppliers were accused of "fail[ing] to advise the Foundry's employees with respect to the dangerous characteristics of silica products and how to protect themselves from them," resulting in exposure to silica and eventual silicosis. After determining that comment n was included in Virginia law, Judge Kiser reasoned that comment n "recognizes that a balancing of these considerations is necessary in light of the fact that no single set of rules could possibly be advanced that would cover all situations." Applying this rationale, Judge Kiser weighed the factors in comment n, concluding that the sophisticated user defense is consistent with the development of failure-to-warn case law. As a result, he found

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114. See supra note 109-10 and accompanying text.
116. Id. at 555.
117. Id. at 557 (citing Barnes v. Litton Indus. Prods., Inc., 555 F.2d 1184, 1188 (4th Cir. 1977)).
118. Id. It is likely that the outcome of Goodbar would have been the same if the case had been brought under section 402A. The plaintiff-workers included a claim for breach of implied warranty failure to warn. Id. at 555. Judge Kiser stated that the duty to warn under a theory of implied warranty "focuses upon whether the lack of warning renders the product unreasonably dangerous . . . ." Id. at 556. This is identical to the standard for strict liability failure to warn. See Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980). Judge Kiser granted summary judgment for the defendants on the plaintiffs' warranty claim, finding that no implied warranty arises when the intermediate purchaser receives the product with full knowledge of its dangerous condition. Goodbar, 591 F. Supp. at 567.
119. Id. at 560-61.
that the product supplier had no duty to warn employees of a knowledgeable industrial purchaser of product hazards.\textsuperscript{120}

Undisputed evidence demonstrating the foundry’s extensive knowledge of the hazards of silica dust inhalation, including the danger of developing silicosis, aided Judge Kiser in reaching this decision.\textsuperscript{121} Significantly, the foundry was aware of proper dust control methods for avoiding these dangers.\textsuperscript{122} Moreover, the court found that information known in the industry since the 1930s should be imputed to foundry officials active in industry groups that disseminated technical information.\textsuperscript{123} Direct evidence demonstrated that these foundry officials actually received information from industry groups, conducted their own occupational health studies, and had “full comprehension . . . of the dangers of high silica dust concentration and silicosis.”\textsuperscript{124} The foundry had retained a local physician to monitor employees exposed to silica dust and its management had actual knowledge of government standards regulating permissible dust exposure levels.\textsuperscript{125} The foundry’s knowledge, obtained independently, rather than through its product suppliers, formed the basis of Judge Kiser’s conclusion that the foundry completely appreciated the hazards connected with silica dust exposure, including silicosis.\textsuperscript{126}

Judge Kiser recognized substantial impediments faced by suppliers seeking to directly warn foundry employees of the silicosis danger: (1) identification of users and others exposed to the products would require constant monitoring of the suppliers due to the constant turnover of the foundry’s large work force; (2) sand products were delivered to the foundry in bulk in unpackaged railroad cars or trucks lots; (3) written product warnings placed on the railroad cars or trucks could not reach affected workers or bystanders because loose sand was unloaded and stored in storage bins until used; (4) only the foundry was in a position to provide the necessary housekeeping measures, training and warnings to its workers on a continuous and sys-


\textsuperscript{121} Goodbar, 591 F. Supp. at 561-65.

\textsuperscript{122} Id.

\textsuperscript{123} Id. at 556.

\textsuperscript{124} Id. at 563.

\textsuperscript{125} Id. at 564-65.

\textsuperscript{126} Id. The plaintiffs’ experts in Goodbar criticized the foundry’s lack of proper corrective measures and concluded that, because of this inaction, the foundry did not have the requisite sophistication. Id. at 565. Judge Kiser found “this conclusion to be nothing short of amazing.” Id. The plaintiffs’ experts admitted that the foundry had information available about silica dust exposure and silicosis. Id. Judge Kiser concluded that “since the Foundry had such insight, Defendants could assume that proper use would be made thereof.” Id.
tematic basis; (5) the suppliers were forced to rely on the foundry to convey safety information to its employees; (6) confusion would result from twelve different suppliers each providing competing, inconsistent information to foundry workers; and (7) given the commercial setting, suppliers realistically could not exert pressure on a large, industrial customer to permit the suppliers access to the foundry to educate foundry workers about the hazards of silicosis.127

Against this factual background, Judge Kiser concluded that no disputed material question of fact existed as to whether the suppliers reasonably relied on the foundry to convey appropriate safety information to its workers.128 As a result, he granted the suppliers' motions for summary judgment, holding on two grounds that they had no duty to warn foundry employees: (1) the employer was a knowledgeable industrial purchaser; and (2) only the employer was directly able to communicate effective warnings to the ultimate product users.129


The Goodbar reasoning furnished the cornerstone of the decision in Higgins v. E.I. Du Pont de Nemours & Co.130 In Higgins, the Baltimore City Fire Department purchased Imron paint from DuPont, which manufactured the paint using glycol ether acetates supplied by Eastman and Union Carbide.131 Eventually, Baltimore City firefighters brought a products liability action against DuPont, Kodak and Union Carbide sounding in negligence, strict liability, and warranty, for failure to warn of possible teratogenic effects of Imron paint.132

Judge Smalkin granted summary judgment in favor of Kodak and Union Carbide, the bulk suppliers of chemicals to Du Pont, holding as a matter of law that they had no duty to warn ultimate users, the firefighters actually exposed to the chemicals in the paint.133 The undisputed facts revealed a "plethora of material" evidencing Du Pont's extensive knowledge concerning possible teratogenic effects of glycol ether acetates.134 The suppliers had obtained independent research and information gathered from third parties, including its own suppliers.135 DuPont's knowledge included technical studies conducted by DuPont's own employees. These studies noted that high doses of the

129. Id. at 566-67.
130. 671 F. Supp. 1055 (D. Md. 1987); see generally id. at 1058-59.
131. Id. at 1056.
132. Id.
133. Id. at 1062-63.
134. Id. at 1056.
135. Id. at 1061.
involved chemicals produced toxic effects on the reproductive and hematological systems of mice.\textsuperscript{136} Moreover, DuPont received reports prepared by Japanese researchers, by Dow Chemical and by the National Institute of Occupational Safety and Health (NIOSH) discussing possible teratogenic effects.\textsuperscript{137} Finally, Union Carbide and Kodak had advised DuPont of research findings that animals experienced testicular changes and infertility from high chemical exposure.

The court held that DuPont was in a superior position than either of the bulk suppliers to communicate effective warnings to ultimate users because it manufactured, packaged, labeled and distributed the finished product.\textsuperscript{138} Thus, DuPont easily could have communicated an effective warning to its customers. By comparison, Kodak and Union Carbide were unable, as a practical matter, to communicate any warning to the ultimate users because they supplied the chemicals to DuPont in bulk.\textsuperscript{139}

In opposing summary judgment, the plaintiffs argued that the sophisticated user and bulk supplier defenses were unavailable in strict liability claims under section 402A.\textsuperscript{140} Moreover, they insisted that the adequacy of warnings is a factual question for the trier of fact, precluding summary judgment on the negligence claims. In the absence of controlling Maryland decisions, Judge Smalkin followed Goodbar.\textsuperscript{141}

As previously discussed, Maryland courts developed a two-part analysis for the sophisticated user/bulk supplier defense.\textsuperscript{142} The first prong focuses on the status of the purchaser, DuPont, a chemical company having sophisticated knowledge of chemicals.\textsuperscript{143} As a dealer in chemicals, DuPont presumably knew the risks and had no need for product danger warnings.\textsuperscript{144} The second prong involves the defendants' position as bulk suppliers of chemicals.\textsuperscript{145} This prong addresses the feasibility of providing warnings beyond DuPont, to end-users, because the product is not actually packaged until a later point in the distribution process.\textsuperscript{146} Generally, warnings are usually found to be most effectively conveyed when placed directly on the product, its label or container.\textsuperscript{147}

\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 1061-62.
\textsuperscript{139} Id. at 1062.
\textsuperscript{140} Id. at 1057.
\textsuperscript{141} Id. at 1062.
\textsuperscript{142} See supra notes 109-11 and accompanying text.
\textsuperscript{143} See Higgins, 671 F. Supp. at 1062.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} See, e.g., 40 C.F.R. § 156.10(4)(i) (1999) (requiring warning label to be securely attached to the pesticide products immediate container); Andries v. Gen. Motors Corp., 444 So. 2d 1180, 1183 (La. 1983) (upholding finding that battery was adequately labeled where warning label was placed on
3. *Sara Lee v. Homasote*

Following *Goodbar* and *Higgins*, Judge Black ruled in *Sara Lee v. Homasote* that the suppliers of bulk chemicals to an intermediate manufacturer had no duty to convey direct warnings to users of the manufacturer's finished product. In *Sara Lee*, the owner of a pickle processing plant sued ARCO and BASF, suppliers of a chemical raw material known generically as expandable polystyrene beads ("EPS beads") to an intermediate industrial purchaser. The purchaser fabricated the EPS beads into expanded polystyrene board insulation, some of which was sold to a contractor who used it in construction of the plant. After a fire destroyed the plant, the owner alleged that ARCO and BASF were liable in negligence, warranty and strict liability for failure to warn of the product's flammability.

Judge Black described *Goodbar* and *Higgins* as "persuasive and controlling" of the failure-to-warn claims against ARCO and BASF. He applied the factors in comment n of section 388, balancing the magnitude of the risks, the intermediary's knowledge of the risks and the ability of the bead suppliers to communicate with ultimate users. Judge Black recognized that, although the potential product risks were substantial, the suppliers' intermediate purchaser "was a knowledgeable industrial user of EPS beads," fully aware of its flammability.

The evidence in *Sara Lee* demonstrated that the president and owner of the intermediate purchaser was a pioneer in the EPS bead industry, who had acquired extensive independent knowledge of the product's flammability. Moreover, the suppliers had furnished to their immediate customers "product literature concerning the flammability characteristics of EPS raw material and EPS board insulation, as well as other important information on product uses and applications."

The court concluded that the intermediate purchaser was in the superior position to communicate an effective warning to ultimate users. Significantly, the beads were received by the intermediate purchaser in bulk shipments of one thousand-pound containers that

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Id. at 420.

Id. at 421-22.

Id. at 424.

Id. at 422-23.

Id. at 423.

Id. at 424.
were later reprocessed and repackaged for distributing. Consequently, ARCO and BASF could not have feasibly placed a warning on the EPS beads that would have reached the ultimate users. As a result, the court analogized the difficulties encountered by the bulk suppliers in warning the foundry employees in Goodbar to the problems faced by ARCO and BASF. The court also recognized that "it would be difficult and unduly burdensome" for the suppliers to identify, much less provide training to, all customers of products containing the suppliers' EPS beads.

The plaintiff in Sara Lee argued that unlike the bulk suppliers in Goodbar, ARCO and BASF actually had developed and directly marketed the technology for molding the EPS raw material to consumers. The plaintiff contended that, "by virtue of this involvement," ARCO and BASF incurred an obligation to directly warn consumers. The court found this argument unpersuasive, however, stating that:

\[\text{[t]he focus of the bulk supplier/sophisticated user defense is not on the knowledge of the raw material suppliers, but rather on the knowledge of the industrial purchaser. The record in this case establishes that Foam Industries knew or should have known at least as much about the dangers of EPS board insulation to the end user as ARCO and BASF.}\]

Theoretically, strict liability should evaluate the product in its final condition rather than the reasonableness of the manufacturer's conduct in producing it. Nevertheless, the standard applied in strict liability warning cases, which evaluates the reasonableness of manufacturer conduct, more closely resembles a negligence standard by evaluating the reasonableness of manufacturer conduct. Under strict liability theory, inadequate warnings render a product defective and unreasonably dangerous. Under a negligence standard, however, if a seller's conduct is reasonable in framing the product's warnings, those warnings are considered "adequate." In the context of industrial products, any consideration of whether a product safety warning is "adequate" must take into account both distribution and workplace realities. From this perspective, the most effective and, therefore, the most adequate warning that a manufac-

\[158. \text{Id.} \]
\[159. \text{Id.} \]
\[160. \text{Id.} \]
\[161. \text{Id.} \]
\[162. \text{Id.} \]
\[163. \text{Id.} \]
\[164. \text{Id.} \]
\[165. \text{See} \text{Kenneth M. Willner,} \text{ Failures to Warn and the Sophisticated User Defense, 74} \text{VA. L. REV. 579, 582-83 (1988).} \]
\[166. \text{Id. at 581.} \]
\[167. \text{Id. at 582 (quoting RESTATEMENT (SECOND) § 402A cmt. j).} \]
turer can provide, will often be to the employer who will, in turn, incorporate the information into its training procedures.

IV. ADOPTION OF THE SOPHISTICATED USER DEFENSE IN THE RESTATEMENT (SECOND)

The drafters of the Restatement (Second) recognized that under certain circumstances it would be impracticable for product suppliers to effectively communicate warnings directly to users. In Restatement (Second) section 388 comment n, the drafters assert that a supplier of a product may discharge its duty to provide an adequate warning by providing information to a third person through whom the product is supplied to the ultimate user. Comment n identifies the following factors to determine whether a product supplier has relied reasonably on an intermediary to convey warnings to ultimate product users:

1. the dangerous condition of the product;
2. the purpose for which the product is used;
3. the form of any warnings given;
4. the reliability of the third person as a conduit of necessary information about the product;
5. the magnitude of the risk involved; and
6. the burden imposed on the supplier by requiring that he directly warn all users.

A. Workplace Warnings Liability

The considerations in comment n are particularly relevant when an industrial customer purchases the initial manufacturer's product for use in its own manufacturing process. The increased impact of warnings liability for injuries arising in the industrial setting has caused two commentators to conclude that the "expansion of warnings liability has occurred with little consideration of what is known about the communication and dissemination of information." Consequently, the extension of workplace warnings liability unguided by practical considerations may result in two undesirable effects. First, holding a manufacturer liable for failing to provide warnings to employees of an intermediate purchaser has the unreasonable poten-
tial of imposing absolute liability in those situations where it is impractical for the manufacturer to warn the product user directly.\textsuperscript{173} Second, the imposition of such liability upon manufacturers may lead to an overuse of "legally sufficient, but practicably useless and even counterproductive warnings" that will ultimately increase the occurrence of injuries in the workplace.\textsuperscript{174}

The principles of "communication theory"\textsuperscript{175} are applicable to the particular problems that attend the transmission of warnings in industrial settings where manufacturers and end-users are separated by one or more intermediate purchasers.\textsuperscript{176} Applying the communication theory, some commentators have outlined three broad requisites for effective warnings.\textsuperscript{177} Warnings must reach the intended audience, must contain adequate admonitory and instructional information, and must be understood by the intended audience.\textsuperscript{178} Because "[t]he ultimate objective of any product warning should be to reduce the risk of injury associated with the product," the critical question must be who can most effectively disseminate product safety information in a manner that will actually protect the product users.\textsuperscript{179} Considered from this perspective, a manufacturer is frequently not the best provider of effective safety information to the employee using the product in an industrial setting.\textsuperscript{180}

1. Manufacturer Inability to Identify Particular Hazards

For a product warning to be effective, it is essential that the provider "be able to identify the specific hazards which the product user is likely to encounter."\textsuperscript{181} Manufacturers of raw materials, bulk chemicals or industrial equipment are frequently unable to predict the risks associated with the use of their products in another manufacturer's process.\textsuperscript{182}

\begin{flushleft}
\textsuperscript{173} Id. (citing Ortho Pharm. Corp. v. Chapman, 388 N.E.2d 541 (Ind. Ct. App. 1979), Bellotte v. Zayre Corp., 352 A.2d 723 (N.H. 1976) and Schuh v. Fox River Tractor Co., 218 N.W.2d 279 (Wis. 1974)). The Maryland Court of Appeals has previously stated that the adoption of strict liability was not intended to cast a seller of a product in the role of insurer or to impose absolute liability on sellers for any injury arising from the use of a product. Phipps v. Gen. Motors Corp., 278 Md. 337, 352, 363 A.2d 955, 963 (1976).
\textsuperscript{174} Schwartz & Driver, supra note 127, at 43-44.
\textsuperscript{175} Id. at 45. Communication theory is concerned with the description and analysis of communication primarily through the use of models intended to define the functional components of a "communication." Id.
\textsuperscript{176} Id. at 67.
\textsuperscript{177} See id. at 46.
\textsuperscript{178} See generally id. at 46-66 (noting that "[p]roduct warnings are a specialized form of communication").
\textsuperscript{179} Id. at 51-52, 62.
\textsuperscript{180} Id. at 62.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\end{flushleft}
Courts have held that where a manufacturer is unable to predict specific hazards that the ultimate product user may encounter, it should not be held liable for failure to warn.\textsuperscript{183} For example, in \textit{Gonzalez v. Volvo of America},\textsuperscript{184} plaintiffs sustained injuries when their Volvo station wagon overturned while pulling a U-Haul trailer. Plaintiffs argued that Volvo should have warned them of the risks of a mismatch of the trailer hitch and bumper. Because Volvo could not have identified the specific risk of a mismatched trailer hitch, the court ruled in favor of Volvo as a matter of law.\textsuperscript{185} The court reasoned:

\begin{quote}
We acknowledge that Section 402A imposed upon Volvo a duty to provide plaintiffs with a reasonably safe station wagon. In our opinion, however, this duty did not extend to a requirement to warn them that a particular trailer hitch was unsafe to use, particularly when it was installed as appropriate by a company engaged in the business of renting trailers. The intervention of a professional such as U-Haul is the rule and not the exception when consumers rent trailer hitches. It was the duty of such professionals and not the duty of defendant-appellant to select an appropriate hitch for plaintiffs. Stated otherwise, the station wagon which defendant Volvo furnished to plaintiffs was not dangerous beyond the expectations of ordinary consumers. Ordinary consumers consult trailer lessors such as U-Haul when renting trailer hitches, a necessary addition if the trailer is to be utilized. It is the advice of such third parties and not the warnings of automobile manufacturers upon which ordinary consumers do, and should be entitled to rely.\textsuperscript{186}
\end{quote}

2. Warnings from a Credible Source

Apart from identifying particular hazards, "the effectiveness of a product warning depends in large part on the credibility of its

\textsuperscript{183} See, e.g., Gonzalez v. Volvo of Am., 752 F.2d 295 (7th Cir. 1985).
\textsuperscript{184} 752 F.2d 295.
\textsuperscript{185} Id. at 301.
\textsuperscript{186} Id. at 300. As a general rule of products liability, under both negligence and strict liability, a product manufacturer must warn product users or consumers of its product's dangers. Christopher P. Downs, Comment, \textit{Duty to Warn and the Sophisticated User Defense in Products Liability Cases}, 15 U. BALI. L. REV. 276, 280 (1986). Often the product manufacturer can fulfill its duty to warn by placing a warning on the product or by providing information in the owner's manual or brochures delivered with the product. Nevertheless, in some circumstances it is impossible or highly impracticable directly to warn the ultimate product user. In these situations, product providers satisfy their warning duty through intermediaries who warn or instruct the ultimate product user. See generally, Richard C. Ausness, \textit{Learned Intermediaries and Sophisticated Users: Encouraging the Use of Intermediaries to Transmit Product Safety Information}, 46 SYRACUSE L. REV. 1185 (1996).
source. An employer will generally have a close relationship and, thus, more credibility with its employees than a remote manufacturer. Furthermore, the warnings should be adapted to the individual needs of the intended receivers, including the employees in a workplace setting. Adapting the warning to individual needs would be easier for the employer than for the manufacturer, as the employer has a much better perspective to evaluate its employees' intelligence and education, as well as their familiarity with the product and technical terms.

Because of its familiarity with the extent of its workers' education and work experience, only the employer can provide and enforce the appropriate levels of training required in the workplace. Written warnings from a remote manufacturer cannot provide the necessary supervision and feedback required in an effective safety program. Indeed, a remote product manufacturer is not even in a position to determine whether its purchasers' employees are capable of comprehending complex technical warnings, or to respond to individual employee inquiries concerning specific technical information. The employer, "with the discipline inherent in the employment relationship," is in the unique position to implement and enforce appropriate and effective training programs. The employer's consistent workplace presence allows it to control that environment and compel adherence to safety rules adapted to the idiosyncratic use of the product in its manufacturing process.

B. Inappropriate Imposition of Absolute Liability

Written warnings provided by manufacturers and directed to users of industrial products, unaccompanied by employee training programs, generally will not be effective in reducing product-related accidents in the workplace. Holding manufacturers liable for injuries they could not reasonably be expected to prevent is tantamount to the regulatory scheme set forth in OSHA's Hazard Communication Standard. 29 C.F.R. §1910.1200.
imposition of absolute liability. Such an approach flies in the face of consistent pronouncements by courts that "strict liability is not a radical departure from traditional tort concepts. Despite the use of the term 'strict liability,' the seller is not an insurer, as absolute liability is not imposed on the seller for any injury resulting from the use of his product."198

The imposition of absolute liability on product manufacturers for failure to warn would have undesirable economic consequences.199 The costs associated with absolute liability would be incorporated into the costs of raw materials, component parts and, ultimately, finished products.200 Thus, society at every level would incur the cost "of workplace injuries which would be preventable under a properly focused set of rules of warnings liability."201

Various commentators maintain that "the most effective solution to workplace warnings problems is to require the employer to communicate safety information to its employees through training and supervision."202 This is particularly true given employers' statutory and common-law duties to maintain a safe workplace, including maintenance of safe equipment, warning of any dangers in the workplace, and training and supervision of their employees.203 The employer generally receives product safety information from the product manufacturer or acquires it through other sources.204 The employer is in the best position to know the dangers associated with the industrial products it purchases and uses in its manufacturing process.205 Therefore, the product manufacturer's duty to warn the employer should be limited to those dangers the employer could not or should not discover.206

199. See Schwartz & Driver, supra note 127, at 74. Manufacturers who are held absolutely liable have no incentive to warn unless the warning would reduce the number of accidents. Because warnings directed at users of industrial products generally are not effective in reducing accidents, manufacturers are forced to pass the costs of workplace injuries on to society. Id.
200. Id.
201. Id.
202. Id. at 79.
203. Id. at 79 n.183.
204. See, e.g., Higgins v. E.I. DuPont de Nemours, 671 F. Supp. 1055, 1167 (D. Md. 1987) (noting that had employer not redistributed manufacturer's product in unlabeled cans to its employers, they would not have been injured).
205. Schwartz & Driver, supra note 127, at 79. This is important because industrial products have a variety of potential hazards associated with their particular use. Id. at 58.
206. Id. at 79.
Such rules promote effective communication to insure that the product user understands and appreciates the necessary safety information.\textsuperscript{207} Thus, they are most likely "to accomplish the basic legal objective underlying warnings liability—accident prevention."\textsuperscript{208}

V. THE RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY

On May 20, 1997, the American Law Institute membership adopted the "Proposed Final Draft," which is the latest and probably final version of the Restatement (Third), "subject to the usual editorial prerogatives."\textsuperscript{209} The last half of the twentieth century will be remembered as a technological revolution.\textsuperscript{210} Products liability law seeks to compensate injured individuals through allocation of losses.\textsuperscript{211} As Justice Traynor explained in his concurring opinion in Escola v. Coca Cola Bottling Co., "public policy demands that responsibility be fixed wherein it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."\textsuperscript{212} Clearly, technology is a "challenge to our outdated legal framework."\textsuperscript{213}

The stated purpose of the Restatement (Third) was to reflect the current state of products liability law.\textsuperscript{214} As the reporters Professors Henderson and Twerski stated as they embarked on their project:

[D]octinal developments in products liability have placed such a heavy gloss on the original text of and comments to section 402A as to render them anachronistic and at odds with their currently discerned objectives. By changing the relevant language to conform to current understandings—by restating the Restatement—we hope to clarify much of the confusion that has arisen over the years.\textsuperscript{215}

The Proposed Final Draft contained 386 pages of black letter law, comments and reporters' notes.\textsuperscript{216} It consists of twenty-one sec-

\textsuperscript{207} Id. at 83.
\textsuperscript{208} Id.; see also General Liability and Consumer Law Committee, Failure to Warn: Product Warnings, Instructions & User Information, ABA Tips Products (1996).
\textsuperscript{209} Restatement (Third).
\textsuperscript{211} Keeton et al., supra note 48, § 1, at 5-6.
\textsuperscript{212} Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Ca. 1944).
\textsuperscript{213} Id. at 440.
\textsuperscript{216} See generally Restatement (Third), supra note 8.
tions.\textsuperscript{217} Sections 1 through 8 address liability for defects existing at the time of sale.\textsuperscript{218} Sections 9 through 11 concern post-sale obligations.\textsuperscript{219} Sections 12 through 14 deal with successor and apparent manufacturer liability.\textsuperscript{220} Finally, sections 15 through 21 address “provisions of general applicability,” including causation, affirmative defenses, and definitions.\textsuperscript{221}

A. Retention of the Product Defect Categories

Significantly, section 2 of the \textit{Restatement (Third)} retains the categories of product defect that exist in current products liability jurisprudence: defective manufacture, defective design and defective warning instruction.\textsuperscript{222} Subsection (a) defines manufacturing defect as a “departure from its intended design.”\textsuperscript{223} Subsection (b) defines defective design, stating that “[a] product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe.”\textsuperscript{224} The reasonable alternative design requirement has proved to be extremely controversial.\textsuperscript{225} Subsection (c) applies the same concept to warning and instructions defects.\textsuperscript{226} A product is defective when it omits risk avoidance or reduction information, the omission of which renders the product “not reasonably safe.”\textsuperscript{227}

1. Negligence-Based Design and Warning Defect

Comment a to section 2 establishes that the only liability standard for manufacturing defects is “strict liability.”\textsuperscript{228} The design and warning defect standards are negligence-based.\textsuperscript{229} Significantly, the “consumer-expectation” test is eliminated as an independent standard for

\begin{itemize}
\item \textsuperscript{217} See id.
\item \textsuperscript{218} Id. §§ 1-8. Sections 1 through 4 cover products generally, and sections 5 through 8 cover special products and product markets, including prescription drugs and medical devices. Id.
\item \textsuperscript{219} Id. §§ 9-11. These sections cover time of sale misrepresentations, post-sale failure to warn and post-sale failure to recall product, respectively. Id.
\item \textsuperscript{220} Id. §§ 12-14.
\item \textsuperscript{221} Id. §§ 15-21. In particular sections 19 through 21 define “product,” “one who sells or otherwise distributes,” and “harm to persons or property.” Id.
\item \textsuperscript{222} Id. § 2.
\item \textsuperscript{223} Id.
\item \textsuperscript{224} Id.
\item \textsuperscript{225} See id. at Introduction; see also id. § 2 cmt. b (explaining that some courts require the plaintiff to prove there is an alternative design available while other courts use the consumer expectations test which directly contradicts the alternative design requirement).
\item \textsuperscript{226} Id. § 2.
\item \textsuperscript{227} Id.
\item \textsuperscript{228} Id. § 2 cmt. a.
\item \textsuperscript{229} Id.
determining defectiveness. Instead, consumer expectation is relegated to the status of a mere non-dispositive factor for consideration in risk-utility balancing. As a logical consequence of this “demotion” of the consumer-expectation test, the obvious danger defense is eliminated in defective design cases.

Under the Restatement (Third) negligence-based standard, warnings and instructions must be reasonable. Reasonableness is measured by considering content, comprehensibility, manner of expression, and characteristics of expected user groups. Instruction for the safe use of the product must be clear and complete. Further, if there are unavoidable, material risks associated with the use of the product, such risks must be disclosed adequately and completely so that the user can make an informed choice whether to use the product.

B. Retention of the Obvious Danger Rule

The Restatement (Third) retains the obvious danger rule in warning defect cases, thus relieving the manufacturer of the duty to warn or instruct of risks that are generally known to product users. On the other hand, a product manufacturer or seller must provide warnings for non-obvious risks that would be material to product users in deciding whether to use the product. Such product warnings should be provided to anyone “who a reasonable seller should know will be in a position to reduce or avoid the risk of harm.”

C. The Restatement (Third) on Learned Intermediaries

The Restatement (Third) insulates health product manufacturers from liability if physicians do not provide product warnings to their patients. Under the Restatement (Third), section 8(d)(1), liability is imposed on the manufacturer only if “reasonable instructions or warnings regarding foreseeable risks of harm posed by the drug or medical device are not provided to prescribing and other health-care providers who are in a position to reduce the risks of harm in accordance with the instructions or warnings.” In mass vaccination cases, however, comment e recognizes that health-care providers cannot

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230. Id. § 2 cmt. g.
231. Id.
232. Id.
233. Id. § 2 cmt. i.
234. Id.
235. Id.
236. Id.
237. Id. § 2 cmt. j.
238. Id. § 2 cmt. i.
239. Id. § 2 cmt. h.
240. Id. § 8(d)(1).
241. Id.
warn patients, imposing a duty on the manufacturer to provide a direct warning to the patient.\textsuperscript{242}

The \textit{Restatement (Third)} recognizes two other special situations. First, direct patient warnings sometimes are required by statute or regulation.\textsuperscript{243} Birth control pills and devices are examples.\textsuperscript{244} Second, drug manufacturers sometimes advertise directly to the public.\textsuperscript{245} The \textit{Restatement (Third)} does not view these situations as exceptions to its no warning rule. Instead, it provides that even if there is a duty to warn patients directly, there remains the question of whether courts should review the adequacy of these warnings.\textsuperscript{246} The \textit{Restatement (Third)} leaves this issue to developing case law.\textsuperscript{247}

The question of whether the manufacturer may discharge the warning obligation by warning a learned or sophisticated intermediary depends on what is reasonable under the factual circumstances.\textsuperscript{248} Significantly, under section 2, comment i, the lack of warning of unavoidable risk is not a legal cause of injury if the product user would have chosen to use the product anyway.\textsuperscript{249} Under comment j, no warnings are required of generally known or obvious risks.\textsuperscript{250} By contrast, the manufacturer must warn for foreseeable adverse allergic or idiosyncratic reactions if a substantial number of users are susceptible to the allergic reaction.\textsuperscript{251}

The impact of the \textit{Restatement (Third)} on Maryland warnings cases cannot be predicted with certainty. To some extent, the "revolutionary" work is still to come. The debates that occupied the American Law Institute will be replayed in the states, including Maryland. Moreover, should Congress depart from its history and pass a uniform national products liability law, the \textit{Restatement (Third)} will to some extent become moot.

Plainly, the \textit{Restatement (Third)} will not have as dramatic or "revolutionary" an influence as the \textit{Restatement (Second)}.\textsuperscript{252} Section 402A of the \textit{Restatement (Second)} was not so much a statement of settled principles as it was a suggested new jurisprudence for states that did not possess their own significant body of products liability jurisprudence.\textsuperscript{253}

\begin{thebibliography}{99}
\bibitem{242} Id. § 8 cmt. e.
\bibitem{243} Id.
\bibitem{244} Id.
\bibitem{245} Id.
\bibitem{246} Id.
\bibitem{247} Id.
\bibitem{248} Id. § 8 cmt. b.
\bibitem{249} See id. § 2 cmt. i.
\bibitem{250} Id. § 2 cmt. j.
\bibitem{251} Id. § 2 cmt. k.
\bibitem{252} Id. at xv (stating the \textit{Restatement (Second)} provided a comprehensive engagement of the law of torts).
\bibitem{253} Id. (stating that, by 1990, the \textit{Restatement (Second)} had been cited nearly 3000 times by courts).
\end{thebibliography}
Today, many states have addressed the issues considered in the Restatement (Third). As a result, the degree of acceptance of the new Restatement may be tempered by principles of stare decisis, or even legislative and judicial inertia. Given Maryland's conservative attitude towards products liability innovation, the courts and legislature may not be receptive to rethinking basic, deeply embedded state law principles. As a result, defenses are likely to remain unchanged.

D. Impact on the Bulk Supplier, Sophisticated User, and Learned Intermediary Doctrines

Two sections of the Restatement (Third) affect the bulk supplier, sophisticated user and learned intermediary doctrines: Sections 5 and 6. Section 5 deals with liability of component-part sellers, while section 6 deals with liability for prescription drugs and medical devices.

1. Section 5

Section 5 provides that the seller of a component part that is not defective itself is not liable for harm caused by a product into which the component was integrated unless the component seller substantially participates in integrating that component into the design of the product. Section 5 seems both fair and efficient. In most situations, the component-part seller cannot monitor how its component is utilized by the end-product manufacturer. If liability were imposed on the component-part manufacturer, it would have to achieve "sufficient sophistication to review the decisions of the business entities that are already charged with the responsibility for the integrated product."

Section 5 was applied first in Zaza v. Marquess & Nell, Inc., a case in which the defendant, a sheet metal fabricator manufactured a quench tank according to specifications. These specifications did

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255. See United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995) (stating that under the principal of legislative inertia, courts will leave laws undisturbed); Meredith v. Beech Aircraft Corp., 18 F.3d 890, 895 (10th Cir. 1994) ("Stare decisis is the policy of courts to adhere to precedent and not to disturb a settled point of law."); Am. Ship Bldg. v. NLRB, 380 U.S. 300, 318 (1965) ("[J]udicial inertia . . . results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.").


257. RESTATEMENT (THIRD) § 5.

258. Id. § 5 cmt. a.


260. Id. at 624.
not require the fabricator to install safety devices. The fabricator was merely required to cut holes for such safety devices. When the tank was integrated into a regeneration system, the safety devices were not installed.

The plaintiff argued that the fabricator had a non-delegable duty to make certain that the quench tank was integrated into the regeneration system with the safety devices. He further argued that the defendant must warn of the dangers of operating the quench tank without safety devices. Concluding that the quench tank was non-defective, the Zaza court reasoned that it was not feasible for the component-part manufacturer to attach safety devices to a quench tank.

The court also opined that it was not possible for such a sheet metal fabricator to warn the product's end-user about the dangers of using the product without such safety devices.

More recent decisions have applied section 5 as well. Component manufacturers of teflon used in medical implants, silicone used in breast implants, asbestos used in insulation, and a pulley integrated into a conveyor belt have all been absolved of liability.

2. Section 6

Section 6 addresses manufacturer liability for defective prescription drugs and medical devices. Section 6(b)(2) imposes liability for defective drug design if the foreseeable risks of harm by the drug are sufficiently greater than foreseeable therapeutic benefits. As a result, if a class of patients exists for whom the drug is the reasonable therapeutic choice, it cannot be defectively designed. At the same

261. Id.
262. Id.
263. Id. at 625.
264. Id. at 628.
265. Id. at 632.
266. Id. at 630-32.
267. Id. at 634-35.
268. Kealoha v. DuPont Co., 82 F.3d 894, 901-02 (9th Cir. 1996) (noting that the court does not cite the Restatement).
270. Cimino v. Raymark Indus., Inc., 151 F.3d 297, 334 (5th Cir. 1998). But see Arena v. Owens-Corning Corp., 74 Cal. Rptr. 2d 580, 588 (Cal. Ct. App. 1998) (citing to section 5 but holding that raw asbestos is itself a defective product rather than an innocuous component such as sand or gravel).
271. Buonnano v. Colmar Belting Co., 733 A.2d 712, 716 (R.I. 1999) (adopting Restatement (Third) section 5; see also Cipollone v. Yale Indus. Prods., Inc., 202 F.3d 376, 379 (1st Cir. 2000) (relying on section 5 in interpreting Massachusetts law to find that the manufacturer of a customized dock lift, which was a component of a material-handling system was not liable because the component itself was non-defective).
272. Restatement (Third) § 6(a).
273. Id. § 6(b)(2).
time, if a different FDA-approved drug is on the market that provides comparable benefits with reduced harm or risk, presumably no reasonable health-care provider would prescribe the riskier drug.274

Another aspect of Section 6 impacts the effect of the learned intermediary doctrine when drug manufacturers directly advertise their drugs to the general public. Under the traditional learned intermediary rule, a drug manufacturer fulfills its duty to warn by warning the physician, rather than the patient.275 Nevertheless, sometimes patients should be directly warned. For example, if vaccines are administered without physician participation, courts have recognized an obligation to warn patients themselves.276

Difficult questions arise when drugs are directly advertised and marketed to consumers. Comment e of section 6 of the Restatement (Third) recognizes that in such situations the learned intermediary rule probably should not insulate drug manufacturers from liability if the advertisements do not adequately inform patients of the risks posed by the drug. The Restatement (Third), however, leaves to developing case law whether to recognize an exception to the learned intermediary rule for mass marketing of drugs. In Perez v. Wyeth Laboratories, Inc.,277 the New Jersey Supreme Court concluded that the learned intermediary doctrine should not relieve drug manufacturers of liability for commercially advertised products if consumers are not warned adequately of drug risks.

E. Impact of the Restatement (Third)

The Restatement (Third) is most likely to affect cases of first impression. For example, if the adoption of comparative negligence is reconsidered, the Restatement (Third) view could be influential.278 On the other hand, if a state has entrenched case law or legislation, it may ignore the Restatement (Third) views.279 Significant controversy is likely

274. But see George W. Conk, Is there a Design Defect in the Restatement (Third) of Torts: Products Liability?, 109 Yale L.J. 1087, 1102 (2000). The Reporters of the Restatement (Third) "believe that Conk has misread Section 6(c) since, if there was available on the market an FDA-approved drug that provides the benefits of the drug in question with lesser medical risks, no reasonable medical provider would prescribe the drug in question." James A. Henderson, Jr. & Aaron D. Twerski, The Products Liability Restatement in the Courts: An Initial Assessment, 27 Wm. Mitchell L. Rev. 7, 26 & n.64 (2000).

275. Restatement (Third) § 6(d)(1).

276. See, e.g., Reyes v. Wyeth Lab., 498 F.2d 1264, 1271 (5th Cir. 1974); Davis v. Wyeth Lab., 399 F.2d 121, 131 (9th Cir. 1968).

277. 734 A.2d 1245 (N.J. 1999).


to remain with regard to abandonment of the consumer-expectation test and adoption of the reasonable alternative design requirement in defective design cases. 280

The sophisticated user defense promotes an efficient communication system, encouraging manufacturers to provide adequate warnings to immediate purchasers by placing the duty to warn ultimate users on the party most likely to be aware of dangers and best able to warn. If the policy goal is to prevent workplace injuries, the sophisticated user and bulk supplier defenses should be accepted as consistent with case law and reflective of industrial realities. The failure to adopt these doctrines would result in the imposition of liability on manufacturers for workplace injuries that only the sophisticated user or employer could prevent, thereby elevating manufacturers to the status of insurers of product safety. Implementing these theories promotes appropriate standards for reasonable product safety.

VI. CONCLUSION

The issuance of the Restatement (Third) of Torts: Products Liability mandates a re-examination of Maryland products liability doctrine, including product-warning cases. In the warning arena, the related, but distinct, defenses of the bulk supplier, sophisticated user, and learned intermediary are central doctrines. 281

Product manufacturers and suppliers must be required to communicate safety information about their products to product users and consumers. To be effective, this safety information may be conveyed directly to end-users or it may be conveyed through intermediaries. 282 Warning through intermediaries is often less expensive and more effective than direct warnings.

The development of the bulk supplier, sophisticated user, and learned intermediary defenses has clarified the obligations and rights of manufacturers and end-users in the products liability arena. The evolving case law and the Restatement (Third) are steps in the right direction as they encourage product manufacturers to place safer prod-

280. Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1331 (Conn. 1997) (refusing to abandon the consumer-expectation test and to adopt the reasonable alternative design requirement). "[T]he fundamental tenet is that a manufacturer should be allowed to rely upon certain knowledgeable individuals to whom it sells a product to convey to the ultimate users warnings regarding any dangers associated with the product." TMJ Implants Prod. Liab. Litig., 872 F. Supp. 1019, 1029 (D. Minn. 1995); see also Reiff v. Convergent Techs., 957 F. Supp. 573, 581-82 (D. N.J. 1997) (holding no duty to warn about the physical manipulation inherent in the use of certain objects, such as computer keyboard repetitive stress injuries, which can cause injury to some users).

281. See supra Part II.D.

282. See supra Part II.D.3.
ucts in the market.\textsuperscript{283} An adequately warned customer makes more informed product decisions. In the final analysis, the purpose of both Maryland case law and the \textit{Restatement (Third)} is identical—promotion of appropriate standards for product safety through effective communication of product information.

\textsuperscript{283} See \textit{supra} Part V.