



1-1-2010

# Defining Sophistication: Forecasting the Evolution of the Sophisticated User Defense in California Post-Johnson

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## Recommended Citation

Lauren A. Manning, *Defining Sophistication: Forecasting the Evolution of the Sophisticated User Defense in California Post-Johnson*, 42 MCGEORGE L. REV. (2016).

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# Defining Sophistication: Forecasting the Evolution of the Sophisticated User Defense in California Post-*Johnson*

Lauren A. Manning\*

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## I. INTRODUCTION

To prepare for his first triathlon, Brett Matherne, a Louisiana college student, purchased a bicycle complete with toe clips.<sup>1</sup> While the manual provided vague instructions for riders to release the straps prior to stopping the bicycle, Matherne struggled to properly use the clips as a novice and fell several times.<sup>2</sup> In order to remove his foot more quickly when stopping, Matherne grew accustomed to

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1. *Matherne v. Poutrait-Morin/Zefal-Christophe, Todson, Inc.*, 2002-2136 (La. App. 1 Cir. 12/12/03); 868 So. 2d 114, 115.

A toe clip is a thin metal cage attached to each pedal that holds the toe of a cyclist's shoe together with an adjustable leather strap that goes over the instep of the cyclist's foot. The toe clip is designed so that when the leather strap is manually tightened, the cyclist's foot will be securely fastened to the pedal. In order to get the foot off of the pedal, the strap must be manually loosened.

*Id.* at n.1.

2. *Id.* at 120.

riding with one of his toe straps significantly looser than the other.<sup>3</sup> Seven years later, this method proved detrimental when Matherne suffered severe injuries resulting from a collision with another bicycle.<sup>4</sup> During a race, Matherne's front tire clipped the back tire of the racer in front of him.<sup>5</sup> Unable to remove his foot quickly enough to detach from the bike, he was drug along the bike's skid path.<sup>6</sup>

When Matherne sued the bike manufacturer for failing to warn him of the danger of riding with the toe clips unstrapped, the court dismissed his claim on the ground that he was a sophisticated cyclist.<sup>7</sup> Applying Louisiana's approach to the sophisticated user doctrine, which defines "sophistication" as having actual knowledge of the danger, the court reasoned that Matherne had significant personal experience with the toe clips due to his seven years of cycling and his testimony that he had fallen several times while learning how to use the them.<sup>8</sup>

Countless sports and innumerable other hobbies are common endeavors for modern day Americans.<sup>9</sup> There is plausible doubt that a recreational cyclist, like Matherne, would ever contemplate whether involvement with recreational sports would someday preclude him or her from bringing suit against the manufacturer or supplier of necessary equipment.<sup>10</sup> If Louisiana defined "sophistication" differently, perhaps by focusing on professional experience, Matherne may not been classified as a sophisticated user.<sup>11</sup> Thus, even subtle differences in each jurisdiction's definition of "sophistication" will have a dramatic impact on who is able to recover from product related injuries.<sup>12</sup>

In 2008, the California Supreme Court formally adopted the sophisticated user defense.<sup>13</sup> Although the doctrine appears straightforward, other state and federal courts have not all adopted the same model of the doctrine.<sup>14</sup> Because

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3. *Id.* at 116.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 120.

8. *Id.* at 121.

9. U.S. Census Bureau, *Table 1212: Participation in Selected Sports Activities (2007)*, available at <http://www.census.gov/compendia/statab/2010/tables/10s1212.pdf> (last visited Dec. 26, 2010) (on file with the *McGeorge Law Review*).

10. *Matherne*, 868 So.2d at 115.

11. See *Haase v. Badger Mining Corp.*, 2003 WI App 192, 266 Wis.2d 970; 669 N.W.2d 737, 744-46 (holding that plaintiff's status as a professional sand foundry precluded them from bringing suit against supplier under the sophisticated user doctrine).

12. See *infra* Part III-IV.

13. *Johnson v. American Standard, Inc.*, 179 P.3d 905 (Cal. 2008).

14. See, e.g., *Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co.*, 532 F.2d 501 (5th Cir. 1976) (precluding a manufacturer's duty to warn sophisticated users "of dangers of which the buyer either knows or should be aware."); *Hines v. Remington Arms Co., Inc.*, 94-0455 (La. 12/8/94); 648 So. 2d 331 (defining a sophisticated user as someone who is familiar with the product and its potential dangers); *Pavlidis v. Galveston Yacht Basin, Inc.*, 727 F.2d 330 (5th Cir. 1984) (examining the manufacturer's marketing practices in determining user sophistication); *Billiar v. Minnesota Min. & Mfg. Co.*, 623 F.2d 240 (2d Cir. 1980) (describing limitation of the sophisticated user defense to tradespeople or professionals only); *Lockett v.*

applicability of the defense turns on whether the plaintiff is a sophisticated user, the definition of sophistication is the crux of the defense.<sup>15</sup> Some courts have addressed this potential ambiguity by limiting the defense to professionals and members of trades.<sup>16</sup> Other courts have crafted models of the defense that give less deference to the plaintiff's professional capacities, instead focusing on elements such as the group of purchasers targeted by the manufacturer.<sup>17</sup> Despite the prevalence of these different definitions, the California Supreme Court provided little guidance regarding whether the defense will apply to professionals and members of trades exclusively, or whether it will include laypersons as well.<sup>18</sup>

Fortunately, the Court specified three policy objectives that aided the decision for adopting the defense in California.<sup>19</sup> In sum, these goals include: (1) a desire to prevent those plaintiffs who have prior notice of the danger from suing manufacturers for their injuries; (2) filtering out plaintiffs who have elevated obviousness of the danger as a result of their individual experience with the product; and (3) reducing manufacturer liability in order to prevent the detrimental proliferation of over-warning.<sup>20</sup> Using these policy goals as guideposts may be helpful for predicting how this defense may develop in the future.<sup>21</sup> This Comment surveys the various approaches other jurisdictions have adopted for defining user sophistication and recommends that California adopt the familiarity approach in light of these three policy reasons.

Part II of this article discusses section 388 of the Restatement, which provides the theoretical underpinnings of the defense.<sup>22</sup> Part III presents an overview of *Johnson v. American Standard, Inc.*<sup>23</sup> and highlights portions of the opinion that create uncertainty regarding how the defense should be applied in California. Also, this Comment explores the three policy goals identified by the court for adopting the sophisticated user defense. Part IV offers a survey of four approaches from other jurisdictions that have adopted different ways of defining user sophistication: the "should have known" model,<sup>24</sup> the professional

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General Electric Co., 376 F.Supp. 1201 (E.D.Pa.1974) (determining user sophistication based on whether the knowledge of the user is equal to that of the supplier).

15. See *infra* Part III.B.

16. *Billiar*, 623 F.2d at 243.

17. *Pavrides*, 727 F.2d at 330.

18. See *infra* Part III.B.

19. See generally *Johnson v. American Standard, Inc.*, 179 P.3d 905 (Cal. 2008) (adopting the sophisticated user defense in California).

20. *Id.*

21. *Id.*

22. RESTATEMENT (SECOND) OF TORTS § 388 (1965).

23. 179 P.3d 905.

24. See *Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co.*, 532 F.2d 501 (5th Cir. 1976) (precluding a manufacturer's duty to warn sophisticated users "of dangers of which the buyer either knows or should be aware.").

considerations model;<sup>25</sup> the targeted marketing model;<sup>26</sup> and the familiarity model.<sup>27</sup> Finally, Part V assesses the suitability of each approach in light of *Johnson's* three policy goals, and ultimately chooses the familiarity approach as the best model of the sophisticated user defense for California.

## II. THE FOUNTAINHEAD

A popular starting point for several jurisdictions' approach to the sophisticated user doctrine is section 388 of the Restatement (Second) of Torts.<sup>28</sup> In general, this provision states that a supplier is subject to liability if the supplier's knowledge regarding both the product and the intended user meets the three requirements laid out in subdivisions (a) through (c).<sup>29</sup> Under subdivision (a), the user should know or have reason to believe that the product, when used for its intended purpose, is dangerous or has the potential to become dangerous.<sup>30</sup> Setting aside subdivision (b) for a moment, subdivision (c) states that a supplier must take reasonable care to inform the user of these inherent or potential dangers.<sup>31</sup>

Subdivision (b) provides the strongest influence in shaping the contours of the sophisticated user defense.<sup>32</sup> This provision exempts the supplier from liability when the supplier "has no reason to believe that those for whose use the [product] is supplied will realize its dangerous condition."<sup>33</sup> However, the analytical roots of this defense run deepest in comment k. Entitled, "*When warning of defects unnecessary*," it states that although the dangerous condition may be readily observable, it still may not be readily apparent to persons of special expertise.<sup>34</sup> Under these conditions:

[I]f the supplier, having such special experience, knows that the condition involves danger and has no reason to believe that those who use it will have such *special* experience as will enable them to perceive

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25. See *Billiar v. Minnesota Min. & Mfg. Co.*, 623 F.2d 240 (2d Cir. 1980) (describing limitation of the sophisticated user defense to tradespeople or professionals only).

26. See *Pavlidis v. Galveston Yacht Basin, Inc.*, 727 F.2d 330 (5th Cir. 1984) (examining the manufacturer's marketing practices in determining user sophistication).

27. See *Hines v. Remington Arms Co., Inc.*, 94-0455 (La. 12/8/94); 648 So. 2d 331 (defining a sophisticated user as someone who is familiar with the product and its potential dangers).

28. *Johnson*, 179 P.3d at 911.

29. RESTATEMENT (SECOND) OF TORTS § 388 (1965).

30. *Id.* § 388, subdiv. (a).

31. *Id.* § 388, subdiv. (c).

32. *Id.* § 388, subdiv. (b).

33. *Id.*

34. *Id.* § 388, cmt. k.

the danger, he is required to inform them of the risk of which he himself knows and which he has no reason to suppose that they will realize.<sup>35</sup>

This specialized knowledge gives birth to a class of defendants who invoke the sophisticated user defense by distinguishing the plaintiff from other users on the basis that the plaintiff's knowledge about potential dangers is more sophisticated than that of a layperson, who typically possesses little or no awareness of the product's potential dangers.<sup>36</sup>

While section 388, subdivision (b), provides a strong basis for the sophisticated user doctrine, comment k leaves open the important question of determining who will qualify as someone with "special experience."<sup>37</sup> Comment k specifically references "persons of special experience," but the commentary to section 388 fails to expand on who may fall into this special class of product users, or to discuss how much experience is necessary to qualify as special experience.<sup>38</sup> These unanswered questions lurking in section 388's commentary led to the proliferation of multifarious articulations of the sophisticated user defense amidst courts, each proposing different contours to the ultimate shape of the defense.<sup>39</sup>

### III. JOHNSON V. AMERICAN STANDARD, INC.

#### A. Making it Official

In *Johnson v. American Standard, Inc.*, the plaintiff, William Keith Johnson, was a certified heating, ventilation, and air conditioning (HVAC) technician who had received extensive training, including an Environmental Protection Agency (EPA) universal certification.<sup>40</sup> This is the highest level of certification offered by the EPA to HVAC technicians, allowing certified individuals to purchase and work with refrigerant for commercial air conditioning systems.<sup>41</sup> In his claim,

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35. *Id.* (emphasis added).

36. *See id.* (describing the basic framework of the sophisticated user doctrine).

37. *Id.*

38. *See id.* (discussing "persons of special experience" without providing a definition of these persons or examples of who would fall within this category).

39. *See, e.g.,* *Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co.*, 532 F.2d 501 (5th Cir. 1976) (precluding a manufacturer's duty to warn sophisticated users "of dangers of which the buyer either knows or should be aware."); *Hines v. Remington Arms Co., Inc.*, 94-0455 (La. 12/8/94); 648 So. 2d 331 (defining a sophisticated user as someone who is familiar with the product and its potential dangers); *Pavlidis v. Galveston Yacht Basin, Inc.*, 727 F.2d 330 (5th Cir. 1984) (examining the manufacturer's marketing practices in determining user sophistication); *Billiar v. Minnesota Min. & Mfg. Co.*, 623 F.2d 240 (2d Cir. 1980) (describing limitation of the sophisticated user defense to tradespeople or professionals only); *Lockett v. Gen. Elec. Co.*, 376 F. Supp. 1201 (E.D. Pa. 1974) (determining user sophistication based on whether the knowledge of the user is equal to that of the supplier).

40. 179 P.3d 905, 908 (Cal. 2008).

41. *Id.* Such extensive training is necessary because "[l]arge air conditioning systems commonly use R-22, a hydrochlorofluorocarbon refrigerant . . . that can decompose into phosgene gas when exposed to flame or

Johnson alleged that he developed pulmonary fibrosis from being exposed to R-22, which is produced when refrigerant lines are brazed.<sup>42</sup> More specifically, he argued the defendant was obligated to warn him of the dangers in using heat or flame near hydro-chlorofluorocarbon refrigerant and the failure to satisfy this duty to warn was the direct cause of his ailment.<sup>43</sup>

In affirming the Court of Appeal's holding, the California Supreme Court laid out its interpretation of the sophisticated user defense,<sup>44</sup> concluding that manufacturers shall not be liable for failing to warn sophisticated users of dangers the user knew or should have known.<sup>45</sup> The court explained that "individuals who represent that they are trained or are members of a sophisticated group of users are saying to the world that they possess the level of knowledge and skill associated with that class"<sup>46</sup> and "[i]f they do not actually possess that knowledge or skill" because, for example, they "misread their training manuals, failed to study . . . or simply [forgot] what they were taught",<sup>47</sup> the actual lack of their knowledge "should not give rise to liability on the part of the manufacturer."<sup>48</sup>

In discussing the sophisticated user doctrine, the court listed three theories, or goals, that supported their decision to adopt the defense in California: the causation theory of the defense; the elevated obviousness theory of section 388; and a public policy reason regarding how to achieve optimal effectiveness of safety warnings.<sup>49</sup>

The causation theory of the defense stems from the overall purpose of the sophisticated user doctrine, which is to "inform consumers about a product's hazards and faults of which they are unaware, so that they can refrain from using the product altogether or evade the danger by careful use."<sup>50</sup> More specifically, the court reasoned that a sophisticated user who is already aware of the product's dangers has prior notice of the danger, and therefore cannot claim that the manufacturer's failure to warn of the danger was the proximate cause of the harm.<sup>51</sup>

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high heat, as could happen while a technician is brazing air conditioner pipes containing residual refrigerant." Inhaling phosgene gas can lead to serious health problems. *Id.*

42. *Id.*

43. *Id.* at 909.

44. *Id.* at 911.

45. *Id.* at 914.

46. *Id.*

47. *Id.*

48. *Id.*

49. See *Johnson v. American Standard, Inc.*, 179 P.3d 905, 911 (Cal. 2008) (discussing the policy reasons for adopting the sophisticated user defense in California).

50. *Id.* at 910.

51. *Id.* at 905 (quoting *Billiar v. Minnesota Min. & Mfg. Co.*, 623 F.2d 240, 243 (2d Cir. 1980)).

Second, the court paid a great deal of attention to section 388 of the Restatement (Second) of Torts and its relation to the obvious danger rule.<sup>52</sup> According to section 388, while some aspects of the product's danger may not be obvious to the average user, those dangers will be obvious to the expert user, thereby negating the manufacturer's duty to warn those sophisticated individuals.<sup>53</sup> *Johnson* adopted this defense due to its ability to target those sophisticated individuals to whom the product's dangers are more readily apparent.<sup>54</sup> In essence, section 388 describes the sophisticated user defense as accounting for the heightened degree of product danger that some individuals will be able to identify based on their prior experience or familiarity with the product.<sup>55</sup>

Finally, the court touched on a public policy theory for adopting the sophisticated user defense.<sup>56</sup> Without the sophisticated user defense, manufacturers would be required to warn product users about nearly every aspect of the product's danger.<sup>57</sup> This practice would be extremely burdensome for manufacturers and would result in mass consumer disregard of product warnings.<sup>58</sup> Furthermore, the court stated that while manufacturers must bear the responsibility for any harm caused to the unknowing user, manufacturers "are not insurers . . . for the mistakes or carelessness of consumers who should know of the dangers involved."<sup>59</sup> In this regard, the *Johnson* court felt the sophisticated user defense would mitigate the danger of over-warning consumers, thereby ensuring that warnings would best promote user safety.<sup>60</sup>

While the court's articulation of the defense and the three reasons offered for adopting it appear straightforward, ambiguity in the court's subsequent discussion of how the defense will operate allows for multifarious conclusions regarding exactly who should be classified as a sophisticated user.<sup>61</sup>

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52. *Id.* at 911.

53. *Id.* at 912 ("Just as a manufacturer need not warn ordinary consumers about generally known dangers, a manufacturer need not warn members of a trade or profession (sophisticated users) about dangers generally known to that trade or profession.").

54. *Id.*

55. *Id.* at 914.

56. *Id.*

57. *Id.*

58. *Id.* (quoting Finn v. G. D. Searle & Co., 677 P.2d 1147 (Cal. 1984) (quoting Twerski et al., *The Use and Abuse of Warnings in Products-Liability - Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 521 (1976))).

59. *Id.*

60. *Id.*

61. *See generally id.* (adopting the sophisticated user defense in California without clearly specifying which model of the defense will apply).



*B. Inconsistency in the Court's Opinion*

While *Johnson* does not express an outright intent to limit the doctrine to professionals, there is language in the opinion suggesting that this is precisely what the court intended.<sup>62</sup> While reviewing origins of the defense, the court discusses how other jurisdictions interpreted subdivision (b) to mean manufacturers who reasonably believe the user will know or should know about a product's risk do not have to provide these users with a warning.<sup>63</sup> The court found that "[t]his is 'especially [true] when the user is a professional who should be aware of the characteristics of the product.'"<sup>64</sup> This is ambiguous because the court insinuates that while application of the defense is especially appropriate when the plaintiff is a professional, application of the defense will not be limited to that specific scenario.

Next, the court identified a narrower, more exclusive approach when characterizing the defense as "the exception to the principle that consumers generally lack knowledge about certain products" making them unaware of the product's potential danger.<sup>65</sup> More specifically, the court defined this exception as being applicable to "those *individuals or members of professions* who do know or should know about the product's potential dangers, that is, sophisticated users, [to whom] the dangers should be obvious, and [to whom] the defense should apply."<sup>66</sup> There is little clarity for whether the court meant individuals of a profession or individuals as in laypersons who are not employed in professional or certified capacities. Similar to how manufacturers are not required to warn ordinary consumers of commonly recognized dangers, the court stated, "a manufacturer need not warn members of a trade or profession (sophisticated users) about dangers generally known to that trade or profession."<sup>67</sup> This language provides a strong basis for arguing the court intended a more exclusive application of the defense.

Subsequent statements in the opinion create further confusion regarding whether the court intended a more exclusive or more inclusive application of the defense.<sup>68</sup> For example, the court's reference to "training manuals, . . . [the study of] the information in those materials,"<sup>69</sup> or the undertaking of classes suggests the plaintiff must have undergone (or been required to complete) some sort of educational employment training for the defense to apply, such as Johnson's

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62. *Id.* (adopting the sophisticated user defense in California without clearly specifying which model of the defense will apply).

63. *Id.* at 911.

64. *Id.* (emphasis added) (quoting *Strong v. E.I. Du Pont de Nemours Co., Inc.*, 667 F.2d 682, 687 (8th Cir. 1981)).

65. *Id.* at 912.

66. *Id.*

67. *Id.*

68. *See id. generally* (adopting the sophisticated user defense without specifying which model applies).

69. *Id.* at 914.

universal certification from the EPA.<sup>70</sup> Similarly, the court stated, “[t]he focus of the defense . . . is whether the danger in question was so generally known within the *trade or profession* that a manufacturer should not have been expected to provide a warning specific to the group to which the plaintiff belonged.”<sup>71</sup> The court provided further support for an exclusive interpretation by finding that individuals representing themselves as being trained in a particular field or as “members of a sophisticated group of users” should be held to possessing the corresponding level of training associated with that class regardless of the knowledge he or she actually possesses.<sup>72</sup>

Towards the end of the opinion, the court swayed toward an inclusive interpretation by affirming the court of appeal’s understanding of the defense as eliminating manufacturers’ duty to warn users of an “expected user population” who should generally be aware of the product’s inherent dangers.<sup>73</sup> The phrase “expected user population” is far more inclusive than the court’s earlier reference to members of a “trade or profession,” creating significant uncertainty regarding to whom the defense will apply.<sup>74</sup>

#### IV. IN SEARCH OF A SUITABLE STANDARD

In light of the uncertainty regarding how the sophisticated user defense will apply in California, a survey of how other jurisdictions apply this defense may illuminate how the defense could potentially develop in California post-*Johnson*. In adopting the defense, each jurisdiction has augmented comment k<sup>75</sup> by weaving in different elements to determine whether the plaintiff is a sophisticated user.<sup>76</sup> The following subsections will provide a sampling of four approaches that courts have employed to assist them in defining user sophistication.

##### A. The “Should Have Known” Model

The “should have known” model dictates that a manufacturer need not warn a sophisticated user of the dangers he or she knows or should have known.<sup>77</sup> A unique attribute of this defense is that even if the plaintiff did not have actual knowledge of the danger, the plaintiff may still be classified as a sophisticated user.<sup>78</sup> In essence, the manufacturer is allowed to rely on the user’s professional

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70. *Id.* at 908.

71. *Id.* at 915 (emphasis added).

72. *Id.* at 914.

73. *Id.* at 916 .

74. *Id.*

75. *See supra* Part II (providing an overview of the origins of the sophisticated user doctrine.).

76. RESTATEMENT (SECOND) OF TORTS § 388 (1965).

77. *Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co.*, 532 F.2d 501, 504 (5th Cir. 1976).

78. *See* 63 AM. JUR. 2D *Products Liability* § 1163 (2009) (discussing the professional considerations model of the sophisticated user defense).

experience and make assumptions about the user's expertise.<sup>79</sup> Thus, the "should have known" model defines comment k's reference to "special experience" as an objective body of knowledge within a trade or profession.<sup>80</sup>

In *Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co.*, the plaintiff Bradco, a company engaged in exploratory drilling, claimed it had to abandon one of its wells because Youngstown's product, P-105 high-strength tubing, was unreasonably hazardous for its intended purpose.<sup>81</sup> When the tubing fractured, Bradco was forced to abandon the drilling expedition<sup>82</sup> and argued Youngstown had a duty to warn that the tubing could be dangerous even when exposed to only trace quantities of hydrogen sulfide.<sup>83</sup> In Louisiana, the 'smell test' was the accepted method for detecting hydrogen sulfide, which dictates that if one does not smell hydrogen sulfide, no further test is conducted to determine its presence.<sup>84</sup> However, even undetectable traces of hydrogen sulfide can lead to embrittlement of the P-105 tubing.<sup>85</sup> The ultimate issue before the court, therefore, was "whether Youngstown had a duty to provide a double warning, i.e., that P-105 tubing was unsafe for use in a [hydrogen sulfide] environment and that the 'smell test' was an inadequate means to assure safe use."<sup>86</sup>

Based on expert testimony regarding the oil and gas industry's awareness of the dangers of hydrogen sulfide,<sup>87</sup> the court concluded the plaintiff's status as an experienced oil and gas producer charged it with the knowledge that, despite the absence of hydrogen sulfide odor, P-105 tubing may still be weakened from trace amounts of the chemical.<sup>88</sup> The court relied on publications previously circulated in the industry discussing the problem and the American Petroleum Institute's advisory warning to conduct pre-tests for possible corrosive substances.<sup>89</sup> Notwithstanding industry warnings and previously circulated publications, Bradco claimed to be unaware of the specific shortcomings of the "smell test".<sup>90</sup> The court dismissed this argument and held that Youngstown had no duty to provide any warning beyond what was commonly known in the industry.<sup>91</sup> This is

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79. *Id.*

80. See generally *Bradco Oil & Gas Co.*, 532 F.2d 501 (applying the "should have known" model of the sophisticated user defense).

81. *Id.* at 503 (5th Cir. 1976) (applying the "should have known" model of the sophisticated user defense); see also RESTATEMENT (SECOND) OF TORTS § 388, cmt. k (1965) (providing the foundation for the sophisticated user doctrine).

82. *Bradco Oil & Gas Co.*, 532 F.2d at 503.

83. *Id.* Hydrogen sulfide is an asphyxiant that can cause moderate to severe respiratory irritations or death depending on the level of exposure. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 504.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

an excellent illustration of the broad inclusiveness of the “should have known” standard.<sup>92</sup>

*B. The Professional Considerations Model*

This model of the sophisticated user defense is premised on the idea that experienced professionals who deal exclusively with certain products are more likely to know about potential danger than the average consumer.<sup>93</sup> Application of the professional considerations model is extremely similar to the “should have known” standard; the only difference is that the court focuses on whether the danger is something the plaintiff knew or should have known by virtue of her membership in a certain profession or trade.<sup>94</sup> Jurisdictions employing this model interpret comment k’s “special experience” as indicating some sort of professional training or certification, providing a bright line test for determining whether the plaintiff is a sophisticated user.<sup>95</sup>

In *Billiar v. Minnesota Min. & Mfg. Co.*, the plaintiff, who worked for an electronic company, frequently used an electrical resin named Scotchcast Resin No. 5 (Scotchcast), manufactured by 3M.<sup>96</sup> The plaintiff filed suit after accidentally spilling Scotchcast and absentmindedly wiping her face before washing her hands.<sup>97</sup> Despite following the proper procedures for cleaning an affected area, the exposure resulted in a severe chemical burn that required several skin grafts.<sup>98</sup> The plaintiff claimed 3M failed to warn her fully of the potential dangers of Scotchcast.<sup>99</sup>

The court focused on the sophisticated user defense—noting the doctrine “has been applied *only to professionals and skilled tradespeople*”<sup>100</sup>—and held the plaintiff did not fall within this group because she had only worked as an assembler for ten months.<sup>101</sup> Despite the defendant’s assertion that this period of time was sufficient to provide requisite familiarity with Scotchcast and its potential dangers, the court concluded that the sophisticated user doctrine has not

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92. *Id.*

93. See 63 AM. JUR. 2D *Products Liability* § 1163 (2009) (discussing the professional considerations model of the sophisticated user defense).

94. *Id.* § 1163.

95. *Billiar v. Minnesota Min. & Mfg. Co.*, 623 F.2d 240, 243 (2d Cir. 1980).

96. *Id.* at 242.

97. *Id.*

98. *Id.*

99. *Id.* at 244. However, if the court is unable to determine as a matter of law that the plaintiff is a professional who also possesses actual knowledge of the danger, the court will allow the jury to determine if the manufacturer’s duty to warn was negated because the plaintiff nevertheless possessed actual knowledge of the danger. *Id.*

100. *Id.* at 243 (emphasis added).

101. *Id.* at 244.

been applied to laypersons, even when they have some familiarity with the product.<sup>102</sup>

This case demonstrates how difficult it will be for defendants to assert the sophisticated user defense absent clear proof that the plaintiff is a professional or member of a trade.<sup>103</sup> For example, the defendant demonstrated that the plaintiff's supervisor warned her about what would happen if the chemical touched her skin, and that the plaintiff had prior encounters with the toxic effects of Scotchcast, receiving medical attention during each of these prior incidents.<sup>104</sup> Perhaps even more probative was the plaintiff's admission that she read the warning label on the Scotchcast container.<sup>105</sup> Based on this determination, the court was unable to hold that the plaintiff was a sophisticated user as a matter of law.<sup>106</sup>

Another unique consequence of applying the professional considerations model is its propensity for alleviating a manufacturer's duty to warn the end user where the plaintiff's employer was the direct purchaser of the product.<sup>107</sup> Because the manufacturer's ability to communicate with the end user is limited, the duty to warn is nullified by placing the burden of delivery on the employer who has direct contact with the end user.<sup>108</sup>

In *Haase v. Badger Mining Corp.*, the plaintiff sued the defendant manufacturer for failing to warn him of the dangers from inhaling silica sand particles.<sup>109</sup> The court discussed the sophisticated user defense and reasoned that situating the duty to warn with the purchaser-employer allows that party, who is more familiar with how employees will use the product, to determine which warnings are most relevant for that particular employee.<sup>110</sup> Because the employer was a professional with significant experience and knowledge regarding the dangers of silica dust inhalation (including information on how to protect against

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102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. See *Ryntz v. Afrimet Indussa, Inc.*, 887 F.2d 1087 (6th Cir. 1989) (holding that defendant cobalt suppliers had no duty to warn employee of product hazards when employer was a sophisticated user with full knowledge of product's dangerous propensities); *Cook v. Branick Mfg., Inc.*, 736 F.2d 1442, 1446 (11th Cir. 1984) ("[W]henever a third party has a duty to warn of a dangerous condition in the workplace that duty is discharged by informing the employer of the dangerous condition—warning to each of the employer's individual employees . . . then becomes the responsibility of the employer."); see also Kenneth M. Willner, *Failures to Warn and the Sophisticated User Defense*, 74 VA. L. REV. 579, 580 (1988) (arguing that removing the manufacturer's duty to warn the end user and relying instead on the purchasing-chain to deliver warnings is a more effective way to ensure that the right warning will reach the right user of the product).

108. See Willner, *supra* note 107 (arguing that removing the manufacturer's duty to warn the end user and relying instead on the purchasing-chain to deliver warnings is a more effective way to ensure that the right warning will reach the right user of the product).

109. 2003 WI App 192, 669 N.W.2d 737, 739 (noting that inhaling silica sand particles can lead to the development of silicosis).

110. *Id.* at 743-44.

those dangers), the court ruled in favor of the defendant.<sup>111</sup> For example, the employer had been operating for over 120 years, its members belonged to the American Foundrymen's Society, and two former safety directors testified they would classify the employer as a technologically advanced, well-informed member of the industry who diligently followed industry standards and government regulations.<sup>112</sup> Based on the plaintiff's experience and failure to heed the defendant's warnings, the court concluded the defendant had no duty to warn the plaintiff directly.<sup>113</sup>

### C. The Targeted Marketing Model

This unique two-pronged approach shifts focus away from the plaintiff's classification and instead focuses on the manufacturer's marketing practices.<sup>114</sup> Essentially, the court asks a threshold question before determining whether the plaintiff is a sophisticated user: is the product marketed to professionals who have experience in using that product, or is the product marketed to the "man-in-the-street?"<sup>115</sup> If the court determines that the product is marketed to the "man-in-the-street," manufacturers are no longer afforded the luxury of assuming that individuals who use their products will know how to use it safely.<sup>116</sup> The main rationale for applying this two-pronged approach is that the adequacy of a warning "cannot be evaluated apart from the knowledge and expertise of those who may reasonably be expected to use or otherwise come into contact with the product as it proceeds along its intended marketing chain."<sup>117</sup> Therefore, this model responds to the ambiguity of comment k by defining "special experience" from the point of view of the manufacturer, not the plaintiff.<sup>118</sup>

An illustration of how the court applies the "man-in-the-street" prong can be found in *Pavrides v. Galveston Yacht Basin, Inc.*<sup>119</sup> Here, the plaintiff was deep-sea fishing when his Robalo R-236 motorboat capsized because the bilge plug either fell out or was left open causing the bilge to fill with water.<sup>120</sup> The R-236 was widely known for being extremely safe and for having special drain holes that allowed water to drain from the boat when it moved forward at a slow speed, thus providing a "self-bailing" mechanism.<sup>121</sup>

111. *Id.* at 745.

112. *Id.* at 740-41.

113. *Id.* at 745.

114. *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 465-66 (5th Cir. 1976).

115. *Pavrides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338 (5th Cir. 1984).

116. *Id.* at 339.

117. *Martinez*, 529 F.2d at 465-66.

118. RESTATEMENT (SECOND) OF TORTS, §388, cmt. k (1965).

119. 727 F.2d 330.

120. *Id.* at 333. "The bilge is the space between the double bottoms of a boat. In the Robalo 236 this space was empty." *Id.* at n.3.

121. *Id.*

Prior to the plaintiff's purchase of his Robalo R-236, the company merged with the defendant, another boat manufacturer.<sup>122</sup> In subsequent production, the R-236 no longer included a fully-foamed hull or an automatic bilge pump.<sup>123</sup> The hollow bilge space "meant that, unlike all other Robalos, the R-236 was not completely self-bailing," as the only way to remove water was by manually engaging the bilge pump.<sup>124</sup> Neither the dealers who sold the boat to the plaintiff nor the owner's manual explained that the bilge plug was capable of falling out accidentally or of the dangers that could result from water entering the bilge space.<sup>125</sup>

The Texas Court of Appeal concluded the defendant improperly assumed that a reasonably prudent boater would have known the dangers of operating a boat in the ocean while the bilge space was open.<sup>126</sup> Because the defendant marketed these boats to the general public, the court reasoned that users might not know that bilge plugs can fall out while at sea or that there was no flood-warning.<sup>127</sup> In sum, this case demonstrates how a manufacturer's duty to warn is much more significant under the "man-in-the-street" prong of the analysis.

Alternatively, if the court determines a product is marketed to professionals, the defendant manufacturer is allowed to assert the sophisticated user defense.<sup>128</sup> For example, in *Martinez v. Dixie Carriers, Inc.*, the court found that the defendant was allowed to use the sophisticated user defense because the product was marketed to professionals.<sup>129</sup> The plaintiff, a shore-based barge worker, was

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122. *Id.*

123. *Id.*

124. *Id.* However, if the bilge space filled with water, the bilge pump batteries could also become flooded, which was what happened to the plaintiff and his shipmates. At this point, it would be too dangerous for the boat operator to open the bilge to determine why water was entering the bilge or to replace the bilge drain plug. *Id.*

125. *Id.* at 335-36.

[N]or does [the manual] mention that the R-236 has a void bilge space, a bilge drain and a bilge drain plug. It does not indicate that the bilge drain plug could come off accidentally; it does not say how an operator is supposed to be aware of the bilge filling with water; it does not state that when water appears on deck in the rear of the cockpit it could well mean that the bilge is flooded and that in consequence the electrical system, including the bilge pump, is in immediate danger of failing and that the engines may shortly fail as well. Nor does it note that replacing the bilge drain plug when the bilge is full of water is a very difficult and hazardous procedure.

*Id.* at 335.

126. *Id.* at 339.

127. *Id.* In assessing the applicability of the sophisticated user defense, the court determined the defendant marketed the R-236 to the general public based on the fact that the defendant did not impose any restrictions on the sale of the R-236, making it available to even a novice boatman. *Id.*

128. *Id.* at 338-39

Where, for example, a product is marketed solely to professionals experienced in using the product, the manufacturer may rely on the knowledge which a reasonable professional would apply in using the product. Where, however, the product is marketed to the general public, the manufacturer must tailor the warning to the man-in-the-street.

*Id.*

129. *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 461 (5th Cir. 1976).

overcome by noxious fumes while stripping a barge that formerly transported Hytrol-D, a petrochemical mixture containing benzene.<sup>130</sup> The defendant chemical manufacturer employed several warning mechanisms, including a Benzene Warning and Cargo Information Card provided by the Manufacturing Chemists Association, which were placed on the barge along with a product identification card to accompany the shipment.<sup>131</sup>

Applying Texas law, the court determined the defendant was not liable for failing to warn the plaintiff of dangers associated with Hytrol-D because the defendant only marketed the product to “industrial users who utilized it in the manufacture of gasoline” and because there was absolutely no evidence that Hytrol-D was to “be sold to or used by the general consuming public.”<sup>132</sup> Additionally, the plaintiff was an experienced professional, justifying the defendant’s assumption that its warnings need only be sufficient to warn a professional about the potential danger of its products.<sup>133</sup> This case demonstrates how the court’s initial determination of whether the product is marketed to laypersons or professionals has drastic implications for the success of the plaintiff’s claim.<sup>134</sup>

#### D. The Familiarity Model

Similar to the actual knowledge standard, the familiarity standard evaluates whether the plaintiff had any firsthand experience with the product to alert him or her to the danger that caused the injury.<sup>135</sup> In contrast with other models of the defense, jurisdictions proscribing to the familiarity model have declined to formulate a clear-cut definition for “special experience,” considering the plaintiff’s potential sophistication on a free-flowing spectrum.<sup>136</sup> For example, in

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130. *Id.*

131. *Id.* at 462.

This warning card displayed two red skull and crossbones insignias, indicated that only properly protected and authorized personnel should be used to effect cargo transfer, detailed a variety of hazards including the harmfulness of the chemical’s vapors, and provided instructions for handling various possible accident or emergency situations. The benzene warning card was selected because specific Coast Guard instructions required that Hytrol-D be classified and regulated as benzene while in marine transit. DuPont maintains that in addition to these two warnings, one of its employees placed a product identification card in the barge’s ‘tube’-a special compartment on the barge which was the normal repository of such documents and was designed to keep them out of the weather.

*Id.*

132. *Id.* at 463.

133. *Id.* at 465. Given the highly technical nature of barge stripping and the tank cleaning trade, the plaintiff had been as a shore tank cleaner for at least eight years. *Id.*

134. *See id.* at 465-66 (determining plaintiff was a sophisticated benzene user based on his professional experience as a barge stripper).

135. Daniel J. Herling & Leyla Mujkic, *CA Adopts the Sophisticated User Doctrine*, 27 No. 1 LJN’s PROD. LIAB. L. & STRATEGY 3 (2008).

136. RESTATEMENT (SECOND) OF TORTS, § 388, cmt k (1965).



*Hines v. Remington Arms Co., Inc.*, the plaintiff, an avid gun user, alleged the defendant failed to warn him that the safest way to store gunpowder is in a wooden box.<sup>137</sup> After converting a room in his home into a gun-storage and reloading station, the plaintiff was injured while loading cartridges into one of his rifles.<sup>138</sup> The rifle was positioned on a loading bench with the muzzle pointed six to eight inches from storage containers full of gunpowder.<sup>139</sup> When the plaintiff finished, he closed the bolt, which caused the gun to fire and trigger a chain-reaction inside the small room, severely burning the plaintiff.<sup>140</sup>

In analyzing the plaintiff's failure to warn claim, the court first stated that manufacturers have "a duty to provide an adequate warning of any danger inherent in the normal use of its product which is not within the knowledge of or obvious to the ordinary user."<sup>141</sup> However, the court reasoned that manufacturers are not required to warn about dangers that would be obvious to the ordinary user, especially when he or she is a sophisticated user who has familiarity with the product.<sup>142</sup> The plaintiff's significant familiarity with guns should have alerted him to the fact that "any barrier, such as wood, would provide additional protection and make storage of the powder safer."<sup>143</sup> Therefore, the court concluded the plaintiff was a sophisticated user who should be well aware that, despite its name, smokeless gunpowder is highly flammable.<sup>144</sup> Based on this finding, the court allowed the manufacturer to assert the sophisticated user defense.<sup>145</sup>

## V. PLOTTING A COURSE FOR CALIFORNIA

In considering the most suitable approach for California, each model of the defense should be assessed through the individual lenses of *Johnson's* policy reasons: the causation theory, section 388 of the Restatement, and the desire to ensure the optimal effectiveness of warnings.<sup>146</sup> While no single approach fully achieves all three goals articulated in *Johnson*, the familiarity approach addresses these concerns most completely and is, therefore, the most attractive evolutionary path for the sophisticated user doctrine in California.

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137. *Hines v. Remington Arms Co., Inc.*, 94-0455 (La. 12/8/94); 648 So. 2d 331, 334.

138. *Id.* at 333. The room included supplies for modifying and loading cartridges, "a reloading bench, several reloading manuals, presses, dies, shells, loaded cartridges, primers[,] and thirty-seven containers of various brands of smokeless gunpowder, which were located on the back of the reloading bench. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 337.

142. *Id.*

143. *Id.* at 338.

144. *Id.* at 336.

145. *Id.* at 338.

146. See *Johnson v. Am. Standard, Inc.*, 179 P.3d 905 (Cal. 2008) (discussing reasons the California Supreme Court chose to adopt the sophisticated user defense).

### A. Prior Notice & the Causation Theory

First, *Johnson* reasoned that failure to warn a user about known risks is usually not the proximate cause of a sophisticated user's injuries resulting from those risks—in effect, such awareness constitutes prior notice of the danger.<sup>147</sup> Therefore, the ideal approach for California should incorporate some analysis of the plaintiff's subjective knowledge of the danger.

The “should have known” model provides little assistance for singling out plaintiffs with prior notice of the product danger.<sup>148</sup> More specifically, this model of the defense is highly inclusive and makes no incorporation of the plaintiff's subjective understanding of the product danger.<sup>149</sup> The fractured tubing incident in *Bradco Oil & Gas, Co.* is a perfect example of this concept,<sup>150</sup> demonstrating how some plaintiffs will be charged with prior notice of the danger despite a complete lack of awareness, which is completely contradictory to the first goal of *Johnson*.<sup>151</sup>

The professional considerations model presents similar difficulties, often negating a manufacturer's duty to warn because knowledge is imputed to a plaintiff based on membership with a trade or profession, regardless of whether there was actual awareness.<sup>152</sup> Conversely, this model of the defense yields counterproductive results when the user possesses actual knowledge of the danger and the defendant is nevertheless barred from asserting the defense because the plaintiff is not a certified professional.<sup>153</sup> Additionally, cases litigated under this model of the defense often turn entirely on expert testimony regarding what a professional might have known about the danger in question.<sup>154</sup> This emphasis on expert testimony detracts from analyzing the plaintiff's actual prior knowledge of the danger.<sup>155</sup> Ultimately, limiting application of the defense to

147. *Id.* at 911 (quoting *Billiar v. Minnesota Min. & Mfg. Co.* 623 F.2d 240, 243 (2d Cir. 1980)).

148. *See id.* (discussing the relevance of whether the plaintiff was a professional in determining user sophistication).

149. *Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co.*, 532 F.2d 501 (5th Cir. 1976).

150. *Id.*

151. *Johnson*, 179 P.3d 905 (quoting *Billiar.*, 623 F.2d at 243). The first goal of the *Johnson* court is preventing those users who had prior notice of the harm from alleging that the manufacturer's lack of warning was the cause of his or her injury. *Id.*

152. *See Guarascio v. Drake Associates Inc.*, 582 F. Supp. 2d 459 (S.D.N.Y. 2008) (finding the plaintiff was a sophisticated user of oxygen manifold breathing apparatus despite unawareness that modifying the location of the valves could cause them to shut off, thereby depriving the diver of oxygen); *Bradco Oil & Gas Co.*, 532 F.2d at 504 (where a professional oil and gas producer was charged with knowledge about inadequacy of commonly-used “smell test” based on its status as a member of the oil and gas producers industry); *Emory v. McDonnell Douglas Corp.*, 148 F.3d 347 (4th Cir. 1998) (holding the Navy's lack of actual knowledge of danger was irrelevant because a reasonable person in the Navy's position is assumed to be aware of the danger).

153. *See Billiar*, 623 F.2d 240 (2d Cir. 1980) (determining as a matter of law that the plaintiff was not a professional, thereby precluding the defendant from asserting the sophisticated user defense, but allowing the jury to determine whether the plaintiff nevertheless had sufficient knowledge of the danger).

154. *Guarascio*, 582 F. Supp. 2d at 464.

155. *See id.* (relying entirely on professional testimony to determine that the plaintiff was a sophisticated

professionals will prevent those plaintiffs who have prior notice of the danger from being classified as sophisticated users based on a minor technicality, *i.e.* that they are not certified professionals.<sup>156</sup>

Similarly, the first prong<sup>157</sup> of the targeted marketing approach fails to account for those members of the general public who may have significant experience with the product despite not belonging to a profession or trade, and who do not require a warning because of this prior knowledge.<sup>158</sup> Conversely, if the plaintiff is considered more sophisticated than the “man-in-the-street,” (or the cyclist-on-the-road in Matherne’s case) he or she will be charged with the knowledge and expertise in that general field.<sup>159</sup> In this regard, the second prong<sup>160</sup> mirrors the “should have known” standard, in that it may charge an unknowing plaintiff with actual knowledge of the danger.<sup>161</sup> While this approach may help to identify those plaintiffs with prior notice of the danger, it is flawed because the body of prior knowledge chargeable to the plaintiff turns on the manufacturer’s marketing practices, not on the *plaintiff’s* comprehension of the danger.<sup>162</sup>

Ultimately, the familiarity approach is the best model for accomplishing *Johnson’s* goal to prevent users with prior knowledge of a product’s potential dangers from asserting a failure to warn claim against the manufacturer.<sup>163</sup> This approach offers a flexible framework that is unencumbered by arbitrary labels or prongs.<sup>164</sup> Instead, this model focuses on whether the plaintiff possesses a significant degree of knowledge regarding the danger based on his or her personal experience with the product.<sup>165</sup> This demonstrates that—regardless of how the product is marketed or whether the plaintiff is a professional—the court will be able to assess the user’s familiarity with the danger.<sup>166</sup> While this

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user, and that the manufacturer had no duty to warn him of the danger of altering commercial dive gear).

156. See *Billiar*, 623 F.2d at 243 (noting that despite plaintiff’s testimony that she had read the warning label and was aware of the danger of coming into contact with the harmful chemical, the court held that she was not a sophisticated user based on her status as a layperson).

157. See *supra* Part IV.C (describing the two prongs of the targeted marketing approach to the sophisticated user doctrine).

158. See *Hines v. Remington Arms Co., Inc.*, 94-0455 (La. 12/8/94); 648 So. 2d 331 (holding that the plaintiff was a sophisticated user based on his extensive recreational use of guns).

159. *Pavrides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338 (5th Cir. 1984).

160. See *supra* Part IV.C (describing the two prongs of the targeted marketing approach to the sophisticated user doctrine).

161. *Johnson v. American Standard, Inc.*, 179 P.3d 905, 911 (Cal. 2008) (quoting *Billiar*, 623 F.2d at 243).

162. See *Pavrides*, 727 F.2d at 338-39 (describing the two prongs of the targeted marketing approach and how plaintiffs are analyzed under either prong based solely on the manufacturer’s marketing practices).

163. *Johnson*, 179 P.3d at 911 (quoting *Billiar*, 623 F.2d at 243).

164. See *Pavrides*, 727 F.2d at 330 (describing the two prongs of the targeted marketing approach and how plaintiffs are analyzed under either prong based solely on the manufacturer’s marketing practices).

165. See *Hines v. Remington Arms Co., Inc.*, 94-0455 (La. 12/8/94); 648 So. 2d 331, 336 (holding that the plaintiff was a sophisticated user based on his extensive recreational use of guns).

166. See *Henrie v. Northrop Grumman Corp.*, 502 F.3d 1228, 1234 (10th Cir. 2007) (noting professional painter testified that he was aware of the danger in removing the holding pins of glass fixture without adequate man power to control the device and was not allowed to claim the manufacturer failed to warn him of the

approach may not be able to isolate only those users with prior notice of a specific danger, it creates a reasonable sphere that includes the users who are most likely to know about the danger by virtue of their experience, as opposed to their occupation or consumer status.<sup>167</sup>

*B. Section 388 & Elevated Obviousness*

Commentators note that the sophisticated user doctrine is intended to identify those individuals whose understanding of a product's potential dangers is more elevated than the general public's.<sup>168</sup> In turn, *Johnson* relied on section 388 for the proposition that some product dangers may be more obvious to sophisticated users than to the average layperson, thereby negating the manufacturer's duty to warn those sophisticated users.<sup>169</sup> Based on this assertion, the best model for accomplishing this goal will incorporate an analysis of whether the plaintiff's ability to appreciate a given product's danger is greater than the general public's.

The "should have known" model is ill-suited for accomplishing this goal because it focuses on the objective information available to a particular industry, as opposed to focusing on the whether the plaintiff's appreciation of the danger was greater than the general public's.<sup>170</sup> Because of this focus, it will be extremely difficult to predict which industry practices the courts will include in the analysis.<sup>171</sup> Further, given that this approach allows manufacturers to make assumptions about the user's expertise, it will also be difficult to ensure that manufacturers are making similar assumptions about the same class of users.<sup>172</sup> This is insufficient in light of *Johnson*'s goal to focus on whether the *plaintiff* had an elevated appreciation of the danger, not what is commonly known in a specific industry.<sup>173</sup>

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dangers of such action).

167. See generally *Hines*, 648 So.2d at 338 (determining the plaintiff's familiarity with guns provided him with enough knowledge to know that storing gun powder in certain boxes would be more safe than in others).

168. Douglas R. Richmond, *Products Liability: Corporate Successors and the Duty to Warn*, 42 BAYLOR L. REV. 535, 547-48 (1993).

169. *Johnson v. American Standard, Inc.*, 179 P.3d 905, 912 (Cal. 2008) ("Just as a manufacturer need not warn ordinary consumers about generally known dangers, a manufacturer need not warn members of a trade or profession (sophisticated users) about dangers generally known to that trade or profession.").

170. See *Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co.*, 532 F.2d 501, 504 (5th Cir. 1976) (discussing the accepted standards and level of information common in the oil and gas production industry when determining whether the plaintiff was a sophisticated user).

171. See *id.* (charging plaintiff with knowledge that the 'smell test' for detecting dangerous chemical was inadequate, despite expert testimony that it was used widely in the oil and gas production industry).

172. See 63 AM. JUR. 2D *Products Liability* § 1163 (2009) (discussing the professional considerations model of the sophisticated user defense).

173. *Johnson*, 179 P.3d at 912 ("Just as a manufacturer need not warn ordinary consumers about generally known dangers, a manufacturer need not warn members of a trade or profession (sophisticated users) about dangers generally known to that trade or profession.").

Similarly, the professional considerations approach does not embrace *Johnson's* second objective.<sup>174</sup> Limiting the assertion of the sophisticated user defense to professionals undermines the second objective by failing to account for those plaintiffs, such as the plaintiff in *Hines*, who have special experience with the product despite their status as laypersons.<sup>175</sup> Therefore, the professional considerations approach is unsuitable for accomplishing the second objective because individuals who have significant experience with the product may escape classification as a sophisticated user based on the mere technicality that they are laypersons.<sup>176</sup>

It should be noted, however, that one attractive feature of the professional considerations approach is that professionals often undergo significant educational or training courses before becoming employed.<sup>177</sup> These employees, similar to the one in *Haase*, often dedicate significant time and resources to ensure their employees are kept abreast of the most current industry standards and government safety regulations.<sup>178</sup> These measures will inevitably provide employees with an increased understanding of the dangers that they may encounter.<sup>179</sup>

Moving on, the targeted marketing approach initially appears calibrated for differentiating between individuals with an elevated awareness of the danger due to their experience with the product compared to individuals who lack any experience whatsoever. However, this approach falls short of accomplishing the second objective in that it focuses entirely on the manufacturer's marketing practices without conducting any analysis of whether the plaintiff had an elevated sense of the danger.<sup>180</sup> The first prong of the defense comes closer than the previously discussed approaches to accomplishing the second objective in that it

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174. See *supra* Part III.A.

175. For example, if *Hines* had adopted the professional considerations standard instead of the familiarity standard, the sophisticated user would be inapplicable defense because the defendant would have been unable to show the plaintiff was a professional gun user. However, it is evident that *Hines* did in fact have significant experience than general public. See *Hines v. Remington Arms Co., Inc.*, 94-0455 (La. 12/8/94); 648 So. 2d 331, 338 (discussing application of the familiarity standard of the sophisticated user doctrine).

176. *Id.* But see *Billiar v. Minnesota Min. & Mfg. Co.*, 623 F.2d 240, 244 (2d Cir. 1980). Despite ten months experience applying Scotchcast, the plaintiff was not a sophisticated user because of her status as a layperson, not a professional. *Id.* However, under the professional considerations approach, the court gave little deference to the amount of knowledge and experience the plaintiff had with the product. *Id.* Surely, the plaintiff in *Billiar* knew far more about the dangers of Scotchcast and how to handle it properly than the general public given the specialized and technical purpose for which Scotchcast was used.

177. See *Henrie v. Northrop Grumman Corp.*, 502 F.3d 1228, 1234 (10th Cir. 2007) (noting plaintiff had undergone several rounds of educational training regarding use of fixtures); *Johnson*, 179 P.3d at 912 (noting plaintiff was a professional HVAC technician who had completed several certification courses and educational courses).

178. *Haase v. Badger Mining Corp.*, 2003 WI App 192, 669 N.W.2d 737, 744.

179. See Douglas R. Richmond, *Renewed Look at the Duty to Warn and Affirmative Defenses*, 61 DEF. COUNS. J. 205, 211 (1994) (stating that a sophisticated user's experience gives him or her a significantly greater appreciation of the product's danger compared to the general public).

180. See *Pavlidis v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338 (5th Cir. 1984) (discussing both prongs of the targeted marketing approach).

allows the manufacturer to take advantage of the increased awareness that some users may possess based on their profession or trade, and to tailor the product's warnings accordingly.<sup>181</sup> However, under the stricter, "man-in-the-street" prong of the targeted marketing approach, the manufacturer is not able to make any assumptions about what the product user may know, thus making the manufacturer's duty to warn far more substantial.<sup>182</sup>

The familiarity approach offers the most effective method for identifying individuals with an elevated awareness of the product's danger.<sup>183</sup> As illustrated in *Hines*, analyzing the user's familiarity with the product—as opposed to the manufacturer's marketing practices or the plaintiff's occupation—renders a wider array of plaintiffs, such as hobbyists and recreationalists, capable of classification as sophisticated users.<sup>184</sup> In concluding that manufacturers are not required to warn about dangers that would be obvious to a user who is familiar with the product, *Hines* was able to account for the elevated sense of awareness that sophisticated users of a certain product will have.<sup>185</sup> The familiarity approach may be viewed as a more restrained formulation of the "should have known" standard, in that it will charge the plaintiff with an objective body of knowledge, but only in proportion to how much experience the plaintiff has with the product in question.<sup>186</sup> Accordingly, the familiarity approach encompasses those plaintiffs whose occupational training has provided them with a greater appreciation of the product's danger.<sup>187</sup>

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181. See *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 465 (5th Cir. 1976) (holding that DuPont's marketing practices justified the assumption that "the warnings need only be sufficient to warn a professional about the potential danger of its products").

182. See *Pavrides*, 727 F.2d at 338-39 (discussing the "man-in-the-street" prong of the targeted marketing approach).

183. See *supra* Part IV.D (discussing the familiarity approach to the sophisticated user doctrine).

184. See *Hines v. Remington Arms Co., Inc.*, 94-0455 (La. 12/8/94); 648 So. 2d 331, 338 (discussing the application of the sophisticated user defense to any plaintiff who is familiar with the product that caused the plaintiff's harm).

185. *Id.* (Had *Billiar* applied the familiarity approach instead of the professional considerations model, the court might have held the plaintiff was a sophisticated user based on her extensive use of the product, injuries sustained from it, and her testimony that she knew the product was harmful).

186. Compare *Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co.*, 532 F.2d 501, 504 (5th Cir. 1976) (discussing application of the "should have known" standard), with *Hines*, 648 So. 2d at 337 (discussing the application of the sophisticated user defense to any plaintiff who is familiar with the product that caused the plaintiff's harm).

187. See *Henrie v. Northrop Grumman Corp.*, 502 F.3d 1228, 12343 (10th Cir. 2007) (noting plaintiff had undergone several rounds of educational training regarding use of fixtures); *Johnson* 179 P.3d at 908 (noting plaintiff was a professional HVAC technician who had completed several certification courses and educational courses); see also *Haase v. Badger Mining Corp.*, 2003 WI App 192, 669 N.W.2d 737 (indicating that if *Haase* adopted the familiarity standard, *Haase's* substantial experience with silica sand might have led the court to conclude that he was a sophisticated user).

C. Over-Warning & the Reduction of Liability Exposure

In *Johnson*, the California Supreme Court reasoned the sophisticated user defense would curb the adverse effects of over-warning.<sup>188</sup> The court also concluded that it would prevent manufacturers from becoming the insurers of those individuals injured as a result of their own mistake as opposed to the manufacturer's failure to provide a warning.<sup>189</sup> Therefore, California's ideal model should restrict the amount of warnings a manufacturer must include with their products while simultaneously shifting some responsibility for using proper safety techniques to the user.<sup>190</sup>

Above all, the "should have known" standard is the best model for limiting manufacturers' liability because it enables manufacturers to rely on each industry to disseminate safety information, which is in line with the job-related obligations of employers and employees to keep informed of dangerous or hazardous products.<sup>191</sup> Because this standard places such a significant emphasis on the common knowledge within an industry, manufacturers can forgo including warnings for every possible danger a user may encounter, thereby increasing their overall effectiveness.<sup>192</sup> In this regard, the "should have known" model provides manufacturers the most deference and takes the greatest strides towards reducing their liability exposure.

The "should have known" standard also offers the most effective method for weeding out plaintiffs who were harmed as a result of their own carelessness or mistake.<sup>193</sup> Imposing an objective body of knowledge on a potentially unknowing plaintiff will create an incentive for plaintiffs to stay informed about the most recent developments in their field or industry, as they will be held accountable to the accepted body of industry knowledge either way.<sup>194</sup>

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188. 179 P.3d at 914 (quoting *Finn v. G.D. Searle & Co.*, 677 P.2d 1147 (Cal. 1984); Twerski et al., *The Use and Abuse of Warnings in Products-Liability-Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 521 (1976)).

189. *Johnson*, 179 P.3d at 914

190. *Id.* (adopting the sophisticated user defense in order to limit manufacturer's liability and weed out those plaintiffs who are able to identify the danger without warnings from the manufacturer).

191. See Willner, *supra* note 108 (arguing that removing the manufacturer's duty to warn the end user and relying instead on the purchasing-chain to deliver warnings is a more effective way to ensure that the right warning will reach the right user of the product).

192. See Rebecca Korzec, *Restating the Obvious in Maryland Products Liability Law: The Restatement (Third) of Torts: Products Liability and Failure to Warn Defenses*, 30 U. BALT. L. REV. 341 (2001) (discussing the tendency of manufacturers to include an abundance of warnings when the jurisdiction does not allow them to rely on the objective knowledge attributable to the product user through the sophisticated user defense). For example, the *Bradco* court was not persuaded by the plaintiff's professed lack of awareness and held "the defendant was not required to give [the plaintiff] any information in addition to that generally known in the industry to protect against use under adverse well conditions of which [the plaintiff] . . . should have been aware." *Bradco Oil & Gas Co.*, 532 F.2d at 504.

193. *Johnson*, 179 P.3d at 914.

194. *Bradco Oil & Gas Co.*, 532 F.2d at 504.

Despite these advantages, this standard will most often apply to professionals or highly trained individuals because the court will look to a particular industry or trade to define the appropriate objective body of knowledge.<sup>195</sup> This may not be inclusive enough in that some individuals with substantial product experience will escape classification as a sophisticated user if they do not belong to an industry or trade.<sup>196</sup> Therefore, if California truly wants to limit manufacturers' liability exposure, the "should have known" standard is the best choice.<sup>197</sup>

Alternatively, the professional considerations model will achieve *Johnson's* third goal because manufacturers will be able to rely on the employer to provide the employees with the appropriate warnings.<sup>198</sup> More specifically, situating the duty to warn with the purchaser-employer allows the party who is more familiar with how the product will be used to determine what safety information is relevant.<sup>199</sup> However, limiting a manufacturer's ability to rely on the knowledge of the *professional* product user still exposes the manufacturer to significant liability from non-professionals who use their products.<sup>200</sup> While attractive in some respects, this approach does not afford manufacturers as much liability protection as the "should have known" standard.<sup>201</sup>

The targeted marketing approach seems to offer a method for achieving *Johnson's* third goal because it acknowledges that the average user demographic is not the same for every product.<sup>202</sup> It also acknowledges that the types of warnings provided should be directly correlated to the members in the specific class of individuals who will use the product.<sup>203</sup> This distinction between laypersons and sophisticated users ensures that the correct warning will reach the appropriate user, which prevents the negative result of over-warning.<sup>204</sup> This two-

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195. *Id.*

196. *See generally* *Billiar v. Minnesota Min. & Mfg. Co.*, 623 F.2d 240 (2d Cir. 1980) (describing limitation of the sophisticated user defense to tradespeople or professionals only).

197. *Johnson*, 179 P.3d at 914.

198. *See Willner*, *supra* note 108 (arguing that removing the manufacturer's duty to warn the end user and relying instead on the purchasing-chain to deliver warnings is a more effective way to ensure that the right warning will reach the right user of the product).

199. *Haase v. Badger Mining Corp.*, 2003 WI App 192, 669 N.W.2d 737, 744. For example, in *Haase*, one of the former safety experts who worked at Neenah Foundry testified the company did not rely on the supplier for instructions on how to handle silica sand properly. *Id.*

200. *See Hines v. Remington Arms Co., Inc.*, 94-0455 (La. 12/8/94); 648 So. 2d 331, 338 (discussing the application of the sophisticated user defense to any plaintiff who is familiar with the product that caused the plaintiff's harm).

201. *Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co.*, 532 F.2d 501, 504 (5th Cir. 1976)

202. *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 465 (5th Cir. 1976).

203. *Id.*

204. *Johnson v. American Standard, Inc.*, 179 P.3d 905, 914 (Cal. 2008) (quoting *Finn v. G.D. Searle & Co.*, 677 P.2d 1147 (Cal. 1984); *Twerski et al.*, *supra* note 188, at 521. For an example of this channeling function, compare *Pavrides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 339, which determined the defendant marketed boats to the general public and therefore should have provided more warnings about potential dangers users, with *Martinez*, 529 F.2d at 466, where the defendant marketed chemicals exclusively to professionals and therefore did not need to provide a long, overly inclusive list of warnings to the sophisticated end user.



pronged analysis remedies the aforementioned shortcomings of the professional considerations approach by allowing non-professionals to be classified as sophisticated users, thereby reducing manufacturers' liability exposure.<sup>205</sup>

Despite these attributes, the dual-pronged nature of the targeted marketing approach poses a potentially threatening result: when manufacturers discover that marketing strictly to professionals will lower the duty to warn, they may include more warnings that say "professional use only" in order to limit their liability despite a substantial likelihood that non-professionals will use the product.<sup>206</sup> These skewed warnings would undermine the essential function of the product warning system because a non-professional user may still use the product.<sup>207</sup> Similarly, the targeted marketing approach focuses on the marketing practices of the manufacturer without shifting any responsibility to a user who was injured due to carelessness or by his or her own mistake.<sup>208</sup> Such a formulaic approach may offer some protection from significant liability exposure, but it pales in comparison to the expansive protection available under the "should have known" model.<sup>209</sup>

Under the familiarity approach, a court will place less pressure on the manufacturer, preventing the inclusion of too many warnings that may create consumer contempt for the warning process.<sup>210</sup> More specifically, *Hines* establishes that manufacturers are not required to warn about dangers that would be obvious to a user who is familiar with the product, which means that manufacturers will not feel pressured to include an abundance of warnings.<sup>211</sup> A prudent manufacturer would take steps to learn whether a particular group of hobbyists uses its product, such as in *Hines*<sup>212</sup> or *Pavrides*<sup>213</sup>, in order to account for the particular warnings those users may need as opposed to providing a laundry list of the dangers they could encounter.<sup>214</sup> The familiarity approach may be viewed as a more restrained formulation of the "should have known" standard

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205. See *Pavrides*, 727 F.2d at 338-39 (discussing application of the targeted marketing approach).

206. See generally *Helene Curtis Indus., Inc. v. Pruitt*, 385 F.2d 841 (5th Cir. 1967) (holding that a manufacturer who markets its product solely to professionals, and who includes a warning that the product is for professional use only, will have a significantly lesser duty to warn the end user).

207. *Id.*

208. See generally *Pavrides*, 727 F.2d at 338-39 (discussing application of the targeted marketing approach).

209. *Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co.*, 532 F.2d 501, 504 (5th Cir. 1976).

210. *Johnson v. Am. Standard, Inc.*, 179 P.3d 905, 914 (Cal. 2008) (quoting *Finn v. G.D. Searle & Co.*, 677 P.2d 1147 (Cal. 1984); Twerski et al., *The Use and Abuse of Warnings in Products-Liability-Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 521 (1976)).

211. *Id.* at 911 (quoting *Strong v. E.I. Du Pont de Nemours Co., Inc.* 667 F.2d 682, 687 (8th Cir. 1981)).

212. See *Hines v. Remington Arms Co., Inc.*, 94-0455 (La. 12/8/94); 648 So. 2d 331, 338 (discussing the application of the sophisticated user defense to any plaintiff who is familiar with the product that caused the plaintiff's harm).

213. See *Pavrides*, 727 F.2d at 338-39 (discussing the "man-in-the-street" prong of the targeted marketing approach).

214. See Twerski et al., *supra* note 188, at 521 (describing research that indicates how manufacturers can make their warnings most effective).

because it will charge the plaintiff with an objective body of knowledge, but only in proportion to how much experience the plaintiff has with the product in question.<sup>215</sup> This also allows the manufacturer to take advantage of the professional considerations model in that those professionals with extensive training and experience will be inherently more familiar with the products they use on the job.<sup>216</sup> Lastly, it addresses the perspective-based flaw of the targeted marketing approach by placing less emphasis on the manufacturer's marketing practices and more responsibility on individuals who have significant experience with a product to employ proper safety methods.<sup>217</sup>

Similar to the "should have known" standard, however, the familiarity model maintains a concern that manufacturers will be unable to identify the precise body of knowledge attributable to the plaintiff.<sup>218</sup> This would be even more complicated where the professional limitation is removed and any individual familiar with the product may be classified as a sophisticated user.<sup>219</sup> While the "should have known" standard creates uncertainty about what is objectively known in a particular trade or industry, the familiarity approach is even less guided in that there could be endless possibilities for defining the objective class to which the plaintiff belongs.<sup>220</sup> Based on this uncertainty, the "should have known" standard remains the best choice for accomplishing *Johnson's* third objective.<sup>221</sup>

#### D. Recommendation

Each of the four approaches surveyed in this Comment fail to adequately encompass all of the *Johnson* goals.<sup>222</sup> Thus, this Comment recommends an

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215. *Compare Bradco Oil & Gas Co.*, 532 F.2d at 504 (discussing application of the "should have known" standard), with *Hines v. Remington Arms Co., Inc.*, 94-0455 (La. 12/8/94); 648 So. 2d 331, 338 (discussing the application of the sophisticated user defense to any plaintiff who is familiar with the product that caused the plaintiff's harm).

216. *See Haase v. Badger Mining Corp.*, 2003 WI App 192, 669 N.W.2d 737, 743-744 (describing application of the professional considerations model); *see also Hines*, 648 So.2d at 338 (discussing the application of the sophisticated user defense to any plaintiff who is familiar with the product that caused her harm).

217. *See generally Pavlides*, 727 F.2d at 339 (discussing application of the targeted marketing approach).

218. *See Bradco Oil & Gas Co.*, 532 F.2d at 503 (discussing the accepted standards and level of information common in the oil and gas production industry when determining whether the plaintiff was a sophisticated user).

219. *Id.*

220. *Id.* For example, in *Hines*, the court could have held that Hines was part of the familiar gun-users class, or taken a more narrow approach and concluded that he was part of the familiar Hodgson's brand-users. *Hines*, 648 So. 2d 331.

221. *Johnson v. American Standard, Inc.*, 179 P.3d 905, 914 (Cal. 2008); *see also Bradco Oil & Gas Co.*, 532 F.2d 501 (discussing the third objective of the *Johnson* court, which is preventing over-warning and limiting manufacturers' exposure to unnecessary liability).

222. *See supra* Part V.A-B (evaluating which of the aforementioned models are best suited for accomplishing each of the *Johnson* court's three reasons for adopting the sophisticated user defense).

approach that comes closest to achieving all three objectives without completely sacrificing one objective for another. Ultimately, the familiarity approach provides the best vehicle for determining which users are most likely to have prior notice of the danger, which users have an elevated awareness of any potential dangers, and for limiting manufacturers' liability exposure while simultaneously ensuring the effectiveness of warnings.<sup>223</sup>

First, the familiarity approach addresses an internal inconsistency in the *Johnson* opinion. In *Bradco*, the court was unwilling to account for the plaintiff's lack of actual awareness of the danger, which is identical to the *Johnson* court's determination that Johnson was a sophisticated user despite his assertion that he did not understand the dangers of heating R-22.<sup>224</sup> If *Johnson* adopted the defense to establish that failure to warn an individual who is already sufficiently familiar with the product cannot be the proximate cause of the danger, the court should have given more deference to Johnson's professed unawareness of the dangers in heating R-22.<sup>225</sup> In this regard, the familiarity approach straddles the line between a purely subjective analysis of whether the plaintiff had prior notice of the danger and the imposition of an objective body of knowledge or professional limitation.<sup>226</sup>

The familiarity approach will also account for plaintiffs with an elevated awareness of any potential dangers a product may pose.<sup>227</sup> The extent of a given user's familiarity is directly correlated to whether their appreciation of potential dangers is greater than the general public's.<sup>228</sup> The familiarity approach is unencumbered by labels, such as "professional" versus "non-professional," or by a misguided focus on the marketing practices of the manufacturer.<sup>229</sup> It is neither too exclusive (as is the professional considerations standard) nor too inclusive (as is the "should have known" standard), but rather, it allows for an unencumbered analysis of the plaintiff's appreciation of the danger.<sup>230</sup>

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223. See *supra* Parts IV.D. & V.A-C (discussing the familiarity approach generally, and then discussing its suitability for accomplishing the three objectives discussed by the *Johnson* court).

224. *Bradco Oil & Gas Co.*, 532 F.2d 501; *Johnson*, 179 P.3d 905 (applying the "should have known" standard of the defense).

225. *Johnson*, 179 P.3d at 911 (quoting *Billiar v. Minnesota Min. & Mfg. Co.* 623 F.2d 240, 243 (2d Cir. 1980)).

226. *Id.* at 905.

227. See *supra* Part V.B (discussing each model's suitability for accomplishing the *Johnson* court's second goal, which is identifying those users who have an elevated awareness of a product's potential danger).

228. *Hines v. Remington Arms Co., Inc.*, 94-0455 (La. 12/8/94); 648 So. 2d 331, 338 (holding that the plaintiff's extreme familiarity with guns provided enough basis to hold that he was a sophisticated user); see also *Bradco Oil & Gas Co.*, 532 F.2d at 501 (discussing the "should have known" model of the defense, which focuses on an objective body of knowledge attributable to the plaintiff); *Pavrides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 339 (5th Cir. 1984) (discussing application of the targeted marketing approach); *Richmond*, *supra* note 179 (stating that a sophisticated user's experience gives them a significantly greater appreciation of the product's danger compared to the general public).

229. See *Hines*, 648 So.2d at 338 (holding that the plaintiff's extreme familiarity with guns provided enough basis to hold that he was a sophisticated user).

230. See *Billiar*, 623 F.2d at 243; see also *Richmond*, *supra* note 179 (stating that a sophisticated user's

In regard to reducing manufacturers liability and preventing an overabundance of warnings, the familiarity approach comes very close to encompassing what the “should have known” standard accomplishes.<sup>231</sup> While the familiarity approach does not allow manufacturers to rely completely on an objectively imposed body of knowledge, it does allow the manufacturer to make some assumptions about what those users with significant product-experience know about potential dangers.<sup>232</sup> This also creates an incentive for users to adequately educate themselves about certain products, as they still may be charged with a more objective body of knowledge based on their familiarity.<sup>233</sup>

In sum, the familiarity approach is the best choice because it tempers the harshness of the actual knowledge standard by casting a wider net to include plaintiffs who may not have actual knowledge, but who nevertheless have enough experience with the product to constitute prior notice.<sup>234</sup> The familiarity standard is unencumbered by labels, such as “professional” or “layperson,” and it only charges the plaintiff with knowledge of the danger where the plaintiff’s experience with the product provides a strong enough basis for concluding that he had the capacity to identify the danger in question.<sup>235</sup>

## VI. CONCLUSION

Sophistication can be defined in many ways.<sup>236</sup> The scope of that definition may have significant consequences for product users by alleviating manufacturer liability for an injury involving their products.<sup>237</sup> The comparison of how different cases would be resolved under the various models of the defense demonstrates

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experience gives them a significantly greater appreciation of the product’s danger compared to the general public).

231. See *Bradco Oil & Gas Co.*, 532 F.2d at 501 (applying the “should have known” model of the defense).

232. See *supra* Part IV.D. (discussing the familiarity approach).

233. See Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. CIN. L. REV. 38 (1983) (quoting Model Unif. Prods. Liab. Act, 44 Fed. Reg. 62, 714-15 (1979)) (discussing how removing manufacturers’ duty to warn users who knew or should have known about a product’s dangers results in shifting the incentive for loss prevention to the end user, who is the best able to accomplish that goal.) As previously mentioned, the familiarity approach may present some issues regarding how to define the objective body of knowledge attributable to the plaintiff. See *Hines*, 648 So.2d at 338 (holding that the plaintiff’s extreme familiarity with guns provided enough basis to hold that he was a sophisticated user). However, using expert testimony or using the testimony of other individuals who have similar experience with the product can remedy this problem. See *Guarascio v. Drake Associates, Inc.*, 582 F.Supp.2d 459, 464 (S.D.N.Y. 2008) (relying heavily on expert testimony in determining whether the plaintiff should have known about the danger by virtue of his profession).

234. Schwartz & Driver, *supra* note 233.

235. See *Hines*, 648 So.2d at 338 (holding that the plaintiff’s extreme familiarity with guns provided enough basis to hold that he was a sophisticated user).

236. See *supra* Part IV (discussing different variations of the sophisticated user defense).

237. See *Matherne v. Pourtrait-Morin/Zefal-Christophe, Todson, Inc.*, 2002-2136 (La. App. 1 Cir. 12/12/03); 868 So. 2d 114, 121 (determining that the plaintiff’s recreational involvement with cycling made him a sophisticated user of toe clips).

how subtle nuances in definition can completely change the outcome of a case.<sup>238</sup> These subtleties should be finely calibrated through the lens of policy objectives the sophisticated user doctrine was adopted to accomplish.<sup>239</sup>

The California Supreme Court carefully assigned three policy reasons for the sophisticated user defense, but unfortunately, the opinion presents many perplexing inconsistencies and thematically paradoxical perspectives on how the doctrine should operate.<sup>240</sup> Ultimately, the familiarity approach, as demonstrated in *Hines v. Remington Arms Co., Inc.*, is the most suitable method for accomplishing the *Johnson* objectives, as it offers the most complete solution for identifying plaintiffs who truly are sophisticated product users and who therefore do not require additional warnings about the dangers they may encounter.<sup>241</sup>

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238. See *supra* Part V (discussing which of the various models of the sophisticated user defense is best suited for accomplishing the *Johnson* court's three reasons for adopting the defense in California).

239. See *supra* Part III (providing an overview of *Johnson*, the ambiguity in the court's opinion, and the three reasons that the court listed in discussing why the defense should apply in California).

240. See *supra* Part III.B; see also *Johnson v. American Standard, Inc.* 179 P.3d 905, 914 (Cal. 2008); *Bradco Oil & Gas Co.*, 532 F.2d 501 (discussing the third objective of the *Johnson* court, which is preventing over-warning and limiting manufacturers' exposure to unnecessary liability).

241. 648 So.2d at 338.