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# Limitations on the Duty to Warn in South Carolina Products Liability Law

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South Carolina law recognizes that many products cannot be made completely safe for use.<sup>2</sup> Therefore, “[i]n order to prevent a product from being unreasonably dangerous, the seller may be required to give a warning on the product concerning its use.”<sup>3</sup> If a product includes a warning that – if followed – makes it safe for use, then the product is not defective or unreasonably dangerous.<sup>4</sup>

However, a manufacturer or seller does not always have a duty to warn, and South Carolina warnings law includes certain limitations on this duty. Some of these limitations are included in comment j. to Restatement (Second) of Torts § 402A, which South Carolina has incorporated by reference into its strict liability statute as the legislative intent of the chapter.<sup>5</sup> Case law has also provided guidance on the extent of the duty to warn depending on the nature of the danger and the sophistication of the product user. This article surveys the various limitations on the duty to warn in South Carolina products liability law.

## A. Common Allergies

The first exception to the duty to warn set forth in comment j. is that “the seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them.”<sup>6</sup> Although this exception to the duty to warn may be straightforward when the consumer’s conduct relates to avoiding individual food products, it becomes more problematic when these food products are ingredients in other dishes. Comment j. therefore qualifies this exception with additional language.

Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge of the presence of the ingredient and the danger.

For example, the Food Allergen Labeling and Consumer Act (“FALCA”) went into effect in 2006 to require that packaged foods containing milk, eggs, fish, crustacean shellfish, peanuts, tree nuts, wheat and soy must display them prominently in the ingredient list.<sup>7</sup> According to FALCA, these “Big Eight” food allergens account for 90 percent of all food-allergic reactions, and federal law requires their disclosure on packaged foods.<sup>8</sup> Comment j. provides some of the rationale for this disclosure: a substantial number of the population is allergic to these ingredients, and the consumer may not know if one of the ingredients is in a food product without the disclosure.

Neither South Carolina state nor federal courts have interpreted this specific aspect of comment j. in the context of a food products failure to warn case. However, in *Vaughn v. Nissan Motor Corp.*, 77 F.3d 736, 738 (4th Cir. 1996), the court stated in dicta that the “ordinary consumer” standard for determining if a product is unreasonably dangerous does not necessarily apply in the case of products associated with allergic reactions in an appreciable number of consumers.

## B. Products Consumed Over a Long Period of Time

Comment j. also carves out an exception to the duty to warn if the potential danger of a product relates to its use over a long period of time or in excessive quantities: “[A] seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized.”<sup>9</sup> As examples, the comment cites to alcoholic beverages and foods containing substances such as saturated fats. A seller has no duty to warn about the risks associated with such products from extended or excessive consumption.

Neither South Carolina state nor federal courts have interpreted this exception in comment j. In *Aldana v. R.J. Reynolds Tobacco Co.*, No. 2:06-3366-CWH, 2008 WL 1883404, at \*2 (D.S.C. Apr. 25,

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2008), the court cited to this portion of comment j. to support that the warnings for a defendant's cigarette products were not required to make the product itself "safe," but the court did not otherwise apply it to excessive or extended use of cigarettes.

### C. Obvious Risks and Matters of Common Knowledge

A seller is also not required to warn of dangers or potential dangers that are generally known and recognized by users.<sup>10</sup> This exception includes dangers that are open, obvious, or matters that should be "common sense" to the user.<sup>11</sup> The rationale for this exception is that the product is not defective or unreasonably dangerous because these dangers are contemplated by the ultimate user.<sup>12</sup> This exception applies where the obvious risk poses a danger to the user of the product or to others.

For example, operating an unlighted golf cart on a public highway at night has been held to present an open and obvious risk. In *Moore v. Barony House Restaurant, LLC*, the plaintiff brought negligence and strict liability claims against a golf cart manufacturer and claimed that the manufacturer failed to provide an adequate warning about operation of the cart at night and on public roads. The South Carolina Court of Appeals affirmed the circuit court's grant of summary judgment for both claims, finding that "operation of an unlighted golf car on a public highway at night presents an open and obvious risk."<sup>13</sup> Furthermore, the court stated that although questions of negligence are often for the jury, there is no duty to warn of an open and obvious risk as a matter of law.<sup>14</sup>

The threat of electrocution from placing a ladder in close proximity to power lines has also been held to be an open and obvious risk. *Anderson v. Green Bull, Inc.* involved a lawsuit by the personal representative of a roofer who was electrocuted when his aluminum ladder came in contact with overhead power lines. The ladder contained a red warning label that read, "KEEP ENTIRE UNIT CLEAR OF ALL UTILITY AND ELECTRICAL WIRING."<sup>15</sup> The trial court denied the manufacturer's motion for a directed verdict, the jury returned a \$50,000 verdict in favor of the plaintiff, and the trial court denied the manufacturer's motion for judgment notwithstanding the verdict.<sup>16</sup> However, the South Carolina Court of Appeals reversed the trial court's decisions. The Court of Appeals did not believe that there was any evidence from which the jury could have reasonably inferred that the ladder was defective because "the conductivity of an aluminum ladder is a condition commonly known and recognized."<sup>17</sup> "Any person of normal intelligence would know 'the risk posed by an aluminum ladder in close proximity to an energized high-voltage line.'"<sup>18</sup> The plaintiff also raised the issue of whether the ladder manufacturer should have provided a warning to users to shorten the length whenever the ladder's length would make it

more dangerous because of surrounding conditions, such as overhead high voltage transmission lines.<sup>19</sup> Because the manufacturer was not required to warn users to stay clear of power lines in the first place, the manufacturer was not required to warn users to take specific measures to stay clear of the lines (i.e., by moving the ladder, shortening it, or actions).<sup>20</sup>

*Moore* and *Anderson* involved injuries to the users of the products at issue. However, this exception also applies where certain use of a product poses a risk to someone else. A manufacturer is not required to warn about certain uses that could pose a danger to someone else as a matter of common sense. For example, in *Dema v. Shore Enterprises, Ltd.*, the South Carolina Court of Appeals held that an Aqua-Cycle water recreational vehicle was not defective for failure to include a warning label cautioning the user to "watch out for swimmers" and to "avoid strong current, wind, or waves."<sup>21</sup> In reaching its conclusion, the court stated as follows:

[U]sers of the Aqua-Cycle would be aware, as a matter of common sense, that they should be careful around swimmers in the surf. Because it is obvious that an Aqua-Cycle can cause injury to a swimmer, [the manufacturer] did not have a duty to warn Aqua-Cycle users of that risk.<sup>22</sup>

South Carolina courts have used similar analysis to determine that there is no duty to warn about overtightening of lug nuts so as to avoid cracking them.<sup>23</sup>

### D. Sophisticated Users and Learned Intermediaries

In addition to limiting the duty to warn about certain dangers, South Carolina law also limits the duty to warn based on either a user's level of sophistication or if the warning is provided to an intermediary who is better situated to provide any direct warnings. These similar legal principles are known as the "sophisticated user" and "learned intermediary" doctrines.

The "sophisticated user" doctrine holds that "a manufacturer of a product has no duty to warn users of that product of all its potential shortcomings in safety and effectiveness where that person is sufficiently sophisticated in the operations of the device or the field in which it is used."<sup>24</sup> Simply put, where a user or employer has a certain level of sophistication about the dangers of a product, the manufacturer is relieved of a duty to provide a direct warning about those dangers.<sup>25</sup>

Similarly, the "learned intermediary" doctrine holds that manufacturers of prescription drugs and medical devices discharge their duty of care to patients by providing warnings to the prescribing physicians.<sup>26</sup> The justification for this rule is that consumers cannot buy prescription drugs or medical devices directly from a manufacturer, and therefore

the manufacturer discharges its duty to warn by providing the warning to a learned intermediary. As stated by the Fourth Circuit Court of Appeals in *Talley v. Danek Med., Inc.*, 179 F.3d 154, 163 (4th Cir. 1999):

Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. As a medical expert, the prescribing physician can take into account the propensities of the drug, as well as the susceptibilities of his patient. His is the task of weighing the benefits of any medication against its potential dangers. The choice he makes is an informed one, an individualized medical judgment bottomed on a knowledge of both patient and palliative. Pharmaceutical companies then, who must warn ultimate purchasers of dangers inherent in patent drugs sold over the counter, in selling prescription drugs are required to warn only the prescribing physician, who acts as a "learned intermediary" between manufacturer and consumer.

Although both of these doctrines are well-known in products liability law, there is no South Carolina state appellate court case that explicitly adopts either of them. Rather, *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995) is the primary case that supports their application because one of the issues on appeal was whether or not the trial court had provided a correct charge of the law. The charge at issue was as follows:

Now, ladies and gentlemen, under South Carolina law, a manufacturer has no duty to warn of potential risks or dangers inherent in a product if the product is distributed to what we call a learned intermediary or distributed to a sophisticated user who might be in a position to understand and assess the risks involved, and to inform the ultimate user of the risks, and to, thereby, warn the ultimate user of any alleged inherent dangers involved in the product. Simply stated, the sophisticated user defense is permitted in cases involving an employer who was aware of the inherent dangers of a product which he, the employer purchased for use in his business. Such an employer has a duty to warn his employees of the dangers of the product.<sup>27</sup>

The South Carolina Court of Appeals concluded that the trial court properly charged the jury concerning the sophisticated user defense.<sup>28</sup>

From this explanation in *Bragg*, the sophisticated user and learned intermediary doctrines appear to enjoy acceptance in South Carolina courts. Federal courts have stated explicitly that South Carolina state courts would apply the learned intermediary rule in the drug and medical device context. In

*Brooks v. Medtronic, Inc.*, 750 F.2d 1227 (4th Cir. 1984), the Fourth Circuit Court of Appeals heard an appeal of a pacemaker case from the District of South Carolina, and one of the issues on appeal was whether the pacemaker manufacturer had a duty to warn the consumer directly, or whether the warnings to the physician were sufficient.<sup>29</sup> The court stated that "[a]lthough the South Carolina Supreme Court has not addressed the issue, we conclude it would adopt the [learned intermediary] rule, generally accepted and supported by sound policy, restricting the manufacturer's duty to warn to the prescribing physician."<sup>30</sup> From reviewing South Carolina strict liability law, the court pointed out that other jurisdictions had adopted the learned intermediary rule, and it believed that South Carolina would as well.<sup>31</sup>

Since *Brooks v. Medtronic*, numerous federal court decisions interpreting South Carolina law have reached this same conclusion.<sup>32</sup> Other practitioners have stated unequivocally that South Carolina has adopted the learned intermediary defense, sometimes citing *Bragg* or *Madison* as support.<sup>33</sup>

## E. Post-Sale Duty to Warn

South Carolina also limits a manufacturer's duty to warn after sale of the product. In *Bragg v. Hi-Ranger, Inc.*, the South Carolina Court of Appeals agreed with the trial court's charge that a manufacturer "has no duty to notify previous purchasers of its products about later developed safety devices or to retrofit those products if the products were nondefective under standards existing at the time of the manufacture or sale."<sup>34</sup> *Bragg's* language appears to apply to *improvements* in design after sale. Subsequent cases have also cited to *Bragg's* language and have indicated that South Carolina does not recognize a post-sale duty to warn.<sup>35</sup>

Although this is the current status of South Carolina law, recent opinions issued by the South Carolina Supreme Court have cited to the Restatement (Third) of Torts: Products Liability (1998) to support adoption of the risk-utility test as the exclusive test for a design defect claim.<sup>36</sup> Although this citation does not change South Carolina's lack of recognition of a post-sale duty to warn, it may have opened the door for plaintiffs to argue that South Carolina should adopt other sections of the Restatement (Third), and specifically section 10. Section 10 of the Restatement (Third) provides for "Liability Of Commercial Product Seller Or Distributor For Harm Caused By Post-Sale Failure To Warn," or a post-sale duty to warn.

Whether a manufacturer or seller has a duty to warn depends in large part on whether a product user realizes the potential dangers associated with the reasonably foreseeable uses of the product. *Gardner v. Q.H.S., Inc.*, 448 F.2d 238, 242-43 (4th Cir. 1971) (applying South Carolina law). However,

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South Carolina warnings law recognizes that certain product users and/or risks do not require a warning (i.e., either because of the user's level of knowledge or because of the nature of the risk). Therefore, any defense of a warnings claim should include careful analysis of the user and risk at issue to determine if South Carolina limits the duty to warn.

## Endnotes

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2 *Claytor v. General Motors Corp.*, 277 S.C. 259, 264, 286 S.E.2d 129, 132 (1982).

3 *Anderson v. Green Bull, Inc.*, 322 S.C. 268, 270, 471 S.E.2d 708, 710 (1996); see also *Claytor*, 277 S.C. at 264, 286 S.E.2d at 132.

4 *Anderson*, 322 S.C. at 270, 471 S.E.2d at 710; *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 427, 404 S.E.2d 354, 357 (Ct. App. 1998).

5 See S.C. Code Ann. § 15-73-30 (1976) ("Comments to § 402A of the Restatement of Torts, Second, are incorporated herein by reference thereto as the legislative intent of this chapter.").

6 Restatement (Second) of Torts § 402A cmt. j.

7 See 21 U.S.C. § 201 et. seq.

8 *Id.* at § 201(2).

9 Restatement (Second) of Torts § 402A cmt. j.

10 *Moore v. Barony House Restaurant, LLC*, 382 S.C. 35, 41, 674 S.E.2d 500, 504 (Ct. App. 2009); *Anderson*, 322 S.C. at 270, 471 S.E.2d at 710.

11 *Id.*; *Dema v. Shore Enterprises, Ltd.*, 312 S.C. 528, 435 S.E.2d 875 (Ct. App. 1993).

12 *Anderson*, 322 S.C. at 270, 471 S.E.2d at 710 (citing Restatement (Second) of Torts § 402A cmt. g. (1965) for the principle that "a product is defective only 'where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.'" (emphasis in original).

13 *Moore*, 382 S.C. at 42, 674 S.E.2d at 504.

14 *Id.*

15 *Anderson*, 322 S.C. at 270, 471 S.E.2d at 710.

16 *Id.* at 269, 471 S.E.2d at 710.

17 *Id.* at 271, 471 S.E.2d at 711.

18 *Id.*, 471 S.E.2d at 710.

19 *Id.* at 271 n.3, 471 S.E.2d at 711 n.3.

20 *Id.*

21 312 S.C. 528, 435 S.E.2d 875 (Ct. App. 1993).

22 *Id.* at 531-32, 435 S.E.2d at 876.

23 *Claytor v. General Motors Corp.*, 277 S.C. 259, 286 S.E.2d 129 (1982).

24 *Jones v. Danek Medical, Inc.*, No. 4:96-3323-12, 1999 WL 1133272, at \*7 (D.S.C. Oct. 12, 1999).

25 See, e.g., *Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985) (holding that corporations which supplied silica sand or related products used in casting process at foundry had no duty to warn foundry employees of risks and dangers of contracting silicosis where foundry had extensive knowledge of hazards associated with inhaling silica

dust, disease of silicosis, proper dust control methods and duty to warn).

26 See, e.g., *Odom v. G.D. Searle & Co.*, 979 F.2d 1001 (4th Cir. 1992) ("Under this doctrine, the manufacturer's duty to warn extends only to the prescribing physician, who then assumes responsibility for advising the individual patient of risks associated with the drug or device.").

27 *Bragg*, 319 S.C. at 549, 462 S.E.2d at 331-32.

28 *Id.*; see also *Madison v. American Home Prods. Corp.*, 358 S.C. 449, 595 S.E.2d 493 (1995) ("[S]trict liability is inconsistent with the learned intermediary doctrine, which places the duty to warn on the prescribing physicians, and not pharmacists....").

29 *Id.* at 1230.

30 *Id.* at 1231.

31 *Id.* at 1231.

32 See *Odom v. G.D. Searle Co.*, 979 F.2d 1001, 1003 (4th Cir. 1992); *Tarallo v. Searle Pharmaceutical, Inc.*, 704 F. Supp. 653, 659 n.2 (D.S.C. 1988); *Jones v. Danek Medical, Inc.*, No. 4:96-3323-12, 1999 WL 1133272, at \*7 (D.S.C. Oct. 12, 1999); *Sizemore v. Georgia-Pacific Corporation*, Nos. 6:94-2894 3, 6:94-2895 3, and 6:94-2896 3, 1996 WL 498410, at \*6 (D.S.C. Mar. 22, 1996); *Pleasant v. Dow Corning Corp.*, No. 3:92-3180-17, 1993 WL 1156110, at \*6 (D.S.C. Jan. 7, 1993).

33 See, e.g., <http://druganddevicelaw.blogspot.com/2007/07/headcount-whos-adopted-learned.html> (visited Feb. 21, 2011) (citing to *Madison* as support that South Carolina has adopted the rule in the non-prescription medical product case); Lynn H. Gorod, "The Evolving Duty of Pharmacists: To Warn or Not to Warn?" 16 S. Carolina Lawyer 14, 16 (July 2004) ("The basis for not extending this duty has widely been premised on the 'learned intermediary doctrine.' This doctrine, which has been accepted in many jurisdictions, including South Carolina, provides that manufacturers of prescription drugs have a duty to warn prescribing physicians of a drug's known dangerous propensities.") (Emphasis added).

34 *Bragg*, 319 S.C. at 548, 462 S.E.2d 331.

35 *Ervin v. Continental Conveyor & Equip. Co., Inc.*, 674 F. Supp.2d 709, 725 (D.S.C. 2009); *Campbell v. Gala Indus., Inc.*, No. 6:04-2036-RBH, 2006 WL, at \*4-5 1073796 (D.S.C. Apr. 20, 2006).

36 See *Branham v. Ford Motor Co.*, 390 S.C. 203, 223-24, 701 S.E.2d 5, 16 (2010) (citing to Restatement (Third) of Torts: Products Liability § 2b (1998) in support of adoption of risk-utility test); *Watson v. Ford Motor Co.*, 389 S.C. 434, 450, 699 S.E.2d 169, 177 (2010) (reiterating in footnote four its adoption of the Restatement (Third) approach for the risk-utility test in *Branham*).