

**CASE NOTE: TORT LAW—SHADES OF GRAY: THE  
SOPHISTICATED INTERMEDIARY DEFENSE IS NOW  
AVAILABLE FOR MINNESOTA INDUSTRIAL FAILURE  
TO WARN ACTIONS—*GRAY V. BADGER MINING CORP.***

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## I. INTRODUCTION

When industrial employees are injured by exposure to harmful materials, they often sue not only their employer, but the original supplier of the materials as well. Failure to warn claims constitute a major part of these industrial lawsuits, which help keep failure to warn among the most frequently filed products liability actions.<sup>1</sup> Minnesota currently allows plaintiffs to hold suppliers of raw materials liable for failure to warn.<sup>2</sup> Because Minnesota products liability law is still incomplete,<sup>3</sup> however, these industrial suppliers are subject to an inefficient, often confusing set of legal standards.<sup>4</sup>

In *Gray v. Badger Mining Corp.*,<sup>5</sup> a decision likely to provide some clarification and assistance to industrial suppliers, the Minnesota Supreme Court designed a multi-faceted approach for analyzing failure to warn litigation. While retaining a negligence-based methodology, the court identified specific defenses available under “common fact patterns” found in industrial failure to warn litigation.<sup>6</sup> Some of the defenses—those most closely related to the actions, knowledge, or abilities of the plaintiff—absolve the defendant of any duty to warn.<sup>7</sup> Others, relating to the actions, knowledge, or abilities of intermediaries, are more fact-specific, requiring the balancing of a number of elements.<sup>8</sup> The sophisticated intermediary doctrine—the primary focus of this Note—belongs in the latter category of defenses.

The *Gray* court limited its holding to the facts of the case,<sup>9</sup> but

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1. Kenneth M. Willner, Note, *Failures to Warn and the Sophisticated User Defense*, 74 VA. L. REV. 579, 579 (1988).

2. *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 274 (Minn. 2004) (citing *Balder v. Haley*, 399 N.W.2d 77, 81 (Minn. 1987)).

3. Mike Steenson, *A Comparative Analysis of Minnesota Products Liability Law and The Restatement (Third) Of Torts: Products Liability*, 24 WM. MITCHELL L. REV. 1, 2 (1998) (comparing existing Minnesota products liability law to the new Restatement (Third)).

4. See, e.g., Carole A. Cheney, Comment, *Not Just for Doctors: Applying the Learned Intermediary Doctrine to the Relationship between Chemical Manufacturers, Industrial Employers, and Employees*, 85 NW. U. L. REV. 562, 563 (1991) (discussing inefficiencies in tort system relating to industrial failure to warn actions).

5. 676 N.W.2d at 268.

6. *Id.* at 275.

7. See *infra* Parts III.B–C.

8. See *infra* Parts III.D–E, IV.

9. 676 N.W.2d at 281.

its adoption of specific defenses will no doubt shape future litigation. Taken as a whole, the defenses acknowledge the difficulties facing industrial defendant-suppliers without eliminating protection for potential plaintiff-employees. As a result, they should lead to more equitable results in industrial failure to warn litigation.

This Note briefly examines the context of Minnesota failure to warn claims against industrial suppliers. It describes the various defenses *Gray* has made available, particularly the sophisticated intermediary and bulk supplier doctrines. The Note also reviews the various jurisdictional incarnations of the sophisticated intermediary defense, and analyzes the doctrine's application in *Gray*. Additionally, the Note attempts to predict *Gray*'s future, recommending that the sophisticated intermediary defense not be expanded beyond the employment context, and suggesting that the *Gray* defenses, viewed as a cohesive whole, will quickly get rid of weaker claims while permitting valid claims to go forward. Finally, the Note concludes that the multi-faceted approach adopted in *Gray* should permit generally fairer outcomes in industrial failure to warn cases.

## II. FAILURE TO WARN CLAIMS AGAINST INDUSTRIAL SUPPLIERS

Although the *Gray* holding has been described as “extend[ing] the duty of suppliers of hazardous products,”<sup>10</sup> the common law duty of such suppliers to warn ultimate users actually existed well before *Gray*. As early as 1919, the Minnesota Supreme Court stated: “as a general rule, the manufacturer or compounder of articles for the market, containing deadly ingredients or qualities, owes a duty to those into whose hands the articles may come to suitably convey notice of the danger . . . . This is generally done by naming or properly labeling the package.”<sup>11</sup>

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10. Marshall H. Tanick, *Changing Times: A Tale of Three Torts*, BENCH & B. OF MINN., May/June 2004, at 24. Mr. Tanick's article primarily discusses the torts of intentional infliction of emotional distress and invasion of privacy, but refers briefly to *Gray* to support the proposition that the Minnesota Supreme Court is not “anti-plaintiff.” *Id.*

11. *McCrossin v. Noyes Bros. & Cutler, Inc.*, 143 Minn. 181, 184–85, 173 N.W. 566, 567 (1919). In *McCrossin*, a patient at a mental institution died after adding an insecticide known as “Roach Doom” to his coffee. The administratrix of his estate sued both the manufacturer and the seller of Roach Doom. The court, although it allowed the complaint to be amended to state a cause of action, speculated that the compound's name itself—Roach Doom—might be sufficient

Originally, Minnesota failure to warn claims were based on negligence principles.<sup>12</sup> Then, in 1967, the Minnesota Supreme Court adopted strict liability standards for failure to warn.<sup>13</sup> During the 1980s, however, the court moved back toward negligence standards<sup>14</sup> until negligence and strict liability for failure to warn became virtually indistinguishable.<sup>15</sup>

In *Gray*, the Minnesota Supreme Court addressed plaintiff's negligence-based failure to warn cause of action, expressly deferring examination of the strict liability claims also filed by Gray.<sup>16</sup> This comports with current trends; a number of courts are moving toward analyzing failure to warn claims in terms of negligence, rather than strict liability,<sup>17</sup> and *Gray* appears to be another step in that direction.

Minnesota is hardly alone in its attempts to return to negligence analysis for failure to warn, as shown by the approach

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to constitute a warning to humans. *Id.* at 186, 173 N.W. at 568.

12. George W. Soule & Jacqueline M. Moen, *Failure to Warn in Minnesota, the New Restatement on Products Liability, and the Application of the Reasonable Care Standard*, 21 WM. MITCHELL L. REV. 389, 391 (1995) ("Failure to warn in Minnesota has its roots in negligence law."); see also *Hartmon v. Nat'l Heater Co.*, 240 Minn. 264, 272, 60 N.W.2d 804, 810 (1953) (holding that where a manufacturer undertakes to provide instructions, failure to give "accurate and adequate" warning may constitute negligence).

13. Steenson, *supra* note 3, at 2 (citing *McCormack v. Hanksraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967)).

14. Soule & Moen, *supra* note 12, at 391-92 (observing that during the 1980s, Minnesota adopted a negligence standard for failure to warn and citing *Germann v. F.L. Smithe Machine Co.*, 395 N.W.2d 922 (Minn. 1986)).

15. *Germann*, 395 N.W.2d at 926 n.4; see also Steven J. Kirsch, *Defenses—Sophisticated User and Learned Intermediary*, 5A MINN. PRAC. SERIES: METHODS OF PRAC. § 6.84 (3d ed. 1990) ("Minnesota has recognized that strict liability for failure to warn is based upon negligence concepts and, in a warning context, there is no difference between strict liability and negligence.").

16. *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 273 (Minn. 2004).

17. Steenson, *supra* note 3, at 22 ("[T]he court has also stated that negligence principles apply in strict liability context.") (citing *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 661 (Minn. 1989); *Huber v. Niagara Mach. & Tool Works*, 430 N.W.2d 465, 467 n.1 (Minn. 1988); *Germann*, 395 N.W.2d at 926 n.4); see also John E. Simonett, *Dispelling the Products Liability Syndrome: Tentative Draft No. 2 of the Restatement (Third)*, 21 WM. MITCHELL L. REV. 361, 368 (1995) ("[I]t appears strict liability is becoming more like negligence law with its traditional standard of reasonable care . . . ."); Hildy Bowbeer, Wendy F. Lumish, & Jeffrey A. Cohen, *Warning! Failure to Read This Article May Be Hazardous to Your Failure to Warn Defense*, 27 WM. MITCHELL L. REV. 439, 444 (2000) ("[I]t is apparent that the strict liability approach to warnings law has been, or is in the process of being, supplanted with the negligence-based reasonableness standard as to whether a manufacturer failed to warn.").

taken by the recent Restatement (Third) of Torts: Products Liability.<sup>18</sup> Although the Restatement does not specifically prescribe either a negligence or strict liability methodology,<sup>19</sup> it describes failure to warn liability as achieving “the same general objectives as does liability predicated on negligence.”<sup>20</sup> The reporters who authored the Restatement have also come out in favor of negligence-type liability over strict liability for all branches of products liability except manufacturing defects.<sup>21</sup> It seems that negligence principles may have unseated strict liability in failure to warn litigation, at least for the foreseeable future.

In addition to the tension between strict liability and negligence, there exists among torts scholars a question of how tort law balances the competing interests of before-the-fact deterrence of legal wrongs and after-the-fact “corrective justice” when a tort has been committed.<sup>22</sup> One commentator has proposed that negligence law “at stage one, seeks to deter negligence generally . . . then, at stage two, acknowledges the incomplete success of its

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18. The Restatement attempts to introduce more consistency among jurisdictions. Professor James Henderson, one of the Reporters responsible for the Restatement, has said, “[t]he revision . . . is not a reform measure. We are trying to read the cases and by and large conform to the trends that we see in them.” James Henderson, *Revising Section 402A: The Limits of Tort as Social Insurance*, 10 *TOURO L. REV.* 107, 111 (1993) (discussing the development of the (at that time) unfinished Restatement (Third) of Torts: Products Liability).

19. *RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB.* § 2 (1998); *see also* Soule & Moen, *supra* note 12, at 389–90 (“The Restatement (Third) avoids the complications of labeling this product liability theory as either negligence or strict liability,” but pointing out that the Restatement advocates a “reasonable care approach.”).

20. *RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB.* § 2 cmt. a (1998).

21. *See, e.g.*, James A. Henderson, Jr., *Why Negligence Dominates Tort*, 50 *UCLA L. REV.* 377 (2002) (postulating that negligence is ethically superior and more viable than strict liability); Aaron Twerski, *From a Reporter’s Perspective: A Proposed Agenda*, 10 *TOURO L. REV.* 5, 12–13 (1993) (noting that analysis of failure to warn cases in the new Restatement is intended to be “negligence-like in its approach” although not necessarily identical to “traditional negligence”).

22. Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 *TEX. L. REV.* 1801 (1997) (proposing a “mixed theory” of tort law that balances corrective justice and deterrence). Kenneth Simons also discusses the values expressed through tort law:

In the end, a determination that an actor is negligent reflects a value judgment at two levels. It expresses the judgment that the actor should have done something different in light of the foreseeable risks of his conduct. It also presupposes value judgments about the relevant advantages and disadvantages of taking such a precaution.

Kenneth W. Simons, *The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness As Well As Efficiency Values*, 54 *VAND. L. REV.* 901, 935 (2001).

stage-one effort and accordingly recognizes the corrective justice rights of those who have been victimized by negligence.”<sup>23</sup>

The Minnesota Supreme Court attempted to address these principles in *Gray*. By employing multiple defenses with differing applications, the court has modified an industrial supplier’s duty to warn without completely eliminating that duty.

Although the newly identified defenses fall short of a perfectly predictable, bright-line rule, suppliers will have a better idea of when they are expected to warn because the doctrines are applied differently depending on whether the court is focusing on an end user or an intermediary employer. Suppliers will also have greater flexibility in providing those warnings; when reasonable, they may rely on an intermediary employer to pass along the warning to the ultimate users of the material.<sup>24</sup> At the same time, the reasonableness requirement deters suppliers from unreasonably abandoning warnings altogether because plaintiffs may still recover through the corrective justice system found in Minnesota tort law.

### III. THE *GRAY* DECISION

Lawrence B. Gray (“Gray”) worked for the same company for more than forty-seven years, from 1951 to 1998, except for two years of military service in Korea.<sup>25</sup> His employer, Smith Foundry, used silica sand in its casting processes and purchased a significant portion of its sand in bulk from Badger Mining Corporation (“Badger”).<sup>26</sup> During his employment with Smith Foundry, plaintiff Gray was exposed to silica dust created by normal foundry procedures.<sup>27</sup>

Although providers and users of sand have long known silica dust to be dangerous,<sup>28</sup> Smith Foundry did not begin receiving warnings from its suppliers about silica’s particular hazards to

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23. Schwartz, *supra* note 22, at 1828 (describing deterrence and corrective justice theories as both “complementary” and “concurrent”).

24. *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 277–78 (Minn. 2004).

25. *Id.* at 271.

26. *Id.*

27. *Id.* The sand is used to make molds for metal casting. Once an item is cast, the sand is forcefully removed from the casting by processes such as “knock off, shake out, chipping, and grinding.” Appellant’s Brief at 7, *Gray* (No. C4-02-2052).

28. Brief of Amici Curiae Minnesota Trial Lawyers at 5, *Gray* (No. C4-02-2052) (citations omitted).

foundry workers until the 1970s.<sup>29</sup> By the 1980s, Smith Foundry had brought itself into compliance with the silica exposure standards required by the Occupational Safety and Health Administration (“OSHA”),<sup>30</sup> but apparently this was insufficient to protect employees like Gray.<sup>31</sup> Although Gray wore disposable respirators supplied by his employer,<sup>32</sup> he contracted silicosis, a lung injury caused by inhaling silica particles.<sup>33</sup>

Gray sued Badger and other sand suppliers for, among other claims,<sup>34</sup> negligent failure to warn that the disposable respirators he used did not sufficiently protect against silicosis.<sup>35</sup> The defendants filed motions for summary judgment.<sup>36</sup> The district court denied these motions, whereupon all defendants except Badger settled.<sup>37</sup> Badger renewed its motion for summary judgment on the grounds that it had no duty to warn Gray “because it sold raw material to a

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29. *Gray v. Badger Mining Corp.*, 664 N.W.2d 881, 884 (Minn. Ct. App. 2003), *rev'd*, 676 N.W.2d 268 (Minn. 2004).

30. *Id.*

31. *See Bergfeld v. Unimin Corp.*, 319 F.3d 350 (8th Cir. 2003). *Bergfeld* is a similar case out of Iowa, where the plaintiff was exposed to silica sand at the foundry where he worked. *Id.* at 352. Although plaintiff *Bergfeld* was never exposed to concentrations of sand above the limit set by the Occupational Safety and Health Administration (OSHA), in 1974, another agency, the National Institute for Occupational Safety and Health (“NIOSH”) recommended a much lower limit for silica exposure. *Id.* The NIOSH recommendation was not binding on employers, and plaintiff claimed that defendant supplier failed to warn him of this lower limit. *Id.* at 353. The *Bergfeld* court, however, found evidence in the record that the employer foundry’s subjective knowledge of the NIOSH recommendation was equal to the defendant supplier’s knowledge. *Id.* at 354. Although the *Bergfeld* court was using “sophisticated user” terminology, the doctrine it applied most closely resembles the “sophisticated intermediary” defense defined in *Gray*.

32. *Gray*, 676 N.W.2d at 272. Many conventional respirators do not sufficiently filter out tiny silica particles; at a minimum, the National Institute for Occupational Safety and Health, commonly known as NIOSH, recommends “respirators with high-efficiency particulate HEPA filters.” Brief of Amici Curiae Minnesota Trial Lawyers at 6, *Gray* (No. C4-02-2052).

33. *Gray*, 664 N.W.2d at 883. Although silica sand is not dangerous in and of itself, foundry procedures fracture the sand into imperceptible “sub-micron-sized particles . . . undetectable by senses of sight, smell, or touch.” *Id.* These infinitesimal, airborne dust particles may be drawn into the lungs and cause permanent damage. Brief of Amici Curiae Minnesota Trial Lawyers at 4, *Gray* (No. C4-02-2052).

34. *Gray*, 676 N.W.2d at 273. The Minnesota Supreme Court declined to address Gray’s claims for strict liability for failure to warn, as well as his claims for breach of warranties of merchantability and fitness for the intended purpose. *Id.*

35. *Id.* at 271.

36. *Id.* at 272–73.

37. *Id.* at 273.

sophisticated purchaser.”<sup>38</sup> This motion was also denied.<sup>39</sup> The parties then took the unusual step of stipulating to an entry of judgment for Gray, with the damage amount contingent upon the results of an appeal of the denial of Badger’s summary judgment motion.<sup>40</sup>

The court of appeals held that Smith Foundry, Gray’s employer, was a “sophisticated purchaser”<sup>41</sup> of silica sand because it “knew or should have known of the dangers of silica.”<sup>42</sup> The appeals court then looked primarily to Eighth Circuit cases before deciding that Badger, as “a bulk supplier of silica sand to a sophisticated purchaser” had “no duty to warn the user of the dangers of exposure to silica dust.”<sup>43</sup> Gray appealed.

The Minnesota Supreme Court granted review of the duty to warn and Badger’s raw material/component part supplier defense.<sup>44</sup> Two amicus curiae briefs were filed in support of Badger: one by the American Chemistry Council<sup>45</sup> another by the

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38. *Id.*

39. *Id.*

40. *Id.* If the appeal process determined that summary judgment should have been entered for Badger, Gray would receive \$17,500; otherwise, Gray would receive \$75,000. The supreme court noted that such a stipulation was unusual and was not authorized under the Minnesota Rules of Civil Procedure. *Id.* at 273 n.2. Because the parties had consented and the appeals court had accepted it, the supreme court declined to assert judgment, however. *Id.*

41. The appellate court appeared to treat the “sophisticated purchaser” and “learned intermediary” doctrines as identical. *Gray v. Badger Mining Corp.*, 664 N.W.2d 885, 887 (Minn. Ct. App. 2003), *rev’d*, 676 N.W.2d 268 (Minn. 2004). The supreme court addressed this possible ambiguity in its opinion: “although the court of appeals mentioned . . . the learned intermediary defense, it ultimately analyzed the case under ‘sophisticated user’ and ‘bulk supplier’ defenses . . . [W]e decline to extend the learned intermediary defense to the employer/employee relationship in the industrial context.” *Gray*, 676 N.W.2d at 276 (citations omitted). Later in its opinion, however, the supreme court did expressly distinguish the learned intermediary defense from the sophisticated user and sophisticated intermediary defenses. *Id.* at 275–77.

42. *Gray v. Badger Mining Corp.*, 664 N.W.2d 885, 887 (Minn. Ct. App. 2003), *rev’d*, 676 N.W.2d 268 (Minn. 2004).

43. *Id.* at 886. Minnesota courts may “determine as a matter of law whether there exists a duty to warn of a danger in a product.” *Id.* at 884 (citing *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986)).

44. *Gray*, 676 N.W.2d at 273.

45. Brief of Amici Curiae American Chemistry Council, *Gray* (No. C4-02-2052). The American Chemistry Council (“ACC”) is an organization representing “the leading companies engaged in the business of chemistry” and companies who make and supply “industrial chemical products.” *Id.* at 3. The *Gray* court expressly states that the sand sold by Badger fits under the legal definition of a “chemical.” *Gray*, 676 N.W.2d 268 at 274 n.3 (quoting 29 C.F.R.

Coalition for Litigation Justice, Inc.<sup>46</sup> jointly with the American Tort Reform Association (“ATRA”).<sup>47</sup> A third amicus brief was filed by the Minnesota Trial Lawyers Association in support of Gray.<sup>48</sup>

In its opinion, issued March 18, 2004, the Minnesota Supreme Court found sufficient issues of material fact existed to preclude summary judgment, in essence finding for Gray because of the parties’ pre-existing stipulation.<sup>49</sup> The court carefully limited its holding to the case’s specific procedural and factual scope.<sup>50</sup>

Despite the scrupulously defined parameters of the court’s opinion, *Gray* will no doubt significantly affect future failure to warn litigation, especially in the industrial employment context. In its “duty to warn” analysis, the *Gray* court identified and defined a number of specific defenses available to industrial supplier defendants. The five defenses outlined in the court’s opinion are: “(1) learned intermediary; (2) sophisticated user; (3) sophisticated intermediary; (4) bulk supplier; and (5) raw material/component part supplier.”<sup>51</sup>

Two of the defenses are not new to the Minnesota court. The learned intermediary defense had already been authorized in

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§ 1910.1200(c)(2003)).

46. Brief of Amici Curiae Coalition for Litigation Justice, Inc. and American Tort Reform Association, *Gray* (No. C4-02-2052). The Coalition for Litigation Justice (formerly the Coalition for Asbestos Justice) was formed by a group of property and casualty insurers whose goal is “to address and improve the silica and other toxic tort litigation environment.” *Id.* at 1.

47. The American Tort Reform Association (“ATRA”) is a “coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms” who support “an aggressive civil justice reform agenda.” Some of ATRA’s goals include: “abolition of the rule of joint and several liability,” “limits on punitive damages,” “limits on noneconomic damages,” and “stopping regulation through litigation.” AMERICAN TORT REFORM ASSOCIATION, *About ATRA*, at <http://www.atra.org/about/> (last visited Oct. 17, 2004).

48. Brief of Amici Curiae Minnesota Trial Lawyers, *Gray* (No. C4-02-2052). The Minnesota Trial Lawyers Association (“MTLA”) is an association of primarily plaintiff’s attorneys who list as one of their objectives “to advance the cause of those who are damaged in person, property or civil rights and who must seek redress therefore at law.” MINNESOTA TRIAL LAWYERS ASSOCIATION, *Mission Statement*, at <http://www.mntla.com/mission.htm> (last visited Oct. 17, 2004).

49. *See Gray*, 676 N.W.2d at 281–82 (noting that the court determined that fact issues existed regarding whether the warnings provided by Badger fell short of federal requirements or were otherwise inadequate regarding the types of respirators that should be used to prevent silica inhalation).

50. *See id.* at 281 (limiting the decision to the “unique procedural posture and particular facts in the record”).

51. *Id.* at 275.

Minnesota for pharmaceutical manufacturers.<sup>52</sup> Additionally, principles of the sophisticated user defense have long been recognized in Minnesota.<sup>53</sup>

In addition to its discussion of existing defenses, the *Gray* court took the opportunity to identify three additional defenses for application in Minnesota. First, the court adopted the Raw Materials/Component Supplier defense from the Restatement (Third) of Torts: Products Liability section 5.<sup>54</sup> This defense has been thoroughly discussed by commentators and is fairly straightforward in its application.<sup>55</sup> The other two defenses, sophisticated intermediary and bulk supplier, were taken from section 388 of the Restatement (Second) of Torts.<sup>56</sup> These “new” defenses are likely to cause the greatest changes in the litigation of industrial failure to warn claims.

The sophisticated intermediary and bulk supplier defenses are the primary focus of this Note, but, to provide context, all five defenses are discussed briefly in the following section.

#### A. *The Learned Intermediary Defense*

As described by the court, the learned intermediary defense applies where a pharmaceutical maker fails to warn an already knowledgeable physician of a hazard posed by the manufacturer’s pharmaceutical product, and a patient is subsequently injured by the product.<sup>57</sup> The learned intermediary defense applies principles of causation; when a physician is fully knowledgeable of the

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52. *Id.* at 276 (citing *Mulder v. Parke Davis & Co.*, 288 Minn. 332, 335–36, 181 N.W.2d 882, 885 (1970)).

53. *Gray*, 676 N.W.2d at 276–77 (citing *Hill v. Wilmington Chem. Corp.*, 279 Minn. 336, 340–44, 156 N.W.2d 898, 902–04 (1968)).

54. *Id.* at 280–81 (citing RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 5 cmt. b (1998)).

55. See, e.g., Richard C. Ausness, *Learned Intermediaries and Sophisticated Users: Encouraging The Use of Intermediaries to Transmit Product Safety Information*, 46 SYRACUSE L. REV. 1185, 1224–25 (1996) (comparing raw material and bulk supplier defenses); Steenson, *supra* note 3, at 32–34 (commenting on the Restatement (Third) and its likely effect on Minnesota law). The *Gray* court adopted this defense from the Restatement (Third) but did not expressly adopt the language of the Restatement dealing with failure to warn claims. See 676 N.W.2d at 274 (endorsing “the broad statement of principles contained in the Restatement (Second) of Torts § 388 [1965]”) (emphasis added).

56. *Gray*, 676 N.W.2d at 278, 280 (citing RESTATEMENT (SECOND) OF TORTS § 388 cmt. n (1965)).

57. *Id.* at 275–76 (citing *Mulder v. Parke Davis & Co.*, 288 Minn. 332, 335–36, 181 N.W.2d 882, 885 (1970)).

product's dangers, the pharmaceutical company's failure to warn is held not to be the proximate cause of the injury.<sup>58</sup>

The *Gray* court pointed out that the learned intermediary defense "has essentially been limited to pharmaceutical products."<sup>59</sup> Although the court recognized that the learned intermediary defense may be available in a few other professional contexts,<sup>60</sup> it specifically declined to extend the learned intermediary defense to industrial employment situations.<sup>61</sup> However, because Badger did not argue to the court for the learned intermediary defense,<sup>62</sup> the court's discussion of the doctrine is probably dictum, and awaits clarification by subsequent litigation.

*B. The Raw Material/Component Part Supplier Defense*

As already noted, the Raw Material/Component Part Supplier defense is derived from the Restatement (Third) of Torts: Products Liability.<sup>63</sup> For the defense to apply in Minnesota, the component must be "inherently safe"<sup>64</sup> when it is supplied to a manufacturer. The supplier then has no duty to warn either the buyer or the ultimate user of the final product in which the component is used, particularly if the component is a basic material that can be put to "multiple uses."<sup>65</sup>

The court declined to apply this defense to Badger, holding that Badger was not a supplier of either safe raw materials or

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58. *Id.* at 276.

59. *Id.*

60. *See, e.g., Minneapolis Soc'y of Fine Arts v. Parker-Klein Assocs. Architects, Inc.*, 354 N.W.2d 816, 821–22 (Minn. 1984), *overruled on other grounds by* 458 N.W.2d 683 (Minn. 1990).

61. *Gray*, 676 N.W.2d at 276. In *Gray*, the court mentioned with approval a Minnesota Court of Appeals case containing a "well summarized" discussion differentiating the medical and industrial employment contexts. *Id.* at 276 n.5 (citing *Todalén v. U.S. Chem. Co.*, 424 N.W.2d 73, 79 (Minn. Ct. App. 1988)).

62. *Id.*

63. *Id.* at 280–81. The *Gray* court quotes the following section from the Restatement:

[W]hen a sophisticated buyer integrates a component into another product, the component seller owes no duty to warn either the immediate buyer or the ultimate consumers of dangers arising because the component is unsuited for the special purpose to which the buyer puts it.

*Id.* at 281 (citing RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 5 (1998)).

64. *Id.* at 280–81.

65. *Id.* at 281.

component parts.<sup>66</sup> As a result, this section of the opinion is also likely dictum. Significantly, however, the court stated that “[e]ven where this defense is applicable, the supplier must still provide an adequate warning to the intermediate purchaser,” particularly where the supplier’s knowledge is “superior” to the purchaser’s.<sup>67</sup> This means that for a raw material/component part supplier to have no duty to the ultimate user, the intermediary employer must be knowledgeable regarding any hazards of the material.

C. *The Sophisticated User Defense*

The sophisticated user doctrine is commonly used in failure to warn litigation and is available in most jurisdictions.<sup>68</sup> As applied in *Gray*, the sophisticated user defense is essentially a bright-line, no-duty defense that relieves a supplier of dangerous material from the duty to warn an ultimate user if the supplier “has reason to believe that the user will realize [the material’s] dangerous condition.”<sup>69</sup> The defense originated from section 388 of the Restatement of Torts, which carried over, without any change, to the Restatement (Second) of Torts.<sup>70</sup> The Minnesota Supreme

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66. *See id.* (finding that the sand was not inherently safe when “used in a foundry process,” and that the sand did not become a “component of a finished product”). Therefore, although the court did not expressly so state, the raw material/component supplier defense could not apply in this case.

67. *Id.* In contrast, in their brief, the Coalition for Litigation Justice and ATRA claimed that the duty to warn should not lie with the supplier, but with the employer. Brief of Amici Curiae Coalition for Litigation Justice, Inc. and American Tort Reform Association at 15–19, *Gray* (No. C4-02-2052).

68. “[I]t would appear, then, that some version of a ‘sophisticated purchaser’ defense is the norm in most jurisdictions.” *Kennedy v. Mobay Corp.*, 579 A.2d 1191, 1197 (Md. Ct. Spec. App. 1990), *aff’d*, 601 A.2d 123 (1992) (quoting *In re Asbestos Litig. (Mergenthaler)*, 542 A.2d 1205, 1211 (Del. Super. Ct. 1986)).

69. *Gray*, 676 N.W.2d at 276.

70. The RESTATEMENT (SECOND) OF TORTS § 388 (1965) reads as follows:

§388. Chattel Known to Be Dangerous for Intended Use

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

- (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
- (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

Court expressly endorsed section 388 in 1959.<sup>71</sup> The court took notice of the Second Restatement section in 1967,<sup>72</sup> and recognized the principles of the sophisticated user defense (without referring to it by name) in 1968.<sup>73</sup> In *Gray*, the court reaffirmed its endorsement of the Second Restatement, confirming the defense's place in Minnesota jurisprudence.<sup>74</sup>

*D. The Sophisticated Intermediary Defense*<sup>75</sup>

The newly named sophisticated intermediary defense, identified in *Gray*, applies when a supplier can demonstrate that it reasonably discharged its duty to warn an end user by relying on an informed intermediary to give the actual warning.<sup>76</sup> Although the Minnesota court identified the defense for the first time in *Gray*,<sup>77</sup> its elements are not new. As early as 1923, the New York Court of Appeals stated that “an instrument which may be dangerous and is generally known to the . . . profession as a danger need not be warned against by a seller.”<sup>78</sup>

Over the years, jurisdictions have applied the defense in various ways. Some require the same elements but use different nomenclature, including “sophisticated purchaser,”<sup>79</sup> “knowledgeable purchaser,”<sup>80</sup> and “knowledgeable, sophisticated employer.”<sup>81</sup> Others evaluate the intermediary's duty under the

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

71. See *Mikel v. Aaker*, 256 Minn. 500, 504–05, 99 N.W.2d 76, 79–80 (1959).

72. See *McCormack v. Hanksraft Co.*, 278 Minn. 322, 333 n.1, 154 N.W.2d 488, 497 n.1 (1967).

73. See *Hill v. Wilmington Chem. Corp.*, 279 Minn. 336, 340–44, 156 N.W.2d 898, 902–04 (1968).

74. *Gray*, 676 N.W.2d at 276–77.

75. The court may have selected the name for this defense from an amicus brief which referred to *Smith Foundry* as a “sophisticated’ intermediary user.” Brief of Amici Curiae Coalition for Litigation Justice, Inc. and American Tort Reform Association at 14, *Gray* (No. C4-02-2052). The MTLA's brief also used the term but treated it as interchangeable with “learned intermediary.” Brief of Amici Curiae Minnesota Trial Lawyers at 8–9, *Gray* (No. C4-02-2052).

76. *Gray*, 676 N.W.2d at 276–77.

77. *Id.* at 277.

78. *Rosebrock v. Gen. Elec. Co. & Tonawanda Power Co.*, 236 N.Y. 227, 238–39 (N.Y. Ct. App. 1923).

79. See, e.g., *In re Asbestos Litig.* (Mergenthaler), 542 A.2d 1205, 1205–08 (Del. Super. Ct. 1986).

80. See, e.g., *Smith v. Walter C. Best, Inc.*, 927 F.2d 736, 739 (3d Cir. 1990).

81. See, e.g., *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552, 561 (W.D. Va. 1984), *aff'd sub nom.*, *Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985).

already existing sophisticated user analysis.<sup>82</sup> Still others merely extend the pharmaceutically related learned intermediary defense.<sup>83</sup> A few courts will not permit the sophisticated intermediary defense at all, especially in strict liability cases.<sup>84</sup>

According to the *Gray* decision, Minnesota now permits the sophisticated intermediary defense, but distinguishes it from the learned intermediary and sophisticated user doctrines.<sup>85</sup> Additionally, unlike the sophisticated user defense, the sophisticated intermediary defense in Minnesota is not a no-duty defense; it does not obviate a Minnesota supplier's original duty to warn.<sup>86</sup>

#### *E. The Bulk Supplier Defense*

Although the Minnesota Supreme Court discusses the bulk supplier and sophisticated intermediary defenses separately, the two are complementary. The bulk supplier defense is a "specialized version" of the sophisticated intermediary doctrine, dealing with the supply of bulk industrial materials to an informed intermediary.<sup>87</sup> Because the two correspond so closely, discussion of the sophisticated intermediary defense often includes the bulk supplier defense by implication.<sup>88</sup>

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82. See, e.g., *Kennedy v. Mobay Corp.*, 579 A.2d 1191, 1194–99 (Md. Ct. Spec. App. 1990); *Tasca v. GTE Prod. Corp.*, 438 N.W.2d 625, 628–29 (Mich. Ct. App. 1988); *Humble Sand & Gravel, Inc. v. Gomez*, 48 S.W.3d 487, 495–502 (Tex. Ct. App. 2001).

83. See, e.g., *Stuckey v. N. Propane Gas Co.*, 874 F.2d 1563, 1568 (11th Cir. 1989). See generally *Cheney*, *supra* note 4, at 562 (recommending extension of learned intermediary defense to employers). The *Gray* court expressly rejected this option. 676 N.W.2d 268, 275–76 (Minn. 2004).

84. See, e.g., *Little v. Liquid Air Corp.*, 952 F.2d 841, 851 (5th Cir. 1992) (declining to fuse sophisticated user and bulk seller defenses because it would undercut strict liability); *Donahue v. Phillips Petroleum Co.*, 866 F.2d 1008, 1012–13 (8th Cir. 1989) (declining to fuse sophisticated user and bulk supplier defenses; also refusing to apply learned intermediary defense to employer–employee relationship). *But see* *Higgins v. E.I. DuPont de Nemours & Co., Inc.*, 671 F. Supp. 1055, 1058–60 (D. Md. 1987) (permitting sophisticated user defense in strict liability claim against bulk supplier); *Phillips v. A.P. Green Refractories Co.*, 630 A.2d 874, 882 (Pa. Super. Ct. 1993) (permitting sophisticated user defense to strict liability claims against bulk silica supplier); *Wood v. Phillips Petroleum Co.*, 119 S.W.3d 870, 874 (applying bulk supplier doctrine to Restatement (Second) of Torts §402A failure to warn claim).

85. *Gray*, 676 N.W.2d at 275–80.

86. *Id.* at 278.

87. *Id.* at 280.

88. *Id.*

Basically, the bulk supplier defense applies when it would be “exceedingly costly” or “impossible” for a supplier of industrial bulk material to warn every end user of that material directly.<sup>89</sup> Minnesota still requires a bulk supplier to provide adequate warnings to intermediary purchasers for dissemination to ultimate users,<sup>90</sup> so the bulk supplier, like the sophisticated intermediary, is not a no-duty defense.

#### IV. THE SOPHISTICATED INTERMEDIARY DOCTRINE APPLIED IN *GRAY*

Generally, courts adopting a sophisticated intermediary defense have taken one of three routes.<sup>91</sup> The first is a common-law, “no-duty” approach: once a relevant intermediary (generally the user’s employer) is warned, the manufacturer no longer has a duty to warn the end user.<sup>92</sup> The second focuses on the supplier’s reasonableness in relying on an intermediary to give the actual warning.<sup>93</sup> Some jurisdictions refer to this as “delegating” the duty to warn.<sup>94</sup> The third approach combines the previous two. Like the second approach, it examines whether a supplier was reasonable in relying on an intermediary, but it also emphasizes the supplier’s continuing duty to the end user.<sup>95</sup> This appears to be the approach adopted in *Gray*. The court requires a supplier to demonstrate

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89. *Id.*

90. *Id.*

91. Willner, *supra* note 1, at 590–606 (discussing differences between the three approaches to sophisticated user defense). Willner also notes that a few courts analyze such cases under causation, with limited success. *Id.* at 588–89 n.47.

92. *See, e.g.*, Smith v. Walter C. Best, Inc., 927 F.2d 736 (3d Cir. 1990); Stuckey v. N. Propane Gas Co., 874 F.2d 1563 (11th Cir. 1989); Marshall v. H.K. Ferguson Co., 623 F.2d 882 (4th Cir. 1980).

93. Willner, *supra* note 1, at 596–604 (discussing Restatement analysis of sophisticated user); *see, e.g.*, Baker v. Monsanto Co., 962 F. Supp. 1143 (S.D. Ind. 1997); Hegna v. E.I. du Pont de Nemours & Co., 806 F. Supp. 822 (D. Minn. 1992); Goodbar v. Whitehead Bros., 591 F. Supp. 552 (W.D. Va. 1984), *aff’d sub nom.*, Beale v. Hardy, 769 F.2d 213 (4th Cir. 1985); Younger v. Dow Corning Corp., 451 P.2d 177 (Kan. 1969); Humble Sand & Gravel, Inc. v. Gomez, 48 S.W.3d 487 (Tex. Ct. App. 2001).

94. *See, e.g.*, Taylor v. Monsanto Co., 150 F.3d 806 (7th Cir. 1998); Adams v. Union Carbide Corp., 737 F.2d 1453 (6th Cir. 1984); Vines v. Beloit Corp., 631 So. 2d 1003 (Ala. 1994).

95. Willner, *supra* note 1, at 605–06 (discussing “mixed” approach to sophisticated user defense); *see, e.g.*, Manning v. Ashland Oil Co., 721 F.2d 192 (7th Cir. 1983); Gordon v. Niagara Mach. & Tool Works, 574 F.2d 1182 (5th Cir. 1978); Dole Food Co., Inc. v. N.C. Foam Indus., Inc., 935 P.2d 876 (Ariz. Ct. App. 1997); Jodway v. Kennametal, Inc., 525 N.W.2d 883 (Mich. Ct. App. 1994); Haase v. Badger Mining Corp., 669 N.W.2d 737 (Wis. Ct. App. 2003).

“that it used reasonable care in relying upon the intermediary” to warn,<sup>96</sup> but the supplier cannot itself be absolved of the duty.<sup>97</sup>

In adopting its sophisticated intermediary defense, the *Gray* court applied the balancing test found in section 388 of the Restatement (Second) of Torts.<sup>98</sup> Under the Restatement, a court must consider “the purpose for which the product is to be used, the magnitude of the risk, the burden of providing direct warnings to end users and the reliability of the intermediary as a conduit.”<sup>99</sup>

A. *Availability of the Defense.*

According to the Minnesota Supreme Court, the availability of the sophisticated intermediary defense depends on the knowledge of the intermediary—usually an employer, as in *Gray*—rather than that of the ultimate user of the material.<sup>100</sup> Unlike the sophisticated user defense, however, the sophisticated intermediary defense is not a no-duty rule.<sup>101</sup> The duty to warn continues to exist; it is merely the physical delivery of the warning that may shift from the supplier to the employer, where reasonable.<sup>102</sup>

The court also noted that the bulk supplier defense falls within the sophisticated intermediary defense.<sup>103</sup> The bulk supplier defense acknowledges that the burden of warning end users, if placed upon suppliers of bulk goods, might be costly, difficult, or even impossible.<sup>104</sup> Thus, a bulk supplier may be able to fulfill its legal duty to warn end users by providing sufficient warning to its immediate purchasers, essentially making those purchasers “sophisticated.”<sup>105</sup>

Although the court seemed to indicate that the generalized

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96. *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 278 (Minn. 2004).

97. *Id.* (quoting *Kennedy v. Mobay Corp.*, 579 A.2d 1191, 1199 (Md. Ct. Spec. App. 1990), *aff'd*, 601 A.2d 123 (1992)).

98. *Id.* (discussing RESTATEMENT (SECOND) OF TORTS, § 388 cmt. n (1965)).

99. *Id.*

100. *See id.* at 277 (explaining that the sophisticated intermediary defense “focuses on the sophistication of the end user’s employer”).

101. *Id.* at 278 (quoting *Kennedy v. Mobay Corp.*, 579 A.2d 1191, 1197 (Md. Ct. Spec. App. 1990), *aff'd*, 601 A.2d 123 (1992)).

102. *Id.*

103. *Id.* at 280.

104. *Id.*

105. *See id.* (noting that the “defense is consistent with the federal regulation of hazardous chemicals, which requires the manufacturer to provide warnings to its purchasers. . .”).

sophisticated intermediary defense would not apply to Badger,<sup>106</sup> it did find that this bulk supplier defense—the “specialized version” of the doctrine<sup>107</sup>—likely did apply. However, the court also determined that sufficient questions of fact remained to prevent summary judgment.<sup>108</sup> This would seem to indicate that, except in exceptionally clear-cut circumstances, courts might be reluctant to take this determination out of the hands of a jury.

*B. The Sophistication of the Intermediary Will Probably Be Determined According to a Subjective Standard*

The appeals court held that Smith Foundry was a “sophisticated purchaser” of sand because it “knew or should have known of the dangers of silica.”<sup>109</sup> In contrast, the Minnesota Supreme Court found “issues of material fact” regarding whether “Smith Foundry’s knowledge was equal to that of Badger Mining” and whether “Smith Foundry shared in the special knowledge possessed by Badger Mining that disposable respirators were ineffective.”<sup>110</sup> Although the supreme court did not specifically so state, its emphasis on Smith Foundry’s actual level of knowledge and its reliance on Badger’s warnings appears to implicate a subjective, rather than objective, standard.<sup>111</sup>

Respondent Badger Mining’s brief to the Minnesota Supreme Court emphasized objective knowledge, as did both amicus briefs supporting Badger.<sup>112</sup> All three briefs suggested that Smith

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106. The court did not specifically state whether the defense would apply to Badger, but noted that “this case is more analogous to the decisions of other jurisdictions that have denied summary judgment to silica suppliers,” then mentioned three cases where courts refused to apply the defense. *Id.* (citing *White v. W.G.M. Safety Corp.*, 707 F. Supp. 544 (S.D. Ga. 1988); *U.S. Silica v. Tompkins*, 92 S.W.3d 605 (Tex. App. 2002); *Humble Sand & Gravel, Inc. v. Gomez*, 48 S.W.3d 487 (Tex. App. 2001)).

107. *Gray*, 676 N.W.2d at 281.

108. *Id.* “Because genuine issues of material fact precluded the district court from deciding, as a matter of law, that Badger Mining had no duty to warn or that its warning to Smith Foundry discharged its duty, the district court did not err in denying summary judgment.” *Id.* at 281–82.

109. *Gray v. Badger Mining Corp.*, 664 N.W.2d 881, 887 (Minn. Ct. App. 2003), *rev’d*, 676 N.W.2d 268 (Minn. 2004).

110. *Gray*, 676 N.W.2d at 278–79.

111. *See id.* at 279–280 (discussing Smith Foundry’s level of general and specific knowledge compared to Badger as well as its actual reliance on the warnings provided by Badger).

112. *See* Respondent’s Brief at 32, *Gray* (No. C4-02-2052) (“Smith Foundry knew *or should have known* how to control exposures to respirable sand particles

Foundry should have had the knowledge necessary to protect its employees from silicosis, thus insulating Badger from liability.<sup>113</sup> However, despite Respondent's urging, the court's opinion appeared to require suppliers to ascertain the actual level of knowledge—both general and specific—of their purchasers. First, the court looked at whether Badger and Smith Foundry's knowledge was "equal" regarding "the general risks of silica in foundry operations."<sup>114</sup> Next, the court examined the parties' relative knowledge regarding the ineffectiveness of disposable respirators in preventing silicosis, before determining "there is no evidence that Badger Mining had reason to believe Smith Foundry had such special knowledge."<sup>115</sup> Finally, the court discussed in detail Smith Foundry's actual reliance on Badger's warnings.<sup>116</sup> In other words, according to the *Gray* court, suppliers may not merely rely on general industry knowledge or warnings furnished by other suppliers to make an intermediary "sophisticated."<sup>117</sup> Instead, the court left the burden on suppliers to determine the subjective specialized knowledge of their purchaser—or else to provide adequate warnings.

Even though industrial suppliers retain the duty to warn, however, the sophisticated intermediary doctrine still benefits them. Functionally, the doctrine creates greater flexibility in how a supplier may provide its required warning. A defendant supplier may now use "reasonable care in relying upon [an] intermediary to give the warning to the end user."<sup>118</sup> When combined with the bulk supplier defense, even a reasonableness standard provides a great

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. . . .") (emphasis added); Brief of Amici Curiae Coalition for Litigation Justice, Inc. and American Tort Reform Association at 14 ("[F]rom an *objective* standpoint, the potential risks associated with the use of industrial sand have been a matter of common knowledge among industrial sand users for many decades. As a result, industrial sand suppliers have no duty to warn employers or users of the hazards associated with their products.") (emphasis added); Brief of Amici Curiae American Chemical Council at 5 ("Where . . . a purchaser knows *or should know* of potential hazards related to a product, a supplier of the product has no duty to warn the purchaser's employees of such dangers.") (emphasis added).

113. See *supra* note 112 and accompanying text.

114. *Gray*, 676 N.W.2d at 279.

115. *Id.*

116. *Id.* at 279–80.

117. See *id.* at 279 ("Evidence of the . . . information that was available to Smith Foundry from government and industry publications, other sand suppliers, and the suppliers of respirators. . . . cannot be said to conclusively establish that Smith Foundry's knowledge was equal to that of Badger Mining.")

118. *Id.* at 278.

deal of protection for industrial defendants like Badger, because of the difficulty in directly reaching the product's users (such as Gray). Because this doctrine entails an individualized analysis rather than an inflexible rule, it is actually more likely to place the warning burden on the party best able to warn.

*C. Sophisticated Intermediary v. Sophisticated User*

As noted earlier, the Minnesota Supreme Court expressly rejected the no-duty approach to the sophisticated intermediary defense.<sup>119</sup> As a result, the defense is further differentiated from the original sophisticated user defense, where there may in fact be no duty to warn if the end user (rather than the intermediary) is sufficiently knowledgeable.<sup>120</sup> This makes sense. If the end user is knowledgeable regarding the existence of a hazard, then any warning, whether provided by a supplier or an employer, would be redundant and unnecessary. Failure to provide such a warning could not be a cause of the harm. On the other hand, if the ultimate user is not sophisticated regarding a particular hazard, then the supplier and employer share a duty to warn of that danger,<sup>121</sup> and fault for not doing so should be apportioned among the parties according to Minnesota comparative fault principles.<sup>122</sup>

Arguments do exist for the no-duty approach to the sophisticated intermediary defense,<sup>123</sup> but they tend to benefit defendants to the detriment of plaintiffs. One such contention is that unpredictability among jurisdictions forces manufacturers to allocate inordinate resources to designing warnings, and manufacturers have little control over how those warnings are disseminated by intermediaries.<sup>124</sup> Courts are then seen to be

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119. *Id.* (quoting *Kennedy v. Mobay Corp.*, 579 A.2d 1191, 1199 (Md. Ct. Spec. App. 1990), *aff'd*, 601 A.2d 123 (1992)).

120. *Hill v. Wilmington Chem. Corp.*, 279 Minn. 336, 342, 156 N.W.2d 898, 902 (1968). The *Hill* court noted: “[I]f [the user] had adequate knowledge of the dangerous propensities of the product . . . no further duty rested . . . to give an additional warning.” *Id.*

121. See 29 C.F.R. § 1910.1200 (2003).

122. MINN. STAT. § 604.02 (2003).

123. See, e.g., Cheney, *supra* note 4, at 581 (advocating for “no obligation” version of learned intermediary defense); Joel Slawotsky, *The Learned Intermediary Defense: The Employer as Intermediary*, 30 TORT & INS. L.J. 1059, 1059–60 (1995) (recommending adoption of “no-duty” version of defense).

124. Cheney, *supra* note 4, at 574 (criticizing unpredictability across jurisdictions; advocating adoption of learned intermediary defense for industrial users).

“punishing the manufacturer” when an intermediary is negligent in passing along a warning.<sup>125</sup> However, these arguments do not take into account that manufacturers are virtually always the best source of information regarding generalized dangers of their products.<sup>126</sup> Additionally, federal regulations already mandate warnings to intermediary purchasers.<sup>127</sup> Requiring a *reasonable* additional effort to determine that the appropriate end users will be warned, as Minnesota does, simply adds an extra layer of protection for those users.

Proponents of the no-duty rule also argue that imposing complete liability on a sophisticated intermediary who fails to warn may create a stronger inducement for that intermediary, who is often closest to the end user and thus “best able to warn.”<sup>128</sup> However, this argument is weakened when the party best able to warn is the employer, which is shielded from liability to a large extent by workers’ compensation statutes.<sup>129</sup> Additionally, a system that imposes liability only on a “sophisticated” intermediary may motivate a party to remain non-sophisticated.<sup>130</sup> By adopting the reasonableness approach instead, the Minnesota court bypassed both problems.<sup>131</sup>

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125. Slawotsky, *supra* note 123, at 1065 (asserting that manufacturer’s liability for informed intermediary’s failure to warn essentially functions as punishment of manufacturer).

126. Willner, *supra* note 1, at 586 (“Manufacturers are usually most knowledgeable about their products . . .”). In Minnesota, “a manufacturer is held to the skill of an expert in its particular field of endeavor, and is obligated to keep informed of scientific knowledge and discoveries concerning that field.” *Karjala v. Johns-Manville Prod. Corp.*, 523 F.2d 155, 159 (8th Cir. 1975).

127. *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 274–75 (Minn. 2004); *see also* Brief of Amici Curiae Minnesota Trial Lawyers at 9–11, *Gray* (No. C4-02-2052) (quoting 29 C.F.R. § 1910.1200(f)(1) regarding labeling of hazardous chemicals and provision of warnings to purchasers).

128. Willner, *supra* note 1, at 595 (asserting that no-duty rule creates greatest likelihood of warning to end users).

129. *Todalen v. U.S. Chem. Co.*, 424 N.W.2d 73, 79 (Minn. Ct. App. 1988), *overruled on other grounds by* 505 N.W.2d 54 (Minn. 1993).

130. Willner, *supra* note 1, at 595–96 (noting intermediaries might deliberately remain ignorant to avoid liability and expense of warning).

131. For a clearly written discussion of the arguments regarding the reasonableness approach versus the no-duty approach, *see Dole Food Co., Inc. v. N.C. Foam Indus., Inc.*, 935 P.2d 876 (Ariz. Ct. App. 1997). The *Dole* opinion states, in part:

[T]he Restatement rule also encourages sellers to warn intermediaries, and any greater incentive to do so offered by the duty rule is offset by its disadvantages, the principal one of which is that it drastically reduces the incentive for sellers to notify end users. An important source of product

*D. Sophisticated Intermediary v. Learned Intermediary*

In addition to rejecting a no-duty approach to the sophisticated intermediary defense, the *Gray* court also differentiated it from the pharmaceutical learned intermediary defense.<sup>132</sup> Minnesota courts applying the learned intermediary defense employ proximate cause analysis: when a fully informed doctor fails to warn a patient, the patient's harm is not proximately caused by the manufacturer's failure to warn.<sup>133</sup> In contrast, the sophisticated intermediary doctrine focuses on the knowledge of the end user's employer, "on the premise that the employer will act in the best interest of its employees."<sup>134</sup>

Another difference is that medical practices are distinguishable from industrial practices. A drug manufacturer may rely on the individual doctor-patient relationship, and a negligent physician is subject to malpractice liability.<sup>135</sup> In contrast, the industrial employer deals with many employees on a less personal level, and is largely protected from negligence liability by workers' compensation statutes,<sup>136</sup> hence the court's decision to define two distinct defenses.

Because the *Gray* court deliberately differentiated between learned and sophisticated intermediaries, the outcome of each defense should be distinct. The court's self-imposed limitations prevent such a clear separation, however. As it stands, the sophisticated intermediary defense functions similarly to the learned intermediary defense: a supplier's duty can be discharged—but not absolved—by adequate warning to an

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warnings is thereby virtually eliminated.

The second alleged advantage of the duty approach is that it encourages intermediaries to warn end users. However, the duty rule does not affect the intermediary's duty. . . . [I]f the intermediary is . . . an employer, its behavior is governed by the workers' compensation scheme under both the duty and Restatement approaches.

*Id.* at 881 n.5.

132. *Gray*, 676 N.W.2d at 275–76.

133. *Mulder v. Parke Davis & Co.*, 288 Minn. 332, 336, 181 N.W.2d 882, 885 (1970).

134. *Gray*, 676 N.W.2d at 277.

135. *Todalen v. U.S. Chem. Co.*, 424 N.W.2d 73, 79 (Minn. Ct. App. 1988) (quoting *Hall v. Ashland Oil Co.*, 625 F. Supp. 1515, 1519–20 (D. Conn. 1986)), *overruled on other grounds by Tyroll v. Private Label Chems., Inc.*, 505 N.W.2d 54 (Minn. 1993).

136. *Id.*

intermediary.<sup>137</sup> However, *Gray* does suggest how future decisions may distinguish between the two doctrines. The court implies that an industrial defendant should face a greater challenge in proving its warning was adequate because certain safeguards exist to protect medical patients that are not available to industrial or other employees.<sup>138</sup>

## V. THE FUTURE OF *GRAY*

### A. *Recommendation: Sophisticated Intermediary Doctrine Should Apply Only to the Industrial Employment Context*

The Minnesota Supreme Court did not use *Gray* to “decide the full applicability or scope” of the sophisticated intermediary doctrine.<sup>139</sup> Indeed, by using the name “sophisticated *intermediary*” rather than “sophisticated *employer*,” the court left open the question of exactly what types of intermediaries might be implicated. In view of the court’s initial analysis of the defense, which refers solely to “employers,”<sup>140</sup> it seems likely that the majority of intermediaries qualifying as “sophisticated” will be employers, especially because of the court’s limitation of its holding.<sup>141</sup> Given the ambiguity of the doctrine’s name, however, its application is not as clearly defined as it could be.

As noted earlier, the court declined to extend the learned intermediary doctrine beyond the medical context because of the specific nature of the physician-patient relationship.<sup>142</sup> Sufficient parallels exist for similarly restricting the sophisticated intermediary defense to employers. Although not the intense, one-on-one relationship seen between doctor and patient, an intermediary employer exercises a certain level of control over its end user employees. This control is not shared by other

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137. See *Gray*, 676 N.W.2d at 279 n.7 (explaining that, even under the learned intermediary defense, drug manufacturer cannot be completely relieved of duty to warn patient).

138. *Id.* at 276 n.5 (citing with approval the learned intermediary discussion in *Todalén*, 424 N.W.2d at 79, and *Hall*, 625 F. Supp. at 1519–20).

139. *Id.* at 278.

140. *Id.* at 277.

141. *Id.* at 281.

142. See *id.* at 276 (declining “to extend the learned intermediary defense to the employer/employee relationship in the industrial context,” but noting that a similar defense was permitted in *Minneapolis Soc’y of Fine Arts v. Parker-Klein*, 354 N.W.2d 816 (Minn. 1984)).

intermediaries and their end users. For example, employers may require employees to read and heed warnings, to attend safety meetings, and to take specific training—or get fired.

Employers are also legislatively required to provide safety training to employees regarding particular hazards of their workplaces.<sup>143</sup> Individuals who might not otherwise heed warnings are more likely to pay attention and derive some benefit when acknowledging warnings is a part of their job requirements. Additionally, most individuals are aware that longer-term, day-to-day exposure to harmful materials encountered on the job may cause more damage than any shorter-term exposure encountered outside the workplace. Employees are thus more motivated than other end users to notice and heed warnings.

In contrast, intermediaries such as vendors who sell to individual consumers have less control over how warnings are received, and do not benefit from any equivalent to workers compensation insurance.<sup>144</sup> The danger is greater that warnings will get lost in transit from supplier to end user, and greater care is needed to ensure that warnings actually reach ultimate users. If these suppliers are able to invoke the sophisticated intermediary doctrine, there will be less protection for both intermediary and end user than the *Gray* court appears to envision.<sup>145</sup>

Thus, because of the greater likelihood that necessary warnings might not reach non-employee end users, the sophisticated intermediary doctrine is best suited for the employment context. Not only are employers in the best position to actually become “sophisticated” intermediaries as intended by the court in *Gray*,<sup>146</sup> but they enjoy greater protection from liability

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143. Brief of Amici Curiae Minnesota Trial Lawyers at 10, *Gray* (No. C4-02-2052) (citing 29 C.F.R. § 1910.1200; U.S. DEPT. OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMIN., *Chemical Hazard Communication*, OSHA Publ. No. 3084, at 2 (1989)).

144. See, e.g., Brief of Amici Curiae American Chemistry Council at 2, *Gray* (No. C4-02-2052) (noting “significant distinctions between the consumer and the industrial contexts . . . including the complex interdependency of modern business relationships and the intricate regulatory environment governing workplace safety”).

145. See *Gray*, 676 N.W.2d at 278 (quoting with approval from *Kennedy v. Mobay Corp.*, 579 A.2d 1191, 1199 (Md. Ct. Spec. App. 1990), *aff’d*, 601 A.2d 123 (1992)). The *Kennedy* version of the defense requires that, if direct warnings were not feasible, the supplier must have “acted in a manner reasonably calculated to assure either that the necessary information would be passed on to the ultimate handlers of the product or that their safety would otherwise be attended to.” *Id.*

146. See *Gray*, 676 N.W.2d at 277–78 (An intermediary is sophisticated where

along with better capabilities of passing along effective warnings.

*B. The Adoption of Specific Affirmative Defenses Will Weed Out Frivolous and Weak Claims*

The current state of products liability law in Minnesota reflects the existence of a legal duty to warn as a question of law to be decided by a court, rather than a jury.<sup>147</sup> This gives Minnesota judges a fair amount of power to decide failure to warn claims.<sup>148</sup> In the case of the sophisticated user defense, this is probably appropriate; if the user is suitably knowledgeable, there should be no failure to warn claim in the first place. In less clear-cut situations, such as where the end user is not sophisticated, the court is willing to adopt a mixed approach that requires a closer analysis of the specific facts—thus, the balancing test required for the sophisticated intermediary doctrine.

Despite dire predictions that unless the court adopts a harsh, bright-line, no-duty sophisticated intermediary defense, Minnesota will become a silicosis plaintiff's paradise—a “magic jurisdiction” facing “an influx of suits, overcrowded dockets, and wasted judicial resources”<sup>149</sup>—the Minnesota Supreme Court wisely refused to create a new absolute defense for suppliers. Instead, the court sought a middle ground, creating greater flexibility for itself.

This is not to say that industrial suppliers have been left wide

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“(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 instructions to the employer.”). Note that the definition is exclusive to employers. *Id.*

147. *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (citing Prosser and Keeton, *The Law of Torts* § 37, (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 328B (1965)); *see also* Steenson, *supra* note 3, at 25 (“[U]nder both negligence and strict liability standards, adequacy is the only issue the jury will resolve. The jury will not determine whether a reasonable manufacturer would have provided warnings and if so, what warnings would have been adequate.”).

148. This power continues to be somewhat controversial. Some commentators have suggested that following *Germann*, Minnesota courts have improperly taken on the role of determining whether the standard of care has been met in any particular case. *See generally* Soule & Moen, *supra* note 12 (proposing that courts should determine only the standard of conduct—i.e., reasonable care—and leave to juries the question of what that standard entails and whether it has been met); George W. Flynn & John J. Laravuso, *The Existence of a Duty to Warn: A Question for the Court or the Jury*, 27 WM. MITCHELL L. REV. 633, 648 (2000) (“The courts should not determine alone the existence of a duty to warn. When the issue turns on a reasonably disputed foreseeability . . . the jury should resolve the dispute.”).

149. Brief of Amici Curiae Coalition for Litigation Justice, Inc. and American Tort Reform Association at 6, *Gray* (No. C4-02-2052).

open to failure to warn liability; in fact, overall, *Gray* will probably have the opposite effect. Even though the *Gray* court essentially found for the plaintiff, its clarification of the defenses available to suppliers—specifically, its adoption of the sophisticated intermediary and bulk supplier defenses—means that industrial suppliers have greater flexibility in how they provide their warnings. Indeed, the *Gray* court found that the bulk supplier defense would probably have applied to Badger.<sup>150</sup>

As noted earlier, Minnesota now has both a no-duty doctrine for sophisticated users and a reasonableness test for sophisticated intermediaries. This means that defendant suppliers have two different arguments to make—and two possible methods to defeat a plaintiff's claim.<sup>151</sup> When combined with the bulk supplier and raw material/component part defenses (and other defenses not discussed here, such as “open and obvious danger”),<sup>152</sup> these defenses present a formidable arsenal for defendant suppliers.

At the same time, plaintiffs who are not sophisticated users (and whose claims are therefore stronger) may have a better chance of reaching a jury, because the defenses available to the supplier in that case—sophisticated intermediary and bulk supplier—require significant fact-based determination. This means that a few more claims may be filed in Minnesota than in a jurisdiction with a more rigid defense. However, with the catalog of defenses outlined in *Gray*, the court has given itself the tools to weed through these cases quickly. To prevail, plaintiffs must defeat the entire list of defenses; as a result, the weakest claims will be

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150. *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 280, 281 (Minn. 2004).

151. If one thinks of sophisticated user as a “duty-oriented” doctrine and sophisticated intermediary as a “balancing” doctrine, the difference in approach can be distinguished as follows:

The duty-oriented analysis is relatively predictable—a desirable characteristic because it provides some assurance to producers and suppliers that their communication structures will pass muster in the courts. However, like most *per se* rules, the duty approach sometimes sacrifices fairness for administrative efficiency. The balancing approach, on the other hand, is more equitable in nature, but is less certain in its application, than the duty-oriented approach. This uncertainty makes it difficult for parties to predict when they may safely rely upon intermediaries to convey safety information to users or consumers.

Ausness, *supra* note 55, at 1224–25.

152. The “open and obvious” danger doctrine is well established in Minnesota: “[n]or is there any duty to warn of nonexistent dangers, or dangers that are obvious to anyone.” *Westerberg v. Sch. Dist. No. 792, Todd County*, 276 Minn. 1, 10, 148 N.W.2d 312, 317 (1967).

dismissed or never filed at all, but stronger claims will be adjudicated more equitably, under a reasonableness standard.

## VI. CONCLUSION

As Justice Simonett has pointed out, [w]e live in a post-industrial society characterized by rapidly advancing technology . . . at a time when there is a clamor for 'tort reform' . . . presumably based on a perceived imbalance in what is fair to require of the producer-seller of products as compared to what is fair for the user-consumer to expect. In the nature of things, these two interests will always be in a state of tension and aberrations will occur. But generally speaking, over the past thirty years, products liability law has kept in mind its purpose to provide, fairly, products that are reasonably safe.<sup>153</sup>

The Minnesota Supreme Court, by introducing the sophisticated intermediary doctrine, carefully negotiated the tort reform tightrope described by Justice Simonett. The *Gray* opinion attempts to balance the rights of industrial sand providers with the health and safety interests of industrial employees. Although the *Gray* court was reviewing a denial of summary judgment and thus did not decide the "applicability or scope" of the sophisticated intermediary defense,<sup>154</sup> it did provide some direction for future courts. The *Gray* court indicated that, for a supplier to discharge its duty to warn of a *general* risk (such as the danger of inhaling silica particles), the intermediary's knowledge must be equal to the supplier's.<sup>155</sup> Additionally, if a supplier has *special* knowledge (such as the ineffectiveness of disposable respirators in protecting against silica inhalation) the supplier must share its knowledge unless it has reason to believe the intermediary already has that exact knowledge.<sup>156</sup> In both cases, the focus remains on the supplier's duty to the user.<sup>157</sup> In Minnesota, then, a supplier's duty to warn a non-sophisticated end user cannot be delegated or abrogated—only discharged by reasonable care.

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153. Simonett, *supra* note 17, at 368 (proposing that despite some problems, products liability law is evolving to meet the needs of litigants on both sides, especially through the Restatement (Third) of Torts: Products Liability).

154. *Gray*, 676 N.W.2d at 278.

155. *Id.* at 279.

156. *Id.*

157. *Id.* at 278.

Minnesota's "reasonableness" approach attempts to find a middle ground between suppliers and end users. If an end user is well informed, a court may still use the original sophisticated user defense to find that the supplier had no duty to warn.<sup>158</sup> If an end user is not sophisticated, courts must look to the conduct of the supplier in getting the warning to the end user, either directly or through an intermediary.<sup>159</sup> If the supplier's conduct was reasonable, the supplier is protected by the sophisticated intermediary defense.

In general, the adoption of specific defenses offers some clarification to industrial suppliers as to what is expected of them in terms of warning ultimate users. Suppliers also have a better chance to achieve a fair result in failure to warn litigation; when they can show that the ultimate user of their product was sufficiently knowledgeable, the court may find that they had no duty at all to warn.

On the other hand, the *Gray* court simultaneously adopted a reasonableness doctrine for use when the end user is not sophisticated. It also declined to extend the broader, learned intermediary defense. This means that the court is continuing to protect non-sophisticated end users and maintain the deterrence effect intended by the common law duty to warn. Manufacturers must still take all available steps to warn these end users and cannot simply rely on employers or other intermediaries without good reason.<sup>160</sup> When they fail in their duty, and plaintiffs are harmed, recovery is still possible under corrective justice principles.

By applying a well-reasoned, multifaceted approach to failure to warn litigation, the Minnesota Supreme Court in *Gray* emphasized individual justice over brute efficiency and "one-size-fits all" solutions.

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158. *Hill v. Wilmington Chem. Corp.*, 279 Minn. 336, 345, 156 N.W.2d 898, 904 (1968).

159. *Gray*, 676 N.W.2d at 278.

160. *Id.* (noting that supplier's reliance on intermediary must be reasonable).