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A Letter to the Trial Judges of America: Help the True Victims of Silica Injuries and Avoid Another Litigation Crisis

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Abstract

The authors discuss silica related illness, increased silica claims, and patterns of lawsuit filings. According to the authors, plaintiff recruitment and settlement conditions may result in increased numbers of silica claims. Encouragement is given to use legal principles to avoid quagmires in silica related litigation and problems that have arisen in asbestos litigation.

Dear Trial Judges of America,

This is our second letter to you about managing complex tort litigation in your courts. In our first letter, “A Letter to the Nation’s Trial Judges: How the Focus on Efficiency is Hurting You and Innocent Victims in Asbestos Liability Cases,”¹ we described how well-meaning judicial

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¹ Victor E. Schwartz & Leah Lorber, *A Letter to the Nation’s Trial Judges: How the Focus on Efficiency is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247 (2000).

control its use, or who are not in the best position to provide appropriate warnings to end-users of silica-containing products.

This letter describes silica litigation as it is today. We offer suggestions to allow the litigation to be properly managed, consistent with the law and sound public policy. We also describe the properties and use of industrial sand, the historical understanding of the health impacts of silica exposure, and the heavy governmental regulation to address occupational exposure to silica. Section II discusses and explains the recent surge in silica litigation. In Section III, we offer some suggestions to address this recent rise in the number and size of claims. We show that the faithful application of the sophisticated user, bulk supplier, and substantial change doctrines is equitable and will assign liability where it belongs. We also suggest that normal procedural rules will prevent meritless and unripe claims from clogging your courts, prevent unnecessary bankruptcies, and preserve resources needed to compensate those who are truly injured.

I. Silica Exposure: A Long-Recognized and -Regulated Problem

A. Introducing . . . Silica, the Fuel of the Newest Toxic Tort Frenzy

Silica—quartz in its most common form—is a ubiquitous mineral that covers beaches and fills children’s sandboxes.⁶ All soil on every continent of the earth contains silica, because it is the major portion of all rocks, sands, and clays.⁷ Silica is made up of oxygen and silicon atoms,⁸ the first and second most abundant elements in the earth’s crust, respectively.⁹

⁶ See Susan Warren, *Silicosis Suits Rise Like Dust: Lawyers in Asbestos Cases Target Many of the Same Companies*, WALL ST. J., Sept. 4, 2003, at B5.

⁷ See U.S. DEP’T OF THE INTERIOR & U.S. BUREAU OF MINES, CRYSTALLINE SILICA PRIMER, SPECIAL PUBLICATION 5 (1992) [hereinafter CRYSTALLINE SILICA PRIMER].

⁸ Silica refers to the chemical compound silicon dioxide (SiO₂) in its crystalline form.

⁹ See CRYSTALLINE SILICA PRIMER, *supra* note 7, at 2.

1. Workers Are Exposed to Silica in Many Industries

Because silica is ubiquitous, workers in a wide range of industries may be exposed to it. Mining industries had the largest numbers of potentially exposed workers.¹⁰ Non-mining industries with a high potential for exposure included masonry, stonework, tile setting, and plastering. Others included services to dwellings; concrete, gypsum, and plaster products; and general industrial machinery and equipment.¹¹

2. Adverse Health Effects Can Occur from Prolonged or Intense Exposure to Industrial Sand Without Proper Workplace Safeguards

Plaintiffs in silica cases assert that they suffer from a disease—primarily silicosis, or scarring of the lungs¹²—as a result of exposure to silica dust through their occupations in various industries.¹³ The health risks of silica are associated with excessive occupational exposure through inhalation of respirable silica in excess of certain levels for a prolonged period.¹⁴

There are three forms of silicosis, representing a range of severity, including “chronic” silicosis (which can be simple or complicated), “accelerated” silicosis, and “acute” silicosis.¹⁵ Chronic simple silicosis

¹⁰ See U.S. DEP’T OF HEALTH & HUMAN SERVS., CENTERS FOR DISEASE CONTROL & PREVENTION, NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, HAZARD REVIEW: HEALTH EFFECTS OF OCCUPATIONAL EXPOSURE TO RESPIRABLE CRYSTALLINE SILICA v, Pub. No. 2002-129 (Apr. 2002) [hereinafter NIOSH HAZARD REVIEW], available at <http://www.cdc.gov/niosh/02-129pd.html>.

¹¹ See *id.*

¹² See *id.* at 23. Silicosis is a disease found in the upper node of the lung, unlike asbestosis, which is found in the lower lobe of the lung. See *Renowned Epidemiologist Says Exposure to Silica Dust Causes Cancer, Other Diseases*, 17:17 MEALEY’S LITIG. REP.: ASBESTOS 16 (Oct. 4, 2002).

¹³ See Warren, *supra* note 6, at B5.

¹⁴ See *id.*

¹⁵ Compare NIOSH HAZARD REVIEW, *supra* note 10, at 23 (referring to “chronic,” “accelerated,” and “acute” silicosis) with U.S. Nat’l Library of Medicine & Nat’l Inst. of Health, MedLine Plus Health Information, *Silicosis*, available at <http://www.nlm.nih.gov/medlineplus/ency/article/000134.htm> (last modified July 19, 2005) (referring to “simple chronic,” “accelerated,” and “acute” silicosis) [hereinafter MedLine Plus

is the most common and mildest form of the disease. It can develop after at least ten to thirty years of exposure to excessive concentrations of respirable silica dust.¹⁶ Basically, simple silicosis appears on chest radiographs as small rounded opacities in the upper and mid lung zones, which represent small areas of scarring in the lungs. These small scars have little or no effect on an individual's health.¹⁷ Those with simple silicosis typically experience no symptoms as a result of the silicosis, and lung function is relatively preserved.¹⁸ Simple silicosis "may go undetected for years in the early stages; in fact, a chest x-ray may not reveal an abnormality until after fifteen or twenty years of exposure."¹⁹

Fewer than five percent of simple silicosis cases develop into a more serious condition referred to as chronic complicated silicosis. Complicated silicosis results when the fibrotic process progresses and small silicotic lesions coalesce into lesions greater than one centimeter.²⁰ Symptoms range from minimal complaints to severe shortness of breath and rapidly occurring respiratory failure. The breathlessness is related to a loss in lung volume and can be progressive, ultimately disabling, and sometimes fatal.

A second form of the disease, accelerated silicosis, can develop five to ten years after initial exposure to silica.²¹ Individuals with accelerated

Health Information] and Am. Lung Ass'n of Ga., *Facts About Silicosis*, available at <http://abrannen.home.mindspring.com/alag/silica.htm> (Mar. 28, 2000) (referring to "simple," "complicated," and "acute" silicosis) [hereinafter *Facts About Silicosis*].

¹⁶ Compare NIOSH HAZARD REVIEW, *supra* note 10, at 23 (stating that simple silicosis develops after ten or more years of exposure) with MedLine Plus Health Information, *supra* note 15 (stating that simple silicosis results from more than twenty years of exposure).

¹⁷ See W. KEITH C. MORGAN ET AL., OCCUPATIONAL LUNG DISEASES (3d ed. 1995).

¹⁸ See Ware G. Kushner & Paul Stark, *Discovering the Cause of Diffuse Parenchymal Lung Disease*, 113-4 POST GRADUATE MED. (Apr. 2003), at 81; *Renowned Epidemiologist Says Exposure to Silica Dust Causes Cancer, Other Diseases*, *supra* note 12; U.S. DEP'T OF LABOR, NAT'L INST. FOR OCCUPATIONAL HEALTH & SAFETY, A GUIDE TO WORKING WITH SILICA: IF IT'S SILICA, IT'S NOT JUST DUST 5 (1997), at <http://www.msha.gov/S&HINFO/SILICO/SILICAX.pdf> (last visited Aug. 11, 2005) [hereinafter GUIDE TO WORKING WITH SILICA].

¹⁹ GUIDE TO WORKING WITH SILICA, *supra* note 18, at 6.

²⁰ See MORGAN ET AL., *supra* note 17.

²¹ See *Renowned Epidemiologist Says Exposure to Silica Dust Causes Cancer, Other Diseases*, *supra* note 12.

silicosis can experience breathlessness, weakness, chest pain, cough, and sputum production.²² The radiographic appearance and symptoms of accelerated silicosis and acute silicosis are similar, but the clinical and radiographic progression of accelerated silicosis is rapid.²³ Unlike chronic silicosis, with accelerated silicosis, fibrosis may be irregular or not even apparent on a chest x-ray.²⁴ Accelerated silicosis can be serious. When death occurs from accelerated silicosis, it is usually caused by hypoxic respiratory failure.²⁵

A third form of the disease, acute silicosis, which is sometimes known as "silicoproteinosis," can develop among those who are exposed to very high concentrations of silica dust in the workplace over a relatively short period of time, such as sandblasters and rock drillers.²⁶ Acute silicosis can occur after exposures ranging from a few weeks to up to five years after the initial exposure,²⁷ and symptoms can include breathing difficulty, weight loss, fever, and coughing. Pulmonary fibrosis is not always present in cases of acute silicosis.²⁸ Acute silicosis progresses rapidly and can lead to severe disability within five years of diagnosis.²⁹ When it is fatal, death normally occurs from hypoxic respiratory failure.³⁰

As it progresses, silicosis is sometimes accompanied by other adverse health conditions. Some studies have found that silicosis may be complicated by mycobacterial or fungal infections, such as tuberculosis.³¹ Since the 1980s, the scientific community has debated whether occupa-

²² See *Facts About Silicosis*, *supra* note 15.

²³ See NIOSH HAZARD REVIEW, *supra* note 10, at 23.

²⁴ See *id.*

²⁵ See *Renowned Epidemiologist Says Exposure to Silica Dust Causes Cancer, Other Diseases*, *supra* note 12.

²⁶ NIOSH HAZARD REVIEW, *supra* note 10, at 23.

²⁷ *Id.*

²⁸ *Id.* at 24.

²⁹ See Jonathan D. Glater, *Suits on Silica Being Compared to Asbestos Cases*, N.Y. TIMES, Sept. 6, 2003, at C1, available at 2003 WLNR 5662921; NIOSH HAZARD REVIEW, *supra* note 10, at 24, 79.

³⁰ *Renowned Epidemiologist Says Exposure to Silica Dust Causes Cancer, Other Diseases*, *supra* note 12.

³¹ NIOSH HAZARD REVIEW, *supra* note 10, at 33.

tional exposure to crystalline silica is associated with an increased risk of lung cancer.³²

Plaintiffs in almost all silica personal injury cases allege products liability failure-to-warn claims against sand suppliers and makers of equipment or machinery regarding the potential health risks of exposure to industrial sand.³³ They claim that such risks were known to the defendants before warnings or employer alerts were issued.³⁴ Plaintiffs also allege design defect claims against makers of respirators and other protective equipment. They claim that these devices did not adequately protect them from disease.

B. Silica: Well-Known and Heavily Regulated for Decades

The health risks of working with silica have been long understood. As early as 460 B.C., for example, Hippocrates linked a metal digger's breathing problems to his work with dust.³⁵ Agricola's treatise on mining shows that scholars in the Sixteenth Century recognized that silica dust "penetrates into the windpipe and lungs, and produces difficulty breathing" after being "stirred and beaten up by digging."³⁶

In the United States, silica's risks have been recognized for over a century.³⁷ The American Foundrymen's Society has distributed literature addressing silica exposure and other foundry hazards to its members for

³² *Id.* at 35-51. NIOSH believes that silica exposure can cause cancer and associates it with lung cancer. Some studies also associated exposure to silica with chronic bronchitis, emphysema, asthma, and peripheral airways disease. *See id.* at 51-52. Case reports also have suggested silica exposure may lead to renal diseases and autoimmune disorders, such as scleroderma, lupus, or rheumatoid arthritis. *See id.* at 67-68.

³³ *See* Warren, *supra* note 6, at B5.

³⁴ *See id.*

³⁵ *See* Gilligan, *supra* note 2, at 20. For a discussion of historical knowledge of health effects of exposure to silica dust, see MARTIN CHERNIAK, THE HAWK'S NEST INCIDENT: AMERICA'S WORST INDUSTRIAL DISASTER 35, 37-39 (Yale Univ. Press 1986).

³⁶ *See* Gilligan, *supra* note 2, at 20.

³⁷ *See* Dresser Indus. v. Lee, 880 S.W.2d 750, 751 (Tex. 1993).

over one hundred years.³⁸ In 1908, the United States Bureau of Labor recognized the health risks of dust for hard-rock miners, stonemasons, potters, glass workers, sandblasters, and foundry workers.³⁹

In the 1930s, medical reports discussed the “harmfulness of silica dust” and the “firmly established” link between silica and silicosis.⁴⁰ National awareness of silica’s health risks increased dramatically after a 1936 tragedy where nearly 1000 miners died near Gauley Bridge, West Virginia, after tunneling through a mountain of “almost pure silica” without using safety precautions.⁴¹ Other notable silicosis outbreaks occurred earlier in the century; one set of incidents led to a 1910 investigation among lead miners near Joplin, Missouri, and another resulted in a series of studies from the 1920s to the 1950s of Vermont granite workers.⁴² Silicosis was recognized as an industrial disease in the 1930s.⁴³ The Department of Labor’s first National Silicosis Conference⁴⁴ featured the film “Stop Silicosis,” which described how to protect workers from overexposure to silica.⁴⁵ The Conference culminated in a 1937

³⁸ See *Haase v. Badger Mining Corp.*, 669 N.W.2d 737, 745 n.2 (Wis. Ct. App. 2003), *aff’d*, 682 N.W.2d 389 (Wis. 2004).

³⁹ See Gilligan, *supra* note 2, at 20 (citing U.S. BUREAU OF LABOR, BULL. NO. 79: THE MORTALITY FROM CONSUMPTION IN DUSTY TRADES 633-875 (1908)).

⁴⁰ W.J. McConnell & J.W. Fehnel, *Health Hazards in the Foundry*, 16 J. IND. HYG. 227-51 (1934).

⁴¹ See *NIOSH Issues Nationwide Alert on Silicosis*, UPDATE (Nat’l Inst. for Occupational Safety & Health, U.S. Dep’t of Health & Human Servs.), at <http://www.cdc.gov/niosh/93-123.html> (Nov. 18, 1992).

⁴² See HENRY N. DOYLE, THE FEDERAL INDUSTRIAL HYGIENE AGENCY: A HISTORY OF THE DIVISION OF OCCUPATIONAL HEALTH (U.S. Pub. Health Serv.). In 1910, Joseph Holmes, the first Director of the U.S. Bureau of Mines, persuaded Surgeon General Walter Wyman to assign a physician to the bureau to study silicosis among galena miners in the tri-state lead region of Missouri, Oklahoma, and Kansas. Dr Samuel Hotchkiss examined 720 miners and diagnosed 433, or 60%, as having “miner’s consumption” or silicosis. Vermont granite studies in the 1920s found that, among pneumatic tool workers, carvers, letterers, and tool grinders, there was 100% silicosis among workers with fifteen or more years of exposure. In the 1930s, a dust standard was established, engineering controls were initiated, and medical surveillance began. By 1956, of 1133 workers employed since 1937, the year in which engineering controls were implemented, only one worker had evidence of suspected silicosis.

⁴³ Gilligan, *supra* note 2, at 20.

⁴⁴ See *Haase*, 669 N.W.2d at 745 n.2.

⁴⁵ *Id.*

report that “directly addressed silicosis prevention in industrial settings, recommending measures for employers to take on behalf of their workers.”⁴⁶

In response to this widespread knowledge of the health risks of silica inhalation, federal and state governments began to regulate silica workplace safety. By the 1930s, the federal government had launched a silica awareness campaign⁴⁷ after investigating, testing, and certifying respiratory protection equipment for abrasive blasting. In the 1940s, the United States Supreme Court noted that “[i]t is a matter of common knowledge that it is injurious to the lungs and dangerous to health to work in silica dust, a fact which [a] defendant [is] bound to know.”⁴⁸ Today, public awareness of silica’s potential health risks is so universal that courts observe that these risks are common knowledge.⁴⁹

In 1971, federal regulations set permissible exposure limits (PELs) for occupational exposure to airborne silica.⁵⁰ In 1974, the Department of Labor’s Occupational Safety & Health Administration (OSHA) applied extensive abrasive blasting safety regulations enacted for government contractors in the 1960s under the Walsh-Healy Act⁵¹ to all employers,⁵² and adopted standards for working with silica in the construction and maritime industries.⁵³ Currently, OSHA provides detailed regulations requiring employers to protect employees from overexposure to silica through the enforcement of PELs and the OSHA Hazard Communications Standard. OSHA also addresses the use of protective equipment.⁵⁴ The

⁴⁶ *Id.* (noting that “[a]mong the recommendations were workplace surveys, compliance with laws and regulations, respiratory protection and employee safety training”).

⁴⁷ Warren, *supra* note 6, at B5.

⁴⁸ *Urie v. Thompson*, 337 U.S. 163, 180, 69 S. Ct. 1018, 1029, 93 L. Ed. 1282, 1298 (1949) (quoting *Sadowski v. Long Island R.R. Co.*, 292 N.Y. 448, 456, 55 N.E.2d 497, 500, *remanded to* 268 A.D. 777 (N.Y. App. Div. 1944)).

⁴⁹ *See id.*

⁵⁰ *See* 41 C.F.R. § 50-204.50 (2004).

⁵¹ 41 U.S.C. §§ 35-45 (2000).

⁵² *See* 29 C.F.R. § 1910.94(a)(5)(ii) (2004).

⁵³ *See* 29 C.F.R. § 1910.1000 tbl. Z-3 (2004).

⁵⁴ *See, e.g.*, 29 C.F.R. §§ 191001.94, 1910.1000, 1910.134, 1915.34, 1915.1000, 1926.55, 1926.57, 1926.103 (2004); 29 C.F.R. §§ 1915.34, 1915.1000 (2003). OSHA’s standards for personal protective equipment are also available online. *See* U.S. Dep’t

National Institute for Occupational Safety and Health (NIOSH) has provided even more stringent “recommended exposure limits” (RELs),⁵⁵ proposed that blast media containing more than one percent silica not be used, and issued safety standards for the use of respirators.⁵⁶

Silica exposure can be minimized when employers and workers take the proper precautions. NIOSH provides numerous suggestions,⁵⁷ such as encouraging employers and workers to use engineering controls to reduce respirable silica levels, including exhaust ventilation and dust collection systems, water sprays, wet drilling, enclosed cabs, and drill platform skirts.⁵⁸ Employers can monitor the air for silica levels and also post warning signs that identify work areas containing respirable silica. In addition, employers and workers can make available and use respiratory protection programs and clothing and respirators to reduce silica exposure.⁵⁹ States have also closely regulated work with silica sand. During the early twentieth century, state governments enacted legislation regarding workplace ventilation and recognizing respiratory diseases as a compensable occupational disease under Workers’ Compensation statutes.⁶⁰

of Labor, Occupational Safety & Health Admin., *Safety and Health Topics: Personal Protective Equipment (PPE)*, at <http://www.osha.gov/SLTC/personalprotectiveequipment/index.html> (July 17, 2004).

⁵⁵ See NIOSH HAZARD REVIEW, *supra* note 10, at 127 app. tbl. A-1 (providing comparison of PELs and RELs for crystalline silica).

⁵⁶ See NIOSH Respirator Users’ Notices, *available at* <http://www.cdc.gov/niosh/npptl/usernotices> (last visited Aug. 11, 2005).

⁵⁷ See *In re Silica Prods. Liab. Litig.* (No. MDL 1553), 2005 WL 1593936, *4 (S.D. Tex. June 30, 2005) (“There are well-known steps employers, workers, and/or government regulators could take to drastically reduce worker exposure to respirable silica.”).

⁵⁸ GUIDE TO WORKING WITH SILICA, *supra* note 18, at 6-10.

⁵⁹ See *id.* at 6-8, 10-11.

⁶⁰ See Gilligan, *supra* note 2, at 20 (citing *Appelquist v. Oliver Iron Mining Co.*, 296 N.W. 13 (Minn. 1941); *Golder v. Lerch Bros.*, 281 N.W. 249 (Minn. 1938)); *see, e.g.*, ARIZ. REV. STAT. § 23-901.02 (2003); ARK. CODE ANN. § 11-9-602 (Michie 2003); CAL. LAB. CODE § 5500.5 (West 2003); COLO. REV. STAT. § 8-43-103 (2003); D.C. CODE ANN. § 32-1510 (2003); IDAHO CODE § 72-438 (Michie 2003); 820 ILL. COMP. STAT. § 310/1 (2002); IND. CODE § 22-3-7-9 (2003); KAN. STAT. ANN. § 44-5a10 (2002); ME. REV. STAT. ANN. tit. 39-A, § 1491 (West 2003); MICH. COMP. LAWS § 418.501 (2003); NEV. REV. STAT. § 617.460 (2003); N.J. STAT. ANN. § 34:15-34 (West 2003); N.M. STAT. ANN. § 52-3-10 (Michie 2003); N.Y. WORKERS’ COMP. LAW § 3 (McKinney 2003); N.C. GEN. STAT. § 97-53 (2002); OHIO REV. CODE ANN. § 4123.68 (West 2003); OKLA. STAT. tit. 85, § 11 (2002); 77 PA. CONS. STAT. § 1208 (2002); R.I. GEN. LAWS

Laws in many states set threshold levels for silica dust in the workplace,⁶¹ prohibit minors from working with silica refractory products,⁶² and offer many other worker protections.⁶³ With such widespread regulation, the public—particularly people who work in industries that use silica—has long been aware of the potential adverse health effects of silica exposure.

II. Silica Litigation Surge

A. Years of Stability, Then an Exponential Increase in Suits

For years, silica litigation was stable, with only a relatively low number of people pursuing silica claims in any given year.⁶⁴ Recently, however,

§ 28-34-2 (2002); S.D. CODIFIED LAWS § 62-8-14 (Michie 2002); TEX. HEALTH & SAFETY CODE ANN. § 84.003 (Vernon 2003); VA. CODE ANN. § 65.2-503 (Michie 2003); W. VA. CODE ANN. § 23-4-1 (Michie 2003).

⁶¹ See, e.g., ALA. CODE § 25-9-111 (2003); 225 ILL. COMP. STAT. § 705/24.06 (2003); W. VA. CODE § 22A-2-24 (2003) (setting silica dust exposure threshold levels).

⁶² See, e.g., ARIZ. REV. STAT. § 23-231(A)(12) (2003); COLO. REV. STAT. § 8-12-110 (2003); N.Y. LAB. LAW § 133 (McKinney 2003).

⁶³ See, e.g., MINN. STAT. § 144.34 (2002) (requiring physicians to report suspected silica exposure to the Michigan Department of Health); MONT. CODE ANN. § 39-73-104 (2002) (establishing eligibility for those with silicosis who cannot continue employment to receive special silicosis benefits); NEV. REV. STAT. § 617.168 (2003) (creating a state general fund for silicosis pensions); N.C. GEN. STAT. §§ 97-60 (2002) (requiring employers in industries that pose risks of silica exposure to give workers medical examinations in certain circumstances), 97-61.5 (authorizing the Industrial Commission to remove employees with silicosis from their employment), 97-76 (2003) (authorizing the Industrial Commission to make inspections of employers' workplaces where there is risk of silica exposure); 52 PA. CONS. STAT. § 701-251 (2002) (creating setback requirements for accumulation of silica dust in mines; maintenance of work area specifications; silica dust exposure threshold levels); S.D. CODIFIED LAWS § 45-6B-7 (Michie 2003) (authorizing the Department of Game, Fish, and Park to regulate silica's impact on water quality), § 62-8-27 (allowing discharge and compensation for those with non-disabling silicosis), § 62-8-28 (providing that employees may petition the state for examination for silicosis); VA. CODE ANN. § 65.2-407 (Michie 2004) (making it more difficult for employees who suffer from preexisting silicosis to sign waiver of added compensation for aggravation of preexisting condition).

⁶⁴ See John M. Black, *Silicosis Is Still a Problem: Recognized as an Occupational Threat to Health Since the 1930's, Exposures to Silica Continue Today*, 170 N.J. L.J. 824, 824 (2002).

the number of silica lawsuits has increased, with many cases brought by the same lawyers and law firms who for years specialized in bringing asbestos personal injury lawsuits.⁶⁵ Mississippi provides an example. In 2000, about forty plaintiffs filed silicosis claims in Mississippi courts; about seventy-six plaintiffs did so in 2001.⁶⁶ In 2002, however, the number of new Mississippi silicosis claims “skyrocketed” to approximately 10,642 and continued to be “shockingly high” thereafter, at 7228 claims in 2003 and 2609 claims in 2004.⁶⁷ “By way of comparison, in 2002, on average, more silicosis claims were filed per *day* in Mississippi courts than had been filed for the entire *year* only two years earlier,” according to the federal district court handling the federal silica multi-district litigation (MDL).⁶⁸

The increase in silica claims are against major and minor players alike. U.S. Silica Company, one of America’s largest suppliers of industrial sand, had about 19,000 new claims filed against it in 2003, up from about 5000 claims for all of 2002 and roughly 1400 claims in 2001.⁶⁹ By 2005, more than 650 different entities from more than fifty classes of business were named as defendants in silica litigation, including power tool and power tool component manufacturers and jewelry manufacturing and buffing equipment manufacturers.⁷⁰

⁶⁵ See *Ingredients Might Be in Place to Make Silica the New Asbestos*, BEST’S INS. NEWS, Sept. 10, 2003.

⁶⁶ See *In re Silica Prods.*, 2005 WL 1593936, at *5 (discussing incidence of silicosis in various regions in the United States).

⁶⁷ See *id.*

⁶⁸ *Id.* Over 10,000 individual claims from Mississippi state courts were consolidated in the federal silica MDL, along with claims from Kentucky, Texas and Missouri. See *id.* at *6.

⁶⁹ See Glater, *supra* note 29, at C1. Pending silica claims against certain Halliburton subsidiaries jumped from 275 in 2000 to 1091 in 2002—then jumped to 2812 just three months later in March 2003, and, in another three months, reached 4269. See Mark A. Behrens et al., *Silica: An Overview of Exposure and Litigation in the United States*, 20:2 MEALEY’S LITIG. REP: ASBESTOS 33 (Feb. 21, 2005).

⁷⁰ See Charlie Kingdollar, *Shifting Sands—Recent Silica Developments*, HAZARDOUS TIMES, 2 (Gen Re Apr. 2005); see also Bob Sherwood, *Weighing the Risk From Food and Phones*, FIN. TIMES, Apr. 28, 2003, at 12 (stating that “[s]ilicosis claims [in the United States] are climbing at such a rate that one company has 17,000 suits against it—and it just makes masks designed to protect people from silica dust”).

B. What is the Explanation for the Rise in Industrial Sand Lawsuits?

One would expect that such an explosion in lawsuit filings would correspond to a dramatic rise in the incidence of silica-related diseases. Indeed, one court said that “these claims suggest perhaps the worst industrial disaster in recorded world history.”⁷¹ Yet there is no evidence of a burgeoning silica medical crisis; to the contrary, silicosis fatalities are steadily falling. For example, NIOSH and its predecessor public health organizations have studied silica-related injuries since 1910; NIOSH reports in its most recent estimates that over the past thirty years, silica-related deaths have declined dramatically.⁷² In fact, the annual number of silica-related deaths has dropped over eighty-seven percent, from 1157 in 1968, to 448 in 1980, to 308 in 1990, to 187 in 1999, and to 148 in 2002.⁷³ To put these figures into context, on average 400 people in the United States die each year from extreme heat,⁷⁴ and 696 workers died in 2003 from falls.⁷⁵

One might expect that a true health crisis would also reveal a national pattern of lawsuit filings in large and populous states, such as California,

⁷¹ See *In re Silica Prods.*, 2005 WL 1593936, at *5.

⁷² See NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., WORKER HEALTH CHARTBOOK, 2004: FATAL AND NONFATAL INJURIES, AND SELECTED ILLNESSES AND CONDITIONS: SILICOSIS (Pub. No. 2004-146), available at <http://www2a.cdc.gov/niosh-Chartbook/ch2/ch2-10-3-5.asp> (last visited Aug. 17, 2005) [hereinafter *Worker Health Chartbook, 2004*]; Centers for Disease Control & Prevention, Dep't of Health & Human Servs., *Silicosis Mortality, Prevention, and Control—United States, 1968-2002*, MMWR WKLY., Apr. 29, 2005, at 1, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5416a2.htm>, printed in 29:21 J. AM. MED. ASS'N 2585 (June 1, 2005) [hereinafter *Silicosis Mortality, Prevention, and Control—United States, 1968-2002*].

⁷³ See *Worker Health Chartbook, 2004*, *supra* note 72, at 169; *Silicosis Mortality, Prevention, and Control—United States, 1968-2002*, *supra* note 72, at 1.

⁷⁴ See *Extreme Heat* (Centers for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., (Washington, D.C.), available at <http://www.bt.cdc.gov/disasters/extremeheat/about.asp> (last visited Aug. 17, 2005).

⁷⁵ See Bureau of Labor Statistics, U.S. Dep't of Labor, *Census of Fatal Occupational Injuries Data (CFOI) Current and Revised Data*, available at <http://www.bls.gov/iif/> (last visited Apr. 29, 2005).

New York, and Illinois. But most recent silica lawsuits have been filed in Mississippi and Texas,⁷⁶ which rank forty-third and thirty-third lowest respectively in the United States for age-adjusted silicosis mortality rates.⁷⁷ Certain counties in these states are aptly described by well-known and experienced Mississippi plaintiffs' lawyer Richard Scruggs as "magic jurisdictions," where plaintiffs are likely to obtain more favorable settlements and judgments than they might at home.⁷⁸ In fact, the number of new silicosis claims filed in Mississippi during 2002 to 2004 (20,479 new claims) is more than five times greater than the total number of silicosis cases one would expect over the same period in the entire United States.⁷⁹ Rather than a true health crisis, "this appears to be a phantom epidemic, unnoticed by everyone other than those enmeshed in the legal system."⁸⁰

Why, then, this explosion in silica lawsuits when silica deaths are on the decline and suits are appearing in plaintiff-friendly jurisdictions? Some propose that the surge in silica lawsuits in Mississippi and Texas is a result of plaintiffs' counsel attempts to beat the clock on the passage of civil justice reform legislation at the state and federal levels.⁸¹ Others

⁷⁶ See Glater, *supra* note 29, at C1; James Doran & Helen Leonard, *Claims Surge as U.S. Lawyers See Silica as the New Asbestos*, THE TIMES (LONDON), Sept. 10, 2003 at 4M.

⁷⁷ See DIVISION OF RESPIRATORY DISEASE STUDIES, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE WORK-RELATED LUNG DISEASE SURVEILLANCE REPORT, 2002 54 tbl. 3-5 (Pub. No. 2003-111, 2003), available at <http://www.cdc.gov/niosh/docs/2003-111/2003-111.html> (last visited Aug. 17, 2005) [hereinafter LUNG DISEASE SURVEILLANCE REPORT].

⁷⁸ 'Medical Monitoring and Asbestos Litigation'—A Discussion With Richard Scruggs and Victor Schwartz, 17:3 MEALEY'S LITIG. REP.: ASBESTOS 19 (Mar. 1, 2002). The American Tort Reform Association has labeled these forums "judicial hellholes." See Am. Tort Reform Ass'n, *Bringing Justice to Judicial Hellholes* (2004), available at <http://www.atra.org/reports/hellholes> (last visited Aug. 17, 2005).

⁷⁹ See *In re Silica Prods.*, 2005 WL 1593936, at *5.

⁸⁰ *Id.* at *6.

⁸¹ See *id.* at *45 ("If searching for an explanation in the legal field, one might focus on the fact that most of the cases were filed just prior to the effective dates of a series of recent legislative 'tort reform' measures in Mississippi."); Susanne Sclafane, *Silica Dust: The Next Asbestos? Hard Hat Maker With Former Rims President Among 160 Defendants Facing Dust Claims*, NAT'L UNDERWRITER PROP. & CASUALTY-RISK & BEN. MGMT., May 10, 2004, at 10, available at 2004 WLNR 14746125 (According to

suggest that “the decline in asbestosis lawsuits” may have left “a network of plaintiffs’ lawyers and screening companies scouting for a new means of support.”⁸²

C. Industrial Sand Litigation, If Left Unchecked, May Run Wild

The same lawsuit-generating tactics and mechanisms that worked to generate claims for the asbestos plaintiffs’ bar now are increasingly being exploited in the silica context.⁸³ Such tactics include plaintiff recruitment through free mass litigation screenings (often held in mobile x-ray vans in hotel or restaurant parking lots), direct mailings to plaintiffs, and Internet websites.⁸⁴ The problems associated with mass litigation

assessments from “many observers . . . there are two reasons for the upsurge. One is that plaintiffs’ lawyers have filed to try to beat tort reforms that were enacted in Mississippi and Texas [and became effective in 2003]. The other one is that, looking ahead, the lawyers were concerned that federal asbestos legislation might pass. . . .”); Warren, *supra* note 6, at B5 (“Some from the defense side charge that the sudden rise in silicosis claims coincides with increasing constraints on asbestos litigation in state courts, as well as the threat of legislation that would create a national trust fund and eliminate asbestos litigation altogether.”). Texas legislation enacted in 2005 may now be driving silica lawsuits out of Texas and into California, which, some say, “barring major tort reforms, remains a destination of choice for plaintiff lawyers.” Justin Scheck, *Breathing Down on California: Texans Charge Into State With Sometimes Shady Silicosis Suits*, THE RECORDER, June 3, 2005, at 1. The legislation, effective September 1, 2005, specifically seeks to address abuses in silica and asbestos litigation. It requires silica and asbestos plaintiffs to show clear breathing impairment to proceed with their claims, not simply a diagnosis based on an x-ray. 2005 Vernon’s Tex. Sess. Law Serv. 2005 Tex. Sess. Law Serv. Ch. 97 (S.B. 15) (West) (to be codified at TEX. CIV. PRAC. & REM. §§ 90.001 *et seq.*).

⁸² *In re Silica Prods.*, 2005 WL 1593936, at *45; see Susanne Sclafane, *Consolidation Ahead, Market Confusion Persists: Industry Execs; NAPSLO Convention Report: Potential Future Opportunity for Surplus Lines Brokers Is Discussed*, 107:38 NAT’L UNDERWRITER PROP. & CASUALTY-RISK & BEN. MGMT., Sept. 22, 2003, at 44, available at 2003 WLNR 12557579 (one insurer remarking, “[a]ll of a sudden, silica is like ‘Asbestos, Jr.’ for some attorneys that are running out of clients”).

⁸³ See Gilligan, *supra* note 2, at 19.

⁸⁴ See *In re Silica Prods.*, 2005 WL 1593936, at **24-45 (describing the use of mass screenings to generate plaintiffs in the federal silica MDL); Sue Reisinger, *Mounting Silica Suits Pose New Threat to Industrial Companies*, 13:136 CORP. LEGAL TIMES, Mar. 2003, at col. 1 (stating that a Texas firm provides free medical screening for

screenings in asbestos litigation—the huge profit incentives for screening companies, doctors and law firms, the use of unlicensed doctors and other unqualified personnel to generate plaintiff diagnoses, and the preponderance of claims by unimpaired people⁸⁵—are appearing in silica litigation as well.⁸⁶

It can be expected that the medical screeners and plaintiffs' lawyers will transfer to silica litigation the practice developed in asbestos litigation of "over-interpreting" chest x-rays to consistently misdiagnose

workers who may have been exposed to silica and noting that Internet advertising states potential plaintiffs could include families of workers and people who lived or worked not at but merely near a silica site); *Increase in Screening for Silica Exposure Victims Evident in Texas*, 1:2 MEALEY'S LITIG. REP.: SILICA 10 (Oct. 18, 2002).

⁸⁵ See, e.g., Gilbert S. Keteltas, *Learning the Lessons of Asbestos: Courts and Defendants Can Do Better in the Case of Silica*, 21:24 ANDREWS TOXIC CHEM. LITIG. REP. 12 (Jan. 8, 2004) ("These for-profit, for-litigation screenings identify thousands of individuals as having results 'consistent with' silica exposure. But the phrase 'consistent with' is not an accepted medical diagnosis and is not legal proof of causation. As in the case of asbestos, this screening process yields tens of thousands of plaintiffs who may never experience any silica-related disease."); Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 62-97 (2003) (describing mass screening procedures used by plaintiffs' lawyers to generate clients and the related financial incentives); David M. Setter et al., *Why We Have to Defend Against Screened Cases: Now Is the Time for a Change*, 2:4 MEALEY'S LITIG. REP. SILICA 11 (Dec. 2003) (detailing deposition testimony regarding profits generated from medical screenings and stating, "[t]hese individuals make huge amounts of money at other's expense"); Order by the Hon. Sharon S. Armstrong, ACR XXIII (Super. Ct. of King County, Wash., Oct. 15, 2002) (stating in an asbestos case that it would "contravene public policy" to allow testimony from one doctor employed by a screening company, as the doctor was not licensed in the state and relied for his diagnoses on radiology reports from unregistered and uncertified technicians or radiologists using unregistered and uncertified equipment).

⁸⁶ See, e.g., *In re Silica Prods.*, 2005 WL 1593936, at *54 ("[I]n the business of mass [silica litigation] screenings, a diagnosis, whether accurate or not, is money in the bank. ... without large numbers of positive diagnoses, the screening company would lose money or would lose the law firm account to a competitor."); *id.* at **37, 85 (issue of whether doctors licensed out-of-state engaged in unauthorized practice of medicine may become relevant if plaintiffs continue to assert claims based on those doctors' B-reads and diagnoses); *id.* at *62 ("Perhaps even more stunning was [one doctor's] reliance on largely untrained secretarial staff to 'translate [the ILO form he completed] into English,' [and] 'prepare [his] reports, stamp [his] name on them and send those reports out without [him] editing or reviewing them.'") (record citations omitted) (internal quote alterations in original).

disease in subjects where no disease exists.⁸⁷ The first occurrence of false readings of x-rays was an enterprising scheme of two attorneys and three physicians who formed the National Tire Workers Litigation Project (NTLWP) in 1986 to sign up tire workers and to file claims for lung injury from asbestos.⁸⁸ According to a handout distributed to tire workers, titled "Information Sheet—Tire Workers Litigation Project," 64% of the workers first examined by chest radiography for asbestosis were positive and in a second group 95% had the disease.⁸⁹ Scientists subsequently conducted a radiologic re-evaluation in 439 tire workers previously designated by the NTLWP as having x-ray changes consistent with an asbestos exposure.⁹⁰ The re-evaluation was conducted by a panel of three board-certified radiologists who were NIOSH certified B-Readers.⁹¹ The readings were performed independently, according to the International Labour Office Guidelines for Pneumoconioses Classification.⁹² Of the 439 films re-interpreted by the three independent radiologists the percentage of positive films was 3.7%, 3.0% and 2.7%.⁹³ A consensus evaluation indicated that approximately 3.6% of the subjects evaluated had a condition consistent with asbestos exposure—a figure that markedly differs from the 64% and 95% findings of the NTWLP physicians.⁹⁴

Similar discrepancies were recently reported in the recent study by researchers at Johns Hopkins University who conducted a re-evaluation

⁸⁷ Indeed, United States District Court Judge Janis Graham Jack noted in the federal silica MDL that "in just over two years, [one screening company] found 400 times more silicosis cases than the Mayo Clinic (which sees 250,000 patients a year) treated during the same period." *In re Silica Prods.*, 2005 WL 1593936, at *31.

⁸⁸ See *Raymark Indus. v. Stemple*, No. 88-1014-K, 1990 WL 72588 (D. Kan. May 30, 1990).

⁸⁹ See *id.* at *10.

⁹⁰ R.B. Reger et al., *Cases of Alleged Asbestos-Related Disease: A Radiologic Re-Evaluation*, 32:11 J. OCCUPATIONAL MED. 1088-90 (1990); see also Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 39, 45 (1991) (recounting that, in sixty-five asbestos cases before District Judge Carl C. Rubin, court-appointed medical experts found no radiographic evidence of any asbestos-related condition in forty-two cases).

⁹¹ *Reger et al.*, *supra* note 90, at 1088-90.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

of 492 films interpreted by B Readers used by plaintiffs as a basis for a legal claim.⁹⁵ In the initial readings, 95.9% of the 492 films were interpreted as positive for abnormalities.⁹⁶ The films were reinterpreted by six B readers in an independent manner with a finding of *only* 4.5% having those same abnormalities.⁹⁷ The data showed statistically significant differences between the interpretations of the initial B Readers—that were used as a basis for the lawsuit—and the independent B Reader panel.⁹⁸

The x-ray markers for asbestos-related disease are very different from the markers for silica-related disease, and it is very rare for a person to develop both.⁹⁹ Still, some screening company doctors also may read x-rays to find a specific disease, depending on whether the litigation at issue involves silica or asbestos exposure.¹⁰⁰ Some plaintiffs' lawyers also

⁹⁵ Joseph N. Gitlin et al., *Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 ACAD. RADIOLOGY 843-56 (2004).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See, e.g., *In re Silica Prods.*, 2005 WL 1593936, at *53 ("It bears repeating that outside of the small cadre of doctors who diagnose for screening companies, even a single case of a dual diagnosis of silicosis and asbestosis is extremely rare."); *Asbestos and Silicon Exposure Issues: Hearing Before the Sen. Comm. on the Judiciary 109th Cong.* (Feb. 2, 2005), available at 2005 WL 265221 (testimony of Dr. Laura Welch, medical director, Center to Protect Workers Rights) ("Asbestosis and silicosis cause a different pattern of lung injury, and can be distinguished with occupational history, pulmonary function testing, and x-ray, so a case of asbestosis can't be turned into a case of silicosis or another dust disease."); *id.*, available at 2005 WL 265223 (testimony of Dr. David Weill, associate professor of medicine, Division of Pulmonary and Critical Care Medicine, associate director, Lung Transplant Program, University of Colorado Health Sciences Center) ("[S]ilicosis and asbestosis are different diseases; they are not easily confused in practice; and it is very rare for one person to have both diseases. ... Outside the litigation setting, confusion between silicosis and asbestosis does not occur."); *id.*, available at 2005 WL 265226 (testimony of Dr. Paul Epstein, clinical professor of medicine at the University of Pennsylvania) ("[I]t is my professional opinion that the dual occurrence of asbestosis and silicosis is a clinical rarity."); *id.*, available at 2005 WL 265225 (testimony of Dr. Theodore Rodman, retired professor of medicine, Temple University) ("Among the thousands of chest x-rays which I reviewed in asbestos and silica exposed individuals, I cannot remember a single chest x-ray which showed clear-cut findings of both asbestos exposure and silica exposure.").

¹⁰⁰ See *In re Silica Prods.*, 2005 WL 1593936, at **25-52 (In analyzing the physician's testimony, the court stated: "In the setting of a mass screening and/or mass B-

appear to be “double-dipping”—restyling the claims of asbestos plaintiffs, who may have already received a recovery, and refileing them as silica lawsuits.¹⁰¹ Some plaintiffs’ lawyers have filed “mixed dust” claims alleging that their clients either developed asbestosis or silicosis due to their exposure to various products in the workplace.¹⁰²

III. Substantial Legal Guidelines and Sound Procedural Steps Will Help Courts Prevent an Asbestos-Like Problem in Industrial Sand Cases

As state court judges, you can prevent unsound policy in silica litigation and avoid the unnecessary problems that arose in asbestos litigation, such as corporate bankruptcies,¹⁰³ lost jobs,¹⁰⁴ eroded pension funds and stock prices,¹⁰⁵ and lengthy delays for compensation for the truly sick.¹⁰⁶

reading for litigation, the B-reader is acutely aware of the precise disease he is supposed to be finding on the x-rays. In these cases, the doctors repeatedly testified that they were told to look for silicosis, and the doctors did as they were told.”).

¹⁰¹ Of 8629 plaintiffs in the federal silica MDL, 5174—or 60%—are “‘asbestos re-treads,’ i.e., people who have previously filed claims for asbestos-related disease.” Roger Parloff, *Diagnosing for Dollars, A Court Battle Over Silicosis Shines a Harsh Light on Mass Medical Screeners—The Same People Whose Diagnoses Have Cost Asbestos Defendants Billions*, FORTUNE, June 13, 2005, at 96, available at 2005 WLNR 8694138; see *In re Silica Prods.*, 2005 WL 1593936, at **33-34, 35-36, 44 (discussing physician testimony regarding readings of patients with asbestos claim in one case and same patient with silica claim in another case; one physician on the stand explained his different diagnoses as “intra-reader variability” and subsequently requested counsel).

¹⁰² See *In re R.O.C.*, No. 04-01-00404-CV (Tex. 4th Ct. App., Jan. 14, 2004) (granting summary judgment against plaintiffs due to the lack of evidence of exposure to either asbestos or silica), available at <http://www.4thcoa.courts.state.tx.us/opinions/opinion.asp?OpinionID=16806> (last visited Aug. 17, 2005).

¹⁰³ See Editorial, *Asbestos Dreams*, WALL ST. J., Oct. 17, 2003, at A10 (seventy-eight corporate bankruptcies and counting).

¹⁰⁴ See Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. BANKR. L. & PRAC. 51 (2003) (reporting that asbestos litigation has resulted in at least 60,000 lost jobs).

¹⁰⁵ See *id.* at 10, 30.

¹⁰⁶ See Steven B. Hantler, *Toward Greater Judicial Leadership on Asbestos Litigation*, at 1 (Civil Justice Forum, Apr. 2003); *In re: Asbestos Prods., Liab. Litig.* (No. VI), No. MDL 875, 2002 WL 32151574, at *1 (J.P.M.D.L. Jan. 16, 2002) (stating that “[t]he

You can do so by requiring silica cases to comport with traditional substantive and procedural law.¹⁰⁷ In the asbestos litigation, courts relaxed traditional tort standards to foster settlements, but this approach also attracted tens of thousands of new, unfounded cases. That mistake should not be repeated here.

Silica litigation is at a tipping point. You, state court judges, should utilize clear and well-developed legal tools before a litigation crisis develops. Such action would represent sound public policy, and should keep personal injury industrial sand lawsuits from spiraling out of control.

A. Substantive Law Requires Rejection of Most Industrial Sand Lawsuits

In controlling the rise of silica filings, you are aided by the fact that these claims are distinguishable from asbestos litigation, where it was shown that some manufacturers knew of risks while workers did not. Silica's properties have been understood for a long time. Practically every workplace in America became acquainted with the dangers of silica when silicosis became a major news topic in the 1930s. In the case of industrial sand, it is the worker's employer, not the seller, that is in the best position to warn the employee of the risks and make sure that the employee takes sufficient protective measures. Employers are in the best position to know their worksites and protect workers from injury—and they are legally responsible under OSHA and common-law for the safety of their employees.

You, State Judges of America, should apply fundamental tort principles to industrial sand litigation as set forth in the *Restatement (Second) of Torts* and the *Restatement of Torts, Third: Products Liability*, namely,

Court finds that the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs"); *Amchem Prods. v. Windsor*, 521 U.S. 591, 631, 117 S. Ct. 2221, 2253, 138 L. Ed. 2d 689 (1997) (Breyer, J., concurring) (noting that "up to one half of asbestos claims are now being filed by people who have little or no physical impairment").

¹⁰⁷ See, e.g., Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1 (2001).

rules like the sophisticated user doctrine, the bulk supplier of raw materials doctrine, and the substantial change doctrine.¹⁰⁸ Applying these well-established legal principles will require dismissal of many silica cases on motions for summary judgment or for a directed verdict.

1. The Sophisticated User Doctrine

The “sophisticated user doctrine” states that a manufacturer or supplier has no duty to warn users when it supplies its product to a user who knows or reasonably should know of a product’s dangers.¹⁰⁹ Section 388 of the *Restatement (Second)* provides that the supplier of a product for another to use may be held liable to those whom the supplier expects to use the product if: (1) the supplier knows or has reason to know the product is likely to be dangerous for the use for which it is supplied; (2) the supplier has no reason to believe that product users will realize the product’s dangerous condition; and (3) the supplier fails to exercise reasonable care to inform the product users of the product’s dangerous condition.¹¹⁰ The sophisticated user doctrine applies when a warning would have little value because those using the product are already aware of its potential adverse health effects.¹¹¹

The *Restatement (Second)* recognizes that products often do not pass directly from the supplier to the end-user, but instead pass through one or more intermediary users (*e.g.*, wholesalers, distributors, retailers, and employers) before winding up in the hands of the end-user.¹¹² Numerous courts have recognized that if the intermediary user is sufficiently aware of the risks of the product, the supplier or manufacturer has no duty to warn the intermediary.¹¹³ Applying this doctrine puts the burden of

¹⁰⁸ Refer to the Appendix of this Article for cases in individual jurisdictions applying these doctrines.

¹⁰⁹ See Gilligan, *supra* note 2, at 25 (citing *Hoffman v. Houghton Chem. Corp.* 751 N.E.2d 848, 854 (Mass. 2001)).

¹¹⁰ See RESTATEMENT (SECOND) OF TORTS § 388 (1965).

¹¹¹ See Gilligan, *supra* note 2, at 26 (citing *Hoffman*, 751 N.E.2d at 854; *Coward v. Avondale Indus.*, 792 So. 2d 73, 76 (La. Ct. App. 2001)).

¹¹² See RESTATEMENT (SECOND) OF TORTS § 388, cmt. n.

¹¹³ See, *e.g.*, *Davis v. Avondale Indus.*, 975 F.2d 169, 173 (5th Cir. 1992) (applying Louisiana law); *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 464 (5th Cir. 1967)

warning those exposed to silica on those who have the best ability to prevent the harm—the sophisticated intermediary employers—rather than on suppliers and manufacturers, who do not know as well as the employers in what form and through what use employees may be exposed to silica. As such, the burden falls on those who are in the best position to know of the product's potential uses, thereby enabling that party to communicate safety information to the ultimate user based upon the specific use of the product.¹¹⁴ As the United States Court of Appeals for the Eighth Circuit recognized, the sophisticated user doctrine is “no more than an expression of common sense as to why a party should not be liable when no warnings or inadequate warnings are given to one who already knows or could have reasonably been expected to know of [a product's] dangers.”¹¹⁵

In the context of industrial sand litigation, Mr. and Ms. State Judge of America, you should apply the sophisticated user defense and assign liability to those who put the sand to use: the sophisticated intermediary employers of the injured plaintiff end-users. Since the risks of silica exposure were common knowledge well before and during the time plaintiffs worked in the industries affected by exposure, sand suppliers should have no duty to warn the sophisticated employers of these plaintiffs.¹¹⁶

In applying the doctrine, you are on solid legal ground. For example, in a 1984 silica case, *Goodbar v. Whitehead Bros.*, a federal district court in Virginia applied the sophisticated user doctrine to the products liability claims of 132 present and former foundry employees who allegedly contracted silicosis due to silica exposure on the job.¹¹⁷ After rejecting

(applying Oklahoma law); *Sara Lee Corp. v. Homasote Co.*, 719 F. Supp. 417, 424 (D. Md. 1989) (applying Maryland law); *Higgins v. E.I. DuPont de Nemours & Co.*, 671 F. Supp. 1055, 1061 (D. Md. 1987); *Damond v. Avondale Indus.*, 718 So. 2d 551, 552 (La. Ct. App. 1998); *Munoz v. Gulf Oil Co.*, 732 S.W.2d 62, 66 (Tex. App. 1987).

¹¹⁴ See *Singleton v. Manitowoc Co.*, 727 F. Supp. 217, 226 (D. Md. 1989) (applying Maryland law).

¹¹⁵ *Crook v. Kaneb Pipe Line Operating P'ship, L.P.*, 231 F.3d 1098, 1102 (8th Cir. 2002) (applying Nebraska law).

¹¹⁶ See *Dresser Indus. v. Lee*, 880 S.W.2d 750, 751 (Tex. 1993).

¹¹⁷ 591 F. Supp. 552, 554-55 (W.D. Va. 1984) (applying Virginia law), *aff'd sub nom.* *Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985).

strict liability and express and implied warranty claims as lacking legal or factual grounds, the court applied section 388 of the *Restatement (Second)* to grant the defendant sand suppliers' joint motion for summary judgment on the plaintiffs' failure to warn claims.¹¹⁸ The court traced the foundry industry's knowledge of the risks of silica throughout the twentieth century. The court concluded that "it is well-established that the [Foundry] was cognizant of the problems of silica dust and silicosis since at least the 1930s. More importantly, from the late 1950s and early 1960s onward, the Foundry's knowledge was . . . extensive."¹¹⁹ Thus, the court found that "only the Foundry is in a position to communicate effective warnings and accordingly should be the one to shoulder any burden of effective warning."¹²⁰ The Fourth Circuit affirmed the trial court's decision to grant summary judgment to the sellers and dismiss the case.¹²¹

Most courts continue to follow this reasoning. For example, in 1990, the Third Circuit affirmed a ruling that a worker who contracted silicosis after thirty years of exposure to silica dust could not recover from the

¹¹⁸ *Goodbar*, 591 F. Supp. at 557-59.

¹¹⁹ *Id.* at 565.

¹²⁰ *Id.* at 566. The court reasoned that

[t]he difficulties that the sand suppliers face in attempting to warn the Foundry's employees of the hazards inherent in the use of sand in a foundry setting are numerous. These include (1) the identification of the users or those exposed to its products would require a constant monitoring by the suppliers in view of the constant turnover of the Foundry's large work force; (2) the manner in which the sand products are delivered in bulk (*i.e.* unpackaged railroad car lots or truck); (3) no written product warnings placed on the railroad cars would ever reach the workers involved in casting or those in the immediate vicinity due to the way the loose sand is unloaded, conveyed, and kept in storage bins until needed; (4) only the Foundry itself would be in a position to provide the good housekeeping measures, training and warnings to its workers on a continuous and systematic basis necessary to reduce the risk of silicosis; (5) the sand suppliers must rely on the Foundry to convey any safety information to its employees; (6) the confusion arising when twelve different suppliers and the Foundry each try to cope with the awesome task of instructing the Foundry workers; and (7) in a commercial setting, it would be totally unrealistic to assume that the suppliers would be able to exert pressure on a large, industrial customer such as the Foundry to allow the suppliers to come in and educate its workers about the hazards of silicosis.

Id.

¹²¹ *See Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985).

supplier.¹²² The court, applying Ohio law, found that “it was reasonable for the sand suppliers to assume [the intermediary] knew of the dangers of silica given the state of common medical knowledge at all relevant times [and] the various statutes and regulations governing silica.”¹²³ A Pennsylvania trial court followed suit in 1993 when it recognized in *Phillips v. A.P. Green Refractories Co.* that it would be prohibitively expensive and unduly burdensome to require industrial sand suppliers to warn each worker and continually monitor them to make sure they were wearing their respirators.¹²⁴ Therefore, the court found that the suppliers could not feasibly reduce the risk to end-users.¹²⁵ Similarly, in 2003, the Eighth Circuit applied the sophisticated user doctrine to affirm the grant of summary judgment in favor of a sand supplier when the worker was exposed to silica levels below the maximum provided by OSHA regulations, but higher than that recommended by NIOSH.¹²⁶ The court, applying Iowa law, found that the foundry’s management was well aware of the risks of failing to implement a respirator policy for these levels of silica exposure in light of “generalized industry knowledge.”¹²⁷

However, the Texas Supreme Court declined to adopt a straightforward bright-line rule in *Humble Sand & Gravel, Inc. v. Gomez*, when it considered whether industrial sand suppliers have a duty to warn their customers’ employees about the hazards of occupational exposure to silica.¹²⁸ Instead, it set forth a six-factor, fact-intensive balancing test to be used and required that these factors be considered with regard to the industry as a whole, not just the parties at issue in the lawsuit.¹²⁹

¹²² See *Smith v. Walter C. Best, Inc.*, 927 F.2d 736, 740 (3d Cir. 1990) (applying Ohio law).

¹²³ See *id.* The court also recognized that the plaintiff’s employer was a “knowledgeable industrial purchaser of silica sand, familiar with the dangers associated with inhaling silica dust and with proper dust control method” and noted that the employer was “in a superior position to supply effective employee warnings.” See *id.* at 741.

¹²⁴ 630 A.2d 874, 881 (Pa. Super. Ct. 1993).

¹²⁵ *Phillips*, 630 A.2d at 881.

¹²⁶ See *Bergfeld v. Unimin Corp.*, 319 F.3d 350, 353-54 (8th Cir. 2003) (applying Iowa law).

¹²⁷ *Id.* at 354-55.

¹²⁸ 146 S.W.3d 170, 192 (Tex. 2004).

¹²⁹ *Id.* These factors are: (1) the likelihood of serious injury from a supplier’s failure to warn; (2) the burden on a supplier of giving a warning; (3) the feasibility and effec-

Finding there was insufficient information for the court to make this determination, the court remanded the case for a new trial. That task, however, may be daunting. As the dissenting justices pointed out: “[T]he Court concludes that this case should be retried to allow Humble to prove that it owed no duty to workers like Raymond Gomez. If I were Humble, I would surely appreciate the second chance—but I wouldn’t have a clue what to do.”¹³⁰ The Texas Supreme Court’s holding is unsound, may undermine incentives for safety in the workplace, and creates the potential for needless and costly litigation.

Unless you find that silica industry employers are sophisticated users, you, America’s Trial Judges, will be forced to parse out—for potentially thousands of plaintiffs—questions of fact concerning plaintiffs’ and defendants’ individual, subjective awareness of the hazards of working with and around industrial sand, creating thousands of mini-trials in case after case. You should not have to bear this burden. Instead, you should adopt the common-sense rule that silica industry employers had the collective knowledge of industrial sand’s potential adverse health effects based upon the widespread knowledge of this fact. As such, the employers, *not* the industrial sand suppliers, have the duty to warn their own employees of the potential adverse health effects of industrial sand exposure.

2. The Bulk Supplier Doctrine

In conformity with traditional products liability law, we also suggest that you apply the bulk supplier doctrine in industrial sand litigation. The doctrine provides that a manufacturer or supplier of bulk materials is not liable for a failure to warn an end-user if the intermediary is aware of the risks or hazards of the bulk product and can warn end-users about these risks.¹³¹

tiveness of a supplier’s warning; (4) the reliability of operators to warn their employees; (5) the existence and efficacy of other protections; and (6) the social utility of requiring, or not requiring, suppliers to warn. *Id.* For a thorough analysis of this case, see Victor E. Schwartz et al., Comment, *Humble Sand & Gravel, Inc. v. Gomez: The Texas Supreme Court Attempted to Define the Duty of Sand Suppliers to End Users, But a More Clean and Sound Rule Is Needed*, 37 ST. MARY’S L.J. – (forthcoming 2005).

¹³⁰ *Id.* at 197 (O’Neill & Schneider, J.J., dissenting).

¹³¹ See Gilligan, *supra* note 2, at 25 (citing *Hoffman v. Houghton Chem. Corp.* 751 N.E.2d 848, 854 (Mass. 2001); *Forest v. E.I. DuPont de Nemours & Co.*, 791 F. Supp.

Although this doctrine is similar to the sophisticated user defense, its rationale is different. The reasoning for the bulk materials doctrine is that intermediaries distribute bulk materials for a great number of varying uses. The bulk supplier doctrine places liability on the entity in the best position to warn the end-users and to take steps to ensure that consumers are not injured: the intermediary user, who is in direct contact with the end-user. As the *Restatement of Torts, Third* explains:

Inappropriate decisions regarding the use of such materials are not attributable to the supplier of the raw materials but rather to the fabricator that puts them in improper use. . . . The same considerations apply to failure-to-warn claims against the sellers of raw material. To impose a duty to warn would require the seller to develop expertise regarding a multitude of different end-products and to investigate the actual use of raw materials [by employers] over whom the supplier has no control. Courts uniformly refuse to impose such an onerous duty to warn.¹³²

As the Reporters have recognized, the bulk supplier doctrine, as set forth in section 5, has been “enormously influential” in the development of state tort law.¹³³

The rationale for the bulk supplier doctrine applies in industrial sand cases. Industrial sand is often distributed in railroad cars, so it would be impracticable, if not impossible, for suppliers to attach a warning label to the bulk material. Moreover, even when industrial sand is distributed in bags or other packaging, industrial sand suppliers and other similarly situated businesses that ship to diverse industries cannot readily identify how their products will be used in a given workplace, who will use them, and what warnings would be appropriate.¹³⁴

1460, 1463 (D. Nev. 1992) (applying Nevada law); *Jones v. Hittle Serv., Inc.*, 549 P.2d 1383, 1394 (Kan. 1976)); *see also Sara Lee Corp. v. Homasote Co.*, 719 F. Supp. 417, 424 (D. Md. 1989) (applying Maryland law).

¹³² RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. c (1997).

¹³³ *See* James A. Henderson, Jr. & Aaron D. Twerski, *The Product Liability Restatement in the Courts—An Initial Assessment*, 27 WM. MITCHELL L. REV. 7, 23 (2000); *see also* James A. Henderson, Jr. & Aaron D. Twerski, *Third Annual Judges and Lawyers Symposium: The Restatement (Third) of Torts and the Future of Tort Law: Overview by the ALI Reporters: Product Liability*, 10 KAN. J. L. & PUB. POL'Y 21, 26 (2000) (comments by Professor Twerski).

¹³⁴ *See, e.g., Smith v. Walter C. Best, Inc.*, 927 F.2d 736, 740 (3d Cir. 1990) (applying Ohio law) (explaining that, because sand was delivered in bulk and the

For these reasons, courts have applied the bulk supplier doctrine in industrial sand lawsuits to grant summary judgment for suppliers. For example, a federal district court in Iowa held that a bulk supplier of industrial sand had no duty to warn the ultimate consumers, because the sand was not dangerous when it was supplied and the processes that created the dangers were not attributable to the sand supplier.¹³⁵ That court recognized that an employer is “in a far better position to ascertain who was at risk of exposure to silica dust and to warn those individuals.”¹³⁶ Courts have also acknowledged the “numerous” difficulties sand suppliers face in attempting to warn foundry employees of potential risks associated with the use of the bulk material.¹³⁷ You, too, should follow this rational course.

3. The Substantial Change Doctrine

After a product leaves the control of its manufacturer or seller, intermediaries, such as employers, and end-users, such as employees and consumers, can subject the product to a variety of changes. Sometimes the product changes so much after it leaves its manufacturer that traditional tort law will refuse to hold the manufacturer responsible for any harm caused by those changes. In some cases, courts have ruled that, where such changes occurred after a product left the manufacturer’s control, the plaintiffs did not make out their case that the product was defective or that the defective product itself caused their injuries.¹³⁸ In

plaintiffs did not participate in the delivery process, the employer was in a better position to convey warnings to its employees).

¹³⁵ See *Bergfeld v. Unimin Corp.*, 226 F. Supp. 2d 970, 978 (N.D. Iowa 2002) (applying Iowa law) (noting that “placing liability on sand supplier would impose an onerous burden on a party in the defendant’s position and would, in effect, extend the duty of a bulk supplier beyond what the law permits”), *aff’d*, 319 F.3d 350 (8th Cir. 2003). The court also based its decision on the “sophisticated user” doctrine.

¹³⁶ *Id.* at 978-79.

¹³⁷ See *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552, 566 (W.D. Va. 1984); see also *Phillips*, 630 A.2d at 882-83 (recognizing that the cost of effectively warning each user “would be unrealistically high and impractical” for a bulk supplier).

¹³⁸ See, e.g., *Moore v. Miss. Valley Gas. Co.*, 863 So. 2d 43 (Miss. 2003) (plaintiff failed to establish prima facie case of product liability claim absent proof that hot water

other cases, courts have found that misuse or post-manufacture changes to a product can constitute an affirmative defense to a products liability claim, reducing the manufacturer's liability for damages, even where the changes were foreseeable or the product was defective before the changes were made.¹³⁹

This common-sense approach, variously called the "substantial change" doctrine or the "misuse, modification, or alteration" doctrine, is recognized by both the Second and Third Restatements of Torts. Section 402A of the *Restatement (Second)* provides that a product seller is strictly liable for harm caused by a product defect if the seller's product "is expected to and does reach the user or consumer *without substantial change* in the condition in which it is sold."¹⁴⁰ In other words, as one state supreme court explained, under the so-called "substantial change" doctrine, a product manufacturer cannot be held liable for a product defect if the product "substantially changes in a way that is material to [the plaintiff's injury] after the product leaves [the manufacturer's] control."¹⁴¹

heater reached her without substantial change or alteration); *Morguson v. 3M Co.*, 857 So. 2d 796 (Ala. 2003) (plaintiff failed to establish product liability case against manufacturers of surgical pump and vent tubing where removal of one-way safety valve by surgical team was a material post-sale alteration to product and the superseding cause of injury); *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 403 N.E.2d 440 (N.Y. 1980) (employer's removal of safety feature on plastic molding machine was post-sale modification to a non-defective product, precluding strict products liability claim against machine manufacturer).

¹³⁹ See, e.g., *States v. R.D. Werner Co.*, 799 P.2d 427 (Colo. App. 1990) (if both defective product and plaintiff's misuse of product contributed to injury, then plaintiff's recovery must be reduced by a percentage representing the amount of fault attributable to his own conduct; if plaintiff's misuse is sole cause of damages, plaintiff cannot recover in strict liability).

¹⁴⁰ RESTATEMENT (SECOND) OF TORTS § 402A (1)(b) (1965) (emphasis added). The Reporters noted that when such a substantial change occurs, a question arises "whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes." *Id.* cmt. p. For example, "the manufacturer of pig iron, which is capable of a wide variety of uses, is not . . . likely to be held to strict liability when it turns out to be unsuitable for a child's tricycle into which it is finally made by a remote buyer." *Id.* Ultimately, the Reporters withheld judgment on the substantial change doctrine, "express[ing] neither approval nor disapproval of the seller's strict liability in such a case," because case law at the time did not provide much guidance on the matter. *Id.*

¹⁴¹ *Haase v. Badger Mining Corp.*, 682 N.W.2d 389, 395 (Wis. 2004).

The *Restatement (Third) of Torts* states that “[p]roduct misuse, modification, and alteration are forms of post-sale conduct by product users or others that can be relevant to the determination of the issues of defect, causation, or comparative responsibility.”¹⁴² The *Restatement (Third)* recognizes that a manufacturer should not be held liable for unforeseeable post-sale changes by others.¹⁴³ Even if post-sale changes are foreseeable, the *Restatement (Third)* provides that the manufacturer has no liability for those changes that are “unreasonable, unusual, and costly to avoid.”¹⁴⁴ Tort law does not impose a duty on manufacturers to protect consumers against every conceivable modification that might be made to products that can be put to many uses after being changed. Instead, it subjects manufacturers to liability when they can foresee specific modifications or uses for their products. It is easy to foresee, for instance, that a chair might be used to stand on, to sit on, or to set something upon.¹⁴⁵ It is much harder to foresee all of the uses and modifications that can be made to bulk materials, such as silica sand.

Courts already have effectively applied the “substantial change” doctrine in silica litigation and other cases involving exposure to potentially hazardous products. For example, the Wisconsin Supreme Court applied the “substantial change” doctrine in a foundry worker’s personal injury lawsuit against an industrial sand company in *Haase v. Badger Mining Corp.*¹⁴⁶ The court ruled that the defendant sand manufacturer could not be held liable for the employee’s injuries, since the

¹⁴² See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. p & Reporters’ Notes on cmt. p (1997) (explaining impact of misuse, modification, or alteration on duty analysis); § 15 cmt. b (explaining impact of misuse, modification, or alteration on causation analysis); § 2 cmt. p (“Moreover, a product may be found to be defective and causally responsible for plaintiff’s harm but the plaintiff may have misused, altered, or modified the product in a manner that calls for the reduction of plaintiff’s recovery under the rules of comparative responsibility.”).

¹⁴³ See *id.* § 2 cmt. p.

¹⁴⁴ *Id.*

¹⁴⁵ See, e.g., *Phillips v. Ogle Aluminum Furniture*, 235 P.2d 857, 859-60 (Cal. Ct. App. 1951) (holding that, “[a]lthough the ordinary use of a chair is to sit on it, it cannot be said as a matter of law, that it could not be reasonably anticipated that the described chairs would be used for the purpose of standing upon them”).

¹⁴⁶ *Haase*, 682 N.W.2d at 392.

industrial sand the company sold had undergone a “substantial and material change” when it was converted into respirable particles after it left the manufacturer’s possession and control.¹⁴⁷ The court noted that when the sand left the manufacturer’s control, it was not respirable because the granules were too large to inhale.¹⁴⁸ It changed into respirable form only at the foundry, when the sand was compacted into a mold for metal casings.¹⁴⁹ The court reasoned that the manufacturer could not be held liable because “the very characteristic which made Badger’s silica sand dangerous, its respirability, did not arise until the sand had been fractured into dust by [the foundry] during the foundry process.”¹⁵⁰

The *Haase* court highlighted important public policy principles guiding its decision. It recognized that where substantial changes are made after a product leaves its manufacturer’s control, the party making the changes to the product is in the best position to make the changes safe by inspecting them and implementing quality control measures.¹⁵¹ Thus, in *Haase*, the foundry was in a much better position than the silica manufacturer to ensure that safety measures were in place when workers encountered respirable silica. Also, the court said, the party making the substantial changes to the product is the party that should be held responsible for the injuries resulting from the changes.¹⁵²

The approach in *Haase* is consistent with other cases concluding that manufacturers and product sellers should not be held liable for harm caused by substantial changes made to a product after it leaves the manufacturers’ or sellers’ control. In *Cothrun v. Schwartz*, the plaintiffs brought a lawsuit for asbestos contamination against defendants who had sold raw asbestos to a mill formerly operating on the plaintiffs’ trailer park property.¹⁵³ Citing the *Restatement (Second)*’s “substantial change” provision, the court held that the defendant asbestos sellers were not liable

¹⁴⁷ *Id.* at 396.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ 752 P.2d 1045 (Ariz. Ct. App. 1988).

for contamination occurring after the mill changed the raw asbestos into dust, holding:

There is no evidence in this case that the raw asbestos posed a danger of any kind to persons in the position of [the property owners]. It only became potentially dangerous to the appellants when it was in the process of being milled, thus creating dust, and after the process had taken place when the mill dumped the [discarded product] in a [discarded product] pile. The responsibility for preventing the escape of asbestos dust during the milling process rests upon the mill and not the [defendant-sellers].¹⁵⁴

The court held that as a matter of law, the defendant-sellers were not liable for the plaintiffs' injuries because the raw asbestos that left the defendant-sellers was not harmful to the plaintiffs. It only became harmful once the mill converted it into respirable asbestos dust.¹⁵⁵

In sum, post-manufacture changes to a product by someone other than the manufacturer can sometimes be so great that the manufacturer cannot be said to owe a duty to plaintiffs harmed by the substantially changed product. The decision in *Haase* recognizes that silica sand undergoes such a change when it is used in certain workplaces. This legal rule furthers good public policy by placing the responsibility for enacting safety measures on the party that can more adequately protect workers: the employer who changes the silica into respirable dust. This sound approach is one you should consider adopting.

B. Procedural Legal Steps State Judges Can Take

By faithfully applying the substantial change, the sophisticated user, and the bulk supplier doctrines in silica cases, you will help prevent silica claims from approaching the volume of asbestos litigation. Even so, asbestos litigation teaches several lessons that may be helpful to you in handling these claims.¹⁵⁶

¹⁵⁴ *Cothrun*, 752 P.2d at 1048.

¹⁵⁵ *Id.*

¹⁵⁶ See generally *Keteltas*, *supra* note 85, at 12 (urging courts to require a timely showing of each plaintiff's basis for filing a claim, to prioritize the claims of those with

As the Supreme Court of Appeals of West Virginia recently stated, the burden of asbestos litigation “effectively forced the courts to adopt diverse, innovative, and often non-traditional judicial management techniques to reduce the burden of asbestos litigation that seem to be paralyzing their active docket.”¹⁵⁷ Your choices will have a critical effect on the direction of industrial sand litigation.¹⁵⁸ Steps you can take include rejecting trial consolidations of dissimilar claims and rejecting the shoddy practice of mass screenings to identify new plaintiffs.

1. Judges Should Reject Plaintiffs’ Lawyers’ Attempts to Implement Trial Consolidations and Should Sever Multi-Plaintiff Cases

Your colleagues on the bench sought to address the overabundance of asbestos claims on their dockets by consolidating cases. This approach was initially appealing, and seemed logical. If claims are crowding court dockets, then it would seem sensible to encourage early settlement of claims and to resolve the remaining claims at trial as efficiently and cost-effectively as possible. Unfortunately, in lowering the barriers to litigation, courts unintentionally encouraged the filing of more claims.¹⁵⁹ The trouble with consolidating cases for trial is that, as illustrated in the asbestos context, consolidations did not account for the lack of factual and legal commonality among the cases.¹⁶⁰ As a result, the claims of people with

a life-impairing injury, and to demand reliable medical evidence of impairment and causation).

¹⁵⁷ *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 304 (W. Va. 1996).

¹⁵⁸ See Rothstein, *supra* note 107, at 1.

¹⁵⁹ See Schwartz & Tedesco, *supra* note 5, at 531.

¹⁶⁰ The concerns about prejudice and bias infecting consolidated trials are to be distinguished from consolidation for pre-trial purposes. This is because consolidations for pre-trial proceedings create efficiencies and do not raise the same problems of juror influence. Pre-trial centralization is appropriate because plaintiffs bring silica actions against many of the same defendants, and their claims involve common questions of fact regarding alleged injuries, exposure to silica, and defendants’ knowledge of danger. See *In re Silica Prod. Liab. Litig.*, Docket No. 1553, 280 F. Supp. 2d 1381, 1381-84 (J.P.M.D.L. 2003). After completing consolidated pre-trial proceedings, cases are then tried individually, allowing just and efficient consolidation of the pre-trial procedures,

mesothelioma, a rare and painful cancer, have been joined with the claims of people with mild and severe cases of asbestosis, and with the claims of people who were exposed to asbestos but were otherwise unimpaired.

Experience has shown that juries have a very difficult time not equating such claims, thereby prejudicing the defendant in the less-sick plaintiff's claim and giving unimpaired plaintiffs a windfall benefit.¹⁶¹ Consolidation at trial would make sense if all the claimants suffered the same illnesses to the same degree, brought on by the same products, to which they all were exposed at the same time. In the silica context, however, each plaintiff is sure to have a unique silica exposure history, work history, and medical history.¹⁶² Determining causation, the extent of the injury, and fair compensation will require an individual assessment of each claim.

Consolidations also raise serious due process issues because defendants are given virtually no opportunity to defend against an individual plaintiff's claims. Defendants are pressured to settle; as noted in the class action context, mass aggregation of claims can produce coercive "black-

and individual proceedings at the trial level, so that prejudicial joinder of dissimilar claims does not taint the trial. *See id.* at 1382-83. This is how the federal system operates in the asbestos context before District Judge Charles R. Weiner in the Eastern District of Pennsylvania and in the silica context before District Judge Janis Graham Jack in the Southern District of Texas. *See In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415 (J.P.M.D.L. 1991); *In re Silica Prods. Liab. Litig.*, Docket No. 1553, 280 F. Supp. 2d at 1381-84 (J.P.M.D.L. 2003).

¹⁶¹ Professor Christopher Edley, Jr. of Harvard Law School (now dean of the University of California, Berkeley, School of Law (Boalt Hall)) testified before the United States House Judiciary Committee that

[i]t is all but certain . . . that impaired victims receive proportionately less of the settlement sum than they would from a tort award based on individualized adjudication . . . [L]oading a large number of claims together produces a bet-the-company risk for the defendants, making settlement more likely. In the settlement, then, the higher potential jury-award value of the impaired claim is spread, at least partially, to the unimpaired. The arithmetic is straightforward: the unimpaired and the attorneys who receive contingent fees benefit at the expense of impaired victims.

Christopher Edley, Jr., *Prepared Statement Concerning H.R. 1283, The Fairness in Asbestos Compensation Act: Hearing on H.R. 1283 before the House Committee on the Judiciary*, 106th Cong. at II.1. (July 1, 1999).

¹⁶² *See Courtroom News*, HARRISMARTIN'S COLUMNS: SILICA, Aug. 2003, at 9 (citing *Tyler v. Pulmosan Safety Equip.*, No. 2002-214 (Miss. Cir. Ct., Clairborne County)) [hereinafter HARRISMARTIN'S COLUMNS: SILICA].

mail settlements.”¹⁶³ This is certainly a quick way to clear a lower court’s docket for a time, but the United States Constitution does not permit courts to trample over litigants’ due process rights in this fashion. In our civil justice system, the ends do not justify the means. This basic fact was at the core of the United States Supreme Court’s decisions in *Amchem Products, Inc. v. Windsor*¹⁶⁴ and *Ortiz v. Fibreboard Corp.*,¹⁶⁵ both rejecting class actions in the context of asbestos.

Given all these factors, trial consolidation does not make sense in the vast majority of silica cases. Courts do not save time by trying multiple cases when each of the individual dissimilar claims must be considered. Severing the claims of joined plaintiffs with varying backgrounds would result in a fairer disposition of each case based on each plaintiff’s exposure and background.

State Court Judges of America, please do not allow the unfair practice of mass consolidations of dissimilar claims for trial infect silica litigation. Use your power to sever cases filed by multiple plaintiffs with varying work histories, exposure levels, and illnesses.

2. Judges Should Reject Premature Claims of Those Exposed to Silica

Judges of America, you have the power to help truly injured plaintiffs obtain compensation by requiring that silica claimants show a present, physical injury to proceed with their case. This is important because the driving force behind the ongoing increase in asbestos claims is the number of unimpaired plaintiffs.¹⁶⁶ While the asbestos litigation began

¹⁶³ *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995); *see also* *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (referring to class actions as “judicial blackmail”); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995) (calling class actions “legalized blackmail”).

¹⁶⁴ 521 U.S. 591, 597, 117 S. Ct. 2221, 138 L. Ed. 2d 689 (1997) (invalidating proposed class action settlement of thousands of asbestos claims, because the settlement failed to satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure).

¹⁶⁵ 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999) (relying on constitutional concerns as well as Rule 23 to invalidate proposed settlement).

¹⁶⁶ *See* Behrens, *supra* note 107, at 336, 342-43 (noting that “the recent explosion of [asbestos-related] filings by unimpaired claimants has been the ‘wild card’ that has caused earlier estimates of the [asbestos] litigation to be so far off the mark”).

with claims by those with mesothelioma and severe asbestosis filing against the major asbestos manufacturers, up to ninety percent of new filings are brought by individuals whose sole “injury” was a fuzzy mark on an x-ray, known as pleural plaques or thickening.¹⁶⁷ Three ways to discourage premature claims are: (1) requiring the plaintiff to demonstrate physical impairment; (2) dismissing all asymptomatic claims filed as the result of mass screenings; or, (3) establishing an “inactive docket” program to defer claims until actual impairment occurs.

a. No Injury; No Recovery

One way that you, State Court Judges, can address meritless or unripe silica claims is to hold that a cause of action cannot be maintained until a plaintiff demonstrates actual impairment. In the asbestos context, the Supreme Court of Pennsylvania has held that asymptomatic pleural thickening, unaccompanied by physical impairment, is not a compensable injury that gives rise to a cause of action.¹⁶⁸ The court held that the discovery of pleural plaques or a nonmalignant, asbestos-related lung pathology “does not trigger the statute of limitations with respect to an action for a later, separately diagnosed disease of lung cancer.”¹⁶⁹ Furthermore, “because asymptomatic pleural thickening is not a sufficient physical injury, the resultant emotional distress damages are likewise not recoverable.”¹⁷⁰ The court’s decision relieves the pressure to file unripe claims simply to avoid statute of limitations issues later on. It also helps

¹⁶⁷ See *id.* at 342-44.

¹⁶⁸ See *Simmons v. Pacor, Inc.*, 674 A.2d 232, 237 (Pa. 1996) (upholding *Giffear v. Johns-Manville Corp.*, 632 A.2d 880 (Pa. Super. Ct. 1993)). For other cases holding that pleural thickening, unaccompanied by physical impairment, does not constitute a compensable injury, see *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 31 (Ariz. 1987); *Owens-Illinois v. Armstrong*, 591 A.2d 544, 560-61 (Md. Ct. App. 1991), *aff’d in part & rev’d on other grounds*, 604 A.2d 47 (Md. 1992); *Bernier v. Raymark Indus.*, 516 A.2d 534, 543 (Me. 1986); *In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990) (applying Hawaii law); *In re: Asbestos Litig.*, Nos. 87C-09-24, 90C-09-79, 87C-09-24, 88C-09-78, 1994 Del. Super. LEXIS 693 (Del. Super. Ct. June 14, 1994); *Caterinicchio v. Pittsburgh Corning Corp.*, 605 A.2d 1092 (N.J. 1992); *Howell v. Celetex Corp.*, 904 F.2d 3 (3d Cir. 1990) (applying Pennsylvania law).

¹⁶⁹ *Simmons*, 674 A.2d at 237.

¹⁷⁰ *Id.* at 238.

preserve assets for the seriously ill by ensuring that they will not have to compete with the unimpaired to obtain compensation.

b. Dismiss Claims Generated by Mass Screenings

Mass screenings have been the primary tool for generating claims by unimpaired and uninjured plaintiffs. Plaintiffs' lawyers have so abused mass screenings in the asbestos context that even prominent plaintiffs' trial lawyers have said that mass screenings and the resulting suits by the unimpaired threaten payments to the truly sick.¹⁷¹ Plaintiffs' witnesses agree. As one plaintiffs' expert medical witness remarked, "I was amazed to discover that, in some of the screenings, the worker's x-ray had been 'shopped around' to as many as six radiologists until a slightly positive reading was reported by the last one."¹⁷²

The use of mass screenings to recruit clients in industrial sand cases has increased "immeasurably" during the past few years.¹⁷³ Many plaintiffs may not have any indication of respiratory problems and have no intention of filing a lawsuit until prodded to do so by a screener in a mobile x-ray van hired by entrepreneurial attorneys. In this way, "simple" silicosis claims appear to have the potential to flood the court system in the same way that pleural plaque claims did in asbestos litigation.

¹⁷¹ Dallas lawyer Peter Kraus, who files suits on behalf of mesothelioma victims, has said that lawyers who represent claimants who are not sick are "sucking the money away from the truly impaired." Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, WALL ST. J., Apr. 25, 2001, at A1; see also Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced as the Medically Unimpaired File Claims*, WALL ST. J., Dec. 14, 2001, at B6 ("According to a letter Manville trustees sent to Judge Weinstein on Dec. 5 [2001], a 'disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever.'"); Trisha L. Howard, *Plaintiff's Lawyers Seek Limit on Asbestos Lawsuits by People with Nonmalignant Illnesses*, ST. LOUIS POST-DISPATCH, Dec. 11, 2001, at Metro (explaining that lawyers representing plaintiffs with malignancies believe steps should be taken to "preserve the integrity of these companies and their assets for people who are truly sick").

¹⁷² Stephen Hudak & John F. Hagan, *Asbestos Litigation Overwhelms Courts*, PLAIN DEALER (CLEVELAND, OHIO), Nov. 5, 2002, at A1; see also Setter et al., *supra* note 85.

¹⁷³ See Hudak & Hagan, *supra* note 172 (explaining that workers often are required to sign attorney-fee contracts and grant power of attorney before screening for silicosis at mobile x-ray vans).

One way that you can stop this abuse is to dismiss all silica cases identified through mass screenings. Senior United States District Judge Charles R. Weiner, who oversees the federal asbestos docket, has dismissed all non-malignant asbestos claims that were identified through mass screenings, allowing them to be reinstated with “some evidence of asbestos exposure and evidence of an asbestos-related disease.”¹⁷⁴ Judge Weiner’s Order stated that “[p]riority will be given to the malignancy and other serious health cases over asymptomatic claims.”¹⁷⁵ Litigation by asymptomatic plaintiffs, the court found, takes away substantial compensation that truly ascertainable asbestos victims could receive as a result of their claims.¹⁷⁶

Another option that may decrease the amount of claims resulting from mass screenings is to require plaintiffs to disclose the names of their diagnosing doctor or other health care provider, their diagnoses, dates of diagnoses or treatments, and what medical screenings or tests resulted in their diagnoses. Such disclosures should highlight cases that stem only from screenings and which cases are backed up by the diagnoses of legitimate medical professionals. This approach has been used by the federal silica MDL in Texas.¹⁷⁷ United States District Court Judge Janis Graham Jack scrutinized the evidentiary bases for the diagnosing doctors’ opinions and issued a 249-page opinion criticizing thousands of diagnoses which, she wrote, “were driven by neither health nor justice: they were manufactured for money.”¹⁷⁸

c. Establish an Inactive Docket

Another option you might consider is establishing an “inactive docket” for silica claims.¹⁷⁹ In the asbestos context, an increasing number of state

¹⁷⁴ *In re Asbestos Prods. Liab. Litig.* (No. VI), No. MDL 875, 2002 U.S. Dist. LEXIS 16590, Admin. Order No. 8, at *4. (E.D. Pa. Jan. 16, 2002).

¹⁷⁵ *Id.* at *1.

¹⁷⁶ *Id.* at *3.

¹⁷⁷ *In re Silica Prods. Liab. Litig.*, MDL 1553, Admin. Order No. 6, at Ex. B (S.D. Tex. Feb. 5, 2004).

¹⁷⁸ *In re Silica Prods.*, 2005 WL 1593936, at *59.

¹⁷⁹ See, e.g., Mark A. Behrens & Monica Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH. L.

courts have established such programs, also known as deferral registries or pleural registries.¹⁸⁰ These judicially-managed systems give trial priority to individuals who demonstrate an impairment based on objective medical criteria. The claims of the unimpaired are suspended and placed on an “inactive” docket. These claims are preserved, because otherwise applicable statutes of limitations are tolled. Discovery is stayed with respect to inactive docket claimants, reducing legal transaction costs. A plaintiff may petition to have his or her case removed to the active docket, and set for trial, by presenting credible medical evidence that an impairing condition has developed.

d. Dismiss Without Prejudice All Cases that Fail to Meet Specified Medical Criteria, or Delay Them While Keeping Them on the Docket

A final option you may wish to consider is classifying silica claims according to the level of the claimant’s impairment and then either dismissing without prejudice all non-impaired claims or moving those claims to the end of the docket. While these options do not establish an inactive docket per se, they prioritize the claims of impaired claimants.

In 1992, in the asbestos context, Judge Weiner ordered that in a select number of cases, plaintiffs were to be placed into one of four disease categories.¹⁸¹ Cases in which the claimant suffered from mesothelioma or lung cancer were thereafter given priority with respect to review, settlement, or further litigation.¹⁸² Thousands of cases involving non-impaired claimants were dismissed without prejudice.¹⁸³ In each case,

REV. 1 (2001); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL’Y 541 (1992).

¹⁸⁰ See Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 REV. LITIG. 253 (2005).

¹⁸¹ *In re Asbestos Prod. Liab. Litig.* (No. VI), MDL 875, Admin. Order No. 3, at 1 (E.D. Pa. Sept. 8, 1992). The disease categories were: (1) mesothelioma, living and deceased; (2) lung cancer, living and deceased; (3) other malignancies, living and deceased; and (4) asbestosis, total disability deceased or total disability living. *Id.*

¹⁸² See *id.*

¹⁸³ See *id.* (dismissing approximately 3200 non-impairment claims without prejudice with all applicable statutes of limitation tolled). Similarly, with respect to claims

plaintiff's counsel was required to have a written medical opinion by a board-certified specialist indicating that exposure to either asbestos or products containing asbestos was a contributing cause to the claimant's condition.¹⁸⁴ Judge Weiner noted that this process prioritized "malignancy, death and total disability cases where the substantial contributing cause is an asbestos-related disease or injury."¹⁸⁵

A similar approach classifies the level of a plaintiff's disease and delays, but does not dismiss claims of plaintiffs who do not meet certain medical criteria. The cases of those who fail to meet the criteria are pushed to the end of the docket and will be heard once all other cases have been resolved. The two judges overseeing the consolidated silica cases in Cuyahoga County Common Pleas Court in Cleveland, Ohio have issued a case management order implementing such a policy.¹⁸⁶ In Cuyahoga County, silica claims are classified according to whether the plaintiff exhibits "functional impairment."¹⁸⁷ Under this system, plaintiffs

brought under the federal Jones Act for asbestos exposures during World War II and thereafter, by a May 1996 Memorandum and Order, Judge Weiner administratively dismissed without prejudice approximately 20,000 cases filed by the Jaques Admiralty Law Firm in Detroit, Michigan. Those orders provided that reinstatement of the claims in the MDL would be warranted only if each plaintiff provided the court with, among other things, sufficient medical evidence of a present "manifest injury" (rather than asymptomatic conditions such as pleural thickening or scarring). *See In re Asbestos Prod. Liab. Litig. (No. VI)*, MDL 875, Civil Action No. 2 (Maritime Actions), Order at 9, 13, 15 (E.D. Pa. May 1, 1996) (With respect to the maritime cases, "only a fraction of the recently diagnosed plaintiffs have an asbestos-related condition, and many of these may be open to question. Numerous cases have either no diagnosis of an asbestos-related condition, or there is scant credible medical evidence To file cases by the thousands and expect the Court to sort out the actionable claims is improper and a waste of the Court's time. Other victims suffer while the Court is clogged with such filings."). Since Judge Weiner entered these orders, only a handful of these 20,000 maritime cases have been reinstated to active status.

¹⁸⁴ *See In re Asbestos Prod. Liab. Litig. (No. VI)*, MDL 875, Admin. Order No. 3, at 1 (E.D. Pa. Sept. 8, 1992).

¹⁸⁵ *See id.*

¹⁸⁶ *See In re Special Docket Cuyahoga County Silica Cases*, General Docket Nos. CV-478998, 479001, 479003, 479006, 482231, 482232, 482235, 482238, 482241, 482244, 482246, 482247, 482248, 482250, Admin. Order No. 1, § J(39)(e) (Ohio Ct. of Comm. Pls. Cuyahoga Co. Nov. 6, 2002). In the CMO, the judges note that the functional impairment requirement "is a temporary approach to managing the silica docket, and will be reviewed in the future by the Court with notice to all parties." *Id.*

¹⁸⁷ *See id.*

with simple silicosis do not meet the “functionally impaired” criteria.¹⁸⁸ Under the court’s order, the claims that are heard first are those where the plaintiffs can “submit objective medical substantiation of a silica-related functional impairment.”¹⁸⁹ All remaining plaintiffs “do not have their cases dismissed, rather these plaintiffs’ cases remain pending and will be grouped for trial once all of the functionally impaired cases have been resolved.”¹⁹⁰

Whether you decide to prohibit causes of action for asymptomatic claimants, dismiss the claims of unimpaired claimants generated by mass screenings, place the claims of the unimpaired on an inactive docket, or dismiss without prejudice or delay claims that do not meet certain medical criteria, any of these courses could help ensure that those who are actually injured will receive compensation, rather than having to face companies bankrupted by the claims of asymptomatic plaintiffs who may never develop silicosis. Though only one company has become bankrupt solely as a result of silica litigation,¹⁹¹ the lessons of asbestos cases are important to heed. Courts facing silica suits should reject claims filed as a result of mass screenings, and only allow cases with evidence of impairment using objective medical criteria to proceed.

IV. Conclusion

Mr. and Ms. Trial Judge of America, we thank you for reading our letter. We appreciate the work that you do for our country. We strongly believe that following the suggestions in our letter will enable you to keep the silica litigation dockets fair and just, and in line with the hornbook law. Learning from the errors of the asbestos litigation crisis, we believe

¹⁸⁸ See *Ohio Judge Denies CMO Modification, Disbands Trial Group*, 1:12 MEALEY’S LITIG. REP.: SILICA 4 (Aug. 2003).

¹⁸⁹ *In re Special Docket Cuyahoga County Silica Cases*, General Docket Nos. CV-478998, 479001, 479003, 479006, 482231, 482232, 482235, 482238, 482241, 482244, 482246, 482247, 482248, 482250, Admin. Order No. 1, § J(39)(e) (Ohio Ct. of Comm. Pls. Cuyahoga Co. Nov. 6, 2002).

¹⁹⁰ *In re Special Docket Cuyahoga County Silica Cases*, Pl.’s Mot. to Modify CMO, at 5 (Ohio Ct. of Comm. Pls. Cuyahoga Co., July 11, 2003).

¹⁹¹ See HARRISMARTIN’S COLUMNS: SILICA, *supra* note 162, at 11 (citing *In re Clemtex Inc.*, No. 01-21794 (Bankr. S.D. Tex.)).

that you can avoid repeating those problems in silica litigation and provide justice to those injured parties who deserve it.

The risks of adverse health effects as a result of silica inhalation have been known for centuries and regulated for decades. Though there were years of stability in silica lawsuits, in recent years such suits have become much more frequent. Substantive legal guidelines and sound procedural steps, however, can stop lawyers from pursuing unworthy cases and can stem unwarranted silica litigation, by placing responsibility on the people in the best position to protect those harmed by silica exposure and by allowing only plaintiffs who actually have injuries to efficiently get their day in court.

Appendix

Sophisticated User Defense

Bulk Supplier Doctrine

ALABAMA

Yes. *Vines v. Beloit Corp.*, 631 So. 2d 1003, 1004 (Ala. 1994) (a manufacturer of parts for a paper machine had no liability for injuries from the machine because parts were sold to a "sophisticated user of the equipment," where the purchaser had significant control over the equipment and its use and was given adequate warnings regarding the risk); *Cook v. Branick Mfg.*, 736 F.2d 1442, 1446 (11th Cir. 1984) (applying Alabama law and holding a manufacturer was not liable for injuries resulting from a tire rim where the manufacturer had discharged its duty to warn by giving adequate warning to the plaintiff's employer).

ALASKA

No cases found on point.

Yes. *Purvis v. PPG Indus.*, 502 So. 2d 714, 720 (Ala. 1987) (holding that a manufacturer of bulk perchloroethylene, where it was difficult to convey on the bulk product effective product information or warnings to the ultimate consumer, had no duty to warn where it had a reasonable basis to believe that a warning or product information would be passed on by the distributor).

Probably yes. Though there are no Alaska cases specifically on point, the bulk supplier doctrine has been discussed in dicta. In *Saddler v. Alaska Marine Lines, Inc.*, 856 P.2d 784, 788 (Alaska 1993), the court cited discussions of the bulk supplier doctrine in the RESTATEMENT (SECOND) OF TORTS § 388 (1965); *Lakeman v. Otis Elevator Co.*, 930 F.2d 1547, 1551 (11th Cir. 1991) (applying Alabama law); *Rivers v. AT&T Tech.*, 554 N.Y.S.2d 401 (N.Y. Sup. Ct. 1990); *Groll v. Shell Oil Co.*, 196 Cal. Rptr. 52, 54-55 (Cal. App. Ct. 1983). Under these authorities, the doctrine provides bulk product manufacturers a defense in failure to warn cases where a manufacturer has a reasonable basis to believe the distributor will pass on warnings to the ultimate user.

ARIZONA

Yes. *Davis v. Cessna Aircraft Corp.*, 893 P.2d 26 (Ariz. Ct. App. 1994) (a component part manufacturer's duty to warn was satisfied when a proper warning was given to a

Yes. *See Dole*, 935 P.2d at 880 (referring to the sophisticated user and the bulk supplier doctrines as "essentially the same when applied to intermediaries between the

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sophisticated intermediary, the plane manufacturer, that a plane was capable of receiving fuel only at a certain range of pressure); *see also* *Dole v. N.C. Foam Indus.*, 935 P.2d 876, 881 (Ariz. Ct. App. 1996) (applying several factors to determine whether manufacturer had fulfilled its duty to warn by warning a sophisticated intermediary: “[t]he likelihood or unlikelihood that harm will occur if the vendee does not pass on the warning to the ultimate user, the trivial or substantial nature of the probable harm, the probability or improbability that the particular vendee will not pass on the warning and the ease or burden of the giving of warning by the manufacturer to the ultimate user”).

ARKANSAS

No cases found on point.

CALIFORNIA

Yes. *Artiglio v. Gen. Elec. Co.*, 71 Cal. Rptr. 2d 817, 822 (Ct. App. 1998) (holding that “component and raw material suppliers are not liable to ultimate consumers when the goods or material they supply are not inherently dangerous, they sell goods or material in bulk to a sophisticated buyer, the material is substantially changed during the manufacturing process and the supplier has a limited role in developing and designing the end product”); *In re Related Asbestos Cases*, 543 F. Supp. 1142, 1151 (N.D. Cal. 1982) (applying California law, first case in the state to allow an asbestos manufacturer to assert the sophisticated user defense provided the plaintiff was allowed to rebut the defense by showing the misuse was foreseeable and the defendant was still potentially liable for failure of its duty to warn).

COLORADO

No cases found on point.

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seller and the end-user”); *see also* *Anguiano v. E.I. Du Pont de Nemours & Co.*, 808 F. Supp. 719 (D. Ariz. 1992) (holding that a bulk supplier of non-inherently dangerous Teflon, who had no reason to know of the danger of the material after fabrication by the intermediary, had no duty to warn the ultimate user, when the plaintiff was the consumer of the intermediary’s product).

No cases found on point.

Yes. *Artiglio*, 71 Cal. Rptr. 2d at 822 (holding that “component and raw material suppliers are not liable to ultimate consumers when the goods or material they supply are not inherently dangerous, they sell goods or material in bulk to a sophisticated buyer, the material is substantially changed during the manufacturing process and the supplier has a limited role in developing and designing the end product”); *Walker v. Stauffer Chem. Corp.*, 96 Cal. Rptr. 803 (Ct. App. 1971) (manufacturer of bulk sulfuric acid did not bear the responsibility for the injury to the ultimate consumer where it did not have control over the subsequent compounding, packaging, or marketing of the item that caused the injury).

Yes. *Bond v. E.I. Du Pont de Nemours & Co.*, 868 P.2d 1114 (Colo. Ct. App. 1993) (holding that a supplier of raw materials - used in a medical device that was designed, manufactured, and sold by another com-

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pany owed no duty to provide plaintiffs with warnings or to refrain from selling the raw materials to the manufacturer).

CONNECTICUT

Probably no. *See Sharp v. Wyatt, Inc.*, 627 A.2d 1347 (Conn. App. Ct. 1993) (refusing to affirm summary judgment for defendant petroleum supplier based on the sophisticated user doctrine, stating that the doctrine is not an affirmative defense, and ruling under the state product liability statute that the “expected product user’s” (not a wholesale distributor’s) anticipated knowledge and awareness of the dangers is a factor in the factual determination of whether warnings were required and adequate). *But see Hall v. Ashland Oil Co.*, 625 F. Supp. 1515, 1521 (D. Conn. 1986) (stating, though decided on other grounds, that where employee was allegedly harmed by exposure to supplier’s benzene at his workplace, supplier would not be able to relieve its duty to warn based on the sophisticated user doctrine unless the supplier could establish “as a matter of fact that Pfizer [the employer] knew of the risks or had sufficient expertise to be charged by law with knowledge of them”).

Yes. *Lamontagne v. E.I. Du Pont de Nemours & Co.*, 41 F.3d 846 (2d Cir. 1994) (applying Connecticut law) (holding that a Teflon manufacturer owed no duty of care to the plaintiffs, because it neither knew nor should have known that the purchaser’s use of the bulk supply of Teflon for jaw implants would be dangerous).

DELAWARE

Yes. *In re Asbestos Litig.*, 542 A.2d 1205, 1212 (Del. 1986) (holding that “when a supplier provides a product it knows to be dangerous to a purchaser/employer whom the supplier knows or reasonably believes is aware of that danger, there is no duty on the part of the supplier to warn the employees of that purchaser unless the supplier knows or has reason to suspect that the requisite warning will fail to reach the employees, the user of the product” and taking into account the purchaser’s involvement with asbestos and the knowledge of the asbestos industry at the time, to determine that the purchaser was aware of the danger, but left for the jury the issue of whether the supplier should have known the warning was not reaching the user of the product).

Uncertain. *In re Asbestos Litig.*, 832 A.2d 705 (Del. 2003) (holding that a distributor and seller of asbestos “cannot avail itself of the ‘mere supplier’ defense set forth in the Restatement (Second) of Torts,” that the supplier defense only applies to the duty to inspect manufactured goods, and that there was enough evidence to allow a jury to decide if the distributor of the asbestos to the plaintiffs’ employer owed a duty to warn the plaintiffs of the hazards; the court declined to address whether the supplier defense reflected Delaware law).

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DISTRICT OF COLUMBIA

Yes. *E. Penn Mfg. Co. v. Pineda*, 578 A.2d 1113 (D.C. Cir. 1990) (accepting an “experienced user” exception to the duty to warn, where the plaintiff end-user knew or should have known of danger due to experience, holding that the test is whether the user, by virtue of his profession and experience, knew or should have known of the latent danger in a case against the manufacturer and seller of a battery that exploded on someone, but finding in this case that the ultimate user was not sufficiently knowledgeable, therefore, the defendants were not absolved of their duty to warn).

No cases found on point.

FLORIDA

Probably yes. No cases were found on the sophisticated user doctrine, but a manufacturer’s duty to warn a learned intermediary was discussed in *Felix v. Hoffman-LaRoche Inc.*, 540 So. 2d 102 (Fla. 1989) (holding that the duty of the manufacturer to warn is directed to the learned intermediary rather than the ultimate user; where the patient’s doctor was aware of the side effects and knowledgeable, the manufacturer had no duty to warn the patient).

Yes. *Shell Oil Co. v. Harrison*, 425 So. 2d 67, 70 (Fla. Dist. Ct. App. 1983) (holding that a manufacturer and bulk supplier of a dangerous toxic component did not have a non-delegable duty to warn ultimate users of the hazards of the product when the product was formulated, packaged, labeled, and distributed by another; the responsibility for adequate warning to the public and obtaining EPA approval lies on the formulator).

GEORGIA

Yes. *Niles v. Bd. of Regents of the Univ. Sys. of Ga.*, 473 S.E.2d 173, 175 (Ga. Ct. App. 1996) (stating, “[o]rdinarily, there is no duty to give warning to the members of a profession against generally known risks, ‘there need to be no warning to one in a particular trade or profession against a danger generally known to that trade or profession,’” where a physics doctoral student’s University and professor had no duty to warn a sophisticated user) (quoting *Eyster v. Borg-Warner Corp.*, 206 S.E.2d 668, 705 (Ga. Ct. App. 1974) (presence of an intermediary with knowledge relieves manufacturer of duty to warn ultimate consumer and an irrebuttable presumption of knowledge arises

Yes. *Exxon Corp. v. Jones*, 433 S.E.2d 350 (Ga. Ct. App. 1993) (holding a bulk supplier of gas to a sophisticated distributor did not have a duty to warn the ultimate consumer and was not liable for breach of duty to a plaintiff injured by a gas explosion); *see also Stuckey v. N. Propane Gas Co.*, 874 F.2d 1563 (11th Cir. 1989) (applying Georgia law and holding that a bulk supplier of propane gas’s duty to warn is satisfied when an adequate warning is given to intermediary distributor, but defendant must establish that intermediary was warned or had actual knowledge of propane gas’s propensity to odor fade).

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when the content of the warning is common knowledge)).

HAWAII

Probably yes. *See Kealoha v. E.I. Du Pont de Nemours & Co.*, 82 F.3d 894, 901 (9th Cir. 1994) (applying Hawaii law) (in dicta, without deciding the issue in this case, the court quoted a case from another jurisdiction (*In re TMJ Implants*, 872 F. Supp. 1019, 1029 (D. Minn. 1995) ("bulk suppliers of products to manufacturers, who are sophisticated users, have no duty in negligence, strict liability, or breach warranty to warn ultimate purchasers of the manufacturer's product")) and an unpublished slip opinion (*Wolfe v. Dupont*, no case number available (D. Haw.) (reportedly concluding that the Hawaii Supreme Court would have applied the doctrine as an alternative basis for granting summary judgment)).

IDAHO

Yes. *Sliman v. Aluminum Co. of Am.*, 731 P.2d 1267 (Idaho 1986) (holding in suit against bottle cap manufacturer that suppliers are absolved of a duty to warn only where their reliance on the intermediary is reasonable; manufacturer lacked reasonable assurance that intermediary would provide proper warning, knows the intermediary is not warning of the danger, and does not suggest to the intermediary a warning is needed or communicate a warning itself).

ILLINOIS

Yes, but conflicting authority. *Hammond v. N. Am. Asbestos Corp.*, 454 N.E.2d 210 (Ill. 1983) (holding that an asbestos manufacturer (an inherently dangerous raw material) *did* have a duty to warn where the plaintiff's employer was a sophisticated user, because the manufacturer knew of the dangerous propensities of asbestos and chose not to warn of the hazard, and a manufacturer has a non-delegable duty to produce a product that is reasonably safe). *But see Manning v.*

Yes. Kealoha v. E.I. Du Pont de Nemours & Co., 844 F. Supp. 590, 594 (D. Haw.) (holding that supplier of Teflon, which is not inherently dangerous, had no duty to "analyze the design and assembly of the completed product of an unrelated manufacturer to determine if the component is made dangerous by the integration into the finished product"), *aff'd*, 82 F.3d 894 (9th Cir. 1994).

Yes. Sliman, 731 P.2d at 1267 (holding that component part suppliers are absolved of a duty to warn only where their reliance on the intermediary is reasonable, otherwise a duty does exist where the manufacturer knows of a danger related to its product, knows the intermediary is not issuing a warning of the danger, and does not suggest to the intermediary a warning is needed or to communicate a warning itself).

Yes. Apperson v. E.I. Du Pont de Nemours & Co., 41 F.3d 1103 (7th Cir. 1994) (applying Illinois law) (a supplier of a safe raw material (Teflon) had no duty to warn plaintiffs of dangers created by a manufacturer's faulty design of a finished product); *see Venus v. O'Hara*, 468 N.E.2d 405, 409 (Ill. App. Ct. 1984) (stating that a manufacturer's duty to warn "will rarely extend beyond the communication of warnings to the immediate vendee, since, as a practical

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Ashland Oil Co., 721 F.2d 192 (7th Cir. 1983) (applying Illinois law) (a supplier of lacquer thinner did not have a duty to warn the ultimate user because the supplier could rely on an intermediary that appeared to it to be knowledgeable and when the supplier did not have notice that the intermediary was not adequately warning the end-user); Cruz v. Texaco, Inc., 589 F. Supp. 777 (S.D. Ill. 1984) (applying Illinois law) (manufacturer of winch truck had no duty to warn truck drivers where employer knew of danger and trained the drivers).

INDIANA

Yes. *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 163 (Ind. App. Ct. 1997) (holding that the manufacturer of natural gas odorizer failed to fulfill its duty to warn because it unreasonably relied on the intermediary to pass on a warning, but stating that a manufacturer has no duty to warn an ultimate user when the product is sold to a "knowledgeable or sophisticated intermediary" whom the manufacturer has adequately warned, the manufacturer reasonably relies on the intermediary to warn the ultimate user based on the likelihood that harm would occur if the intermediary did not pass on the warning, the seriousness of the potential harm, the chances the intermediary would not pass on the warning, and the ease or burden of the manufacturer giving the end-user the warning); *see also Downs v. Panhandle E. Pipeline Co.*, 694 N.E.2d 1198 (Ind. Ct. App. 1998) (holding that a bulk gas supplier, as opposed to suppliers who could warn through use of warning labels on bags, had no duty to warn the ultimate consumer where the intermediary distributor of gas had adequate knowledge of the dangers associated with the gas it purchased); *Baker v. Monsanto Co.*, 962 F. Supp. 1143 (S.D. Ind. 1997) (holding that a manufacturer is not automatically insulated from liability where it relies on a sophisticated purchaser to warn

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matter, the vendor has neither the means of controlling the vendee's subsequent actions nor the opportunity to provide warnings directly to the ultimate user," but reversing the trial court's grant of summary judgment for the supplier of pest control chemicals that were subsequently manufactured, sold, and distributed by another, holding there was a material question of fact regarding the adequacy of the warning provided to the intermediary regarding the inherently dangerous chemicals, and whether the end-user's injuries were within the risks included in the warning).

Yes. *Downs*, 694 N.E.2d at 1198 (holding that a bulk gas supplier, as opposed to suppliers who could warn through use of warning labels on bags, had no duty to warn the ultimate consumer where the intermediary distributor of gas had adequate knowledge of the dangers associated with the gas it purchased).

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ultimate users, but, rather, it is a balancing of factors based on each case's terms).

IOWA

Yes. *Bergfeld v. Lockheed-Martin Corp.*, 226 F. Supp. 2d 970 (N.D. Iowa) (applying Iowa law and holding that a supplier of silica sand had no duty to warn plaintiff about alleged hazards of silica sand where plaintiff's employer was a sophisticated user), *aff'd*, 319 F.3d 350 (8th Cir. 2002); *see also* *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943 (8th Cir. 1998) (applying Iowa law and concluding that the supplier does not have a duty to warn if the end-user knows the risk of using the product and is familiar with the product, where the user was as knowledgeable as the distributor and in a better position to prevent accidents related to grain dust explosions); *Stoffel v. Thermogas Co.*, 998 F. Supp. 1021, 1027 (N.D. Iowa 1997) (applying Iowa law and stating that, "[w]hile the Iowa Supreme Court has not explicitly approved the 'bulk supplier' [or 'sophisticated user'] defense by name . . . this Court concludes that the Iowa Supreme Court has in fact adopted the defense").

KANSAS

Yes. *Jones v. Hittle Serv., Inc.*, 549 P.2d 1383, 1394 (Kan. 1976) (holding that a bulk supplier has no duty to warn the ultimate consumer where the distributor of gas has adequate knowledge of the dangers associated with the gas, stating, "[t]he manufacturer of LP gas who sells it to a distributor in bulk fulfills his duty to the consumer when he ascertains that the distributor to whom he sells is adequately trained, is familiar with the properties of the gas and safe methods of handling it, and is capable of passing on that knowledge to his customers").

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Probably yes. *Stoffel*, 998 F. Supp. at 1027 (applying Iowa law and considering the bulk supplier doctrine and the sophisticated doctrine together, the court stated that "[w]hile the Iowa Supreme Court has not explicitly approved the 'bulk supplier' [or 'sophisticated user'] defense by name . . . this Court concludes that the Iowa Supreme Court has in fact adopted the defense," where the court found the supplier of propane gas not liable for failure to warn the end consumer that the odorizer could fail).

Yes. *Jones*, 549 P.2d at 1394 (adopting the bulk supplier doctrine stating, "[i]f the product is sold in bulk, adequate warning to the vendee is all that can reasonably be required[;] warning is required to impart knowledge, and if that knowledge has already been acquired, it is not necessary"); *see also* *Mason v. Texaco, Inc.*, 862 F.2d 242, 246 (10th Cir. 1988) (applying Kansas law, interpreting *Jones*, and stating, "the holding imposes upon the bulk seller the obligation to sell only to knowledgeable and responsible distributors[;] *Jones* does not impose a duty on the bulk seller to warn the ultimate consumer, and specifically does not impose a duty on the bulk seller to police the adequacy of warning given by the distributor").

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No cases found on point.

No cases found on point.

LOUISIANA

Yes. *Cowart v. Avondale Indus.*, 792 So. 2d 73 (La. Ct. App. 2001) (holding that supplier of silica sand had no duty to warn users of its product about alleged hazards of silica sand where plaintiff's employer was a sophisticated user); *Scallan v. Duriron Co.*, 11 F.3d 1249 (5th Cir. 1994) (applying Louisiana law and holding that a manufacturer has only a limited duty to warn a sophisticated user that a danger exists if the sophisticated user knew or should have known of the risk involved, and if the risk would be obvious to the sophisticated user, then the manufacturer has no duty to warn); *Davis v. Avondale Indus.*, 975 F.2d 169, 173 (5th Cir. 1992) (concluding that Louisiana courts would hold that "the product manufacturer owes no duty to the employee of a purchaser if the manufacturer provides an adequate warning of any inherent dangers to the purchaser or if the purchaser has knowledge of those dangers and the duty to warn its employees thereof," where employee contracted lung disease from breathing fumes emitted during the use of the manufacturer's cadmium-based brazing rods).

Yes. *Longo v. E.I. Du Pont De Nemours & Co.*, 632 So. 2d 1193, 1197 (La. Ct. App. 1994) (quoting *Austin's of Monroe, Inc. v. Brown*, 474 So. 2d 1383, 1388 (La. App. Ct. 1985) (holding that a bulk supplier had no duty to warn a plaintiff because its material, Teflon, was a component part of the implant and supplier had no control over the actual implant; "[t]he manufacturer of a non-defective, even though substantial, component of a thing assembled and created by another should not be liable to the buyer of that thing for redhibitory vices in the assembled and created thing[; i]n this sense, the assembler or creator of the thing from component parts effectively becomes the manufacturer of the thing").

MASSACHUSETTS

Yes. *Slate v. Bethlehem Steel Corp.*, 510 N.E.2d 249, 252 (Mass. 1987) (holding there is no duty to warn the plaintiff of a risk or hazard that was known to the same extent as a warning would have provided, where the supplier lacked sufficient information regarding the employer's use of a printing press and was not any more aware of the dangers than the employee, and the employee participated in the employer's design and assembly of the printing press).

Yes. *Cohen v. Steve's Ice Cream*, 737 F. Supp. 8 (D. Mass. 1990) (applying Massachusetts law) (holding that a bulk supplier had no duty to warn the ultimate consumer when the intermediary took the extract out of the original containers and repackaged the chemical and when reliance on the intermediary was reasonable).

MARYLAND

Yes. *Higgins v. E.I. Du Pont de Nemours, Inc.*, 671 F. Supp. 1055 (D. Md. 1987) (ap-

plying Maryland law and holding that a manufac-

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plying Maryland law) (holding that the supplier of chemicals in paint products had no duty to warn unknown and unknowable customers, or employees of the paint manufacturer, where the manufacturer was warned and aware of the dangerous propensities of the chemicals), *aff'd*, 863 F.2d 1162 (4th Cir. 1988); *Kennedy v. Mobay Corp.*, 579 A.2d 1191 (Md. Ct. Spec. App. 1990) (adopting the rule set forth in *Higgins*, that a supplier of chemicals had no duty to warn a sophisticated manufacturer's employees); *Sara Lee Corp. v. Homasote Co.*, 719 F. Supp. 417 (D. Md. 1989) (applying Maryland law; stating that the focus is not on the bulk supplier's knowledge, but on the knowledge of the producer to determine if the reliance was reasonable).

MAINE

No cases found on point.

MICHIGAN

Yes. *Antcliff v. State Employees Credit Union*, 327 N.W.2d 814 (Mich. 1981) (supplier of power scaffolding that was developed for, marketed, and sold to scaffolding professionals had no duty to instruct or give directions for the safe rigging of its product when it was provided to the professionals in a non-defective condition, particularly where end-users were professionals familiar with use of product); *see also Portelli v. IR Constr. Prods. Co.*, 554 N.W.2d 591, 599 (Mich. Ct. App. 1996) (holding that Michigan law supports the sophisticated user doctrine and does not hold manufacturers liable for failure to warn, and to hold otherwise "would lead to demonstrably unfair and unintended results," where a manufacturer is able to presume mastery by a user) (quoting *Antcliff v. State Employees Credit Union*, 327 N.W.2d 814, 821 (Mich. 1981); *Aetna Cas. & Sur. Co. v. Ralph Wilson*

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turer of the paint was in a far better position than the bulk supplier to communicate an effective warning to its customers or customers' employees).

Unknown. *Townsend v. Chute Chem. Co.*, No. CV-92-174, 1998 Me. Super. LEXIS 21, at *7 (Me. Jan. 23, 1998) (The court was not aware of any precedent for a bulk supplier defense in Maine.).

Yes. *Nowak v. E.I. Du Pont de Nemours & Co.*, 827 F. Supp. 1334 (W.D. Mich. 1993) (applying Michigan law) (holding that a bulk supplier of a component part of a faulty implant had no duty to warn a patient where the product was inherently safe when delivered to the manufacturer).

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Plastics Co., 509 N.W.2d 520, 524 (Mich. Ct. App. 1993) (stating that "Michigan jurisprudence has recognized the sophisticated user doctrine," and holding that the plaintiff was a sophisticated user as a commercial enterprise and informed of the potential dangers of the flammability of the supplier's glue solvent, so the supplier had no duty to warn of this danger).

MINNESOTA

Maybe. *Gray v. Badger Mining Corp.*, 676 N.W.2d 268 (Minn. 2004) (explaining that a product supplier has no duty to warn the ultimate user where: (1) the end-user's employer already has a full range of knowledge of the dangers, equal to that of the supplier, or (2) the supplier makes the employer knowledgeable by providing adequate warnings and safety instructions to the employer and concluding that the adequacy of the warnings was a jury question, but holding in this case that the plaintiff's employer's knowledge of silica risks was not enough to "conclusively establish" that the employer's knowledge was equal to the defendants and therefore the bulk supplier of silica sand had a duty to warn the user of the dangers of exposure to silica dust).

MISSISSIPPI

Yes. *Little v. Liquid Air Corp.*, 952 F.2d 841 (5th Cir. 1992) (applying Mississippi law and acknowledging the district court's

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Maybe. *Gray*, 676 N.W.2d at 268 (acknowledging that to directly warn every employee of the product risks would be extremely costly, if not impossible, but holding that as with the sophisticated intermediary defense, in order to assert the bulk supplier defense, the product supplier needed to have provided an adequate warning of the product risks to the product purchaser, and in this case there were fact issues about the adequacy of the bulk supplier's warning); *see also* *Todalen v. U.S. Chem. Co.*, 424 N.W.2d 73, 78-80 (Minn. Ct. App. 1988) (finding that a bulk chemical supplier had a duty to warn the ultimate user), *overruled on other grounds*, *Tyroll v. Private Label Chems.*, 505 N.W.2d 54 (Minn. 1993); *In re TMJ Implants*, 872 F. Supp. 1019, 1029 (D. Minn. 1995) (applying Minnesota law and stating that "bulk suppliers of products to manufacturers, who are sophisticated users, have no duty in negligence, strict liability, or breach warranty to warn ultimate purchasers of the manufacturer's product"). *But see* *Temporomandibular Joint (TMJ) Implant Recipients v. E.I. Du Pont de Nemours & Co.*, 97 F.3d 1050 (8th Cir. 1996) (applying Minnesota law and holding that a bulk supplier of Teflon had discharged its duty to warn the ultimate consumer by warning a sophisticated purchaser of the dangers).

Yes. *Little*, 952 F.2d at 841 (applying Mississippi law and inferring that state courts would adopt the bulk supplier de-

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assumption that Mississippi state courts would accept the bulk supplier/sophisticated user doctrine, but corrected the district court's merging of the bulk supplier/sophisticated user doctrine and then addressed the bulk supplier issue).

MISSOURI

Yes. *Donahue v. Phillips Petroleum Co.*, 866 F.2d 1008, 1012 (8th Cir. 1989) (applying Missouri law and holding that the sophisticated user doctrine has been used in the state to protect a distributor from strict liability for failure to warn when "the user of a product knows or reasonably may be expected to know of a particular danger," but holding manufacturer liable for failure to warn of a propane gas odorizer's dangerous propensity to fail because the ultimate user, the consumer, was not a sophisticated user, and was not knowledgeable of the propensity) (quoting *Grady v. Am. Optical Corp.*, 702 S.W.2d 911, 915 (Mo. Ct. App. 1985) ("[M]anufacturers and distributors are not under a duty to provide warnings about dangers which are open and obvious, or which are commonly known;" jury is to decide whether it is open and obvious that safety glasses could shatter and injure user.)).

MONTANA

No cases found on point.

NEBRASKA

Yes. *Crook v. Kaneb Pipe Line Operating P'ship*, 231 F.3d 1098, 1102 (8th Cir. 2000) (applying Nebraska law and holding that a supplier of propane gas had no duty to warn a party who knows or could reasonably have been expected to know of the dangers, because the "rule of the 'sophisticated user' is

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fense and holding that one who sells a product to another manufacturer or distributor, which in turn packages and sells the product to the public, is required only to warn the intermediate distributor, as long as the reliance on the intermediary is reasonable, and looking to whether the intermediary is adequately trained, the intermediary is familiar with the product's properties and the safe way to handle it, and that the intermediary is capable of passing the knowledge to the ultimate user).

Potentially yes. *Morris v. Shell Oil Co.*, 467 S.W.2d 39, 42 (Mo. 1971) (holding that a bulk supplier of industrial cleaning solvent must warn its immediate purchaser "with the intention that such warning be given the ultimate consumer," if the supplier or manufacturer knew or should have known of the dangerous propensity, where plaintiff was employee of the ultimate consumer); *see also Donahue*, 866 F.2d at 1012 (8th Cir. 1989) (applying Missouri law and citing RESTATEMENT (SECOND) OF TORTS § 388 cmt. n (1965)) (a bulk supplier must provide adequate instructions to the distributor or ascertain that the distributor is knowledgeable as to the nature of the product and is in a position to convey the information so that the ultimate consumer is apprised of the dangerous propensity of the product).

No cases found on point.

No cases found on point.

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no more than an expression of common sense," where the plaintiff was a professional and familiar with propane gas and should have been aware of the propensity of the odor warning to fade).

NEVADA

Probably yes. *Forest v. E.I. Du Pont de Nemours & Co.*, 791 F. Supp. 1460 (D. Nev. 1992) (applying Nevada law, court never affirmatively accepted the sophisticated user doctrine, but in applying the bulk supplier doctrine, where a supplier provided a component part of a defective implant, the court held that a product supplier must take affirmative steps to ascertain that the intermediary was knowledgeable and to show that the product supplier reasonably relied on the intermediary's knowledge of the risk and reasonably relied on the intermediary to warn the end-user); *see also Forest v. Vitek, Inc.*, 884 F. Supp. 378 (D. Nev. 1993) (applying Nevada law) (court never expressly applied the sophisticated user doctrine, but in holding that a bulk supplier had no duty to warn, the court considered the reasonableness of the product supplier's belief that the intermediary knew of the dangers associated with the bulk product and the reasonableness of its reliance on the intermediary to warn the ultimate user of such dangers, where the bulk supplier provided non-dangerous material to a knowledgeable intermediary that used the material in creating a harmful product).

NEW HAMPSHIRE

No cases found on point.

NEW JERSEY

Yes. *McGarvey v. G.I. Joe Septic Serv., Inc.*, 679 A.2d 733, 742 (N.J. Super. App.

Probably. *Fisher v. Prof'l Compounding Ctrs. of Am.*, 311 F. Supp. 2d 1008 (D. Nev. 2004) (applying Nevada law and recognizing that Nevada has neither accepted nor rejected the bulk supplier doctrine, but in a case involving fen-phen, holding the doctrine did not apply because a genuine issue of fact existed as to whether fen-phen is inherently dangerous); *Forest v. E.I. Du Pont de Nemours & Co.*, 791 F. Supp. 1460 (D. Nev. 1992) (applying Nevada law and holding that the bulk supplier doctrine applies in Nevada where a supplier reasonably relies on the intermediary's knowledge of the risk and reasonably relies on the intermediary to warn the end-user; supplier must show it took reasonable, affirmative steps to ascertain that the intermediary was knowledgeable, where the bulk supplier provided the raw material, Teflon, which the manufacturer used in creating a defective implant); *see also Forest*, 884 F. Supp. at 378 (applying Nevada law and holding that a bulk supplier has no duty to warn if it reasonably believed the intermediary knew of the dangers associated with the bulk product, and reasonably relied on the intermediary to warn the ultimate user of such dangers, where the bulk supplier provided non-dangerous material to a knowledgeable intermediary that used the material in creating a harmful product).

No cases found on point.

No cases found on point.

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Div. 1996) (holding that the manufacturer's duty to warn "is owed only to the reasonably-anticipated sophisticated user, not the untrained interloper;" jury is to decide whether it was foreseeable that a knowledgeable, licensed truck driver would have discovered the missing lights on a truck and chassis when driving at night); *Olencki v. Mead Chem. Co.*, 507 A.2d 803, 806 (N.J. Super. 1986) (ruling that sophisticated user defense was available to manufacturer of photomask coater-developer machine, seller of developer, and supplier of product used in developer).

NEW MEXICO

No cases found on point.

Yes. *Parker v. E.I. Du Pont de Nemours & Co.*, 909 P.2d 1 (N.M. Ct. App. 1995) (holding a supplier of a component part or raw material, which is not inherently defective or dangerous at the time it leaves the manufacturer's control, and which is used in the manufacture of another product, does not owe a duty to an ultimate consumer to issue a warning concerning the suitability or safety of the finished product, where plaintiff was injured by an implant that contained some of the supplier's material).

NEW YORK

Yes. *Rosebrock v. Gen. Elec. Co.*, 140 N.E. 571 (N.Y. 1923) (recognizing the "knowledgeable user" exception might apply if risk was normally known to industry, in case where wooden blocks placed in a transformer for shipping purposes caused an explosion when the transformer was installed, but such use of blocks was unusual); *Steinbarth v. Otis Elevator Co.*, 703 N.Y.S.2d 417 (N.Y. App. Div. 2000) (recognizing that the defendant "has no duty to warn a knowledgeable user who is aware of the risks inherent in the product," but finding that factual issues with regard to the user's actual knowledge of the risk precluded summary judgment); *Travelers Ins. Co. v. Fed. Pac. Elec. Co.*, 625 N.Y.S.2d 121 (N.Y.

Yes. *Polimeni v. Minolta Corp.*, 653 N.Y.S.2d 429, 431 (N.Y. App. Div. 1997) ("where a product, such as a gas or a liquid, is sold in bulk with the contemplation that such will be repackaged and resold by the manufacturer's distributee, the manufacturer will have satisfied its duty to act reasonably if it adequately warns the distributee of the risks and dangers associated with the use of its product"); *Rivers v. AT&T Tech.*, 554 N.Y.S.2d 401 (N.Y. Sup. Ct. 1990) (holding that bulk supplier of dimethylformamide (DMF) had no duty to provide warnings of the toxicity of DMF to file clerk in control center of telephone company, where supplier provided extensive warnings to its immediate distributees,

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App. Div. 1995) (holding that a circuit breaker manufacturer owed communications company no duty to warn of dangers of failing to test operation of wet switchboard before putting it back to use, as communications company's electricians were knowledgeable users of circuit breakers in wet conditions). *But see* *Billsborrow v. Dow Chem.*, U.S.A., 527 N.Y.S.2d 352 (N.Y. Sup. Ct. 1988) (ruling that the knowledgeable user doctrine has been limited to members of a trade or profession involved with the product, that an unskilled worker cannot be a knowledgeable user, and that the knowledge of the employer cannot be imputed to the employee to establish that the employee is a knowledgeable user).

NORTH CAROLINA

No cases found on point.

NORTH DAKOTA

No cases found on point.

OHIO

Yes. *Smith v. Walter C. Best, Inc.* 927 F.2d 736 (3d Cir. 1990) (applying Ohio law) (holding that a sand supplier had no duty to warn users of the alleged hazards of silica sand where it was reasonable for the sand supplier to assume the plaintiff's employer knew of the dangers of silica, given the medical knowledge at the time, various statutes and regulations on the topic, the employer's involvement in the industry, and the difficulty in reaching the ultimate users); *see also* *Ditto v. Monsanto Co.*, 867 F. Supp. 585, 592 (N.D. Ohio 1993) (applying Ohio law and holding that bulk supplier had no

and where each of the parties in the chain of distribution was a responsible intermediary, fully aware of the implications of exposure to DMF and the supplier had no control over use of DMF once the form was altered).

No cases found on point.

Yes. *Veil v. Vitek, Inc.*, 803 F. Supp. 229 (D. N.D. 1992) (applying North Dakota law) (holding that a supplier of raw material had no duty to warn the ultimate consumer where the Teflon supplier informed the intermediary of its concern with the use of its material in the product, a medical implant, and the supplier lacked knowledge as to whether the intermediary's use was potentially dangerous).

Yes. *Ditto*, 867 F. Supp. at 585 (applying Ohio law and holding that bulk supplier had no duty to warn ultimate users about their insulating chemicals, where the manufacturers of the electrical equipment were sophisticated users who repackaged the supplier's products for use in their own product, the "pivotal inquiry in determining whether [the bulk supplier/sophisticated user] defense is available is a fact-specific evaluation of the reasonableness of the supplier's reliance on the third party to provide the warning.") (quoting *Adkins*, 923 F.2d at 1230).

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duty to warn ultimate users of their insulating chemicals, where the manufacturers of the electrical equipment were sophisticated users who repackaged the supplier's products for use in their own product, the "pivotal inquiry in determining whether [the bulk supplier/sophisticated user] defense is available is a fact-specific evaluation of the reasonableness of the supplier's reliance on the third party to provide the warning") (quoting *Adkins v. GAF Corp.*, 923 F.2d 1225, 1230 (6th Cir. 1991)), *aff'd*, 36 F.3d 1097 (6th Cir. 1994).

OKLAHOMA

Yes. *Akin v. Ashland Chem. Co.*, 156 F.3d 1030 (10th Cir. 1998) (interpreting Oklahoma law to embrace the sophisticated user doctrine, imposing no duty to warn end-users who are aware or should be aware of the potential dangers, and holding that a manufacturer of chemicals used in cleaning jet engines had no duty to warn a sophisticated purchaser of the potential dangers of low-level chemical exposure, where the employer and employees of the purchaser should have known the risk).

OREGON

No cases found on point.

PENNSYLVANIA

Yes. *Phillips v. A.P. Green Refractories Co.*, 630 A.2d 874 (Pa. Super. Ct. 1993) (holding that a bulk supplier of silica sand had no duty to warn end-user of its product about alleged hazards of silica sand, where plaintiff's employer was a sophisticated user in that they knew or should have known of the hazard), *aff'd on other grounds*, 665 A.2d 1167 (Pa. 1995).

Yes. *Duane v. Okla. Gas & Elec. Co.*, 833 P.2d 284 (Okla. 1992) (holding that a bulk supplier had no duty to warn knowledgeable users where the product of insulating oil was not inherently dangerous for its intended use and supplier was not responsible for the ultimate design and construction of the end product).

Yes. *Hoyt v. Vitek*, 894 P.2d 1225 (Or. Ct. App. 1995) (holding that the bulk supplier of Teflon was not strictly liable for failure to warn the plaintiff or the medical community of the danger from the manufactured implant of which Teflon was a component part).

Yes. *White v. Weiner*, 562 A.2d 378, 385 (Pa. Super. Ct. 1989) (holding a bulk supplier of chemicals used in prescription drugs had no duty to warn the plaintiff, the plaintiff's doctor, or the manufacturer of the prescription drug, where the supplier had complied with the federal labeling requirements; the court "decline[d] to impose an additional common law duty to

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warn extending from a bulk supplier to a final manufacturer"); *Phillips*, 630 A.2d at 882, 883 (holding that a bulk supplier can rely on an intermediary/employer to warn end-users, where reliance is reasonable based on the intermediary's knowledge, otherwise the cost of effectively warning each user "would be unrealistically high and impractical").

RHODE ISLAND

No cases found on point.

Yes. *Buonanno v. Colmar Belting Co.*, 733 A.2d 712 (R.I. 1999) (holding that a component manufacturer should not be liable for failure to warn unless the component part itself was defective when it left the manufacturer, where an employee was injured by a conveyor belt system, but the component wing pulley did not present a danger until integrated into the entire system).

SOUTH CAROLINA

Yes. *Bragg v. Hi-Ranger, Inc.*, 462 S.E.2d 321, 331-32 (S.C. Ct. App. 1995) (approving jury instructions on the use of the sophisticated user doctrine "in cases involving an employer who was aware of the inherent dangers of a product which the employer purchased for use in his business; such an employer has a duty to warn his employees of the dangers of the product;" supplier of aerial buckets was not liable for injuries sustained by a worker when an improper hose was connected to the device, because the employer "frequently used and was familiar with aerial devices . . . and was well aware that conductive materials like conductive hoses should not be used in the buckets of aerial devices").

Probably yes. *Coffey v. Chem. Specialties, Inc.*, No. 92-2397, 1993 U.S. App. LEXIS 21430, at *9 (4th Cir. Aug. 20, 1993) (applying South Carolina law and holding that state law recognizes the bulk supplier defense, where plaintiff was injured using the supplier's chemicals to treat wood, while admitting that neither the state legislature nor the state courts have expressly adopted the bulk supplier doctrine: "we disagree . . . that the absence of specific authority presents an impenetrable barrier to our decision on the viability of the bulk supplier defense in this case") In citing *Livingston v. Noland Corp.*, 362 S.E.2d 16 (S.C. 1987), the *Coffey* court said that "adoption of comment 'n' and the derivative bulk supplier defense logically follows." *Coffey*, 1993 U.S. App. LEXIS 21430, at *10. In *Livingston*, a products liability case brought by the purchaser of an allegedly defective refrigerator compressor, the court stated, "A supplier and manufacturer of a product are liable for failing to warn if

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they know or have reason to know the product is or is likely to be dangerous for its intended use; they have no reason to believe the user will realize the potential danger; and, they fail to exercise reasonable care to inform of its dangerous condition or of the facts which make it likely to be dangerous." *Livingston*, 362 S.E.2d at 18.

SOUTH DAKOTA

Uncertain. *See generally* *Smith v. Chevron Chem. Co.*, 242 F.3d 376 (8th Cir. 2000) (applying South Dakota law) (rejecting the appeal of defendant company on several grounds, including sophisticated user doctrine, without explanation, where the manufacturer of a high-volume tapping tee was found liable for injuries suffered when plaintiff fused the tee to a pressurized gas pipeline).

No cases found on point.

TENNESSEE

Probably yes. *Pittman v. The Upjohn Co.*, 890 S.W.2d 425, 429 (Tenn. 1994) (holding that, under the learned intermediary doctrine, "makers of unavoidably unsafe products who have a duty to give warnings may reasonably rely on intermediaries to transmit their warnings and instructions," in a case where the prescription drug, Micronase, was ingested by an unintended person); *see also* *Whitehead v. The Dycho Co.*, 775 S.W.2d 593 (Tenn. 1989) (frequently cited case that neither rejects nor adopts sophisticated user doctrine, but acknowledges that some state jurisdictions accept it, in ruling that purchaser was not a learned intermediary and therefore the doctrine was not available as a defense for the misuse of the chemical, naphtha).

Probably yes. *Davis v. Komatsu Am. Indus. Corp.*, 42 S.W.3d 34 (Tenn. 2001) (holding that Tennessee recognizes a component parts doctrine and noting that the same principles apply to the raw materials supplier defense, where a supplier provided a press that was incorporated into a press line and did not significantly participate in the design of the final product); *see also* *Miller v. E.I. Du Pont de Nemours & Co.*, 811 F. Supp. 1286 (E.D. Tenn. 1992) (holding that, though there are no Tennessee cases on point, it would apply the bulk supplier doctrine under Tennessee law).

TEXAS

Yes. *Humble Sand & Gravel v. Gomez*, 146 S.W.3d 170 (Tex. 2004) (reaffirming sophisticated user doctrine, reversing judgment for plaintiff-employee, and remanding for development of facts as to whether supplier had

Yes. *Alm*, 717 S.W.2d at 592 (Tex. 1986) (holding that a bulk supplier can only use defense if dealing with an intermediary who meets the definition of a sophisticated user); *Wood v. Phillips Petroleum Co.*, 119

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reasonable expectation that warnings would reach end-users in industry); *Alm v. Aluminum Co. of Am.*, 717 S.W.2d 588, 592 (Tex. 1986) (holding that the supplier's duty to warn the ultimate user may be relieved if reliance on the intermediary was reasonable, considering whether the distributor was adequately trained, if the distributor was familiar with the properties of the product and its safe use, and whether the distributor is capable of passing on its knowledge to the consumer).

UTAH

Yes. *House v. Armour of Am., Inc.*, 929 P.2d 340, 345 (Utah 1996) (holding that the sophisticated user doctrine requires the court to find that the user actually knew of the danger, or "based on the user's special expertise and the circumstances of the transaction, the supplier reasonably could have believed that he knew of the danger").

VERMONT

No cases found on point.

VIRGINIA

Yes. *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552, 560-61 (W.D. Va. 1984) (applying Virginia law) (holding that the supplier of silica sand had no duty to warn user of its product about alleged hazards of silica sand, "when the supplier has reason to believe that the purchaser of the product will recognize the dangers associated with the product, no warnings are mandated"), *aff'd sub nom. Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985).

WASHINGTON

Uncertain. No cases on point, though the state recognizes the "learned intermediary doctrine" for prescription drug cases. *Terhune v. A.H. Robbins Co.*, 577 P.2d 975 (Wash. 1978).

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S.W.3d 870 (Tex. 2003) (stating that the bulk supplier must have reasonable assurance that its warning is going to reach the end-user).

Yes. *House*, 929 P.2d at 348 (holding that a "bulk supplier of raw materials which are not themselves inherently dangerous has no duty to warn ultimate users of the manufactured product").

No cases found on point.

Probably. *Lescs v. Dow Chem. Co.*, No. 94-0091(H), 1995 U.S. Dist. LEXIS 21654 (W.D. Va. June 5, 1995) (applying Virginia law) (citing *Goodbar* as also upholding the bulk supplier doctrine in Virginia).

Yes. *George v. Parke-Davis*, 733 P.2d 507 (Wash. 1987) (holding the bulk manufacturers of the drug DES, which was not inherently dangerous, were not liable for failure to warn, but rather imposed a duty on the tablet manufacturer to account for

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and warn of the drug's dangers when used in a specific manner).

WEST VIRGINIA

No cases found on point.

No cases found on point.

WISCONSIN

Yes. *Haase v. Badger Mining Corp.*, 669 N.W.2d 762, 266 Wis. 2d 1003 (Wis. Ct. App. 2003) (holding that Wisconsin law accepts the sophisticated user doctrine, and as such, the supplier of silica sand had no duty to warn users of its product about alleged hazards of silica sand, where the plaintiff's employer was a sophisticated user and was or should have been aware of the risk).

Yes. *Haase*, 669 N.W.2d at 762 (holding that a bulk supplier of silica sand has no duty to warn the ultimate consumers, because the sand was not dangerous when it was supplied, and the fabrication process that creates alleged dangers are not attributable to the raw material supplier).

WYOMING

No cases found on point.

No cases found on point.