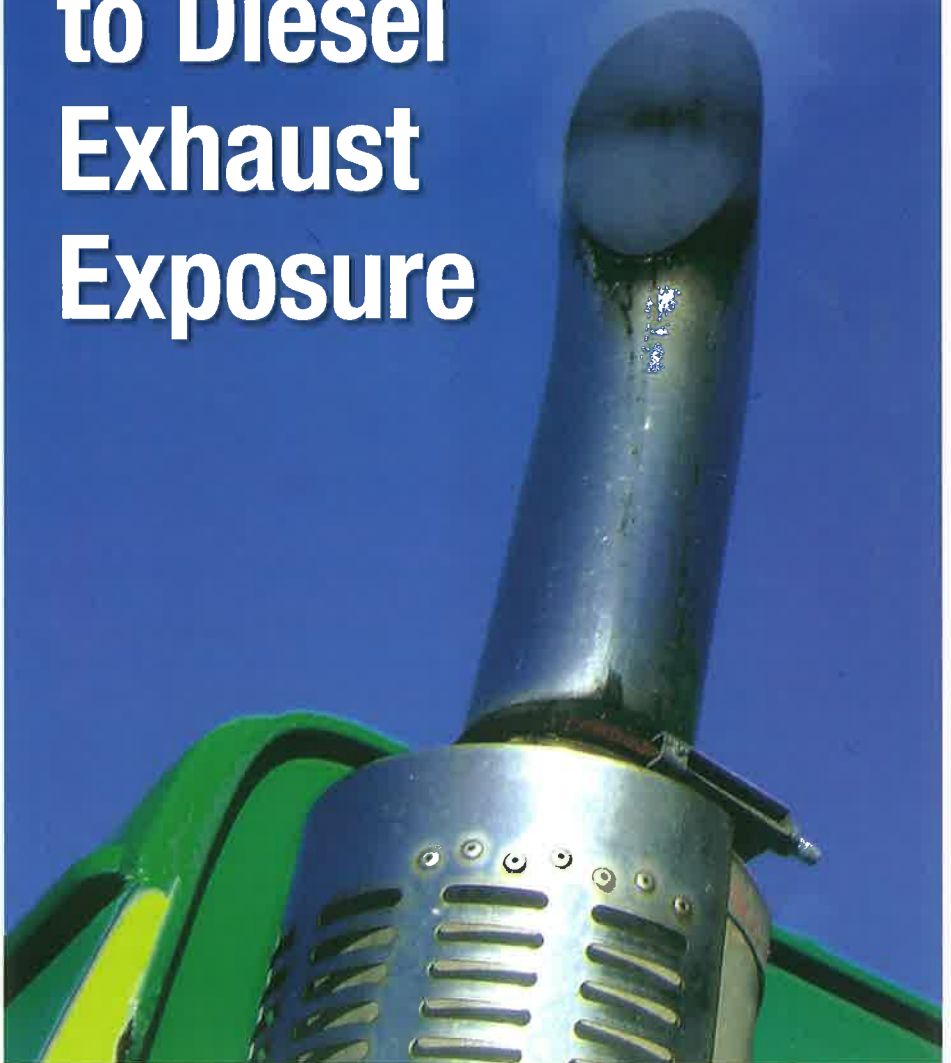


## Diesel Exhaust Exposure

By Allen C. Schlinsog, Jr.,  
and Amy L. MacArdy

**F**orcing plaintiffs to attempt to prove their claims with good science could terminate this new litigation before it gains traction.

# Emerging New Toxic Tort Claims Relating to Diesel Exhaust Exposure



■ Allen C. Schlinsog, Jr., is a senior shareholder, and Amy L. MacArdy is a senior associate, at Reinhart Boerner Van Deuren s.c., headquartered in Milwaukee. Mr. Schlinsog is the chair of the Litigation Department and the Product Liability and Safety Group. A DRI member since 1999, his national practice focuses on defense of manufacturers in pharmaceutical, medical device, and significant product liability actions. Ms. MacArdy concentrates her litigation practice in the area of product liability litigation, defending a variety of toxic tort, mass tort, and prescription drug and medical device lawsuits as both national and local counsel.

## Although many different products have emitted diesel exhaust for generations, some plaintiffs' lawyers have started to sue manufacturers of select diesel powered equipment, claiming that their clients' exposure to diesel

exhaust has caused a wide variety of injuries ranging from cancer to erectile dysfunction. Ignoring the fact that most diesel exhaust constituents originate from many different sources, these attorneys attempt to blame one specific piece of equipment for all of their clients' alleged injuries. This is counterintuitive, but a strategy that plaintiffs' counsel must attempt. After all, if diesel exhaust in general caused their injuries, plaintiffs would be unable to prove causation against any particular manufacturer or product. As a result, general and specific causation are the most fundamental issues in these cases.

The science is complicated, and the stakes are high. Diesel engines emit a mixture of gaseous and solid material. Solid emissions from diesel engines are known as diesel particulate matter, or DPM. That much is true for all diesel engines. But precisely what is emitted from particular diesel engines is highly variable and depends on a number of factors, including the specific nature of the fuel, the engine's combustion, and the means used to capture and to treat the emissions further. Although no two engines will emit the same constituents or the same amounts, studies of old diesel engine technology have identified diesel exhaust and DPM in general as carcinogens and causes of other negative health effects.

In one existing case, four plaintiffs' firms in California recently have joined together to prosecute the claims of nearly 300 individual plaintiffs in a single lawsuit. The plaintiffs primarily are longshore workers at the ports of Los Angeles and Long Beach. These 300 plaintiffs filed product liability claims against multiple manufacturers and a maintenance company related to their use of yard trucks, specialized semi-tractor trailer rigs, in the course of their employment with the ports. The plaintiffs claim that diesel particulate filters (DPFs) incorporated into the exhaust systems of the trucks caused their injuries. DPFs, ironically, are a newer emis-

sion control technology designed to capture and to *reduce* particulate matter and nitrogen oxide emissions, which the government *mandated* be installed on yard trucks and many other diesel equipment. See 13 Cal. Code Regs. §2479(a)(19) (defining diesel particulate filter).

The defense bar must diligently defend this and all similar cases to prevent these claims from taking hold across the country. If the plaintiffs succeed in demonstrating a causal link between diesel exhaust and the litany of injuries that they claim in this case, there is a chance that plaintiffs could pursue these claims against diesel engine and equipment manufacturers anywhere, creating a new mass tort. This article addresses some of the key issues to consider in defending these claims.

### History of Diesel Exhaust Regulation

In addition to discussing federal regulations, this article will discuss California, which has a particularly active diesel exhaust regulatory system.

### Regulation Nationwide

For many years, a host of federal agencies and scientific bodies have evaluated the health effects of old diesel exhaust technology and concluded that such exhaust can contain harmful pollutants. Leading the way, the National Institute of Occupational Safety and Health (NIOSH), first recommended that diesel exhaust be regarded as a potential occupational carcinogen in 1988. Cal. Air Resources Bd., Scientific Review Panel, The Report on Diesel Exhaust (Apr. 22, 1998), at ¶18, available at <http://www.arb.ca.gov/srp/findings/4-22-98.pdf>. Also in 1988, the International Agency for Research on Cancer (IARC), part of the World Health Organization (WHO), classified diesel exhaust as *probably carcinogenic to humans* (Group 2A). Press Release, Int'l Agency for Res. on Cancer, Diesel Engine Exhaust Carcinogenic (June 12, 2012),

available at [http://www.iarc.fr/en/media-centre/pr/2012/pdfs/pr213\\_E.pdf](http://www.iarc.fr/en/media-centre/pr/2012/pdfs/pr213_E.pdf). Recently, in June 2012, after a week-long meeting of international experts, IARC escalated its classification of diesel exhaust to Group 1, indicating that it is carcinogenic to humans. *Id.*

In 2002, the United States Environmental Protection Agency (EPA) published a health assessment document for diesel



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engine exhaust classifying diesel exhaust as a likely carcinogen when humans inhale it. U.S. Env'tl. Protection Agency, Health Assessment Document for Diesel Engine Exhaust (May 2002), available at <http://www.epa.gov/ttnatw01/dieselfinal.pdf>. It also concluded that both long-term and short-term exposures are linked to adverse health effects, including lung cancer, other damage to the lungs, and exacerbation of existing allergies and asthma. *Id.*

The EPA also has imposed diesel emissions regulations requiring reduction in exhaust emissions. See 69 Fed. Reg. 38958-01 (governing control of emissions of from nonroad diesel engines and fuel); 66 Fed. Reg. 5002-12 (governing control of diesel emissions of heavy-duty engines and vehicles). The EPA has set emission standards applicable to new diesel engines and diesel fuel. In an effort to reduce emissions from in-use diesel engines, the EPA is also implementing voluntary local and regional initiatives.

### Diesel Exhaust Regulation in California

Also based on studies of older diesel technology, in 1990, through Proposition 65,



the state of California identified diesel exhaust as a chemical known to cause cancer. 27 Cal. Code Regs. §27001(b). An essential problem with this and the prior categorizations is that “diesel exhaust” is not a “chemical.” It is a complex mixture of gases and particulates. In addition, no diesel exhaust is the same. The constituents emitted depend on a variety of factors, including the specific fuel used, the engine type, and the filtering system used in the exhaust system.

Then, in 1998, the California Air Resources Board identified DPM as a toxic air contaminant, noting a relationship between occupational exposure and lung cancer and other long-term noncancerous effects, including chronic bronchitis, reduced pulmonary function, inflammation of lung tissue, immunological allergic reactions, and airway constriction. Cal. Air Resources Bd., *supra*. Since that time, the Air Resources Board has funded more than 50 research projects to study various aspects of DPM, including exposure levels, health effects, and emissions. The Air Resources Board regulates emissions from a variety of vehicles from on-road trucks and buses to ocean-going ships and a plethora of off-road equipment.

In 2005, as part of an overall Diesel Risk Reduction Plan to reduce diesel emissions, the Air Resources Board adopted a regulation for mobile cargo handling equipment at ports and intermodal rail yards in an effort to reduce DPM and oxides of nitrogen (NOx). The regulation, effective December 6, 2006, mandated that all new and in-use yard trucks meet California’s stricter emissions standards. 13 Cal. Code Regs. §2479(e)(1)(A). On or after January 1, 2007, all new yard trucks—the product involved in the diesel exhaust toxic tort lawsuit filed on behalf of nearly 300 plaintiffs in California has targeted—must be equipped with either a certified on-road engine meeting the current model year standards or a certified final Tier 4 off-road diesel engine. 13 Cal. Code Regs. §2479(e)(1)(A)1.b.(i)–(iii). To comply, yard truck manufacturers equipped yard trucks with complying engines as well as with exhaust systems containing DPFs. This achieved its goal and reduced DPM emissions.

The regulation also sets a phased compliance schedule for in-use yard trucks to

meet stricter emissions standards. See 13 Cal. Code Regs. §2479(e)(2)(A). The primary method of compliance is through accelerated turnover of older yard trucks to those equipped with cleaner, certified on-road engines. 13 Cal. Code Regs. §2479(e)(2)(A)1.–2.; Cal. Air Resources Bd., Overview of the Regulation for Mobile Cargo Handling Equipment at Ports and Intermodal Rail Yards (Oct. 2009), available at <http://www.arb.ca.gov/ports/cargo/documents/chefactsheet.pdf>. The regulation also gives owners the option to comply by equipping the yard truck with a verified diesel emissions control strategy that reduces emissions to certain specified levels, including by retrofitting yard trucks with DPFs. See 13 Cal. Code Regs. §2479(e)(2)(A)(3); 13 Cal. Code Regs. §2701(a)(13). California also adopted similar regulations governing other types of diesel equipment, including on-road mobile equipment such as heavy-duty trucks, buses, and light-duty cars and trucks. See, e.g., 13 Cal. Code Regs. §2025; 13 Cal. Code Regs. §1959.5 *et seq.*

### Diesel Exhaust Litigation

As commonly occurs, the publications and regulations described above caught the attention of the plaintiffs’ bar. Although diesel exhaust claims previously were unheard of, plaintiffs’ attorneys now work with labor unions to identify potential claimants. Although claims based on diesel exposure likely will become more frequent given the increased regulations and classification as a known carcinogen, to date only a few cases have dealt with these claims. Of the cases that do exist, many have turned on questions of causation. The causation question, and ultimately the final outcome of these cases, depends on what kind of expert testimony a court admits.

In many jurisdictions, it is well-accepted that a plaintiff alleging an injury in a toxic tort lawsuit must demonstrate both general and specific causation. This also is true in diesel exhaust cases. See *Missouri Pac. R.R. Co. v. Navarro*, 90 S.W.3d 747, 754–55 (Tex. App. 2002); *Richardson v. Union Pacific R.R. Co.*, 386 S.W.3d 77, 80 (Ark. Ct. App. 2011); *King v. Burlington N. Santa Fe Ry. Co.*, 762 N.W.2d 24, 34–35 (Neb. 2009). To prove general causation, a plaintiff must demonstrate that diesel exhaust or some constituent of it generally can cause the

injury that the plaintiff alleges. *Navarro*, 90 S.W.3d at 754–55. If a plaintiff’s experts establish general causation, then a plaintiff also must demonstrate specific causation—that is, whether diesel exhaust did in fact cause his or her injury. *Id.*

In most jurisdictions, a plaintiff must establish general and specific causation through expert testimony that is admissible under the standard articulated by the Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). In diesel exposure cases when an injury could have multiple potential causes, a plaintiff will need expert testimony to establish causation. See *Richardson*, 386 S.W.3d 77; *King*, 762 N.W.2d at 32. If these cases arise in jurisdictions that have adopted the Supreme Court *Daubert* rule, the expert testimony must be not only relevant, but also reliable. See *Navarro*, 90 S.W.3d at 750; *Richardson*, 386 S.W.3d at 81; *King*, 762 N.W.2d at 31, 43. Under the *Daubert* framework, courts assess the reliability of an expert’s testimony by considering whether the expert bases his or her opinion on a scientifically valid methodology and whether the expert accurately applies that methodology to the facts of the case. See *Richardson*, 386 S.W.3d at 81 (citing *Daubert*); *King*, 762 N.W.2d at 42–43 (same).

It is imperative that the defense assemble a team of experts as soon as possible to help understand the nuances of the technology involved. In addition, because questions related to expert testimony admissibility are vitally important, defense attorneys should consider using experts to attack the plaintiffs’ experts during a *Daubert* hearing. Often the outcome of a case turns almost entirely on which expert testimony a court finds admissible on causation.

General causation questions are especially crucial and often case dispositive because whether diesel exhaust causes numerous permanent injuries remains a novel question. The plaintiff in *Missouri Pacific Railroad*, 90 S.W.3d 747, for instance, lost her case after the Texas Court of Appeals excluded her experts’ testimony on causation. Plaintiff Manuela Navarro worked for 20 years in various capacities at defendant Union Pacific’s rail yard, was diagnosed with multiple myeloma near the end of that period, and then sued Union Pacific under the Federal Employ-

ers' Liability Act, alleging that the diesel exhaust that she was exposed to on the job caused her disease. *Id.* at 749. The trial court admitted testimony from Navarro's experts, but that decision was reversed on appeal. *Id.*

The court concluded that the opinions of Navarro's experts were unsupported or contradicted by the studies on which

of specific causation as being too speculative. *Id.* at \*6.

In other cases, courts have viewed proffered expert testimony more favorably. In *King*, 762 N.W.2d 24, the Nebraska Supreme Court reversed the trial court's exclusion of the plaintiff's expert witness and its subsequent award of summary judgment to the defendant. Bradley B. King, a railway worker and smoker, was diagnosed with multiple myeloma and brought a Federal Employers' Liability Act claim against his employer, alleging that his exposure to diesel exhaust on the job caused his illness. *Id.* at 31. The court noted that although King's expert did not know of any scientific studies definitively stating that benzene or diesel exhaust causes multiple myeloma, he relied on studies that "point to" a causal relationship. *Id.* at 49. The court held that the trial court erroneously imposed a "conclusive study" standard for admissible expert testimony. *Id.* It remanded the case with instructions to determine whether King's expert used a reliable methodology in concluding that King's disease was caused by exposure to diesel exhaust and, if so, whether he properly applied it in his differential diagnosis. *Id.* at 48-51.

The Ohio Court of Appeals in *Cutlip v. Northfolk Southern Corp.*, Case No. 02-1051, 2003 WL 1861015 (Ohio Ct. App. Apr. 11 2003), affirmed a jury award in favor of the plaintiff that depended on the admissibility of differential diagnosis testimony to establish specific causation. The plaintiff in that case was a locomotive engineer who had previously smoked cigarettes and lost a portion of a lung after being injured in the army. *Id.* at \*1. He sued his employer under Federal Employers' Liability Act and the Locomotive Inspection Act, alleging that his repeated exposure to diesel exhaust inside the locomotive cabs caused his chronic asthma. *Id.* at \*1-2. In affirming the jury verdict, the court concluded that the plaintiff's experts examined his condition; methodically ruled out other possible causes, the chest wound and smoking; and formed their conclusions after a thorough differential diagnosis. *Id.* at \*9.

### Defense Strategies

As explained above, the courts have resolved the few reported diesel exhaust exposure cases based on causation and

admissibility of expert witness testimony issues. Defending these cases by raising causation and expert admissibility remains a viable strategy because the theory remains novel, diesel exhaust constituents vary, and the scientific literature is inconclusive, especially with respect to newer, more efficient diesel technology. But many other defense strategies exist as well.

As these cases grow in complexity and size, defendants may want to turn to a greater variety of strategies in addition to the general and specific causation issues that were discussed above. These strategies range from challenging the basic ability to sue, as with a federal preemption defense, to challenging a plaintiff's evidence and theories of causation by using *Lone Pine* orders. Other strategies include arguing that a defendant has met the applicable standard of care by complying with statutory emissions requirements or arguing that a defendant provided proper warnings with a product.

### Statute of Limitations

As with all product liability lawsuits, a defendant's answer always should raise a statute of limitations defense as an affirmative defense. Generally, the statute of limitations period begins on the date of the event that caused a plaintiff's injury. This defense can be very fruitful, especially when a plaintiff has operated the same allegedly offending diesel vehicle for years.

### Product Identification

In lawsuits with multiple product manufacturers, multiple types or models of equipment, or even hundreds of the same piece of equipment, a defense team should consider advocating very early on in a case, ideally, during the initial scheduling conference, for phased discovery, beginning with limited product-identification discovery. The goal of product-identification discovery is to force the plaintiffs to identify each and every piece of equipment that allegedly caused their injuries, including the manufacturer, make, and model, among other things, before being able to take any liability discovery from the defense.

Product identification issues in diesel exhaust lawsuits can be quite complex. For example, if 100 plaintiffs allege that they were each injured by an individual exposure to diesel exhaust while operating a

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they relied and that the evidence failed to establish a specific level of exposure to diesel exhaust, often referred to as "dose response," that is known to cause multiple myeloma. *Id.* at 758. Accordingly, the court held that the testimony of Navarro's experts was unreliable and insufficient to establish general causation. *Id.* at 759. The plaintiff in *Richardson*, 386 S.W.3d 77, lost his case on similar grounds.

More recently, a diesel exposure plaintiff was able to demonstrate general causation but still fell short on specific causation. In *Brooks v. Ingram Barge Co.*, plaintiff Oscar Brooks, who developed lung cancer, worked for 28 years aboard defendant Ingram Barge Company's vessels; he also smoked three packs of cigarettes per day for 50 years. Case No. 4:07CV62, 2008 WL 5070243, at \*1 (N.D. Miss. Nov. 21, 2008). Although the court found conflicting evidence in the scientific literature, it held that the plaintiff's expert testimony was reliable to establish a general causal link between exposure to diesel exhaust and lung cancer in humans. *Id.* at \*3. Even so, the court found that one of plaintiff's theories of specific causation, which was based on only a single study, was not admissible under *Daubert*. *Id.* at \*4. The court also rejected the plaintiff's experts' remaining theories



diesel truck, the defense team should ask that a court order the plaintiffs to identify each and every truck specifically by make, model, and vehicle identification number that allegedly caused the plaintiffs' injuries. This is because such lawsuits resemble litigating 100 separate car accidents, making the use, condition, and maintenance history of each specific vehicle crucial.

In these circumstances, each allegedly defective vehicle has a history requiring unique consideration. This is because, in part, diesel exhaust is a complex mixture of gases and particulates, which is never exactly the same. The constituents emitted depend on a variety of factors, including the specific fuel used, the engine type, and the filtering system used in an exhaust system. Using product identification-only discovery early in a lawsuit can identify defect-free products and achieve dismissals of their manufacturers and potentially of plaintiffs who cannot identify the specific products that they claim caused their injuries. Inspecting the identified vehicles also could reveal an altered condition or equipment that did not exist at the time of sale. And from a practical perspective, it is impossible to know which vehicles to inspect or test if plaintiffs have not made this identification. Testing a sample truck is not a workable alternative because these vehicles all differ and emit different constituents. Obviously, it also may not be feasible to inspect or to test a manufacturer's entire fleet at a particular site.

### Lone Pine Orders

Another successful defense strategy is to use *Lone Pine* orders to force plaintiffs to provide causation evidence early in the litigation. *Lone Pine* orders are named for the 1986 New Jersey case in which a court first used such an order. See *Lore v. Lone Pine Corp.*, 1986 WL 837507 (N.J. Super. Ct. Law Div. Nov. 18, 1986). In that case, a toxic tort case involving 464 defendants and many plaintiffs, the court dismissed the case after the plaintiffs failed to comply with an order to present a prima facie case by establishing basic facts of injury and causation for each plaintiff. A typical *Lone Pine* order requires a plaintiff to provide, by a particular date, documentation showing the identity and amount of each chemical to which the plaintiff was exposed, the precise disease

or illness from which the plaintiff suffers, and evidence supporting causation—often in the form of expert affidavits.

In federal court, the power of a court to issue a *Lone Pine* order comes from the district court's broad discretion to manage discovery and to control the course of litigation under Federal Rule of Civil Procedure 16. In particular, Federal Rule 16(c)(2)(L) authorizes a court to adopt special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems. See *Avila v. Willits Environ. Remediation Trust*, 633 F.3d 828, 833 (9th Cir. 2009).

In the case of diesel exhaust, a *Lone Pine* order can require each plaintiff to demonstrate both general causation, meaning whether diesel exhaust can cause certain injuries, and specific causation, meaning whether diesel exhaust did in fact cause that plaintiff's particular injuries, by a particular date or risk dismissal. *Lone Pine* orders can be powerful tools in diesel exhaust cases given the extremely large and varying number of diesel exhaust constituents and the extremely broad range of injuries that plaintiffs generally will allege. Alleged injuries have included both long-term and short-term injuries ranging from lung cancer, to asthma, to a plethora of cognitive issues. A *Lone Pine* order can force plaintiffs to employ experts and to proffer a theory of causation at an early litigation stage and require each plaintiff to establish his or her particular diagnosis early. Defendants then can establish a defense to a concrete theory, such as countering the theory that a particular constituent caused that injury, rather than trying to defend against a constantly moving target.

### Federal Preemption and Statutory Standards Compliance

Defense attorneys have used the preemption defense successfully in diesel exhaust cases. See, e.g., *Butnick v. Gen. Motors Corp.*, 472 F. App'x 80 (2d Cir. 2012). In *Butnick*, the Second Circuit upheld the district court's finding that the federal Clean Air Act preempted the plaintiffs' claims against manufacturers of diesel fuel engines and of urban transit buses based on injuries from inhaling diesel exhaust fumes. The plaintiffs attempted to

use the act to establish a standard of care with which the defendants did not comply. *Id.* at 81. However, the Clean Air Act establishes that "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from any new motor vehicles or new motor vehicle engines subject to this part." 42 U.S.C. §7543(a). The



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*Butnick* court held that using state common law to bring an action that questions compliance with the standard promulgated under the Clean Air Act exemplifies a state attempting to enforce the Clean Air Act, which the law prohibits. *Butnick*, 472 F. App'x at 82.

Under the Clean Air Act, the EPA promulgates emissions standards for new motor vehicles. States generally cannot promulgate their own standards in this area. 42 U.S.C. §7543(a). However, the law waives this prohibition for any state "which has adopted standards... for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966." 42 U.S.C. §7543(b)(1). California is the only state that meets this waiver criterion. See S. Rep. No. 90-403 at 632 (1967). Moreover, the Clean Air Act explicitly authorizes California to adopt and to enforce emissions standards relating to non-road engines or vehicles. 42 U.S.C. §7543(e)(2)(A). California is, therefore, exempt from this aspect of the Clean Air Act and is governed instead by its own state diesel emissions regulations. Even so, the courts have not conclusively resolved whether California's regulations so thoroughly occupy the field to preempt common law claims.

Similarly, in the event that a preemption defense is unavailable, a defense team may argue that compliance with a statutory standard of conduct establishes that no breach of duty occurred. Specifically, a defense team should argue that the jury instructions should reflect that a defendant was not negligent if it complied with the strict diesel emissions standards. This strategy is most likely to be effective when evidence suggests that the facts show that a case involves only the ordinary situation contemplated by the statute. *See, e.g., Ramirez v. Plough, Inc.*, 6 Cal. 4th 539, 548 (1993) (holding that there is some room in tort law for a defense of statutory compliance “[w]here the evidence shows no unusual circumstances, but only the ordinary situation contemplated by the statute or administrative rule”); Rest. 2d Torts, §288C, cmt. a (“Where a statute, ordinance or regulation is found to define a standard of conduct for the purposes of negligence actions, ... the standard defined is normally a minimum standard, applicable to the ordinary situations contemplated by the legislation.”).

However, many courts do not favor using statutory compliance as a defense to tort liability. The Restatement Second of Torts summarizes the prevailing view: “[The] legislative or administrative minimum does not prevent a finding that a reasonable man would have taken additional precautions where the situation is such as to call for them.” Rest. (Second) of Torts §288C, cmt. a. If you find yourself in one of these jurisdictions, you should still present evidence demonstrating compliance with all the applicable emissions standards as a mitigating fact and as part of a “state of the art” defense.

### Assumption of Risk and Open and Obvious Danger

It is well-established that a product cannot be defective if a hazard was patent or obvious. Only latent hazards can be considered defects. As a result, in most jurisdictions, a product liability plaintiff cannot recover when the danger posed by the product is “open and obvious.” *See, e.g., Tanner v. Shoupe*, 228 Wis. 2d 357, 367, 596 N.W.2d 805 (Wis. Ct. App. 1999) (discussing obvious danger defense for a design defect claim). Moreover, manufacturers and sell-

ers have no duty to warn consumers of obvious dangers inherent in the product. *See, e.g., Liriano v. Hobart Corp.*, 170 F.3d 264, 270–71 (2d Cir. 1999) (applying New York law and discussing the obvious danger defense for a duty-to-warn claim). In diesel exhaust cases, sometimes a defense team can argue that the material risks associated with inhaling diesel exhaust fumes while operating equipment that runs on diesel fuel is obvious to a reasonably prudent equipment operator. *See Greene v. A.P. Prod., Ltd.*, 475 Mich. 502, 717 N.W.2d 855 (2006) (holding that the defendants had no duty to warn of the material risk involved with ingesting and inhaling hair oil because the risk was obvious to a reasonably prudent product user). Given the numerous studies and warnings dating back over 25 years, you should strongly consider this defense.

A similar potential defense to liability is that a product user knew of the risk created by the defendants’ conduct and subjectively agreed to accept the risk and to encounter it. *See* Restatement (Second) of Torts §496A. Many of the plaintiffs in these diesel exhaust cases have alleged continuous daily exposure to diesel exhaust contaminants in the course of their employment, sometimes lasting decades, injured them. The defense should argue that after years of operating such equipment with allegedly constant exposure to diesel exhaust, a plaintiff at some point began to assume the risk of such injury by voluntarily continuing to encounter it. *See* Restatement (Second) of Torts §496A & cmt. c.3. It should be fairly easy to demonstrate that any hazards associated with diesel exhaust were well-known, open, and obvious hazards. Certainly, the air quality conditions of the ports, rail yards, or loading docks involved will be obvious to all plaintiffs who work there.

### Proper Warnings

Another way to ensure that a manufacturer has made any potential hazard openly known and obvious is to warn of a potential hazard. When the law requires a warning, a manufacturer must show not only that it provided a warning, but also that the warning was legally adequate, both in the warning’s prominence and legibility, as well as in its substantive message.

### Sophisticated User Doctrine

Similarly, under the “sophisticated user” doctrine, a manufacturer has no duty to warn when it has reason to believe that a purchaser of its product has knowledge of the product’s allegedly hazardous condition. *See, e.g., Mohr v. St. Paul Fire & Marine Ins. Co.*, 2004 WI App 5, ¶¶ 15–20, 269 Wis. 2d 302, 674 N.W.2d 576; *Johnson v. Am. Standard, Inc.*, 43 Cal. 4th 56, 65, 179 P.3d 905 (2008). Invoking this doctrine, a defense team can avoid liability by demonstrating that operators of a defendant’s diesel equipment were sophisticated and understood the alleged hazards of diesel exhaust. This defense is considered an exception to a manufacturer’s general duty to warn consumers. Therefore, in most jurisdictions, it acts as an affirmative defense that completely negates a manufacturer’s duty to warn. *Johnson*, 43 Cal. 4th at 65.

### Third-Party Claims Against Employers or Vehicle Owners

A final defense strategy addressed here is to bring third-party claims against the plaintiffs’ employers or the vehicle owners. Workers’ Compensation laws often preclude plaintiffs from bringing these claims against their employers so defendants have the onus. *See, e.g., State ex rel. City of Martinsburg v. Sanders*, 632 S.E.2d 914 (W. Va. 2006).

These third-party claims could take a few different forms. They may take form as product liability claims or general negligence claims. When an employer or a vehicle owner has failed to maintain vehicles as instructed or failed to remedy a problem with a vehicle’s exhaust system after learning about it, pursuing a third-party claim against the employer or the owner may be a successful strategy.

### Conclusion

Exposure to diesel exhaust or DPM has the potential to become the next mass toxic tort as more plaintiffs claim a variety of injuries stemming from exposure to diesel exhaust and DPM. It is imperative that the defense bar take these cases very seriously from the beginning. Forcing plaintiffs to attempt to prove their claims with good science could terminate this new litigation before it gains traction.

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