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# Post-Sale Duty to Warn

A Report of the Products Liability Committee

**AMERICAN BAR ASSOCIATION**  
Section of Litigation

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*General Editor and Contributor*

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## Introduction

I have been intrigued by the concept of post-sale duty to warn for over twenty years. As an in-house lawyer from 1976 until 1987, it was my responsibility, in part, to counsel my clients on post-sale issues. This was always one of the most challenging and potentially dangerous areas of counseling any lawyer had to provide.

A manufacturer that makes an inappropriate decision in this area can incur significant fines from government agencies, bad publicity, new accidents, an increased risk of liability for compensatory and punitive damages, decreased goodwill with suppliers and vendors, an increased risk of recalls, and decreased sales to consumers.

Recently, more courts have adopted some version of law imposing post-sale responsibilities on manufacturers and other product sellers. In recognition of this trend, the American Law Institute included certain post-sale duties to warn in the *Restatement Third, Torts: Products Liability*. According to Professors Henderson and Twerksi, the Reporters for the *Restatement (Third)*, "...post-sale warnings are probably the most expansive area in the law of products liability." They go on to say that "[I]f you want to see people turn ashen white quickly, we recommend that you gather representatives from industry in a room and then flash the words 'post-sale warnings' on a screen." They further describe post-sale warnings as "timeless" and a "monster duty."

In addition, various U.S. government agencies and Congress, reacting to recent safety issues in the U.S. and abroad, expanded a manufacturer's responsibility to report safety problems to the appropriate U.S. regulatory agency and to take remedial action when appropriate. Lastly, the European Union has significantly expanded the responsibility of a manufacturer to report safety problems to the appropriate European agency, including the obligation, in some circumstances, to withdraw its product from the marketplace.

Because of these developments, the ABA Products Liability Committee of the Section of Litigation undertook a 50-state survey of this law. This 50-state survey confirms that well over 30 states have approved, or there is an indication they would approve, some form of this duty. Since virtually all manufacturers either sell in many states, or know that their products will be used in other states, they need to assume that there is such a duty and need to act accordingly. After litigation has arisen, the manufacturer will then have to examine the particular state's law that is to be applied to the action to determine if they have a defense.

Unfortunately, the law has been and continues to be confounding. The juries and courts that considered the older cases were very confused as to how they viewed this duty. Was the product defective when it was sold and the duty arose after sale? Or alternatively, was the product safe when it was sold and it became defective after sale? Even after reading the opinions, it was often impossible to tell which of these positions the court or jury accepted.

Then, during the development of the *Restatement( Third)*, the American Law Institute attempted to clarify the prior and often perplexing law in this area, and published provisions setting forth what that body thought the best rule of law should be. While not all states had, at that time, adopted some version of post-sale duty, the ALI felt it was appropriate to include these sections because it was “good law.” Also, and in the context of the Institute’s adoption of some provisions opposed vigorously by those expressing the interests of plaintiffs, some involved in the process viewed inclusion of these sections as a way to make the overall Restatement more evenhanded, as the identification of post-sale duties is quite clearly a favorable legal development for plaintiffs.

With this in mind, this monograph was conceived with the objective of giving a comprehensive summary of the current U.S. common and regulatory law in this subject, while also summarizing developments in Europe. In addition, some of the material raises questions to be considered by litigators as to the use of such evidence during litigation and at trial.

Professor M. Stuart Madden, Distinguished Professor of Law at Pace University Law School, has included an article that undertakes to make some sense of the U.S. common law in this area. I have also included two articles I wrote in 2002 and 2003 that were published by the Defense Research Institute on developments in U.S. and European regulatory law in this area and how to implement an effective and defensible post-sale remedial program. The remainder of this monograph is a summary of the post-sale duty law in the 50 states and the District of Columbia.

This monograph does not contain a comprehensive review of regulatory laws in the U.S. and elsewhere. Also, it necessarily leaves open the question of how courts and regulatory agencies may interpret this duty in the future. This monograph does, nevertheless, provide a good start for readers to get a sense of current law and regulations as of today, where it may be going, and how to deal with it in litigation.

This area of law will continue to impact a manufacturer’s manufacturing and sales activities, liability, and litigation. It is imperative that those interested in this area continue to monitor those aspects that are important to them. These duties will most certainly change and expand in the future.

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# THE QUIET REVOLUTION IN POST-SALE DUTIES

*M. Stuart Madden \**

## **I. Generally**

- A. Duties To Advise or Warn
- B. Duties to Recall or Retrofit

## **II. Post-Sale Duty To Warn**

- A. Generally
- B. Successor Liability, Useful Life and Prescription Product Variations
- C. Contemporary Approaches
  - (1) *Generally*
  - (2) *Latent Defect Not Discovered Until After Initial Sale*
  - (3) *After-Discovered Product Risks Irrespective of Point of Sale Defect.*
  - (4) *Post-Sale Duties Surviving Modification or Misuse of Product.*
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## **III. Post-Sale Duty To Recall Or Retrofit**

- A. Generally
- B. Special CPSC Considerations

## **IV. Conclusion**

- Distinguished Professor of Law, Pace University School of Law

## I. Generally

### A. Duties to Advise or Warn

All affected by, interested in or involved in the developing law of liability for injuries caused by defective products knows well the extraordinary growth and dynamism of the field in the last 40 years. Putting to one side the *Restatement (Third): Products Liability*,<sup>1</sup> in the past decade specifically, common law development of products liability may have slowed. If this has been so, it is attributable largely to increased state statutory intervention in the field.

A contemporary exception to what may be seen as an increasingly sluggish common law development of products liability is found in the vigorous search by courts for standards governing manufacturers' post-sale obligations. In many jurisdictions such duties are not today recognized.<sup>2</sup> However, in an increasing number of jurisdictions, continuing manufacturer obligations of one or another stripe are being defined judicially<sup>3</sup> or legislatively.<sup>4</sup> The importance of these doctrinal expansions, or conversely, refusals to extend seller duties, has become of cardinal significance to manufacturers, attorneys, legislators and jurists.<sup>5</sup>

In broad terms, a product seller's obligations to purchasers and product users are discharged by its introduction into commerce of a duly safe product.<sup>6</sup> If warnings or instructions<sup>7</sup> for judicious use are necessary for the product to be used with no more than a reasonable degree of risk, then the failure to provide such warnings or instructions renders the product defective.<sup>8</sup> In a limited number of settings, however, a seller's

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<sup>1</sup> *Restatement (Third) of Torts: Products Liability* (1997)(hereinafter *Products Liability Restatement*).

<sup>2</sup> E.g., *Buonanno v. Colmar*, 733 A.2d 719 (R.I. 1999); *Modelski v. Navistar Intern. Transp. Corp.*, 302 Ill. App.3d 879 (Ill. Ct. App.1999).

<sup>3</sup> E.g., *Smith v. Ford Motor Co.*, 908 F. Supp. 2d (N.D. Ind. 1995)(Indiana law); *Moulton v. Rival*, 116 F.3d 22 (1<sup>st</sup> Cir. 1997)(Maine law).

<sup>4</sup> E.g., Wash. Rev. Code § 7.72.030(1)(c) (recognizing certain post-sale duties); Ohio Rev. Code §2307.76 (recognizing certain post-sale duties); La. Rev. Stat. Ann. § 9:2800.57(C) (recognizing certain post-sale duties).

<sup>5</sup> See the valuable overview and analysis found in Kenneth Ross, *Post-Sale Duty to Warn: A Critical Cause of Action*, 27 WM. MITCHELL L. REV. 339 (2000).

<sup>6</sup> *Products Liability Restatement* § 1 cmt. a (defining "Liability of Commercial Sellers Based on Product Defect at Time of Sale"); see also id. at § 2 (setting forth the categories for when a product is defective at the time of sale). Other non-seller participants in the distribution of a product may be treated as sellers for the purposes of informational obligations. For the most part, these departures from the orthodox application of products liability to sellers alone occurs when the participant undertakes activities ordinarily associated with the activities of sellers. An example of such a non-seller that often is treated as a seller for the purposes of products liability might be a commercial automobile lessor.

<sup>7</sup> For the sake of brevity, a seller's duty to provide adequate warnings, instructions, or both warnings and instructions, may be referred to collectively as the duty to warn.

<sup>8</sup> See generally DAVID G. OWEN, M. STUART MADDEN, MARY J. DAVIS, 1 MADDEN & OWEN ON PRODUCTS

warnings or instructions obligations will survive the product's initial sale.<sup>9</sup> The presence or absence of a duty in tort, including a post-sale duty to provide warnings or instructions, is usually decided by the trial court as a matter of law.<sup>10</sup> Issues of warning adequacy and causation ordinarily remain as factual issues for the finder of fact.

The decisional law suggests that post-sale (often also described as “continuing”) advisory duties may arise in four circumstances. First, a seller may be obligated to warn consumers of a latent defective and unreasonably dangerous condition associated with the product that was unknown at the time of initial sale, but which was discovered after sale.<sup>11</sup> This is the position taken by the majority of courts that recognize such a duty in the first place. An alternative tack is that taken by *Products Liability Restatement* § 10, which states a rule that irrespective of whether there exists a latent point-of-sale defect, a post-sale advisory obligation may be imposed when “a reasonable person in the seller’s position would provide such a warning.”

A third position recognizes a post-sale warning obligation when a seller learns or should have learned of significant hazards associated with product misuse or alteration. Be the misuse or modification of the product caused by the user or by third parties, if it renders the foreseeable use of the product unreasonably unsafe, at least one influential court has held that the seller may be required to advise purchasers—even in circumstances where the misuse or alteration might provide the seller a successful defense in a design defect claim.<sup>12</sup> The fourth approach, which a few courts have

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LIABILITY § 9:1-9:11 (2000).

<sup>9</sup> See generally AM. LAW. PROD. LIAB. 3d § 79 (“Post-Sale or Continuing Duty to Warn”).

<sup>10</sup> E.g., *Wilson v. United States Elevator Corp.*, 972 P.2d 235 (Ariz. Ct. App. 1998) (affirming summary judgment in elevator accident claim, finding manufacturer of elevator had no continuing duty to notify known purchasers of technological advancements in door-closing mechanisms). See also *Products Liability Restatement* § 10 cmt. a:

As with all rules that raise the question whether a duty exists, courts must make the threshold decisions that, in particular cases, triers of fact could reasonably find that product sellers can practically and effectively discharge such an obligation and that the risks of harm are sufficiently great to justify what is typically a substantial post-sale undertaking. . . . In light of the serious potential for overburdening sellers in this regard, the court should carefully examine the circumstances for and against imposing a duty to provide a post-sale warning in a particular case.

<sup>11</sup> *Canto v. Ametek, Inc.*, 328 N.E.2d 873, 878 (Mass. 1985) (imposing post-sale duty to warn of latent design defect “to eliminate the risk created by the manufacturer’s initial fault”); see also *Products Liability Restatement* § 10 cmt. a (stating “[c]ourts recognize that warnings about risks discovered after sale are sometimes necessary to prevent significant harm to persons and property.”); see generally Michael L. Matula, *Manufacturer’s Post-Sale Obligations in the 1990’s*, 32 TORT & INS. L.J. 88 (1996).

E.g., *Vasallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909 (Mass. 1998). In *Vasallo*, the Massachusetts Supreme Judicial Court, “abrogating” prior precedent, wrote: “A manufacturer will be held to the standard of knowledge of an expert in the appropriate field, and will remain subject to a continuing duty to warn, at least purchasers, of risks discovered following the sale of the product at issue.” *Id.* at 923.

<sup>12</sup> See generally *Liriano v. Hobart Corp.*, 700 N.E.2d 303 (N.Y. 1998). The plaintiff in *Liriano*, a teenaged grocery store employee, suffered amputation of his right hand and lower forearm while using defendant’s commercial meat grinder, from which the safety guard had been removed. *Id.* at 305.

evaluated either independently or in conjunction with one or more of the positions stated above, focuses upon the relationship between the seller and the vendee, or as appropriate, users or consumers. Some courts adopting this approach propose that a post-sale duty will be appropriate only when, following the initial sale, the seller has commenced or continued activities, ranging from continued servicing of like products to undertaking safety-related research, sufficient to induce the purchaser or the user to reasonably expect the seller's duty to disseminate hazard information to continue. Along similar logic, some claimants have alleged that a post-sale failure to warn constitutes actionable negligence pursuant to the common law doctrine of "negligent undertaking."

## B. Duties to Recall or Retrofit

In contrast to the substantial minority of jurisdictions that have recognized one or another rationales for a continuing informational obligation, a far more restrictive approach prevails regarding claims that the seller should have recalled, retrofitted, or otherwise acted to remedy an unreasonable product hazard. When such a theory is advanced, it is often paired with an allegation that the seller also breached a continuing warning obligation. The profiles of such claims fall into two broad categories. In the first category, plaintiff alleges that there exists a post-sale duty to recall or otherwise endeavor proactively to remedy a product flaw upon the seller's post-sale discovery of unreasonable risks not known to it at the time of initial sale. The second category of such claims arises when post-sale advancements in technology might permit, or have permitted, introduction and sale of an alternatively designed and safer product.<sup>13</sup>

Courts and legislatures have generally declined to impose such latter obligations, even in jurisdictions recognizing one or another form of continuing warning obligation. A frequently stated rationale for resisting calls for post-sale recall or repair duties has been the high costs associated with recalls and retrofitting. Accordingly, there is virtual unanimity that such a duty will ordinarily only be triggered in two limited circumstances. The first is when such action is required by statute, regulation or governmental order, and the seller has failed to execute such an obligation.<sup>14</sup> One well known situation in which a post-sale obligation may be imposed by statute will be pursuant to the authority vested in the Consumer Product Safety Commission, the statutory charge of which is described briefly below.<sup>15</sup> The second triggering circumstance will be when, even absent a governmentally imposed obligation, the seller has "undertak[en] to recall the product[,]" and has failed to perform this undertaking as would a reasonable man.<sup>16</sup> *Products*

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<sup>13</sup> See generally *Products Liability Restatement* § 11 ("Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Recall Product"); see also *id.* at Reporters' Note (a) (collecting authority).

<sup>14</sup> *Id.* at § 11(a)(1) (1997), proposing liability for harm when the seller fails to recall a product if "a governmental directive issued pursuant to a statute or administrative regulation specifically requires the seller or distributor to recall the product".

<sup>15</sup> See discussion at Part III-B.

*Liability Restatement* § 11 proposes recognition of these two limited exceptions, and none other, to a broader “no duty” rule for recall and similar asserted obligations.

## II. Post-Sale Duty To Advise or Warn

### A. Generally

In a significant expansion of the law of seller warning and instructions duties, a growing number of jurisdictions now recognize one or another post-sale or continuing seller informational duties. As with warnings duties generally, when a post-sale warning obligation is imposed, the question of to whom the warning should be given will turn upon the facts of a particular case, and will contemplate evaluation of the risks involved, the efficacy and feasibility of one warning strategy over another, and the likelihood that any warning will be conveyed to the users of the product or those vulnerable to injury or loss due to the product’s unsafe condition.<sup>17</sup> State by state authority as to the appropriateness of such duties remains split, with a substantial number of jurisdictions finding or predicting that no such general obligation should be imposed absent a showing of a point-of-sale defect.<sup>18</sup> Still other jurisdictions have reached no decisions on the matter.<sup>19</sup>

Evaluation of the efficacy or adequacy of any post-sale warning is similar, but not identical to that pertaining to point-of-sale warnings. As with point-of-sale warnings, the seller’s duty is owed generally to foreseeable product users or to intermediaries who can reasonably be expected to pass on the warning.<sup>20</sup> Read in the aggregate, the decisional law suggests that this evaluation of nature of the warning and to whom it should be given

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<sup>16</sup> *Id.* at § 11 (2) (a) (1), (2).

<sup>17</sup> *See generally* Walton v. Avco Corp., 610 A.2d 454, 459 (Pa. 1992) (stating : “[t]he responsibility to warn of known defects cannot be satisfied merely by alerting participating service centers. Because of the likelihood that a purchaser will have a product serviced by its own technicians or by an unaffiliated service center...sellers must take reasonable steps to warn the user or consumer directly.”); *see also* Cover v. Cohen, 461 N.E.2d 864, 872 (N.Y. 1984) (commenting that the “nature of the warning to be given and to whom it should be given likewise turn upon a number of factors, including the harm which may result . . .”).

<sup>18</sup> *Products Liability Restatement* § 10 (Reporters' Note (a)) (citing, among other decisions, Birchler v. Gehl Co., 88 F.3d 518 (7th Cir. 1996) (Illinois law imposes no general continuing duty to warn)); Romero v. Int'l Harvester Co., 979 F.2d 1444 (10th Cir. 1992) (applying Colorado law); Carrizales v. Rheem Mfg. Co., 589 N.E.2d 569, 579 (Ill. Ct. App. 1991); Syrie v. Knoll Int'l, 748 F.2d 304, 311-12 (5th Cir. 1984) (applying Texas law).

Even without applicable Nebraska state court decisions, the Eighth Circuit Court of Appeals in Anderson v. Nissan Motors Co., 139 F.3d 599 (8th Cir. 1998) predicted that no such general post-sale warning duty would be imposed under Nebraska law. *Id.* at 602. In that action, involving injuries to a forklift operator, the plaintiff claimed that the manufacturer owed a post-sale duty to warn of dangers of operating the forklift without an operator restraint system. *Id.*

<sup>19</sup> *E.g.*, Alabama, Alaska, Arkansas, California, Florida, Hawaii, Nevada, New Hampshire, West Virginia.

<sup>20</sup> *Restatement (Second) of Torts* § 388 cmt. n (1965) (stating a method of warning should give “reasonable assurance that the information will reach those whose safety depends upon their having it”).

are guided properly by evaluation of the harm that may follow from use of the product without an advisory from the seller; the reliability of any intermediary who may be enlisted to convey the warnings to the current user; the burden on the vendor or manufacturer in locating the persons to be warned; the attention that a notice of the type contemplated would likely receive from the recipient; the nature of the product involved; and the corrective actions, if any, taken by the seller in addition to the post-sale warning.<sup>21</sup>

## B. Successor Liability, Useful Life, and Prescription Product Variations

Distinct issues are raised by claims that a successor corporation breached a duty to warn of product defects that it discovers, after sale, in its predecessor's product. In *Harris v. T.I., Inc.*,<sup>22</sup> the Virginia Supreme Court, "assuming without deciding that in the proper case [the court] would recognize a successor corporation's post-sale duty to warn[,]” found nevertheless that the plaintiff had not proved a “special relationship” between the consumer and the successor that would support finding such a duty.<sup>23</sup> *Products Liability Restatement* § 13(a) states a rule proposing successor liability for failure to provide post-sale warnings when:

(1) the successor undertakes or agrees to provide services for maintenance or repair of the product or enters into a similar relationship with the purchasers of the predecessor's product giving rise to actual or potential economic advantage to the successor, and (2) a reasonable person in the position of the successor would provide a warning.<sup>24</sup>

Many states have by statute adopted statutes of repose that operate to extinguish any potential products liability claim upon passage of a certain number of years following a product's initial sale, without regard to whether or not a product has caused an injurious accident or illness by that time. Among the cluster of rationales for such legislation is that a statute of repose can give finality to a seller's potential liability, with the

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<sup>21</sup> *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1314-15 (Kan. 1993). The Patton court noted, however, that ordinarily the manufacturer has no duty to take the additional measure(s) of retrofitting or recalling the product. *Id.* at 1315. See discussion below in Part II. B.

<sup>22</sup> 413 S.E.2d 605 (Va. 1992).

<sup>23</sup> *Id.* at 610, explained in *Ambrose v. Southworth Products, Inc.*, 953 F. Supp. 728, 733 (W.D. Va. 1997) (claim against successor of industrial elevator manufacturer).

<sup>24</sup> *Products Liability Restatement* § 13(a)(1), (2). Section 13(b) thereto provides indicia for determining whether “[a] reasonable person in the position of the successor would provide a warning[,]” and states:

- (b) A reasonable person in the position of the successor would provide a warning if:
- (1) the successor knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
  - (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
  - (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
  - (4) the risk of harm is sufficiently great to justify the burden of providing a warning.



advantages for business planning and efficient procurement of insurance that such finality brings. It would, therefore, seem to follow that upon exhaustion of an applicable state repose period, a seller's potential liability for any post-sale warning or other product-related obligation would likewise cease. Nevertheless, the Wisconsin Supreme Court decided otherwise in *Sharp v. Case Corp.*<sup>25</sup> *Sharp* involved a suit brought by a minor, an Oregon resident, and his parents against the tractor manufacturer, alleging that a defect in the tractor's power take-off (PYO) shaft caused it to engage without warning, causing the 17-year-old farm worker's arms to be drawn into the baling mechanism, and amputating both beneath the elbow.<sup>26</sup> While ultimately deciding that the juxtaposition of Oregon law and Wisconsin law on the issue presented only a false conflict, the Wisconsin court adopted as authoritative the Oregon Supreme Court's interpretation of its statute of repose as germane only to a seller's acts or omissions to acts occurring before sale, and as not "intend[ed] . . . to immunize defendants for claims based upon negligent acts or omissions committed after the sale of a product."<sup>27</sup>

As to prescription products, the general post-sale warning propositions regarding seller inquiry and advisory duties have little applicability. This is so because the specialized duties of sellers of prescription products, including blood and biological products, as well as surgical implants,<sup>28</sup> have long, by both statute and decisional law, been held to have a continuing duty to advise governmental authorities of new information regarding risk levels in use of their products. Consistent with this expectation, these duties have been found to anticipate that even after introduction of the product into the market, the manufacturer will employ on an ongoing basis its scientific and medical expertise to discover and advise health care professionals of new hazard related information. Thus, with regard to manufacturers of pharmaceuticals, most jurisdictions recognize a "continuous duty" to remain apprised of new scientific and medical developments and to inform the medical profession of pertinent information related to treatment and side effects.<sup>29</sup> This continuing informational obligation imposed

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<sup>25</sup> 595 N.W.2d 380 (Wis. 1999).

<sup>26</sup> *Id.* at 383.

<sup>27</sup> *Id.* at 385. The Sharp court continued by quoting the Oregon Supreme Court's decision in *Erickson Air-Crane v. United Tech. Corp.*, 735 P.2d 614, 618 (Or. 1987), to this effect:

[The legislature], in enacting [Oregon Statute] 30.905, contemplated placing limits only on a defendant's exposure to liability for acts or omissions taking place before or at the time the defendant places the product in the stream of commerce. Nothing in [Oregon Statute] 30.905 or its legislative history indicates that the legislative intent was to allow a manufacturer to retreat to the date of "first purchase for use or consumption" and raise the defense of [Oregon Statute] 30-905 for negligent acts committed after the date of the first purchase[.]

<sup>28</sup> "[C]ourts traditionally impose a continuing duty of reasonable care to test and monitor after sale to discover product-related risks' of prescription drugs and devices." *Products Liability Restatement* § 10 cmt. c.

<sup>29</sup> *Id.* ("With regard to . . . prescription drugs, courts traditionally impose a continuing duty to test and monitor after sale to discover product-related risks."). *E.g.*, *Wooderson v. Ortho Pharmaceutical Corp.*, 681 P.2d 1038, 1049-50 (Kan. 1984):

In cases involving prescription drugs the courts have imposed a `continuous duty to keep abreast of scientific developments touching upon the manufacturer's product and to notify the medical profession of

upon the manufacturer even after the marketing of the product is not confined to the passive interpretation of scientific, medical, or technical advances or revelations explored by third parties. Under certain circumstances, the pharmaceutical manufacturer's continuing post-sale duties have been found to include the initiation of further investigations, studies or tests.<sup>30</sup>

### C. Contemporary Approaches

#### (1) Generally

Because the law of most states has essentially fused the concept of strict liability failure to warn with that of negligent failure to warn, some states recognizing post-sale advisory duties make no distinction between claims brought in negligence and those brought in strict tort liability. Decisions in other jurisdictions have concluded, however, that important distinctions remain between negligence and strict liability claims, and that those distinctions commend recognition of a continuing duty in negligence, but not in strict tort liability. As the Kansas Supreme Court explained in *Patton v. Hutchinson Wil-Rich Manufacturing Co.*,<sup>31</sup> “[a] negligence analysis is more appropriate than an application of strict liability in the post-sale context” because “the emphasis in strict liability upon the danger of the product rather than the conduct of the manufacturer’ requires recognition that if ‘a product is not . . . unreasonably dangerous by the absence of warnings when it leaves the manufacturer’s control, it cannot at some later date become unreasonably dangerous due to the lack of warnings.’”<sup>32</sup>

Whether a continuous seller advisory duty is recognized in strict liability, in negligence or in both doctrines, the state-by-state formulations—usually judicial—of the

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any additional side effects discovered from its use . . . .’ The drug manufacturer's duty to warn is, therefore, commensurate not only with its actual knowledge gained from research and adverse reaction reports, but also with its constructive knowledge as measured by the scientific literature and other available means of communication.

Id. (quoting *Schenebeck v. Sterling Drug, Inc.*, 423 F.2d 919, 922 (8th Cir. 1970)). Subsequently, the Kansas Supreme Court held that the continuing investigational duty described in *Wooderson* “should be narrowly applied to the facts peculiar to the manufacture and distribution of ethical drugs.” *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1308 (Kan. 1993); *see also* *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 428 (Tenn. 1994) (“Manufacturers of prescription drugs, like manufacturers of any other unavoidably dangerous product, have a duty to market and distribute their products in a way that minimizes the risk or danger.”); *Stanback v. Parke Davis & Co.*, 502 F. Supp. 767, 769-70 (W.D.Va. 1980) (involving suit brought by a patient who, after receiving flu vaccine, contracted Guillane-Barre Syndrome). In *Stanback*, the court stated, at id.:

Although the duty of the ethical drug manufacturer to warn is limited to those dangers which the manufacturer knows or should know are inherent in the use of the drug, the manufacturer is treated as an expert in its particular field and is under a continuing duty to notify the medical profession of any side effects subsequently discovered from its use.

<sup>30</sup> *Products Liability Restatement* § 10 cmt. c.

<sup>31</sup> 861 P.2d 1299 (Kan. 1993).

<sup>32</sup> Id. at 1310.

duty, explicitly or implicitly, fall into four broad categories. In the first category, a seller may have a duty to advise purchasers of latent product defects of which the seller learns subsequent to initial sale. In the second category, and that adopted by *Products Liability Restatement* § 10, a seller may have such a continuing duty without regard to whether the product was defective at the time of sale, if a reasonable seller would recognize a substantial product risk and take measures to warn of it.

A third position is that even should the post-sale product risk be occasioned by product modification or misuse, where such misuse or modification becomes known to the seller a duty to warn of the risks may attach even if the misuse or alteration would serve as a defense to a design defect claim. A fourth and final basis for a continuing duty provides for recognition of a duty that is triggered when a seller has sustained a level of contact or joint safety-related activity with the buyer or the user. This fourth circumstance, therefore, may arise should the seller have undertaken initial remedial, ameliorative or informational responsibilities, and the purchaser or third party has placed reliance upon its continuation. Each of these four approaches will be discussed in order.

### *(2) Latent Defect Not Discovered Until After Initial Sale*

Both by statute<sup>33</sup> and by decisional law a “growing number” of jurisdictions have expanded a seller’s point-of-sale warning responsibilities “to require warnings after the sale when the product later reveals a defect not known at the time of sale.”<sup>34</sup> As the following discussion will demonstrate, where not required by statute, imposition of a post-sale obligation will most frequently turn on consideration of the nature and degree of the potential harm, and the feasibility of undertaking such post-sale efforts.<sup>35</sup>

While many states have yet to rule on the issue, the sturdy minority of jurisdictions that are currently sculpting such seller duties have concluded that “[w]hen a manufacturer learns . . . of the dangers associated with a reasonably foreseeable use of its products after they are distributed . . . [it] must take reasonable steps to warn reasonably foreseeable users about those dangers . . . .”<sup>36</sup> Under this emerging body of law of post-sale duties, a manufacturer who, after the initial sale of the product, learns or should have

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<sup>33</sup> The pertinent provision of the Iowa Code states: “Nothing contained in this section shall diminish the duty of an assembler, designer, supplier of specifications, distributor, manufacturer or seller to warn of subsequently acquired knowledge of a defect or dangerous condition that would render the product unreasonably dangerous for its foreseeable use or diminish the liability for failure to warn.” Iowa Code § 668.12 (1999).

<sup>34</sup> *Lovick v. Wil-Rich*, 588 N.W.2d 688, 693 (Iowa 1999) (noting Iowa adoption of doctrine by statute).

<sup>35</sup> *Crowston v. Goodyear Tire & Rubber Co.*, 521 N.W.2d 401, 409 (N.D. 1994) (allegedly defective tire and wheel); *Patton v. Wil-Rich Mfg. Co.*, 861 P.2d at 1314-15 (allegedly defective farm equipment, with court writing that factors to consider in deciding presence or absence of duty include nature and likelihood of the injury, feasibility, expense, effectiveness of potential warning, and ability to identify past purchasers); *Cover v. Cohen*, 461 N.E.2d 864, 866 (N.Y. 1984) (alleged malfunction of acceleration system and brake failure).

<sup>36</sup> *Moulton v. Rival Co.*, 116 F.3d 22, 25-26 (1st Cir. 1997) (Maine law).

learned of latent product defects that render the product not duly safe for foreseeable uses and who fails to warn the purchaser or the consumer when a reasonable seller would have done so may be liable for personal injury or property damage proximately caused thereby.<sup>37</sup> As suggested, this scenario typically involves (1) a product that is defective at the time of sale; (2) the defect, due to its latent nature, is undetected prior to sale; and (3) the defect becomes known or knowable—by consumer complaints, related accidents or otherwise—only after the original sale.<sup>38</sup>

An early and influential decision identifying a manufacturer’s post-sale duty to warn was entered in *Comstock v. General Motors Corp.*,<sup>39</sup> which involved the alleged failure of the automobile manufacturer to take remedial measures after learning, soon after the model was put on the market, of a vulnerability of the vehicles’ brakes to failure. A claim was brought by a mechanic at an automobile dealership who suffered severe injuries when a car rolled into him in a service bay. The court, after first describing the manufacturer’s general duty to warn at the point of sale, stated that “a like duty to give prompt warning exists when a latent defect which makes the product hazardous becomes known to the manufacturer shortly after the product has been put on the market.”

The Kansas Supreme Court took a harmonious approach in *Patton v. Hutchinson Wil-Rich Manufacturing Co.*,<sup>40</sup> and while highlighting the importance of the gravity of the harm, stated: “We recognize a manufacturer’s post-sale duty to warn ultimate consumers . . . when a defect, which originated at the time the product was manufactured, is discovered to present a life-threatening hazard.”<sup>41</sup> To like effect was *Kozlowski v. John E. Smith Sons Co.*,<sup>42</sup> in which plaintiff alleged defective design and inadequate warnings at the time of sale.<sup>43</sup>

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<sup>37</sup> *Products Liability Restatement* § 10 cmt. b (“The standard governing the liability of the seller is objective: whether a reasonable person in the seller's position would provide a warning.”). While *Products Liability Restatement* § 10 speaks in terms of sellers, cmt. b thereto recognizes that manufacturers and non-manufacturing sellers are not similarly situated:

In applying the reasonableness standard to members of the chain of distribution it is possible that one party's conduct may be reasonable and another's unreasonable. For example, a manufacturer may discover information under circumstances satisfying [§ 10(b)(1)-(4)] and thus be required to provide a post-sale warning. In contrast, a retailer is generally not in a position to know about the risk discovered by the manufacturer after sale and thus is not subject to liability because it neither knows nor should know of the risk. Once the retailer is made aware of the risk, however, whether the retailer is subject to liability for failing to issue a post-sale warning depends on whether a reasonable person in the retailer's position would warn under the criteria set forth in [§ 10(b)(1)-(4)].

<sup>38</sup> *Id.* at § 10 cmt. c (noting that a post-sale duty to warn may arise “when new information is brought to the attention of the seller, after the time of sale, concerning risks accompanying the product's use or consumption.”).

<sup>39</sup> 99 N.W.2d 627 (Mich. 1959).

<sup>40</sup> 861 P.2d 1299 (Kan. 1993)

<sup>41</sup> *Id.* at 1313.

<sup>42</sup> 275 N.W.2d 915 (Wis. 1979).

<sup>43</sup> *Accord Gracyalny v. Westinghouse Elec. Corp.*, 723 F.2d 1311 (7th Cir. 1983) (claim that manufacturer failed to

### *(3) After-Discovered Product Risks Irrespective of Point of Sale Defect*

A post-sale duty to warn may attach when the product, through use or operation, has betrayed hazards not earlier known to the seller, or to other sellers of like products.<sup>44</sup> *Products Liability Restatement* § 10 adopts a conventional “reasonable seller” approach to gauging whether such a duty exists on any particular set of facts.<sup>45</sup> The section states that such a duty to provide post-sale warnings is triggered “when a reasonable person in the seller’s position would provide such a warning.”<sup>46</sup> In assessing the reasonableness standard, subsection (b) thereto suggests considering a number of factors such as whether:

(1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and (2) those to whom a warning might be provided can be identified and may reasonably be assumed to be unaware of the risk of harm; and (3) a warning can be effectively communicated to and acted on by those to whom the warning might be provided; and (4) the risk of harm is sufficiently great to justify the burden of providing a warning.<sup>47</sup>

Hewing explicitly to the *Products Liability Restatement* approach is the Massachusetts Supreme Judicial Court decision in *Lewis v. Ariens Co.*,<sup>48</sup> the appeal of a personal injury claim brought by the purchaser of a used snow blower, who lost four fingers upon contact with the device’s impeller blades. The court focused on the fact that the claimant purchased the product “at least” second hand, and 16 years after its initial sale, as such factors would bear upon the warnings feasibility factors identified in *Products Liability Restatement* § 10(b)(2) and (3), to wit, the ability to identify those to whom a warning might be directed, the ability to communicate this warning to such

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provide adequate warnings regarding post point-of-sale discovery of hidden defect); *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 328 (Mich. 1995) (“[B]efore there can be a true continuing duty--whether it be to warn, repair or recall--there must be a defect or actionable problem at the point of manufacture.”); *see also* *Reeves v. Cincinnati, Inc.*, 528 N.W.2d 787 (Mich. Ct. App. 1995) (held: manufacturer had no post-sale duty when products were produced without defects; manufacturer not required to provide notice of updated features).

<sup>44</sup> *Straley v. United States*, 887 F. Supp 728, 748 (D.N.J. 1995) (held: manufacturer of garbage truck lacking safety decals warning of dangers posed by using riding step while truck operating in reverse, a manufacturer had duty to warn of dangers revealed by developing state of the art); *see also* *Koker v. Armstrong Cork, Inc.*, 804 P.2d 659, 666 (Wash. Ct. App. 1991) (in shipyard worker’s products liability action brought against manufacturers of asbestos products manufacturers, held: “[the] duty to warn attaches, not when scientific certainty of harm is established, but whenever a reasonable person using the product would want to be informed of the risk of harm in order to decide whether to expose himself to it.”); *see generally* Robert E. Manchester, *Consequences of Failure to Recall Defective Product at Earliest Possible Moment*, 1 PROD.LIAB.L.J. 76 (1988); Matula, above, at 3.

<sup>45</sup> *Products Liability Restatement* § 10(a).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at § 10(b)(1)-(4).

<sup>48</sup> 751 N.E.2d 862 (Mass. 2001).

persons, and the likelihood that such a warning would be acted upon. Given the passage of time and the multiple sales associated with the product in issue, the Massachusetts high court found no continuing duty to warn.<sup>49</sup>

On reasoning that can be reconciled with the *Products Liability Restatement* emphasis upon hazard recognition and warning feasibility, a New Jersey appeals court in *Dixon v. Jacobsen Mfg. Co.*<sup>50</sup> stated: “Where the manufacturer knew the identity of the owner of its product, we have no hesitation in holding that such [post-sale] duty existed, and it was for the jury to determine whether that duty had been discharged.”<sup>51</sup> The *Products Liability Restatement* “reasonable seller” position can be recognized as providing for a duty that may be broader than that advanced in *Comstock* and the cases following *Comstock*’s approach, which is to say, adoption of a requirement that plaintiff show that the product had a point-of-sale (and presumably latent) defect. *Products Liability Restatement* § 10 contains no such requirement. Thus a warning duty may, of course, be found when a pre-existing defect is or should have been discovered, but also when, irrespective of defect, the hazard and the circumstances set forth in subsections 10(b)(1)-(4) are such that a reasonable seller would provide a post- sale warning.

The majority of jurisdictions have held that the manufacturer of a non-defective product has no duty to warn prior purchasers of new safety devices that are employed by the manufacturer or by manufacturers of like product. In the words of one federal trial court applying Pennsylvania law: “there is no cause of action for a continuing duty to warn purchasers of new developments which may make the product more safe.”<sup>52</sup> *Products Liability Restatement* § 10 makes clear its recognition that even if the product

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<sup>49</sup> Id. at 867-68. The court explained:

We [conclude] that in this case Ariens owed no continuing duty to Lewis, who purchased the product at least second hand, sixteen years after it was originally sold, and did not own the product until years after a duty to provide warnings arguably arose. In these circumstances, he is a “member of a universe too diffuse and too large for manufacturers or sellers of original equipment to identify. It would be unreasonable to require a manufacturer to provide warnings to an individual in Lewis’s circumstances.

Id. (citation omitted).

<sup>50</sup> 637 A.2d 915, 923-24 (N.J. App. Div. 1994)

<sup>51</sup> *Products Liability Restatement* § 10 cmt. a Reporters' Note.

<sup>52</sup> *Habecker v. Clark Equip. Co.*, 797 F. Supp. 381, 386 (M.D. Pa. 1992); see also *Reeves v. Cincinnati, Inc.*, 528 N.W.2d 787 (Mich. Ct. App. 1995), appeal denied, 549 N.W.2d 563 (1996); *Romero v. Int'l Harvester Co.*, 979 F.2d 1444, 1446 (10th Cir. 1992) (applying Colorado law)(held: duty to provide prior purchasers with advisories only appropriate upon proof that the product was defective under standards existing at the time of manufacture) (collecting authority); *Moorehead v. Clark Equip. Co.*, No. 86 C 1442, 1987 WL 26158, at \*5 (N.D. Ill. 1987) (applying Illinois law)(court rejects plaintiff's argument that there existed a “continuing duty of a manufacturer to notify prior purchasers of new safety devices”); see generally Comment, *Gregory v. Cincinnati: Searching for Continuing Duty to Recall or Retrofit Under Michigan Law*, 1996 DET. C.L. MICH. ST. U.L. REV. 721 (1996). E.g., *Williams v. Monarch Machine Tool Co.*, 26 F.3d 228, 223 (1st Cir. 1994) (applying Maine law)(held: no manufacturer duty “to advise purchasers about post-sale safety improvements that have been made to a machine that was reasonably safe at the time of sale.”).

had no latent defect at the time of initial sale, many products, while non-defective and reasonably or duly safe at the time of sale, later become recognized to pose avoidable (though not necessarily unreasonable) risks of injury because later post-manufacture advancements in science or technology permit an alternative and safer design. Still and all, § 10 should be interpreted as suggesting that when a product is duly safe at the point of sale, based upon then extant scientific, medical or technological knowledge, even upon a plaintiff's showing that advancements in knowledge would permit the product to be made more safely, courts ought not make manufacturers responsible for advising purchasers or consumers of the virtues of the safer product unless 'a reasonable person in the seller's position' would do so.<sup>53</sup>

The decisional law supports this position, and one finds ample authority that a reasonable seller is not obligated to advise purchasers or others regarding advancements in safety. This is particularly so in settings in which the product, at the time of initial sale, was not conspicuously obsolete and conformed to established industry standards.<sup>54</sup> One rationale underlying the refusal of courts to impose a general duty to advise past purchasers of technological or safety advances is that an obligation upon manufacturers to identify, locate and warn all users of safety improvements would unreasonably burden a manufacturer.<sup>55</sup> As most technologically advanced products are regularly improved upon in terms of either their effectiveness or their safety, one official comment to § 10 states plainly that it does not propose a post-sale warning duty every time a subsequent design modification results in improved safety.<sup>56</sup> In this respect the official comments to *Products Liability Restatement* § 10 adopt the prevailing rule that post-sale warning duties do not extend to advisory notification of post-sale safety improvements.<sup>57</sup> The

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<sup>53</sup> *Products Liability Restatement* § 10(a). *But see* *Hernandez v. Badger Construction Equipment Co.*, 229 Cal. App. 4th 1791, 1827 (Ct. App. 4th Dist. 1994), involving injuries to a crane user, stating that under California law there may exist a cause of action, and "quite apart from the design issue", for failure to warn ("notify") owners of the crane about later-discovered dangerous propensities of the product, "and the availability of safety devices which the manufacturer would install."

<sup>54</sup> *Wilson v. United States Elevator Corp.*, 972 P.2d 235, 237, 241 (Ariz. Ct. App. 1998) (no duty to provide post-sale advisories of improvements in elevator door closing mechanism).

<sup>55</sup> *Products Liability Restatement* 10(a) cmt. c ("When risks are not actually brought to the attention of sellers, the cost of constantly monitoring product performance in the field is usually too burdensome to support a post-sale duty to warn."); *see also* *Williams v. Monarch Machine Tool Co.*, 26 F.3d 228, 232 (1st Cir. 1994) (applying Massachusetts law) (holding latent defects must exist before any post-sale duty arises); *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1311 (Kan. 1993) (declining to "impose a requirement that a manufacturer seek out past customers and notify them of changes in the state of the art.").

<sup>56</sup> *Products Liability Restatement* § 10 cmt. a.

<sup>57</sup> *Accord*, *Wilson v. United States Elevator Corp.*, 972 P.2d 235 (Ariz. Ct. App. 1998). In *Wilson*, which involved a plaintiff's injury when his hand was caught in the doors of an elevator, plaintiff claimed that the manufacturer had a duty to advise the elevator purchaser (the premises manager) of a "shield sensor" available after the manufacture and sale of the elevator in question. *Id.* at 237-38. Held: "the fact that other safety methods were available imposed no duty on the manufacturer to 'produce a machine which incorporated only the ultimate in safety features.'" *Id.* at 238 (quoting *Rodriguez v. Besser Co.*, 115 Ariz. 454, P.2d 1315 (Ariz. Ct. App. 1977)).

Comments to *Products Liability Restatement* § 10 caution, however, that such a post-sale inquiry and potential warning obligation may exist “when reasonable grounds exist for the seller to suspect that a hitherto unknown risk exists, especially when the risk involved is great[.]”<sup>58</sup>

*Products Liability Restatement* §§ 10(b)(2) & (3) suggest that the assessment of the presence or absence of duty take into account that there will be varying degrees of feasibility in identifying purchasers or current users. A motor vehicle, a piece of capital equipment, or a durable and relatively expensive product such as a meat slicer used in a sandwich shop, will often be traceable through the location of product identification numbers, returned warranty cards, dealer records, or other fairly accessible means. For such products, where the other criteria of § 10(b) are met, application of the liability rule that section imposes will be appropriate. For other classes of products, price, perishability, limited useful life, or the availability of such products through typical over-the-counter markets which characteristically do not involve recording the purchasers’ name, will militate against finding a post-sale duty to warn individual product users or consumers. *Products Liability Restatement* § 10 comment *e* observes that when customer records are not available, it becomes more difficult for sellers to identify its product users for whom warnings would be useful and may prevent a post-sale duty from arising.<sup>59</sup> In some circumstances, nonetheless, the absence of means for individual consumer identification will not obviate the appropriateness of a post-sale warning duty, such as, for example, if “customer records . . . identify the population to whom warnings should be provided . . . [or] indicate classes of product users, or geographically limited markets [.]” thereby permitting post-sale warnings by public notice.<sup>60</sup>

*Products Liability Restatement* § 10(b)(4), which emphasizes the centrality of considering the severity of the potential injury in assessing continuing seller duties, is in agreement with the decisional law holding that where the severity of the potential injury is modest (as opposed to substantial, or serious), a continuing duty to provide warnings should not be imposed. While adopting in general terms a post-sale duty identified by the *Products Liability Restatement*, courts in some jurisdictions place particular emphasis upon the magnitude of danger factor. For example, in *Crowston v. Goodyear Tire & Rubber*,<sup>61</sup> the plaintiff, a service station employee, was injured while inflating a 16-inch truck tire on a mismatched 16.5-inch wheel.<sup>62</sup> He sued Goodyear, the tire manufacturer, and Kelsey-Hayes Co., the wheel manufacturer, arguing that they had a post-sale duty to

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<sup>58</sup> *Products Liability Restatement* § 10 at cmt. *c*.

<sup>59</sup> *Id.* at § 10(b)(3) cmt. *e*.

<sup>60</sup> *Id.*

<sup>61</sup> 521 N.W.2d 401, 405 (N.D. 1994).

<sup>62</sup> *Id.* at 405.



warn consumers and users about dangers of mismatching.<sup>63</sup> The North Dakota Supreme Court acknowledged that the law of that state recognized post-sale advisory duties in “special” circumstances.<sup>64</sup> On the facts before it, the state high court held that the peril of tire rim and wheel mismatching was sufficiently great in terms of seriousness of injury and the large number of persons who might be exposed to the risk as to warrant imposition of a post- sale informational duty upon the manufacturer.<sup>65</sup>

Applying Minnesota law, a federal district court in *McDaniel v. Bieffe USA, Inc.*<sup>66</sup> found that the manufacturer of a motorcycle helmet had a post- sale duty to warn of the risks of misusing the helmet’s Velcro strap by employing it as a substitute for proper fastening of the helmet’s actual chin strap.<sup>67</sup> The claim arose following a fatal accident in which a motorcyclist’s helmet dislodged in an accident in which he was hit by a van that ran a red light.<sup>68</sup> The specific risk pertaining to the Velcro strip on the helmet’s chin strap was that the strip was a feature intended only ‘to give the rider a means of fastening down the loose end of the strap after it [had] been passed through the retaining bar.’ Decedent’s representatives claimed that from a human factors standpoint, the design was defective, in that it “induce[d]. . .users to fasten the strap ‘improperly,” which is to say, users might employ the Velcro surface to actually fasten the helmet, and forego passing the strap through the retaining bar.

The federal trial court noted that the Minnesota Supreme Court had explicitly recognized a post-sale duty to warn in “special cases.”<sup>69</sup> The “special cases” language derived from the state high court decision in *Hodder v. Goodyear Tire & Rubber Co.*,<sup>70</sup> also a tire rim personal injury case, in which the Minnesota high court emphasized the following findings: (1) the manufacturer had known for years that the rims “could be temperamental”; (2) “that the margin for error in servicing [the rims] was dangerously small”; (3) that when accidents occurred they usually resulted in death or serious bodily injury; and (4) that the defendant had plied the tire rim trade for many years, and even after ceasing production of the rim, had continued to sell tires and other products for use with the rims.<sup>71</sup>

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<sup>63</sup> Id. at 405-06.

<sup>64</sup> Id. at 409.

<sup>65</sup> Id.

<sup>66</sup> 35 F. Supp. 2d 735 (D. Minn. 1999).

<sup>67</sup> Id. at 736, 743.

<sup>68</sup> Id. at 737.

<sup>69</sup> Id. at 739-40.

<sup>70</sup> 426 N.W.2d 826, 823 (Minn. 1988).

<sup>71</sup> Id. at 833.

Since *Hodder*, the *McDaniel* court noted, observed, Minnesota courts and federal courts applying Minnesota law had found a post-sale duty to warn based upon the relative presence or absence of “*Hodder* factors”.<sup>72</sup> Finding that the *McDaniel* facts included some *Hodder* factors,<sup>73</sup> and did not include others,<sup>74</sup> and noting further the absence of an explanation in *Hodder* of “what factors are determinative in deciding when to impose a post-sale duty-to warn[,]”<sup>75</sup> the *McDaniel* court denied defendant Bieffe’s motion for summary judgment as to the post-sale duty to warn count, concluding that under Minnesota law, material issues of fact existed as to the manufacturer’s warning obligations.<sup>76</sup>

*Crowston*,<sup>77</sup> referenced above, placed reliance upon *Hodder* in reaching its holding that Goodyear Tire & Rubber Co. had a duty to advise past purchasers of a post-point of sale discovery of the danger of mismatching a sixteen-inch tire with a sixteen-and-one-half inch rim.<sup>78</sup> Deciding that the logic of *Hodder* was sufficiently broad to commend its application to mass market consumer products,<sup>79</sup> the South Dakota Supreme Court found the facts before it were aligned significantly with those considered by the Minnesota Supreme Court in *Hodder*:

In both cases, serious injury was a consequence of the dangers associated with the use of the product. The defendants became aware of those dangers after the manufacture and sale of the product, and those dangers may have been eliminated

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<sup>72</sup> *McDaniel*, 35 F. Supp.2d at 740:

Relying upon *Hodder*, a few Minnesota courts, and federal courts applying Minnesota law, have recognized or discussed post-sale warning duties, *e.g.*, *T.H.S. Northstar Assocs. v. W. R. Grace & Co.*, 66 F.3d 173, 177 (8th Cir. 1995) (affirming district court decision to allow jury determination of whether asbestos manufacturer breached its post-sale duty to warn); *Ramstad v. Lear Siegler Diversified Holdings Corp.*, 836 F. Supp. 1511, 1517 (D. Minn. 1993) (holding auger manufacturer had no post-sale duty to warn of dangers associated with auger because numerous *Hodder* factors not present); *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517, 1528 (D. Minn. 1989) (recognizing post-sale duty to warn, and corresponding duty to test for alleged dangers associated with intrauterine contraceptive device); *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 100-01 (Minn. 1989) (holding a successor corporation has no post-sale duty to warn of product defects where successor never succeeded to any service contracts, was not aware of claimed defects, and did not know of location of the product at time of plaintiff’s injury).

<sup>73</sup> The court noted specifically issues of fact as to whether the manufacturer had reason to know of the risk, including (1) the latency of the risk; (2) the potential for death or serious bodily injury; and (3) the continued sale of similar products. *McDaniel*, 35 F. Supp. at 740.

<sup>74</sup> Bieffe had not continued to service the product, had not remained in contact with users, and had not undertaken a duty to keep purchasers advised of product developments. *Id.* at 740-41.

<sup>75</sup> *Id.* at 741.

<sup>76</sup> *Id.* at 741-743.

<sup>77</sup> 521 N.W.2d 401, 408-09 (N.D. 1994).

<sup>78</sup> *Id.* at 409.

<sup>79</sup> *Id.* at 408 (“Simply because a product is mass produced and widely distributed does not totally absolve a manufacturer of a post-sale duty to warn under ordinary negligence principles.”).

by appropriate post-sale warnings. The number of individuals exposed to the potential dangers in both cases was significant. Although the number of . . . [the products] produced militates against individualized notice to the original purchasers, that same factor suggests that manufacturers cannot totally ignore post-sale information which has the potential to prevent serious injury to so many people.<sup>80</sup>

A continuing duty to warn was found in *Alexander v. Morning Pride Manufacturing, Inc.*,<sup>81</sup> a suit brought by fire fighters against the manufacturer of fire fighting “bunker gear” that allegedly failed to protect plaintiffs adequately against burns when they knelt on hot surfaces.<sup>82</sup> The plaintiffs complained that the material in the knees of the bunker gear, when compressed by the firefighters’ kneeling, lost its heat-protective characteristics, and that in use, the defendant’s protective gear bunker gear gave them no physical notice, such as by gradual warming, of the need to move their knees from the source of the heat. Rather, the complaint contended, the condition of the product created an unreasonable risk of serious burns before the fire fighters could take ordinary measures to protect themselves.<sup>83</sup> Denying the manufacturer’s motion for summary judgment, the federal trial court wrote: “As the Court instructed the jury, a manufacturer’s duty to warn of inherent limitations in a product is a continuing one. Nevertheless, the testimony was clear that even after Morning Pride learned the “horrendous” news that Philadelphia fire fighters were being burned, “[it] never warned them, although it could easily have contacted [them] directly and warned them of the gear’s limitations.”<sup>84</sup>”

#### (4) *Post-Sale Duties Surviving Modification or Misuse of Product*

Noteworthy as well are the situations in which the manufacturer has knowledge that its product is subject to systematic modification or misuse that elevates the risk of harm. When the manufacturer has actual or constructive knowledge that its product has been subject to widespread user modification, and there is information suggesting that such modifications create a risk of injury to persons or damage to property, the

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<sup>80</sup> Id. at 409.

<sup>81</sup> 913 F. Supp. 362 (E.D. Pa. 1995).

<sup>82</sup> Id. at 364.

<sup>83</sup> Id. at 367. As explained by a 1991 revised sheet issued by defendant:

Wetness and compression both reduce system insulation. When the system is BOTH wet and compressed, (i.e., the fire fighter kneeling after sweating in his liner; the increase in protection is even more pronounced (even worse the decrease is in the area of warning time). According to the evidence, no fire fighters received this user sheet, and the manufacturer withdrew it from use three years later.

Id. at 368-69.

<sup>84</sup> Id. at 368.

manufacturer's obligation to issue post point-of-sale advisories will depend upon the foreseeability of harm that may be occasioned by such modifications or alterations.<sup>85</sup>

In many instances a post-sale product modification or the misuse of a product may be of a sufficient order of magnitude and so unforeseeable as to itself become the producing cause of the plaintiff's harm. One might first suppose that in such circumstances the manufacturer could not possibly be found liable for failing to provide warnings against a plaintiff's action that might, in ordinary circumstances, be shown to be a superceding cause of his harm, and a thus complete defense to any design defect claim that might be brought against the manufacturer. The issue then arises as to whether and in what circumstances a continuing warning duty might nevertheless be imposed even when product alteration or misuse would preclude a finding of defective design.

A leading decision in this regard is that reached by the New York Court of Appeals in *Liriano v. Hobart Corp.*<sup>86</sup> *Liriano* involved a 17-year-old grocery store employee who had his right hand and lower forearm amputated following an injury while using the store's meat grinder.<sup>87</sup> A safety device sold as original equipment with the product, and designed to prevent a user's hand from coming into contact with the grinder's feeding tube and "worm", had been removed<sup>88</sup>. No warnings were on the machine indicating the dangers of using the machine without the safety guard.<sup>89</sup> Removal of the guard by persons unknown had taken place during the time of its operation on the grocery store premises.<sup>90</sup>

The evidence showed that Hobart, the manufacturer, had learned "that a significant number of purchasers of its meat grinders had removed the safety guards[,] and had commenced to affix warnings to new machines being sold, but had taken no effort to advise earlier purchasers of the risk."<sup>91</sup> The Second Circuit Court of Appeals certified to the New York high court the question of whether or not "manufacturer

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<sup>85</sup> *E.g.*, *Piper v. Bear Med. Sys. Inc.*, 883 P.2d 407, 414 (Ariz. Ct. App. 1993) ("[A] manufacturer may be liable for a failure to warn of dangers of product modifications that it knew or had reason to know were occurring."); *Village of Groton v. Tokheim Corp.*, 608 N.Y.S.2d 565, 568 (App.Div. 1994) (imposing upon manufacturer duty to warn authorized and unauthorized distributors after learning that product was being used with another product in a dangerous manner); *see also* *Perry v. Rockwell Graphics Systems, Inc.*, PROD.LIAB.REP. (CCH) P 27,445 (D. Mass.1985) (not reported in F. Supp.). *Perry* involved a worker's injuries, sustained in 1982, while using a cardboard cutting machine manufactured by defendant in 1914. Held: the manufacturer's "actual or imputed" knowledge of "widespread modification" of its presses in the cardboard industry "could be the basis for liability for failure to warn of hazards discovered after manufacture of the machine."

<sup>86</sup> 700 N.E.2d 303 (N.Y. 1998).

<sup>87</sup> *Id.* at 305.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

liability exist under a failure to warn theory in cases in which the substantial modification defense would preclude liability under a design defect theory.”<sup>92</sup> The New York Court of Appeals answered in the affirmative. It commented that under New York law, a manufacturer has “a duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable”<sup>93</sup> and explained:

The justification for the post-sale duty to warn arises from the manufacturer’s unique (and superior) position to follow use and adaptation of its product by consumers. Compared to purchasers and users of a product, a manufacturer is best placed to learn about the post-sale defects or dangers discovered in use. A manufacturer’s superior position to garner information and its corresponding duty to warn is no less with respect to the ability to learn of modifications made to or misuse of a product. . . . This Court therefore concludes that manufacturer liability can exist under a failure to warn theory in cases in which a substantial modification defense . . . might otherwise preclude a design defect claim.<sup>94</sup>

#### *(5) Post Sale Duties Arising From Seller Conduct*

Some decisions falling within this final category seemingly recognize that upon particular facts, continuing advisory duties may arise when a seller has undertaken some level of cautionary effort upon which a product user has relied, thereby creating, plaintiff alleges, an obligation to continue to advise or warn on an ongoing basis.<sup>95</sup> The fourth category of decisions that have evaluated post-sale warning or advisory duties have employed criteria similar in ways to those adopted in *Hodder v. Goodyear Tire & Rubber Co.*<sup>96</sup> and *McDaniel v. Bieffe USA, Inc.*,<sup>97</sup> discussed above. However in these cases, the courts have adopted the analysis of *Restatement (Second) of Torts* § 324A, which states a rule that:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform]<sup>98</sup> his

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<sup>92</sup> Id. at 304.

<sup>93</sup> Id. at 305 (citations omitted).

<sup>94</sup> Id. at 307-08 (citations omitted).

<sup>95</sup> See generally *Artiglio v. Corning Incorporated*, 957 P.2d 1313 (Cal. 1998) (alleging defendant's toxicology research established such an 'undertaking'); *Walton v. Avco. Corp.*, 610 A.2d 454, 459 (Pa. 1992) (held: post-sale duty to warn where the manufacturer of a crucial component part of a helicopter was notified of product defect by subcontractor and had remained in contact with the owner).

<sup>96</sup> 426 N.W.2d 826 (Minn. 1988).

<sup>97</sup> 35 F. Supp. 2d 735 (D. Minn. 1999) (applying Minnesota law).

<sup>98</sup> In the published *Restatement* provision, the bracketed word appears as “protect.” Use of that word has been

undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.<sup>99</sup>

Illustrative of such a “negligent undertaking” claim is that resolved by the California Supreme Court decision in *Artiglio v. Corning, Inc.*,<sup>100</sup> the review of an action brought by recipients of silicone gel breast implants against the manufacturer of the implants and its parent corporation. With specific regard to the claim against one of two parent corporations, Dow Chemical Company, plaintiffs asserted that (1) Dow had conducted toxicology research concerning various silicone products; (2) it had provided this research to the manufacturing subsidiary, Dow Corning Corp.; (3) the research “implicate[d] the well-being and protection of third parties [the implant recipients]”; and (4) the manufacturer’s various undertakings with the research were conducted negligently.<sup>101</sup> The trial court granted summary judgment, and the appellate court affirmed.<sup>102</sup> The California Supreme Court affirmed the appellate decision, and in its holding emphasized two shortcomings of plaintiff’s “negligent undertaking” count. First, the court found that once Dow had undertaken and shared its toxicological research, it did not incur thereby an obligation to conduct additional research and to advise either its subsidiary or the third party implant recipients indefinitely.<sup>103</sup> In reaching this conclusion, the court quoted authority suggesting that “[t]he duty of a ‘good Samaritan’ is limited. Once he has performed his voluntary act he is not required to continue to render aid indefinitely[,]” and that an initial act taken to protect another does not make the actor “the guarantor of [the third party’s] future safety.”<sup>104</sup> Secondly, the court wrote, the record revealed that other than the provision of early studies, Dow had engaged in no operational contact with Dow Corning, such as inspecting or testing the devices manufactured by its subsidiary that might form the basis for a relational argument for a post-sale duty, or the basis for any claim of detrimental reliance.<sup>105</sup>

Whatever obstacles may stand in the way of a plaintiff’s recovery under a “negligent undertaking” theory, there is broad authority for the proposition that the presence or absence of a post-sale warning obligation may turn upon the manufacturer’s

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widely recognized as mistaken, and courts have instead substituted the word “provide”

<sup>99</sup> *Restatement (Second) of Torts* § 324A (1965).

<sup>100</sup> 957 P.2d 1313 (Cal. 1998).

<sup>101</sup> *Id.* at 1319-20.

<sup>102</sup> *Id.* at 1316.

<sup>103</sup> *Id.* at 1319.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1320 (citing *Temporomandibular Joints (TMJ) Implants*, 113 F.3d 1184, 1194 (8th Cir. 1997)).

post-sale activities. Where a manufacturer has continued, for example, to promote a product as safe, a warning obligation may attach upon its learning of information indicating the contrary. For example, in *T.H.S. Northstar & Assoc. v. W.R. Grace & Co.*,<sup>106</sup> a Minneapolis building owner sued for cleanup and abatement costs, alleging that Grace's Monokote 3 fireproofing product contaminated the premises with asbestos.<sup>107</sup> Subsequently, the federal appeals court affirmed an award of damages to plaintiff entered by a jury that had been instructed as to a limited manufacturer continuing duty to warn.<sup>108</sup> Grace argued that evidence adduced at trial fell short of a showing of 'special circumstances' that would create an ex post warning obligation.<sup>109</sup> The appeals court disagreed, finding that under applicable Minnesota law, such a 'special circumstances' duty could be found to exist when "(1) the manufacturer insisted that its product was safe if used properly; (2) it became evident to the manufacturer over time that great care was required in the handling and servicing of the product, or serious injury would occur; and (3) the manufacturer continued in the business of selling related products and undertook a duty to warn users of post-sale hazards."<sup>110</sup>

Illustrative too is *Bell Helicopter v. Bradshaw*,<sup>111</sup> in which the defendant manufactured and sold a helicopter with rotor blades that were, at the time of the 1961 sale, state of the art. In 1968, the defendant undertook the safety measure of updating the blades. Following a 1975 accident, the court found that the manufacturer's conduct in replacing the blades had created a post-sale duty to remediate unreasonable product risks. In the court's words:

Where the record reflects, as in this case, an apparent assumption of such a duty by a manufacturer, it is not wholly improper for us to measure its conduct against such a duty with respect to plaintiff's allegations of post-manufacture negligence. Here, the defendant assumed the duty to improve the safety of its helicopter by replacing the 102 system with the 117 system. Once the duty was assumed, the defendant had an obligation to complete the remedy by using reasonable means available to it to cause replacement of the 102 systems with 117 systems.<sup>112</sup>

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<sup>106</sup> 66 F.3d 173 (8th Cir. 1995).

<sup>107</sup> Id. at 174.

<sup>108</sup> The trial court's instruction read, id. at 176:

[I]f a manufacturer learns that a previously distributed product poses a danger to users, it must give additional warnings or instructions that will enable users to make informed decisions and use the product safely.... A manufacturer has no duty to warn, however, if the user is or should be fully aware of the dangers inherent in a product, but past experience or familiarity with the product does not necessarily alert a user to all of the dangers associated with the product.

<sup>109</sup> Id.

<sup>110</sup> Id. (relying upon *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988)).

<sup>111</sup> 594 S.W.2d 519 (Tex. Ct. App. 1979).

<sup>112</sup> Id. at 532.

Along a similar line of reasoning is *Calderon v. Maschinenfabriek Bollegraff Appingedam BV*.<sup>113</sup> *Calderon* was a suit brought by a paper baling machine operator against a service distributor whose agent made a post-sale service call, during which the service distributor's agent observed the hazardous condition created by the machine owner's removal of safety gates. An operator thereafter sustained severe injuries while reaching into the machine to untangle wires as the machine was still running, and suit was brought claiming that the service distributor had a duty to advise the operator or the operator's employer of the hazardous condition. The New Jersey court found that the trial court's removal of plaintiff's failure to warn count was error, as a jury might have found that the service distributor "had assumed an obligation to warn" the machine owner.<sup>114</sup> It found the error harmless, however, in light of persuasive evidence that any failure of the service distributor to provide post-sale cautionary information was the legal cause of plaintiff's harm, as the weight of the evidence supported the conclusion that the plaintiff's employer would not have heeded any warning from defendant.<sup>115</sup>

The "relationship" or "special circumstances" rationale for evaluating a claimed warning duty was developed further in *Birchler v. Gehl Co.*<sup>116</sup> In that decision, the Seventh Circuit, applying Illinois law, considered appellant's assignment of error to the trial court's refusal to instruct the jury that a hay bailer manufacturer had a post-sale duty to warn of the risks created by the fact, appellant claimed, that the baler took in hay faster than an operator could release it. Affirming a defense verdict, the appeals court noted first that Illinois law does not recognize a general post-sale duty to warn.<sup>117</sup> The court distinguished *Seegers Grain Co., Inc. v. United States Steel Corp.*,<sup>118</sup> which involved the explosion of a grain storage tank, which due to its steel construction, was unable to withstand the cold Illinois winter temperatures. Plaintiffs therein claimed that the seller knew of a prior accident that was virtually indistinguishable from the accident that caused their loss, and that their vendor knew specifically that the steel seller knew precisely the use to which the steel it sold would be put.<sup>119</sup> In contrast, the *Birchler* court continued, the appellant's claim before it involved "no personal relationship" between seller and buyer that would permit the seller to know how the product would be used, and sounded instead in the very language the *Seegers* court had used to distinguish its facts in such a way as to permit its departure from Illinois authority finding no post-sale warning

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<sup>113</sup> 667 A.2d 1111 (N.J. Super. 1995).

<sup>114</sup> *Id.* at 1115.

<sup>115</sup> *Id.* at 1116.

<sup>116</sup> 88 F.3d 518 (7th Cir. 1996).

<sup>117</sup> *Id.* at 521 (citing *Carrizales v. Rheem Mfg. Co.*, 589 N.E.2d 569, 579 (Ill. App. Ct. 1991)); *Kempes v. Dunlop Tire & Rubber Co.*, 548 N.E.2d 644, 649 (Ill. App. Ct. 1989); *Collins v. Hyster Co.*, 529 N.E.2d 303, 306 (Ill. App. Ct. 1988).

<sup>118</sup> 577 N.E.2d 1364 (Ill. App. Ct. 1991).

<sup>119</sup> *Id.* at 1374.



obligation, *i.e.*, settings in which courts declined to impose a continuing advisory duty in claims involving “an over-the-counter sale of a generic product for use by an unknown consumer.”<sup>120</sup>

### III. Post-Sale Duty To Recall or Retrofit

#### A. Generally

Plaintiffs often allege simultaneously that a manufacturer has breached both (1) a potential post-sale warning obligation, and (2) a potential recall or retrofit obligation. Courts and commentators, in turn, often discuss the bona fides of such claims as though are related closely, or even allied. However, the two claims are markedly different, and require separate analysis. Perhaps most fundamentally, in terms of the burden upon the manufacturer, the practical consequences of imposing a recall or retrofit obligation would typically be, and in several orders of magnitude, far greater than would be a requirement of even the most extensive continuing duty to warn.

The far more costly and complex obligation to recall a product is readily distinguishable from a post-sale duty to warn, as the former would require the manufacturer to regain control over the entire product line, and to retrofit or upgrade it, incurring far higher internal and external costs than would be involved with a post-sale duty to warn.<sup>121</sup> As, through technological advancements, products are continually being made safer and better, manufacturers would confront “incalculable costs” if they had to upgrade previously sold products every time an improvement was technologically feasible.<sup>122</sup> Accordingly, the decisional law has adopted almost without deviation the rule that progress in technology that would permit, or have permitted, the design and manufacture of an improved and safer product will not trigger a seller duty to undertake a recall or other refitting efforts.<sup>123</sup>

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<sup>120</sup> *Id.* at 1773-74.1

<sup>121</sup> *Products Liability Restatement* § 11 cmt. *a* (“Duties to recall products impose significant burdens on manufacturers. Many product lines are periodically redesigned so that they become safer over time. If every improvement in product safety were to trigger a common-law duty to recall, manufacturers would face incalculable costs every time they sought to make their product lines better and safer.”).

<sup>122</sup> *Id.*

<sup>123</sup> *Products Liability Restatement* § 11 cmt. *a*, Illus. 1 states this hypothetical:

MNO Corp. has manufactured and distributed washing machines for five years. MNO develops and improved model that includes a safety device that reduces the risk of harm to users. The washing machines sold previously conformed to the best technology available at the time of sale and were not defective when sold. MNO is under no common-law obligation to recall previously-distributed machines in order to retrofit them with the new safety device.

*But see* *Hernandez v. Badger Construction Equipment Co.*, 28 Cal. App. 4th 1791 (1994), in which the court writes: “Failure to conduct an adequate retrofit campaign may constitute negligence apart from the issue of defective design. . . . Even if, properly instructed, the jury had found none of the mechanical design features in issue . . . constituted a defect, it could still have found that [the seller's] knowledge of the injuries caused by these features imposed a *duty to warn* of the danger and/or a *duty to conduct an adequate retrofit campaign*.” *Id.* at 1827 (emphasis

*Restatement (Third) of Torts: Products Liability* § 11 suggests a rule in which a seller incurs no recall duty unless such action is required by statute or regulation,<sup>124</sup> or the seller, having voluntarily commenced to recall a product, “fails to act as a reasonable person in recalling the product.” Section 11 would impose a duty upon the seller to recall a defective product after the time of sale when a statute or other governmental regulation specifically requires a recall or when the seller voluntarily recalls the product and fails to act as would a reasonable person in recalling the product.<sup>125</sup>

The rationale for a rule that would impose liability only when the supplier is required specifically by statute or regulation to recall the product is based upon the recognition that the origination of any such duty would require a complex and polycentric evaluation of (1) breadth of risk; (2) severity of risk; (3) examination of alternative remedial measures; (4) financial and other costs to the manufacturer; and (5) the logistics, management and practicality of such an obligation. Such an evaluation, the logic continues, is best left to such government agencies as enjoy supervisory authority over the safety of like products, as they are (1) most practiced in the collection of risk and incident data; and (2) more expert than would be the manufacturer in assessing the benefits and the burdens of a recall; and (3) should a recall obligation be imposed, most able to work with the manufacturer to design and delimit the initiative in order to secure optimal results.<sup>126</sup>

When a seller undertakes a voluntary recall, the *Products Liability Restatement* commends a rule for tort liability should the seller “fail [I] to act as a reasonable man in recalling the product.” *Products Liability Restatement* § 11 comment *c* explains that the reasoning for such an approach “lies partly in the general rule that one who undertakes a

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in original) (internal authority omitted).

<sup>124</sup> *Products Liability Restatement* § 11 provides:

One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by a seller's failure to recall a product after the time of sale or distribution if:

(a)(1) a governmental directive issued pursuant to a statute or administrative regulation specifically requires the seller or distributor to recall the product; or

(2) the seller or distributor, in the absence of a recall requirement under Subsection (a)(1), undertakes to recall the product; and

(b) the seller or distributor fails to act as a reasonable man in recalling the product.

Id. at § 11 cmt. *a* (“Issues relating to product recalls are best evaluated by governmental agencies capable of gathering adequate data regarding the ramifications of such undertakings.”). Examples of decisions finding no common law recall or related duty are *Anderson v. Nissan Motor Co.*, 139 F.3d 599 (8th Cir. 1998) (predicting Nebraska law in claim alleging manufacturer duty to equip previously sold forklift with operator restraint); *Habecker v. Copperly Corp.*, 893 F.2d 49 (3d Cir. 1990) (“[N]o Pennsylvania case has recognized a duty to retrofit, and, indeed, one has suggested that such a duty would be inappropriate under established principles of Pennsylvania law.”) (citing *Lynch v. McStome & Lincoln Plaza Assoc.*, 548 A.2d 1276, 1281 (Pa. Super. 1988)).

<sup>125</sup> Id.

<sup>126</sup> Id. at § 11 cmt. *a*.

rescue, and thus induces other would-be-rescuers to forbear, must act reasonably in following through.”<sup>127</sup> Comment *c* notes tellingly that “courts appear to assume that voluntary recalls are typically undertaken in the anticipation that, if the seller does not recall voluntarily, it will be required to do so by a government regulator.”<sup>128</sup> Comment *c* concludes: “Having presumably forestalled the regulatory requirement, the seller should be under a common law duty to follow through in its commitment to recall.”<sup>129</sup>

Informative in this connection, albeit in the context of an accident following a mandatory recall, in *Springmeyer v. Ford Motor Co.*<sup>130</sup> a California appeals court considered the claim of a mechanic who was injured when a truck fan blade disengaged and struck him. The evidence suggested that the truck’s prior owner, the lessor Avis, might not have responded to the manufacturer’s timely recall initiatives. While stating the general proposition that a manufacturer’s duty to produce a duly safe product is non-delegable,<sup>131</sup> the California court reversed judgment for the mechanic, relying in part upon Ford’s showing that its follow-up procedures for its recall showed due care, and included, among other efforts, an original recall notice to the prior owner, and two follow-up notices to the new owner, even absent a regulatory obligation to do so.<sup>132</sup>

Similarly, in *Tabieros v. Clark Equipment Co.*,<sup>133</sup> the claim of a dockworker whose legs were crushed by a straddle carrier used to move shipping containers, the Hawaii Supreme Court reversed plaintiff’s damage award on his claim that the manufacturer had a duty to retrofit its product with safety devices unavailable at the time of initial sale.<sup>134</sup> The court stated: “[W]e hold that a manufacturer has no duty to ‘retrofit’ its products with ‘after-manufacture’ safety equipment, although it may be found negligent or strictly liable for failing to install such equipment—or not otherwise making its product safer—existing at the time of manufacture.” Likewise, the Third Circuit Court of Appeals, assessing Pennsylvania law, has written that “no Pennsylvania case has recognized a duty to retrofit [.]” As the court explained: “majority of jurisdictions hold that a duty to recall or retrofit will be recognized only where the product was sold in a dangerously defective condition, the risks of which only came to the manufacturer’s attention after initial sale.”<sup>135</sup>

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<sup>127</sup> Id.

<sup>128</sup> Id.

<sup>129</sup> Id.

<sup>130</sup> 71 Cal. Rptr. 2d 190 (Cal. Ct. App. 1998).

<sup>131</sup> Id. at 202.

<sup>132</sup> Id. at 204-05 (noting that third-party negligence may constitute superseding cause when so extraordinary as to be unforeseeable)

<sup>133</sup> 944 P.2d 1279 (Haw. 1997).

<sup>134</sup> Id. at 1291.

<sup>135</sup> See generally *Romero v. Int'l Harvester Co.*, 979 F.2d 1444 (10th Cir. 1992). E.g., *Sexton v. Bell Helmets, Inc.*,

Reaching a conflicting decision, but on facts distinguishable in significant respects from the above authority is the decision in *Downing v. Overhead Door Corp.*,<sup>136</sup> a suit against the manufacturer of a garage door opener that had an activator button within the reach of children. Learning of the risks involved, the manufacturer undertook to warn new purchasers of the product, but did not warn previous purchasers. Rejecting the defendant's argument that its warning duties extended only to new purchasers, the Colorado Appeals Court stated, in terms applicable to warning and recall obligations alike:

The duty to warn exists where a danger concerning the product becomes known to the manufacturer subsequent to the sale and delivery of the product, even though it was not known at the time of the sale. After a product involving human safety has been sold and dangerous defects in design have come to the manufacturer's attention, the manufacturer has a duty either to remedy such defects, or, if a complete remedy is not feasible, to give users adequate warnings and instructions concerning methods for minimizing danger.<sup>137</sup>

*Downing* has been interpreted as pertaining only to products that were defective at the time of manufacture, not to products "which could subsequently be made safer by a later developed safety device or design improvement."<sup>138</sup> In agreement with this limiting assessment of *Downing* is the Tenth Circuit decision in *Romero v. International Harvester Co.*,<sup>139</sup> an action arising from the death of a farm worker while using a tractor, manufactured and sold in 1963 without a roll bar (or ROPS, a Roll-Over Protection System). Although at the time of its manufacture the tractor met all of the applicable government and industry standards for safety, plaintiff, noting later-developed rollover protection devices, claimed the manufacturer was negligent in failing to retrofit the equipment. Observing that Colorado law recognized no "rigid distinction" between claims in negligent failure to warn and strict liability failure to warn, and further interpreting plaintiff's warnings claims as co-extensive with the claims in failure to retrofit, the court concluded that no Colorado authority supported the proposition that a claim against a manufacturer "should be exempted from having to show a negligent or

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926 F.2d 331, 337 (4th Cir. 1991) ("[A] product can only be defective if it is imperfect when measured against a standard existing at the time of sale or against reasonable consumer expectations held at the time of sale."); *Dion v. Ford Motor Co.*, 804 S.W.2d 302, 310 (Tex. Ct. App. 1991) ("Ford did not have a duty to improve upon the safety of its tractor by replacing an existing rollover protection system within improved rollover protection systems."); *Wallace v. Dorsey Trailers Southeast, Inc.*, 849 F.2d 341, 344 (8th Cir. 1988) (applying Missouri law, and holding that defendant was "not negligent as a matter of law in failing to retrofit the allegedly defective aerial bucket lift.").

<sup>136</sup> 707 P.2d 1027 (Colo. Ct. App. 1985).

<sup>137</sup> *Id.* at 1033 (citations omitted).

<sup>138</sup> *Romero v. Int'l Harvester Co.*, 979 F. 2d 1444, 1450 (10th Cir. 1992) (applying Colorado law).

<sup>139</sup> *Id.*

defective design under standards existing at the time of manufacture and sale . . . .”<sup>140</sup> In *Oja v. Howmedica, Inc.*,<sup>141</sup> the Tenth Circuit reaffirmed its decision in *Romero*, and held that no post-sale duty to warn or otherwise remedy a claimed hazard extended to a manufacturer when the product was not defective at the point of initial sale.<sup>142</sup>

The Michigan Supreme Court confirmed the absence of a manufacturer’s post-sale duty to recall or repair an allegedly defective product in *Gregory v. Cincinnati, Inc.*,<sup>143</sup> an action deriving from a sheet metal worker’s injuries while operating a press brake. The defect pleaded was in the brake’s allegedly inadequate guarding of the ‘point of operation,’ and also the lack of a guard to prevent inadvertent activation of the product with its foot pedal.<sup>144</sup> At trial, the jury was instructed that a manufacturer “has a duty to incorporate new advances in technology[,]” and that “a manufacturer who learns of a design defect after the product has been sold has a duty to take reasonable steps to correct the defect.” A Michigan appeals court reversed and remanded, and, reviewing *Comstock v. General Motors Corp.*,<sup>145</sup> held that while “a manufacturer has a duty to warn of a latent defect, [it] does not have a duty to repair a latent defect.”<sup>146</sup> Noting that the issue presented was one of “public policy”, appropriate for the legislature to address,<sup>147</sup> the court distinguished the settings in which this issue might arise: (1) a defect known to the manufacturer at the point of manufacture, *i.e.*, while the product was yet in the manufacturer’s control; and (2) the absence of a defect, in terms of the state of the art at the time of manufacture, but with post-sale advancements in technology rendering the product arguably defective under subsequent analysis.<sup>148</sup> Finding that appellant’s allegation of defect did not pertain to a latent point-of-manufacture defect, but rather a “defect” by dint of technological advances, the Michigan Supreme Court distinguished *Comstock*, and found no duty to repair or recall under Michigan law.<sup>149</sup>

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<sup>140</sup> Id. at 1452.

<sup>141</sup> 111 F.3d 782 (10th Cir. 1997).

<sup>142</sup> Id. at 791 (quoting *Perlmutter v. United States Gypsum Co.*, 4 F.3d 864, 869 (10th Cir. 1993))(claim alleging defective hip prosthesis). Accord *Anderson v. Nissan Motor Co.*, 139 F.3d 599 (8th Cir. 1998) (applying Nebraska law to a claim brought by an injured employee who alleged that defendant’s forklift was defective for want of an operator restraint system). The court stated, *id.* at 602:

The Nebraska Supreme Court has not specifically addressed the issue of whether it would recognize either a post-sale duty to warn or a duty to retrofit. The district court determined that, when called upon to decide the issue, the Nebraska Supreme Court would not be likely to recognize either cause of action. After a *de novo* review, we agree with the district court’s determination.

<sup>143</sup> 538 N.W.2d 325 (Mich. 1995).

<sup>144</sup> Id. at 327.

<sup>145</sup> 99 N.W.2d 627 (Mich. 1959).

<sup>146</sup> *Gregory*, 538 N.W.2d at 328.

<sup>147</sup> Id. at 330.

<sup>148</sup> Id.

<sup>149</sup> Id. at 334. The court stated, at 336:

At issue in this case is the propriety of a continuing duty to repair or recall theory of products liability in a

The Michigan court further noted that adoption of a recall or retrofit duty would muddy the fact finder consideration of the issue of design defect, and explained: “Because a prima facie case [of design defect] is established once the risk-utility test is proven, we are persuaded that it is unnecessary and unwise to impose or introduce an additional duty to retrofit or recall a product. Focusing on post-manufacture conduct in a negligent design case improperly shifts the focus from point-of-manufacture conduct and considers post-manufacture conduct and technology that accordingly has the potential to taint a jury’s verdict regarding a defect.”<sup>150</sup>

Similarly, when a product is not defective at the time of manufacture, but is subsequently made safer by advancements in technology, the Michigan Supreme Court held in *Reeves v. Cincinnati, Inc.*<sup>151</sup> that a manufacturer has no duty to advise former purchasers of the existence or the availability of such advancements.<sup>152</sup> The *Reeves* court relied on *Gregory* and reasoned that as Michigan does not impose a duty upon manufacturers to remedy defects after sale, it follows that the manufacturer should have no duty to inform consumers of new safety features for non-defective products.<sup>153</sup> The court concluded by observing that the party in control of the product, not the manufacturer, was in the best position to know of the advisability of incorporating any later-developed safety features.<sup>154</sup>

As discussed earlier, in *McDaniel v. Bieffe*,<sup>155</sup> a federal trial court, applying Minnesota law, held that Minnesota would recognize a post-sale duty to warn in the context of a later-discovered latent defect in a mass-produced product, in that instance a motorcycle helmet, only upon a demonstration that the harm that could be suffered was grave, and that there were present other “special circumstances” identified by the Minnesota Supreme Court in an earlier holding. Plaintiffs in that suit also opposed defendant’s motion for summary judgment on the count of plaintiffs’ complaint alleging that the manufacturer had breached a post-sale duty to recall the product.

In contrast to its denial of summary judgment on plaintiff’s post-sale warnings count, the trial court granted defendant summary judgment on the recall count, stating:

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negligent design case. The inquiry is whether Michigan law recognizes a continuing duty to repair or recall . . . We hold that there is no continuing duty to repair or recall . . . a product.  
*See also Patton v. Wil-Rich Mfg. Co.*, 861 P.2d 1299 (Kan. 1993) (interpreting Kansas law in reaching conclusion similar to that in *Gregory*).

<sup>150</sup> *Gregory*, 538 N.W.2d at 333.

<sup>151</sup> 528 N.W.2d 787 (1995) (injury sustained in operation of press brake).

<sup>152</sup> *Id.* at 788.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 790.

<sup>155</sup> 35 F. Supp. 2d 735 (D. Minn. 1999).

“While no Minnesota court has addressed this issue directly, this Court is convinced that Minnesota would refuse to impose a duty on manufacturers to recall and/or retrofit a defective product because the overwhelming minority of other jurisdictions have rejected such an obligation.”<sup>156</sup> To similar effect is the decision of the Third Circuit Court of Appeals in *Habecher v. Copperloy, Corp.*<sup>157</sup>

That a manufacturer has no general duty to redesign a product was reiterated in the Third Circuit opinion of *LeJeune v. Bliss-Salem, Inc.*,<sup>158</sup> a claim arising from injuries suffered by a worker in the course of operating a steel mill’s transport line. Plaintiff alleged that the supplier of the mill’s electrical drive and control system, and the general contractor, had a duty to redesign the line in the course of their work in furtherance of reopening the mill. Defendants countered that the contracts governing the work “simply required them to put the mill machinery back into working order and that any duty on their part did not extend to reevaluating the safety aspects of the various machinery involved.” Affirming summary judgment, the appeals court wrote: “Due to the limited nature of the contractual undertaking in this case, no duty in tort arose on the part of [a]ppellees to redesign safety features of the equipment or to warn of potential hazards.”<sup>159</sup>

## B. Special CPSC Considerations

The first sections to this chapter discuss a seller’s limited post-sale duties to warn regarding a product’s unreasonably dangerous condition, and in even more limited settings, a post-sale duty to recall or repair. This post-sale informational or remedial obligations imposed by statute, and specifically the recall, repair, or refund obligations under the Consumer Product Safety Act (‘CPSA’).<sup>160</sup> Consumer Product Safety Act § 15 requires firms to report to the Commission whenever a product is or even might create a “substantial product hazard”, and gives the Commission broad powers to command product recalls under certain circumstances.<sup>161</sup>

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<sup>156</sup> Id. at 743, and summarizing this authority: *Tabieros v. Clark Equip. Co.*, 944 P.2d 1279, 1298-1300 (Haw. 1997)(collecting authority and stating that 'virtually every court that has confronted the issue head-on' has rejected this duty); *Burke v. Deere & Co.*, 6 F.3d 497, 508 n.16 (8th Cir. 1993) (no duty under Iowa law); *Wallace v. Dorsey Trailers Southeast, Inc.*, 849 F.2d 341, 344 (8th Cir. 1988) (affirming district court's conclusion that Missouri does not recognize a duty to retrofit); *Gregory v. Cincinnati*, 538 N.W.2d 325, 334 (Mich. 1995) (no continuing duty to recall).

<sup>157</sup> 893 F.2d 49 (3d Cir. 1990) (applying Pennsylvania law).

<sup>158</sup> 85 F.3d 1069 (3d. Cir. 1996) (applying Delaware law).

<sup>159</sup> Id. at 1074.

<sup>160</sup> Consumer Product Safety Act, Pub. L. 92-573, 86 Stat. 1207 (1972) (codified as amended at 15 U.S.C.A. § § 2051-2084 (1994)).

<sup>161</sup> Id.

Both recall and reporting requirements are keyed to the phrase “substantial product hazard.” A recall can be required when a product is found “actually” to constitute a substantial product hazard, but a report to the Commission is also required when a product “could” be a substantial product hazard. CPSA §15 requires a subject firm to notify the Commission that its product: (1) does not comply with an applicable consumer product safety rule, or (2) contains a “defect” which could create a “substantial risk of injury to the public” and therefore presents a substantial product hazard.<sup>162</sup> When either the failure to comply with the rule or the actual defect creates a substantial risk of injury to the public and therefore constitutes a substantial product hazard, CPSA § 15 further authorizes the Commission, after a hearing, to order a firm to provide notice of any such hazard to the public, manufacturers, distributors, retailers, and purchasers (including consumers), and further to order replacement, repair, or refund of the purchase price, less a reasonable allowance for use. In addition to providing for voluntary remedial action, including ‘corrective action plans’ and consent agreements, CPSA §15 gives the Commission authority to seek injunctive relief to prevent further distribution of an allegedly dangerous product.

Failure to furnish information required by CPSA § 15(b) is prohibited under § 19(a)(4) of the Act, and a knowing violation of CPSA § 19(a)(4) may subject the violator to civil penalties.<sup>163</sup> A separate violation can be found with respect to each consumer product involved. A knowing violation of CPSA § 19 following a Commission “Notice

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<sup>162</sup> 15 U.S.C.A. § 2064(a) (1998) defines 'substantial product hazard' as:

(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or

(2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates substantial risk of injury to the public.

Section 2064(b) describes action to be taken upon discovery of potentially unsafe products:

Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product: (1) fails to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard upon which the Commission has relied under [15 U.S.C.A. § 2058] of this title; or (2) contains a defect which could create a substantial product hazard described in subsection (a)(2) of this section; or (3) creates an unreasonable risk of serious injury or death, shall immediately inform the Commission of such failure to comply, of such defect, or of such risk, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect, failure to comply, or such risk.

<sup>163</sup> 15 U.S.C.A. § 2068, provides in pertinent part:

(a) It shall be unlawful for any person to: (1) manufacture for sale, offer for sale, distribute in commerce, or import into the United States any consumer product which is not in conformity with an applicable consumer product safety standard under this chapter; (2) manufacture for sale, offer for sale, distribute in commerce, or import into the United States any consumer product which has been declared a banned hazardous product by a rule under this chapter; (3) fail or refuse to permit access to or copying of records, or fail or refuse to establish or maintain records, or fail or refuse to make reports or provide information, or fail or refuse to permit entry or inspection, as required under this Act or rule thereunder; (4) fail to furnish information required by section 2064(b); (5) fail to comply with an order issued (relating to notification, and to repair, replacement, and refund, and to prohibited acts).



of Noncompliance” can subject the violator to criminal penalties under CPSA § 21.<sup>164</sup> No private cause of action accrues against the manufacturer or seller for failure to notify the Commission in a timely manner.<sup>165</sup>

#### **IV. Conclusion**

Whether the products liability observer is buoyed or disaffected by the advent of new positive obligations in tort continuing after initial sale of a product, what is certain is that in multiple jurisdictions such duties have become a fixture of the modern tort landscape. From the above brief examination, two conclusions may be made -- one somewhat theoretical, and the other practical. From a theoretical perspective, the interplay between statutory activity and the common law in this subject, be it in favor of recognizing continuing duties or to the contrary, is a modern and perfect example of the harmonious roles statute and decisional law have come to play in the law of torts, until recently so pervasively common law based. Accordingly, the evolving law of post-sale manufacturing duties demonstrates that it will ever increasingly be seen that legislatures and courts will each be a necessary, but neither onto themselves a sufficient, protagonist in significant issues of public policy issues raised in matters of civil liability.<sup>166</sup>

The second, greater and practical significance of the law of continuing duties can be put in the form of an admonition: Today’s manufacturers and their counsel must examine closely the law of continuing information or other duties as they may be found in the seller’s home state or in such other jurisdictions as the product may come into use.

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<sup>164</sup> 15 U.S.C.A. § 2070(a) (1998), provides that “(a) Any person who knowingly and willfully violates § 2068 of this Act after having received notice of noncompliance from the Commission shall be fined not more than \$50,000 or be imprisoned not more than one year, or both.”

<sup>165</sup> *E.g.*, *Kloepfer v. Honda Motor Co., Ltd.*, 898 F.2d 1452, 1457 (10<sup>th</sup> Cir. 1990) (survivors of six-year-old girl killed in ATV accident had no private cause of action under CPSA for alleged manufacturer's failure to report).

A fuller treatment of these Consumer Product Safety Commission requirements may be found at 1 MADDEN & OWEN ON PRODUCTS LIABILITY § 11:4.

<sup>166</sup> See generally M. Stuart Madden: *The Vital Common Law: Its Role in a Statutory Age*, 18 U. ARK. (L.R.) L.J. 555 (1996).

## **Avoiding Future Problems: The Increased Duty to Take Post-Sale Remedial Action**

**By Kenneth Ross<sup>1</sup>**

Manufacturers have been and will be subjected to increased post-sale responsibilities in the United States and elsewhere as a result of changes in the common and regulatory law. These changes have occurred because governmental agencies feel that manufacturers that sell defective and dangerous products need more rigorous requirements to report problems to governmental agencies, and the government agencies need more resources to monitor product safety and stronger regulations to force manufacturers to recall hazardous products. The increased responsibilities can either enhance the safety of products in the field or, if neglected, increase the possibility that the manufacturer will suffer irreparable harm to its brand name, as well as be subjected to fines, lawsuits, and the possibility of punitive damages.

### **Common Law and the Restatement**

The American Law Institute recently considered the status of product liability law in the United States, culminating in the publishing of the new *Restatement (Third) of Torts: Products Liability* in 1998. The Second Restatement did not include any mention of post-sale responsibilities. However, beginning in 1959 and continuing over the years, a number of courts have adopted requirements that manufacturers issue post-sale warnings of hazards to product users. The ALI ultimately decided that a sufficient body of law now exists to justify including the post-sale duty to warn in the Third Restatement. It requires, in certain instances, manufacturers or product suppliers to provide post-sale warnings, or possibly to recall or repair products. The post-sale duty section in the Third Restatement is truly new, and not a mere recitation of prior case law. Section 10 provides as follows:

#### **Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Warn**

- (a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product when a reasonable person in the seller's position would provide such a warning.
- (b) A reasonable person in the seller's position would provide a warning after the time of sale when:

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- (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
- (2) those to whom a warning might be provided can be identified and may reasonably be assumed to be unaware of the risk of harm; and
- (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
- (4) the risk of harm is sufficiently great to justify the burden of providing a warning.

Section 10 does not include a duty to do anything other than warn. However, because some decisions have held that, in certain narrow instances, a manufacturer may have a duty to recall or retrofit a product, the ALI included a section in the Third Restatement that severely limits the duty to recall a product. Section 11 provides:

**Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Recall Product**

One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to recall a product after the time of sale or distribution if:

- (a)(1) a statute or other governmental regulation specifically requires the seller or distributor to recall the product; or;
- (2) the seller or distributor, in the absence of a recall requirement under subsection (1), undertakes to recall the product: and
- (b) the seller or distributor fails to act as a reasonable person in recalling the product.

Section 11 basically provides that the seller or distributor is not liable for a failure to recall the product unless the recall is required by statute or regulation, or the seller or distributor voluntarily undertakes to recall the product and does so negligently. The main reason for including Section 11 in the Restatement was to make it clear that Section 10 does not include a duty to recall the product. However, it also included the so-called "Good Samaritan" doctrine, where liability can attach for a negligent recall, even if it is voluntary.

While it is clear that over 30 states have adopted some type of post-sale duty to warn, the common law concerning the duty to recall and retrofit a product remains very limited. This is not true for U.S. regulatory law.

## **United States Regulatory Law**

Despite the limited requirement to recall or retrofit products under the common law, U.S. regulatory law, for decades, has required manufacturers and sellers of various products to report safety problems to governmental agencies and undertake some sort of remedial actions, depending on the severity of the problem and the ability to find the purchasers of the product. These regulations are now being expanded, in part to deal with the concern that global safety issues, such as those experienced in the Ford-Bridgestone situation, are not being considered by manufacturers in making decisions concerning products in the United States.

Several federal agencies may become involved with recalls and have proposed or enacted new requirements.

- **Consumer Product Safety Commission**

The CPSC has always required a manufacturer or product seller to monitor its products that are in consumers' hands and report defects that could create a substantial risk of injury to the public or may create an unreasonable risk of serious injury or death. Such reports usually result in some type of corrective action program or recall that includes repair, replacement, or refund of the purchase price.

In November 2001, the CPSC finalized revisions to its interpretative rule concerning reporting regulations to make it clear that manufacturers and product sellers must consider information generated from sources outside the U.S. when deciding whether to report. It has previously taken this position, but the Ford-Bridgestone tire recall focused attention on the relevance of such information and demonstrated that manufacturers may not consider it relevant.

The CPSC clarified its position that information a manufacturer must evaluate to determine if a reporting responsibility has arisen includes information that a firm obtains, or reasonably should have obtained, about product use, experience, performance, design, or manufacture outside the United States that is relevant to products sold or distributed in the United States. This applies to manufacturers that sell products outside the United States, and importers, distributors, and retailers that obtain or should have obtained information in a foreign country.

- **Food and Drug Administration**

The FDA regulates foods, drugs, cosmetics, medical devices, biologics, radiation-emitting products, and feed and drugs for pets and farm animals. It has various regulations requiring manufacturers of these products to report safety problems or hazards. However, the FDA has no authority under the law to order a recall. Usually, the

manufacturer will voluntarily undertake a recall, or the FDA will request that a recall be undertaken. If the company does not recall its products after being requested to do so, the FDA can seek a court order authorizing the federal government to seize the product.

- **United States Department of Agriculture**

The Food and Inspection Service (FSIS) of the USDA is responsible for ensuring that meat and poultry products are safe, wholesome, and accurately labeled, and also inspects pasteurized egg products. The FDA regulates all other foods.

When the FSIS learns about adulterated or mislabeled meat or poultry, it will request the company to recall the product if such a recall has not yet been instituted. While no company has yet refused, if one did, the FSIS has the authority to detain and/or seize meat and poultry products that may be hazardous.

- **National Highway Traffic Safety Administration**

The NHTSA regulates motor vehicles and motor vehicle equipment. A manufacturer of the vehicle or the equipment, which determines that a safety-related defect or noncompliance with a NHTSA regulation exists in its product, must report to NHTSA within five working days. The manufacturer's proposed remedial program is to be included with the report. This remedy will always include a recall of the affected products from the customers' control if the product has made it into the market.

The Ford-Bridgestone tire recall directly led to the enactment of new legislation governing recalls of motor vehicles and motor vehicle equipment. On November 1, 2000, Congress passed the aptly named Transportation Recall Enhancement, Accountability, and Documentation Act (TREAD) in response to disclosures of non-reporting of tire problems in foreign countries.

TREAD adds a number of sections to Title 49 of the United States Code concerning increased reporting responsibilities. See, in particular, 49 U.S.C. §30166. Section 3(a) of TREAD discusses reports to NHTSA of defects in motor vehicles and motor vehicle equipment that occur in foreign countries. Manufacturers have five working days to report after determining that they will conduct a safety recall or other safety campaign in a foreign country on a vehicle or equipment that is identical or substantially similar to one they offer in the United States. Section 3(a) also requires a report when a foreign government requires a recall on an identical or substantially similar vehicle or equipment. Section 3(b) requests the Department of Transportation to create a rule concerning early warning reporting requirements. These requirements concern warranty and claims data received by the manufacturer from foreign or domestic sources claiming serious injuries or property damage from alleged defects.

On December 21, 2001, NHTSA issued a proposed regulation to implement these early warning requirements; per TREAD, NHTSA is required to issue a final regulation by June 30, 2002. The proposed regulation will require manufacturers to regularly provide data to NHTSA. Manufacturers will no longer be allowed to determine for themselves whether a safety-related defect or noncompliance exists. NHTSA will analyze the data and presumably encourage the manufacturer to report and undertake a recall.

The early warning provisions would require large volume manufacturers of motor vehicles to report all incidents alleged or proven to have been caused by a possible vehicle or equipment defect in the United States and in foreign countries. Manufacturers would not need to provide data concerning internal investigations and design changes in parts and components. This was originally proposed but strenuously opposed by the manufacturers as burdensome and unclear as to when an internal investigation begins. In addition, manufacturers would have to provide to NHTSA, in part, reports of consumer complaints and warranty claims related to problems with components and systems.

The new TREAD requirements will seriously increase the post-sale monitoring of product safety and reporting to this government agency.

### **Foreign Regulatory Activity**

Recalls and other post-sale remedial programs are required under the law of many foreign nations. Again, it was foreign recalls by Ford-Bridgestone that were not also undertaken in the United States that focused attention on the interrelationship of safety in products sold around the world. This attention has caused expansion of a manufacturer's responsibilities to monitor safety, report problems to governmental bodies, and possibly recall its products.

Safety problems in one country may indicate a problem in another country. And, despite the lack of the vigorous sort of product liability litigation we know in the U.S., foreign nations are not shy to demand remedial action in appropriate situations. United States and foreign governmental agencies dealing with safety are regularly communicating with each other to identify instances where safety problems or remedial action in one country could signal a problem in another country.

- **European Union**

The EU's Machinery Safety Directive sets forth essential health and safety requirements relating to design and construction of industrial machinery and safety components. It creates a post-sale duty to update instructions by requiring manufacturers to draw the user's attention "to ways—which experience has shown might occur—in

which the machinery should not be used.” While the scope of the industrial machinery post-sale duty remains largely undefined, manufacturers should monitor their products’ field experience and consider incorporating revisions into their warnings and instructions.

The most significant European Union action to address post-sale duties is the General Product Safety Directive. It obligates EU member countries to impose upon producers a general requirement to place only safe products on the market. The original 1994 Directive contains a requirement that imposes on manufacturers a post-sale duty to monitor their products. This presumably means manufacturers must update warnings and instructions in accordance with the information gathered from the monitoring program. National authorities, which also are required to monitor product performance, can request that manufacturers issue new warnings based on their post-sale monitoring.

The General Product Safety Directive has been criticized for lack of clarity and other weaknesses, especially in the area of post-sale monitoring and withdrawals and recalls. For example, some officials were upset that their government received notification of a safety problem in Europe from a U.S. agency that received a report from the European manufacturer.

On December 3, 2001, the European Parliament voted to repeal the 1994 Directive as of January 15, 2004, to be replaced with a new General Product Safety Directive. European Union members are required to adopt the 2004 Directive as their national law (although they may retain provisions in their own law that are more restrictive than the Directive).

The 2004 Directive substantially expands manufacturers’ and government’s post-sale responsibilities. It attempts to strengthen each member country’s powers to monitor and to improve collaboration on market surveillance and enforcement. The mechanism for this effort will be a Product Safety Network that will develop Rapid Alert System (RAPEX) procedures. RAPEX requires member countries to inform the Commission of serious risks so that it can alert other member countries.

The objective of this new Product Safety Network will be to facilitate the exchange of information on risk assessment, dangerous products, test methods and results, and recent scientific developments. In addition, joint surveillance and testing projects, the exchange of expertise and best practices, and cooperation in training activities will be established and executed. Presumably, there will be close cooperation in tracing, withdrawal, and recall of dangerous products. The obligations and enforcement powers of the member countries have been expanded to meet these objectives. This includes clarification of when a member country can order or organize the issuance of warnings or a recall of a dangerous product.

The 2004 General Product Safety Directive also increases responsibilities for manufacturers and distributors. Distributors will have to monitor the safety of products placed on the market, especially by passing on information on product risks, keeping and providing documentation necessary for tracing the origin of products, and cooperating in actions taken by manufacturers and government agencies to avoid the risks. Both manufacturers and distributors have a duty to immediately notify government agencies when they know or ought to know that a product they have placed on the market poses risks to the consumer that are incompatible with the general safety requirement of the Directive.

The 2004 Directive defines a “safe product” as one that “does not present any risk or only the minimum risks compatible with the product’s use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons...” Suffice it to say that this threshold for reporting appears to be much lower than under any U.S. statute or regulation.

- **Outside the European Union**

Many other nations have requirements to report to government agencies when a recall is undertaken or when a problem arises and before the recall is commenced. These include Canada, Japan, Australia, and many countries in Asia-Pacific.

All of these countries have adopted some type of product liability law, and it can be expected that the government has or will adopt some type of consumer protection legislation. Enforcement will vary from country to country and possibly product to product. Any diligent, responsible manufacturer will need to determine its reporting responsibilities in all countries in which its products are being distributed. This will be no easy task.

- **The effect on U.S. litigation**

While non-compliance with foreign standards and regulations has generally been deemed not to be admissible evidence at trial, such non-compliance has been, and can be expected to continue to be, used frequently by plaintiffs in their arguments to support punitive damages. For example, a manufacturer that recalls a product in the United States and not in a foreign country should have a good reason for the inconsistency.

The plaintiff will try to argue that this exhibits a malicious disregard for the public safety. Is the fact that the public is foreign any excuse? Public opinion arising out of the Ford-Bridgestone recall shows that the public certainly doesn’t understand how a manufacturer can recall a product in a foreign country and not in the U.S. The plaintiff will try to use any inconsistent approach to post-sale reporting and remedial programs to its advantage, regardless of the country where it occurred.



## **Post-Sale Remedial Programs**

Learning about a manufacturer's reporting responsibilities is hard enough, especially if it sells products around the world. Determining just how to *meet* its post-sale responsibilities can be a much more daunting task. Many official governmental regulations and guidance in the United States and elsewhere, as well as many unofficial suggestions, contain information the manufacturer needs in meeting post-sale responsibilities. So, where to begin? The following is a synthesis of best practices obtained from a variety of U.S. and foreign sources.

- **Product safety policy and post-manufacture action plan**

A manufacturer should be guided by a formal product safety policy. The policy serves as a benchmark for overall product safety. In addition to a general statement of product safety, there should be an additional post-sale action plan. This document establishes procedures for analyzing the need for post-sale action and for implementing whatever action is determined to be appropriate in the United States and anywhere else the product is being sold.

Both of these documents represent good business practices and could be helpful in defending any litigation that might arise. It is important to be able to point to a document, endorsed by the board of directors, the CEO, the president, or the general manager, that confirms a manufacturer's desire to market safe products and to identify and remedy any post-sale problems that come to its attention, regardless of where the product is sold.

- **Pre-sale advance planning**

A manufacturer's most important post-sale responsibility is to establish post-sale procedures *before* the product is sold so the manufacturer can easily and efficiently obtain information, analyze it, make decisions about appropriate post-sale remedial programs, and implement the programs. These procedures cannot be implemented after sale of the product—it will be too late. Below are some of the measures a manufacturer should consider implementing.

- (1) Products should be designed and tested with the possibility of post-sale problems in mind. For example, the product should be designed in modules so that components that prove to be defective can be replaced without needing to replace the entire product.

- (2) Products should be manufactured using traceability and marking procedures that are used before manufacture, during manufacture, and during distribution. A continuous log of all batches, materials, processes, materials, components, and design changes of safety-critical parts should be maintained. Products or components should be marked or coded so that anyone, including customers, can identify the product to be returned.
- (3) The manufacturer should develop a post-sale exposure audit where the manufacturer summarizes worst-case scenarios and develops initial strategic action plans for each scenario. This would include a determination of safety-critical parts and what can occur if they fail.
- (4) The manufacturer must develop an information-gathering network before sale so that appropriate information is identified and analyzed. This procedure is so important that it is discussed in more detail below.
- (5) The manufacturer's lawyers should analyze and make agreements with upstream and downstream entities that anticipate and deal with post-sale issues such as information that must be supplied, who has the responsibility or authority to report to a governmental agency, which approvals are necessary to undertake a remedial program, who pays for the remedial program, etc. Insurance and indemnity provisions must also be in the agreement.
- (6) The manufacturer, in cooperation with all entities in the distribution chain, should design and maintain an effective product and customer database so that different levels of customers in the chain of distribution can be identified quickly. These databases must be updated periodically.
- (7) Press releases, customer alerts, distributor bulletins, Web site postings, and questions and answers to be used by management should be drafted before sale or, at least, not too long after sale. Processes to communicate this information quickly and efficiently to the appropriate people or entities should be developed at this time. For example, a manufacturer should be able to almost instantly send (by broadcast fax or e-mail) a message to its distributors requesting that the distributors and their customers embargo sales of a particular product. This will prevent sales of unsafe products and minimize the number of products to be recalled.
- (8) The manufacturer must develop criteria on the types of remedial programs that may need to be implemented and develop procedures and processes to implement each of these programs. Recall is not always necessary. And, different levels of recall may be appropriate, depending on the level of risk and difficulty of locating the products.

- (9) The manufacturer should consider record creation and retention procedures so that sufficient documents are created to demonstrate the due diligence used by the manufacturer in identifying the problem and addressing it. This will include determining the record keeping requirements of all relevant governmental agencies or applicable standards or directives, including ISO 9000 if the manufacturer is so certified.
- (10) The manufacturer should even consider creating procedures to reintroduce the product to the market. This involves an analysis of the worst-case scenarios, how to test and modify the product quickly, and how to design communications to restore and strengthen the product's reputation among the distributors, retailers, and customers.
- (11) Lastly, the manufacturer should consider recall training, drills, and full-scale mock exercises. When a crisis occurs, it will be time and money well spent. A manufacturer needs to be careful that this pre-sale planning does not appear to be an admission that the company expects safety problems with this product and is just planning for the inevitable recall. The planning needs to be routine and consistent with the product safety policy. It can also be justified as necessary to comply with U.S. and foreign regulations that require a manufacturer to be better prepared to recall its product.

- **Information-gathering network**

The foundation of a post-sale program is establishment of an information network that will allow a company to determine how its product is performing in the United States and world marketplaces. This information is necessary for the manufacturer to ultimately make decisions about which, if any, post-sale action might be necessary.

The enhanced impact of foreign events on U.S. responsibilities makes it even more important that this network encompass information received anywhere in the world. In addition, the regulatory and common law requirements apply to information the manufacturer obtained (or should reasonably have obtained) that identifies an unsafe condition. Therefore, anything less than a "reasonable" effort at obtaining information may be considered by the jury or governmental agency in determining whether you should have known about the problem.

A manufacturer has a number of readily available sources of information. For example, notices of claims or accidents might provide information on the types of products that are failing, the mode of failure, and possible misuse of the product. Personnel should be trained to ensure that sufficient information is gathered concerning the claims and accidents so that potential problems can be identified. Lawsuits (including

settlements and verdicts) will provide the same information, as well as reports from plaintiffs' experts that may provide further insight into how the product could be made safer.

Customer complaints and warranty returns provide fertile sources of information. A pattern of complaints and returns may indicate that a product is failing in a particular mode on a regular basis. Again, personnel should be trained to identify and clarify the information so that it is accurate and substantiated. The manufacturer does not want to gather and maintain inaccurate and overstated complaints and claims that incorrectly make it appear that a problem exists.

An unusual number of sales of safety-critical component parts may indicate that a part is failing prematurely. Of course, observations by sales and service personnel who are actually out in the field talking to customers are invaluable sources of information. Post-sale information can also come from competitors at trade shows or as part of membership in a trade association.

Post-sale information, albeit some of it unsubstantiated or even incorrect, is now posted on the Internet. This will include customer complaints against a manufacturer's products or its competitors' products. Some companies monitor the Internet, especially sites customers might visit, to read comments about their products. Each manufacturer will need to determine whether a follow-up investigation of safety issues raised by customers or product owners who post such information is warranted. Ignoring such information can be perilous. However, following up on all alleged safety problems could be very time-consuming and fruitless.

Some statutes and regulations set forth post-sale monitoring requirements. These need to be considered in establishing such a program. Monitoring requirements include the kinds of information that should be considered and the kinds of documentation that need to be maintained.

- **Analyzing the information and taking action**

Once a manufacturer has obtained all relevant information, it must determine whether post-sale action is necessary. This includes reporting to the relevant governmental agency and undertaking some form of remedial plan.

Ideally, a corporate or divisional product safety committee will analyze the information. This committee should be made up of representatives from various areas of the company, including engineering, service, sales, marketing, and legal. It is also very important that the lawyer advising the committee is experienced in product liability and regulatory law in the countries where the affected product was sold.

Analyzing the information and deciding what it means is the most critical phase of this process. Many manufacturers use or should use risk assessment prior to selling their products. This process identifies the risk, probability of the risk occurring, consequences if it occurs, and methods to minimize the risk. Before sale, the manufacturer should make a best guess on the probability of the risk occurring. It is, of course, difficult to estimate the probability of an event occurring when it has never happened before.

After sale, the manufacturer is, in effect, plugging new numbers into its risk assessment. Post-sale incidents may indicate risks or consequences that were never imagined, or increase the estimated probability calculated before sale. Redoing the pre-sale risk assessment is a good way to formally recalculate the numbers and assumptions. Unfortunately, that doesn't really answer the question of which action is necessary.

Determining whether post-sale action is necessary under United States common law requires applying the factors identified in the case law and Section 10 of the Third Restatement of Torts to the facts learned through the information-gathering network and the results of the revised risk assessment. Because the manufacturer's products have presumably been sold in all 50 states, it is necessary to assume that a post-sale duty to warn exists. And, because the law in the states differs, the best approach is to examine Section 10 to gain a general sense of the national law on post-sale duty to warn.

For products regulated by a government agency, the manufacturer needs to identify the threshold for taking action. For example, the CPSC provides criteria for determining the existence of a substantial product hazard. The criteria to be considered are the pattern of defect, the number of defective products distributed in commerce, and the severity of risk to consumers. Using these criteria will provide guidance to the manufacturer about which information to gather and how to analyze the information. However, the CPSC provides little further guidance on this basic question and expects the manufacturer to report a substantial product hazard, or any suspicion that the product contains such a hazard, to the CPSC.

After the manufacturer reports to a government agency, the agency will most likely, if not always, strongly encourage some type of remedial program. So, the manufacturer must be prepared, if it can as part of its report, to describe the remedial program that it believes will solve the problem.

If the information reveals one incident involving property damage out of many products in the field, it may be important to take note of the incident, but no post-sale action may be necessary. A manufacturer must simply apply the factors to the information gathered, keeping in mind that the primary objective is to make safe products, prevent accidents, and, if necessary, present itself as a responsible company to the jury. If a number of injuries involving the same product occur, with the same basic

failure mode, some type of reporting and post-sale remedial action will always be necessary.

### **Implementing a Post-Sale Program**

If adequate pre-sale planning has occurred, implementing the program will be less difficult and more organized than if no planning occurred. Everyone will know what to do and when to do it. Because so many variations of programs exist that are dependent on the distribution chain, the product type, the risk, and the governmental agency involved, it is too much to discuss in detail here.

Many sources of information exist that will help a company plan an effective post-sale program. These include government agencies, lawyers, crisis management companies, management experts, and companies that specialize in recall management. Below is a listing of some of these entities and Internet sites, as well as useful articles and books where more information can be found.

- CPSC *Recall Handbook*. <http://www.cpsc.gov/businfo/8002.html>
- U.K. Department of Trade and Industry, *Consumer Product Recall – A Good Practice Guide*.  
<http://www.dti.gov.uk/CACP/ca/advice/productrecall/pdf/consumer.pdf>
- CPSC *Recall Checklist*. <http://www.cpsc.gov/businfo/recallcheck.pdf>
- CPSC Report on Recall Effectiveness.  
<http://www.cpsc.gov/LIBRARY/FOIA/FOIA03/os/RecallEffectiveness.pdf>
- NHTSA *Safety Recall Compendium*.  
<http://www.nhtsa.gov/cars/rules/standards/recompendium.pdf>
- Example of an excellent web site for a voluntary replacement program.  
<http://www.sprinklerreplacement.com/VRP/enterVRP.php3>
- *The Corrective Action Handbook*. Available for purchase at <http://www.patonpress.com/>
- “A Strategic Approach to Managing Product Recalls,” Harvard Business Review, September-October 1996, Reprint 96506
- *The Product Recall Planning Guide*, American Society for Quality

### **Conclusion**

Post-sale duties are among the most complex and most potentially dangerous responsibilities a manufacturer and product distributor can have. Most punitive damage cases involve some evidence that the manufacturer knew or should have known about a post-sale problem and did not take adequate remedial actions to prevent accidents involving deaths, injuries, or property damage.

Most manufacturers do not like to spend significant time and resources planning for an event that they hope will never occur. They tend to wait until it happens to figure out what to do. This article explains why this duty is too complex to consider only when a problem occurs. Pre-sale planning, from a legal, regulatory, and process standpoint, is critical to ensure that the likelihood of a post-sale problem is minimized and, if it occurs, can be handled in the most efficient and effective manner.

Failing to take such actions can result in huge losses in litigation, cancelled insurance, government fines and possibly criminal penalties, and ultimately, demise of the business entity. The phrase “an ounce of prevention is worth a pound of cure” has a great deal of application and meaning in this area.

## **“Adequate and Reasonable” Product Recalls**

**by Kenneth Ross<sup>1</sup>**

Most manufacturers, at some point, will have to undertake a post-sale remedial program in connection with one of its products. The program could include a consumer warning, recall, retrofit, or safety upgrade. Such a program may be instituted as a result of a series of accidents or consumer complaints, lawsuits, an adverse jury verdict, a safety improvement, a change in standards, or a request or order of a governmental entity in the United States or abroad.

Any manufacturer selling in the United States needs to assume it has at minimum a post-sale duty to warn, since significantly more than half of the states have adopted some version of this duty, either through the courts or the legislatures. On the regulatory side, U.S. governmental agencies have revised their regulations to require reporting of more safety issues. Governments in the European Union will be required next year to issue new regulations increasing a manufacturer’s responsibility to withdraw its products from the marketplace. In addition, the U.S. Consumer Product Safety Commission has recently sponsored meetings and studies on recall effectiveness to try to help manufacturers develop better ways to recall their products.

If the manufacturer’s product was defective at the time of sale, the common law provides generally that a highly effective recall will not cut off liability for the manufacturer. A post-sale duty to warn is a separate cause of action, based on negligence. So, while a manufacturer may successfully defend this cause of action, the existence of the recall or other remedial program may be considered an admission that the product is defective. And, as long as the product injured someone, the manufacturer could still be held liable for selling a defective product.

All of this makes it important for manufacturers to be prepared to institute a post-sale remedial program quickly, and that the program be as effective as it can under the circumstances. This effectiveness will reduce the number of products in the field that could harm people, and will hopefully allow the jury and any affected government agency to conclude that the manufacturer’s conduct was reasonable. And, even if the manufacturer is held liable under strict liability or negligence for selling a defective

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<sup>1</sup> Article published in *For The Defense*, Defense Research Institute, October 2003. Copyright 2003 Defense Research Institute. Reprinted with permission. Kenneth Ross is Of Counsel to Bowman and Brooke LLP in Minneapolis. For 27 years, he has helped manufacturers and product sellers set up safety and liability prevention programs and recall their products.



product, its actions and due diligence should be helpful in defending against a claim of punitive damages.

This article will describe various guidelines, regulations, and best practices for implementing a post-sale remedial program and will discuss how to defend the adequacy of a post-sale program. This article will not discuss when a manufacturer should or is legally required to report a post-sale problem to the government or how to set up a product safety management program, including a post-sale planning protocol. I have already discussed these issues in “Establishing an Effective Product Safety Management Program,” in the January 2003 issue of *For The Defense*, and “Avoiding Future Problems: The Increased Duty to Take Post-Sale Remedial Action,” in the April 2002 issue.

### **Common Law and the Restatement**

The common law basis for post-sale duty to warn is negligence. So, using Judge Learned Hand’s formula for negligence, the basis for determining whether this duty has been met is the reasonableness of the manufacturer’s conduct after balancing the risk of harm against the burden on the manufacturer to reduce the harm. The higher the risk, the more the manufacturer needs to do to minimize the risk to consumers and other product users.

However, as with all questions of reasonableness under negligence, the common law provides no further basis for a manufacturer to understand how effective its remedial program must be in order for it to be considered non-negligent.

The 1997 *Restatement (Third) of Torts: Products Liability* has three sections that are pertinent to this examination. They discuss the post-sale duty to warn, the duty to recall a product, and the effect of compliance or non-compliance with product safety statutes or regulations. (For a comprehensive discussion of the common law in all 50 states and of U.S. and foreign regulatory law on this subject, see *Post-Sale Duty to Warn*, a monograph published in September 2003 by the American Bar Association’s Section of Litigation.)

Section 10 establishes four criteria to consider when deciding whether a manufacturer has a post-sale duty to warn. Failure to issue such a warning would be unreasonable and a basis for liability. The criteria are similar to the Learned Hand formula—the higher the risk, the more responsibility to warn, unless the burden is too high. This section provides nothing more than a reasonableness test for determining if the duty has been met. And the trier of fact, of course, decides this issue.

Section 11 of the Restatement states that there is no common law duty to recall a product. However, it also says that if there is a mandatory or voluntary recall and a

manufacturer fails to act reasonably, it can be held liable. Again, there are no further criteria to provide guidance on what is reasonable. Also, the Reporter's Notes to comment d of this section says that there is "a paucity of authority discussing the legal effect of the efforts of a manufacturer to recall its products when such efforts are not successful in avoiding injury due to the fact that either dealers or purchasers do not take advantage of the recall."

However, the few cases cited in Section 11 and other relevant cases basically show that the plaintiff can always argue that the manufacturer should have done more. The recall letter or other notice could have been sent out earlier and could have contained more explicit language. Or, it could have been sent certified mail or sent out more than once. Or, the advertisement could have been on page 2 instead of page 40 of the magazine.

The ability of the plaintiff to argue that more could have been done will be boundless. And, plaintiffs may not even need an expert to support this theory. In such cases, the defendant will need to prove that the conduct by the manufacturer was "state of the art," complied with all applicable governmental statutes and regulations, and was as comprehensive as necessary considering the level of risk.

That leads to the third relevant section of the Restatement. Section 4 clearly says that compliance with applicable governmental regulations or statutes is a minimum requirement. The Reporter's Notes to Section 4 cite Section 288C of the Second Restatement, which says, "Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."

Based on this law, it is apparent that a manufacturer may not be able to successfully defend itself by claiming that a government agency "approved" its post-sale program. However, while this "approval" by a government agency may not get into evidence directly, it should be able to be used by an expert witness who can cite it as one of the bases for opining that the manufacturer's conduct was reasonable and the post-sale program adequate.

Given the paucity of judicial authority describing an adequate post-sale remedial program, it is necessary to consider United States and foreign regulatory law, guidelines and regulations as well as suggestions provided by those in the recall industry to help establish an outline of an "adequate" program.

## Consumer Product Safety Commission

Many U.S. regulatory agencies provide helpful guidelines to manufacturers on how to undertake a recall and how to make it more effective. One of the most useful documents is the CPSC Recall Handbook. See <http://www.cpsc.gov/businfo/8002.html>. The CPSC handbook states that the core element of a recall is as follows:

A company that undertakes a recall should develop a comprehensive plan that reaches throughout the entire distribution chain to consumers who have the product. The company must design each communication to motivate people to respond to the recall and take the action requested by the company. The handbook goes on to say that the objective of any recall is:

- to locate all defective products as quickly as possible;
- to remove defective products from the distribution chain and from the possession of consumers; and
- to communicate accurate and understandable information in a timely manner to the public about the product defect, the hazard, and the corrective action.

A large part of the handbook discusses the many ways in which the manufacturer or other entities in the chain of production or distribution can communicate with consumers. However, it leaves it up to the party doing the recall to determine what is appropriate. The CPSC says that in determining what forms of notice to use, the paramount consideration should be the level of hazard that the recalled product presents.

The CPSC will classify the hazard as A, B, or C. Class A is defined as a risk of death or grievous injury or illness that is likely or very likely, or serious injury or illness is very likely. This hazard requires the recalling entity to “take immediate, comprehensive, and imaginative corrective action measures to identify and notify consumers, retailers and distributors...”

The CPSC also provides a recall checklist that is helpful for manufacturers and retailers in implementing a consumer product recall. This checklist can be found at <http://www.cpsc.gov/businfo/recallcheck.pdf>. Nowhere does the CPSC say how effective the recall must be to be considered successful. Recalls or retrofit programs with an effective rate of less than 10% have been deemed acceptable by the CPSC. And, the CPSC has said that the average response rate for most recalls is between 4% and 18%.

Because of concern that effectiveness rates are too low and can be improved, the CPSC has instituted a recall effectiveness project that includes public meetings to discuss successful techniques for recalls, a literature search and evaluation of consumers’ behavior as it relates to recalls, and an evaluation of the CPSC recall database to assess

the effectiveness of previous recalls. This was prompted in part by the urging of consumer advocates and some in Congress.

Several meetings discussing recall effectiveness have taken place. The first meeting took place on May 15, 2003; the subject was “Motivating Consumers to Respond to Recalls.” (See [http://www.cpsc.gov/businfo/rem\\_sum1.pdf](http://www.cpsc.gov/businfo/rem_sum1.pdf) for a summary of this meeting). Eighteen social marketing and public relations experts discussed the following four questions: How can we motivate consumers to act? Which campaigns/programs have motivated consumers to act? Which specific ideas from these programs could increase consumers’ response to product safety recalls? How do we measure whether we have motivated consumers?

The experts at the May 15 meeting identified creative techniques that are not part of the standard recall procedures that have been used for years. While most of these techniques would not be considered “state of the art” today, they may in the future. Therefore, manufacturers should consider such suggestions and test some of them in a future remedial program.

A second meeting took place on July 25, 2003. It focused on “tools” that manufacturers, retailers, and others who distribute safety information use to notify consumers of recalls. Panelists included retailers, manufacturers, credit card companies, and various public interest entities. A third meeting took place on September 9; the attendees discussed new methods to be considered to provide a more complete account of recalled products.

In another significant effort in this area, on August 5 the CPSC released a new study that organized and summarized the literature found on recall effectiveness and effective safety communications, including warnings. For a copy of the full report, go to <http://www.cpsc.gov/LIBRARY/FOIA/FOIA03/os/RecallEffectiveness.pdf>.

In addition, the authors reviewed empirical data developed by the CPSC and others on recall effectiveness. This report also contains information on the effectiveness of NHTSA and FDA recalls. It should be reviewed by manufacturers of any product since it identifies studies that have analyzed how to motivate consumers on safety matters. The report concluded by saying:

The research collected and reviewed for this project details the large number of steps required for a recall message to achieve an active response from an affected product user. Users must receive the message, internalize and comprehend its instructions, determine that a response is necessary, and be willing to perform that response even if there are costs associated with doing so. In the case of product recalls, they must follow through on that

willingness to check if they have an affected product, then take additional actions to eliminate or reduce the hazard.

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We believe that the materials identified and reviewed for this report provide a more than adequate foundation for an assessment of ways in which recall programs—and particularly recall communications—might be modified to improve potential response rates.

The August 5 report and research summarized therein will also be useful to cite in defending the adequacy of a recall since it confirms how difficult it is to motivate consumers to respond to what would clearly be an adequate notice.

The report also pointed out that the CPSC last evaluated recall effectiveness rates from its database in the early 1980s. The CPSC staff said in February of this year that it would be undertaking such an evaluation of recent effectiveness data, including indications of which techniques have worked in the past to increase effectiveness.

The result of all of this activity is that the CPSC will most likely eventually come out with updated and improved regulations and guidelines on how to undertake a recall. Hopefully, these new requirements and suggestions will help improve recall effectiveness rates and, if they comply, will help manufacturers present evidence that they were reasonable and did the best they could under the circumstances.

## **Food and Drug Administration**

The FDA has jurisdiction over most foods and all cosmetics, drugs, and medical devices. The FDA, like the CPSC, will classify the level of hazard when it receives a report; the hazard levels are I, II, and III. Class I recalls are the highest level and are for dangerous or defective products that predictably could cause serious health problems or death.

After classifying the hazard, the FDA, unlike the CPSC, develops a strategy for each individual recall that sets forth how extensively it will check on a company's performance in recalling the product in question. For a Class I recall, for example, FDA would check to make sure that 100% of the defective products have been recalled or reconditioned. Effectiveness rates for Class II or III would be much less.

The regulations describing recall strategy and recall communications are set forth in 21 C.F.R. Subpart C, §7.42 *et seq.* These regulations make clear that the recalling entity must conduct the recall in accordance with an approved strategy. The strategy will need to address the depth of the recall (to whom the communications are directed), whether the public as well as health care professionals are alerted, and which

effectiveness checks will be used. The regulations identify five effectiveness levels—Levels A thru E, with A requiring 100% effectiveness and B through E much less.

The regulations describe the types of recall communications that should be considered by the recalling entity. 21 C.F.R. Subpart C, §7.49. These communication techniques are similar to those described in the CPSC Recall Handbook. They also provide that a recall will be terminated when the FDA “determines that all reasonable efforts have been made to remove or correct the product in accordance with the recall strategy...” 21 C.F.R. Subpart C, §7.55.

The FDA’s recall procedures are set forth in Chapter 7 of its Regulatory Procedures Manual ([http://www.fda.gov/ora/compliance\\_ref/rpm\\_new2/ch7.html](http://www.fda.gov/ora/compliance_ref/rpm_new2/ch7.html)). This manual describes the recall strategy that FDA develops with each manufacturer as follows:

Each circumstance necessitating a recall is unique and requires its own recall strategy. FDA will review and/or recommend the firm’s recall strategy, and will develop a strategy for its own audit program based on the agency’s hazard evaluation and other significant factors such as type or use of the product, distribution pattern, market availability, etc. The need for publicity, the depth of the recall, the level of effectiveness and audit checks, and other recall implementing factors will be a part of the recall strategy. The strategy is separate from, and not tied to, the class of recall selected.

The procedures manual also describes the FDA’s approach to analyzing effectiveness:

It is FDA policy that after a firm decides to recall its products and so notifies the agency and recipients of the products, the recalling firm has the responsibility to determine whether the recall is progressing satisfactorily. Because effectiveness checks aid in verifying that all known, affected consignees have received notification about a recall and have taken appropriate action, it is the obligation of all recalling firms to conduct effectiveness checks as part of their recall strategy. Only in this way can the firm fulfill its responsibility to FDA and consumers.

The manual contains a number of helpful sample recall documents and guidances in various areas. For example, there is a guidance on how to evaluate hazards in order to make the initial decision on whether a recall is necessary, and then how to create an acceptable recall strategy. The factors to consider are the usual ones that any manufacturer uses to evaluate future risk—what is the hazard, when does it occur, what type of people will be exposed to it, what is the probability of the hazard occurring, and what are the consequences if it occurs.

## **U.S.D.A. and N.H.T.S.A.**

The United States Department of Agriculture's Food Safety and Inspection Service are responsible for meat and poultry that is in interstate commerce. Intrastate food safety is the responsibility of state and local food inspectors. Like the FDA, the FSIS classifies hazards as Class I, II, and III, with I being the most hazardous.

The FSIS's primary role is to closely monitor the effectiveness of the firm's recall procedures and to provide scientific and technical advice. FSIS has a standing Recall Committee that works with the company to coordinate the recall. It is chaired by the Recall Management Division and consists of scientists, technical experts, field inspection managers, enforcement personnel, and communications specialists. More guidance is provided on FSIS procedures at [www.fsis.usda.gov/OA/background/bkrecalls.htm](http://www.fsis.usda.gov/OA/background/bkrecalls.htm).

The National Highway Traffic Safety Administration provides a comprehensive compendium of information concerning recalls, dated June 2001, on its Web site. See [www.nhtsa.gov/cars/rules/standards/recompendium.pdf](http://www.nhtsa.gov/cars/rules/standards/recompendium.pdf). It summarizes all of the regulations and procedures for undertaking a recall.

NHTSA recalls are a bit different than consumer product recalls and many FDA recalls. Since on-road motor vehicles must be registered with some governmental entity, it is generally easier to find the current owner and communicate with him or her. However, certain important motor vehicle equipment, such as baby car seats, are not registered, and owners can change a number of times over the seat's lifetime.

The kinds of information to be provided to the purchaser are described in this compendium. It is similar to the information that the FDA and CPSC require to be provided. Other content of the compendium includes press releases to the public, notice to the dealers, forms for reporting to the NHTSA, sample letters to consumers and dealers, and the possible need to renotify all of the affected parties if NHTSA deems the recall not totally effective. The recalling entity must report quarterly to NHTSA on the progress of the recall.

The compendium does not discuss recall effectiveness or the criteria used by NHTSA to determine if a recall has been successful. Again, because motor vehicles are registered and the products expensive, it would be expected that response rates on recalls would be high where the risk is perceived to be significant by the consumer.

## **Other Governmental Agencies**

A few other agencies require certain manufacturers to report and to undertake recalls. These include Bureau of Alcohol, Tobacco and Firearms (alcoholic beverages),

Coast Guard (recreational boats and equipment), Environmental Protection Agency (pesticide products and vehicle emission control system) and the Department of Housing and Urban Development (manufactured housing).

## **European Union**

The EU has recently increased the responsibilities of manufacturers to report safety problems to a governmental agency and the responsibility of agencies to be more proactive in dealing with post-sale problems. See Ross, "Avoiding Future Problems: The Increased Duty to Take Post-Sale Remedial Action," April 2002 *For The Defense* 37.

The revisions to the EU's General Product Safety Directive will become effective in January 2004. Then, each EU member state must enact legislation incorporating the requirements of the new GPSD. It could be expected at that time that governments in the EU will provide more guidance on how manufacturers should undertake a recall.

The 2004 GPSD substantially expands manufacturers' and government's post-sale responsibilities. It attempts to strengthen each member state's powers to monitor and to improve collaboration on market surveillance and enforcement. The mechanism for this effort will be a Product Safety Network that will develop Rapid Alert System (RAPEX) procedures. RAPEX requires member states to inform the European Commission of serious risks so that it can alert other members.

The objective of the new Product Safety Network will be to facilitate the exchange of information on risk assessment, dangerous products, test methods and results, and recent scientific developments. In addition, joint surveillance and testing projects, the exchange of expertise and best practices, and cooperation in training activities will be established and executed. Presumably, there will be close cooperation within the European Union and also with foreign agencies responsible for product safety, in the tracing, withdrawal, and recall of dangerous products.

The 2004 GPSD also increases responsibilities for manufacturers and distributors. Distributors will have to monitor the safety of products placed on the market, especially by passing on information on product risks, keeping and providing documentation necessary for tracing the origin of products, and cooperating in actions taken by manufacturers and governmental agencies to avoid the risks. Both manufacturers and distributors will have a duty to immediately notify agencies when they know or ought to know that a product they have placed on the market poses risks to the consumer that are incompatible with the general safety requirement of the GPSD.

The GPSD applies only to consumer products. However, the EU is proposing that the law be changed so that the market surveillance and product withdrawal



responsibilities also apply to industrial products and other products governed by the New Approach Directives (such as machinery, toys, low voltage equipment, medical devices, etc.).

In some recent reports, the EU has focused on providing guidance to member states about how to improve and make consistent throughout the EU market surveillance techniques used to identify unsafe products that need to be withdrawn from the marketplace. See, “Guide to the Implementation of Directives based on the New Approach and the Global Approach” (September 1999), <http://europa.eu.int/comm/enterprise/newapproach/legislation/guide/legislation.htm>, and “Enhancing the Implementation of the New Approach Directives COM (2003) 240” (July 5, 2003), <http://europa.eu.int/comm/enterprise/newapproach/index.htm>.

For example, the July 2003 report describes market surveillance techniques in the EU as follows:

Some Member States have a “proactive” approach to market surveillance, while others adopt a “reactive” strategy. A reactive strategy covers activities such as response to complaints, safeguard clause notifications of other Member States and basic customs checks. A proactive approach suggests targeted campaigns, use of risk assessment tools, co-operation with other authorities.

The report also says “Member States need to ensure effective communication and co-ordination at national level between their market surveillance authorities and their other authorities which work in the field of product safety such as occupational health and safety authorities and customs.”

On the issue of encouraging companies to report and voluntarily withdraw their products from the market, the July 2003 report states “Deterrent measures like strong sanctions against persons or companies repeatedly misusing the freedoms offered by the New Approach system, product recall actions or information campaigns are appropriate actions to help reduce the number of deficient products on the Internal Market.”

The EU also envisions much greater cooperation between member states in transmitting information about unsafe products. The July 2003 report states: “Information about non-complying products, especially those that are subject to frequent complaints, need to be passed from one national authority to all other national market surveillance authorities faster than the products can be moved from one national market to the other.”

However, one organization avers that there is no way for market surveillance bodies to exchange information among themselves within a short space of time, thereby

making it possible for an unsafe product taken off the market in one country to be on sale for a long time in another country. The solution, according to the Information and Communication System for Market Surveillance ([www.icsms.org](http://www.icsms.org)), is an Internet-based system made up of manufacturers, trade associations, and governments that will then be able to more quickly transmit safety information concerning market surveillance and product safety issues.

Despite all of this new legislation and guidance, few manufacturers selling in the EU know how to withdraw products from the marketplace and how effective the recall must be. The focus seems to be much more on governments mandating recalls and product withdrawals and then placing public notices in various locations concerning the recall.

However, a failure to take your European responsibilities seriously because of the lack of product liability litigation in Europe can be a big mistake. In addition to causing legal problems in the EU, the failure to take appropriate remedial actions in the EU might even creep into your U.S. litigation. In two cases where the author was retained as an expert witness, one involved an allegedly inadequate recall in Europe and the other involved, in part, a failure to recall a product in Europe after recalling the product in the United States. Plaintiffs will most likely inquire into whether the manufacturer undertook any post-sale remedial program in any country outside the U.S., and try to get that fact into evidence.

## **Other Nations**

One of the most useful guides on recalls is an excellent pamphlet published in 1999 by the United Kingdom's Department of Trade and Industry. *Consumer Product Recall: A Good Practice Guide* (see <http://www.dti.gov.uk/CACP/ca/advice/productrecall/pdf/consumer.pdf>). It provides excellent guidance on communicating to product users about safety issues involving consumer products; it also lists other guides in the U.K. on recalling cars, food, medicine, aerosol products, and appliances. This guide also includes: planning for a recall, deciding whether to recall, what the recall message needs to say, how to deliver the recall message, and innovative ways to improve your recall. The guide also provides case studies of actual recalls and the lessons learned from the recall.

In addition, the U.K.'s DTI has issued a useful report called *Product Recall Research* ([http://www.consumer.gov.uk/homesafetynetwork/gh\\_recal.htm](http://www.consumer.gov.uk/homesafetynetwork/gh_recal.htm)), which surveyed recalls in the U.K. from 1990 to 1996 and, in part, identified the key reasons and factors as to why certain recalls were particularly successful or not successful. The response rates averaged 37% with the largest number of recalls coming in at less than 10%.

The highest levels of response were attributable to a high-perceived risk, comprehensive mailing lists, a high expenditure of money on published notices, and a high level of free publicity. The low levels of recall effectiveness were attributable to the age of the product (they'll continue using a product that has been used safely for years), the low cost of the product (they'll just throw the product away), and a low perceived risk (they'll just continue using the product). And, unfortunately, it will be difficult to consider products that are just discarded or not used anymore as a result of the recall notice in tracking response rates.

The Consumer Safety Unit of the Australian Treasury published a recall guide in July 2002. It can be found at [http://www.recalls.gov.au/recalls\\_guide1.cfm](http://www.recalls.gov.au/recalls_guide1.cfm). Its content is similar to the U.K. and CPSC manuals described above. However, a manufacturer recalling any consumer product in Australia should consult this guide for any requirements that are particular to Australia, especially those involving reporting the recall to the Australian government.

In Canada, the Consumer Products Division of the Health Ministry has powers to enforce the Hazardous Products Act, but does not have recall powers. In addition, manufacturers and importers do not have a specific duty to recall their products. However, their products can be seized if they violate the Act. As a practical matter, the Ministry does not have a public list of recall procedures. Instead, it works with each manufacturer or importer to develop a recall strategy for the specific product. The Canadians probably rely on procedures and guidelines similar to those of the CPSC and other safety agencies.

The Canadian Motor Vehicle Safety Act does give Transport Canada the right to order recalls, although there do not appear to be any recall guidelines for manufacturers. Basic instructions on how to implement a recall and how to report the recall's progress are in the Act, but there is no mention of required recall effectiveness.

The Canadian Health Products and Food Branch Inspectorate of Health Canada has published product recall procedures for food, drugs, cosmetics, medical devices, and radiation emitting devices. These procedures can be found at [http://www.hc-sc.gc.ca/hpfb/inspectorate/recall\\_procedure\\_entire\\_e.html](http://www.hc-sc.gc.ca/hpfb/inspectorate/recall_procedure_entire_e.html). They are similar to the recall procedures issued by the United States FDA. HPFB helps companies develop a recall strategy, communication effort, and effectiveness checks. And the government classifies hazards with the designation Class I, II and III and with similar recall effectiveness checks.

## **How to Perform an Effective Recall**

The first question is: what is an effective recall? Since this is dependent on so many variables and there are no set numbers or even ranges of numbers that

would allow one to conclude that a recall has been reasonable and effective, there is no good answer. It is very specific to the types of products, cost of the product, risks in using the product, perceived risks by the consumer, distribution techniques, difficulty in reducing or eliminating risk, and other factors.

Another question to ask is how effective does the recall have to be? This goes to the question of the level of risk that exists if people continue to use the product. In many recalls, the goal is at least to get the message out about a hazard and not necessarily to get the product back. The consumer could destroy the product, not use it, or change his or her behavior when using it. In these types of remedial programs, it is impossible to track a “response” since the consumer doesn’t have to respond to the public notice or recall letter or safety bulletin. Also, many products may have been already taken out of service or are not being used anymore. So, tracking the number of products sold versus the number of products recalled or fixed is not an accurate measure of the effectiveness of the recall.

The guides published by the various governmental agencies should, of course, be reviewed. However, except for medical devices recalled in the United States, there are no effectiveness levels established in the regulations. So the manufacturer has flexibility to develop a rationale to convince the agency and possibly a jury that the effectiveness rate was adequate.

Some of the conclusions from the CPSC recall effectiveness study issued in August 2003 confirm ways in which a recall can be more effective. Consumers are less likely to comply where compliance is inconvenient, takes time, or costs money. For example, where consumers must return the recalled product before they receive a replacement, response rates have been low.

One of the principal authors of the CPSC recall effectiveness study is Ed Heiden, the former chief statistician for the CPSC. He has written extensively on how to perform a recall, how to measure recall effectiveness, and how to defend the adequacy of recalls. Several years ago, Ed analyzed the potential to increase recall response rates by increasing the receipt of product registration cards. He thinks that the chances of increasing the receipt of such cards will not be significantly improved with more effort and that the value of the cards diminishes with time. People move frequently (16% per year) and products are sold or discarded. Instead, Heiden believes that using modern communication media such as the Internet might increase effectiveness.

Many observers have written over the years on the subject of how to perform a recall. Typically, they focus on pre-recall planning, management

techniques to establish for obtaining and analyzing post-sale information and performing the recall, logistics and communication planning, post-recall tracking, and follow-up. Most of their suggestions are similar to those contained in the various government documents.

An entire coterie of consultants has emerged to help with recalls—crisis management experts, legal experts in recalls, financial and logistics experts, and experts in what is called “reverse marketing.” A manufacturer should at least consider these resources in determining how best to perform a remedial program.

### **Defending the Adequacy of the Recall**

Given the variables of determining the adequacy and effectiveness of a recall program, it is difficult to come up with definite strategies for defending the recall. As stated earlier, the best recall most likely will not automatically cut off liability for the manufacturer for selling a defective product. And, given the fact that most recall letters admit that the product is defective, defense counsel needs to look elsewhere for a good defense.

Of course, the best approach would be to keep the recall from being introduced into evidence. You can argue that the recall is a subsequent remedial measure and should not be allowed into evidence. See Carter, “Defending Against Product Recall Evidence at Trial,” April 2002 *For The Defense* 43. However, often a good plaintiff’s attorney can somehow get the recall into evidence or find an expert to argue that the product should have been recalled. In fact, it may be beneficial to the manufacturer to affirmatively place the recall in evidence as proof of the manufacturer’s commitment to safety and the well being of its consumers.

Having the recall in evidence would be necessary to use some of the other possible defenses. The best one is that the recalled product or part of the recalled product that was defective did not cause the injury or damage. Of course, the existence of the recall, if it gets into evidence, will muddy the facts and may result in liability even without causation.

The next good defense would be that the consumer saw the message or received the letter and ignored the recall. While it may be hard to prove an assumption of the risk, this argument should at least help establish some contributory fault on the injured party. When using this defense, it is imperative to be able to prove that the “warning” in the letter or notice was adequate, using general warning principles. That is why some type of comprehension testing of recall letters may be helpful before they are sent out. However, these kinds of surveys can also be performed during the defense of the case to support the adequacy of the notice.

If the recall is to be performed by an intermediary such as a dealer or retailer, and they did not do it adequately, the manufacturer might be able to pass along some or all of the liability to that entity. For example, in one case, a propane gas dealer was held liable and the manufacturer was absolved because the dealer did not send out the manufacturer's recall letters to their customers after promising to do so. His failure to send out the letters constituted a superseding, intervening cause. Similarly, a retailer's failure to remove recalled products from the shelves and warehouse, or failure to place the recall notice in a conspicuous place, may also constitute some contributory fault or intervening cause.

If you can't break the causal link, then you must defend the adequacy of the specific recall or post-sale program. Since the recall was presumably not effective to the injured party, the plaintiff will argue that the manufacturer could have and should have done more. The manufacturer will have to evaluate the techniques it employed, the effectiveness rates as compared to others for similar products, try to explain the effectiveness rate in the context of limitations to increasing the rate, and discuss why doing more would not have necessarily increased the rate.

An analysis of past punitive damages awards clearly show that the basis for most such awards is that the jury believed that the manufacturer failed to undertake adequate post-sale remedial measures. At a minimum, hopefully the manufacturer can minimize or prevent the chance that punitive damages will be imposed by establishing lack of causation, intervening cause, or other contributory fault, or defend the effectiveness of the response and limitations on improving it.

## **Conclusion**

Manufacturers need to be prepared to recall their products even if they have never had to do so in the past. Once a product safety issue arises, it is too late to develop a plan. Preparing for a recall before it occurs can significantly increase its effectiveness and lessen the costs and disruption. Of course, the manufacturer also needs to employ pro-active pre-sale product liability prevention techniques so that a recall is not necessary in the first place.

It is clear that governments around the world will focus more on identifying product safety problems and forcing or encouraging manufacturers to do something about them. Keeping up with the state of the art will require paying attention to what other companies are doing and what government agencies are requiring. This vigilance will pay large dividends.

Manufacturers should not assume that their effectiveness rates are static and can't be improved. Technology is available today that could increase their ability to quickly communicate with the distribution chain and even consumers about the recall. They

should continually look for ways to significantly improve the success of their recalls and other post-sale remedial programs. Hopefully, this will minimize risks and the potential for accidents and provide some type of defense if an accident happens.

## 50-State Survey

### Alabama – Theodore C. Miloch, II

There are no Alabama state court decisions or statutes that specifically address a post-sale duty to warn. The Eleventh Circuit, however, in an appeal from an Alabama District Court, recognized a post-sale duty to warn in *Miller Industries v. Caterpillar Tractor Co.*, 733 F. 2d 813, 820-821 (1984), 738 F. 2d 451(11<sup>th</sup> Cir, 1984). *See also In re Silicone Gel Breast Implants Products Liability Litigation*, 996 F. Supp. 1110, 1117 (N. D. Ala. 1997) (plaintiffs' post-sale duty to warn claims in multi-district litigation were precluded by a particular defense or factually unsupported). It is unclear from the language in these decisions whether the courts were applying Alabama state law.

### Alaska – Mark Berry

Alaska has no case law on a manufacturer's duties after the product has been sold.

### Arizona – Jill Goldsmith

While Arizona may recognize a duty to warn product users of defects discovered after the sale of the product, there is no duty to warn after the sale of advances in safety for products that are not defective when sold. *Wilson v. U.S. Elevator Corp.*, 193 Ariz. 251, 972 P.2d 235 (Ct. App. 1998).

In *Wilson*, the appellate court affirmed the trial court's finding that the manufacturer had no continuing duty to notify the owner of the elevator that an improved door closing mechanism had become available years after the elevator had been purchased and installed. *Wilson*, 972 P.2d at 236. The case arose out of an injury when plaintiff's wrist was caught in the doors of an elevator. *Id.* at 237. Plaintiff suffered permanent injuries to his wrist and hand and brought an action against the defendant, who made the elevator, and the elevator maintenance company, Hotchkiss Elevator Company. *Id.* Plaintiff asserted claims of strict liability against the defendant manufacturer and negligence theories against the maintenance company. *Id.*

The elevator involved in the accident was manufactured in January 1974. *Id.* The manufacturer serviced and maintained the elevator until 1987, when the service contract was awarded to another company. *Id.* Subsequently, Hotchkiss was awarded the contract to service the elevator, and it did so at least once a week before and after the time of Wilson's accident, June 1993. *Id.* The elevator incorporated a dual beam photo-eye and standard safety edge system, which used rubber bumpers along the closing edges of the doors to automatically retract the doors if they came in contact with any person or object. *Id.* After the accident, Hotchkiss installed a newer "shield sensor" device, which used multiple light beams to retract the doors and offered greater protection than the original system. *Id.* The elevator manufacturer did not make or sell the shield sensors, but it was aware of their development sometime before 1989. *Id.*



The manufacturer filed a motion for summary judgment and argued that as a matter of law, it had no continuing duty to notify the owner of the elevator about an improved door mechanism that became available years after the elevator was made and installed. *Id.* The trial court granted the elevator manufacturer's motion for summary judgment because it found that "a number of years after its maintenance contract and monthly contacts with the user had ceased, [the manufacturer] had no duty to contact the user and advise the user that there was a 'safer', 'better', or 'improved' version of the door closing mechanism." *Id.*

In a matter of first impression in Arizona, the appellate court considered the issue of whether a manufacturer has a continuing duty to notify each owner of a previously sold product of improved safety designs, even though the product was not defective when sold and the manufacturer no longer services or maintains it. *Id.*

In reaching its decision, the *Wilson* court noted that plaintiff did not allege any flaw in the elevator's design or manufacture or any informational defect at the time of the sale and installation. *Id.* at 238. However, plaintiff contended that the manufacturer had a continuing duty to inform past customers of the availability of new safety devices once it learned of them. *Id.* Plaintiff relied on the Court of Appeals' decision in *Readenour v. Marion Power Shovel, Inc., modified on appeal*, 149 Ariz. 442, 719 P.2d 1058 (Ct. App. 1986); and *Rodriguez v. Besser Co.*, 115 Ariz. 454, 565 P.2d 1315 (Ct. App. 1977).

In *Rodriguez*, the Court of Appeals noted that a manufacturer may have a continuing duty to warn about dangers discovered after sale, but it found no duty to warn of potential dangers from independent post-sale modifications made by a third party after the product left the manufacturer's possession and control.<sup>1</sup> *Id.*

The *Wilson* court noted that *Rodriguez* had no impact in this case because *Rodriguez* addressed the issue of the continuing duty to warn where there was an inherent danger in the product. The court also distinguished this case from cases in other jurisdictions in which the plaintiffs alleged that the product was defectively designed and lacked sufficient warnings at the time of sale. The court further explained that other jurisdictions have refused to impose a continuing duty to warn, except when the manufacturer, believing it had sold a non-defective product, subsequently learned that its product was, in fact, defective when placed in the stream of commerce. *Id.* at 239 (citing *Romero v. Int'l Harvester, Co.*, 979 F.2d 1444 (10th Cir. 1992) (applying Colorado law); *Lynch v. McStome & Lincoln Plaza Assoc.*, 378 Pa. Super. 430, 548 A.2d 1276 (1988)). Additionally, the court noted that this view is supported by the Restatement (Second) of Torts, which Arizona follows in the absence of contrary precedent. *Id.* at 239-40. Thus, "before there can be any continuing duty -- whether it be to warn, repair, or recall -- there

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<sup>1</sup> Because *Rodriguez* was decided before Arizona's product liability statute was enacted, the continuing validity of *Rodriguez* is questionable. Additionally, in *Wilson*, the court noted that the Arizona Supreme Court modified the court of appeals decision in *Readenour* with no mention of *Rodriguez*. *Wilson*, 972 P.2d. at 238.

must be a defect or an actionable problem at the point of manufacture." *Id.* at 240 (citing *Gregory v. Cincinnati, Inc.*, 450 Mich. 1, 538 N.W. 2d 325, 328 (1995)).

The *Wilson* court found *Lynch* particularly persuasive. In that case, plaintiff sued the manufacturer of an escalator for injuries received when the escalator came to an abrupt halt. *Id.* Plaintiff claimed that the company had a duty to notify its past customers of a newer, allegedly safer, braking system. The Pennsylvania appellate court in *Lynch* found no precedent for such a broad duty, nor could it find it appropriate under standard negligence principles. The *Lynch* court explained:

“We recognize that there are products liability cases from other jurisdictions which speak of a manufacturer's or seller's 'continuing duty to warn.'... Our review of these cases leads us to conclude that this phrase has been used most often to describe no more than the obligation imposed where a manufacturer or seller, believing that it has sold a non-defective product, *subsequently learns that its product was, in fact, defective when placed in the stream of commerce.* In these circumstances, saying that there is a 'continuing duty to warn' is, of course, a tacit recognition that the duty existed in the first instance. Such an obligation is not at all synonymous, however, with the claim -- made here by plaintiff -- that where a product is free from all defects when sold, the seller, nevertheless, has a duty to monitor changes in technology and notions of safety and, either periodically or otherwise, notify its purchasers thereof. For where, as here, no initial duty to warn exists, none can be said to 'continue.' “

*Id.* at 240 (quoting *Lynch*, 548 A.2d at 1281) (emphasis added).

Applying *Lynch* to the facts in *Wilson*, the court noted that the elevator was installed with an accepted and relied upon safety standard in the industry in 1974. *Id.* Although the newer shield sensor was superior and had gained general acceptance, the parties agreed that both safety mechanisms performed the same job -- reopening elevator doors -- and that the older system was not obsolete. *Id.* In fact, the older system was still the standard required by the National Elevator Code when the *Wilson* court decided the case. *Id.* Additionally, the court noted that the manufacturer did not make or sell the newer device, and it was not available when the subject elevator was manufactured and installed. *Id.* Finally, the court recognized that the appellee had not serviced the elevator or had any responsibility for it since 1987, more than five years before the accident. *Id.* at 240-41. Accordingly, the court concluded that the mere subsequent development and production of an alleged superior safety device did not render the 1974 installed elevator unreasonably dangerous, nor did it impose a duty upon the appellee to issue warnings to all past purchasers of its elevators. *Id.* at 241. The *Wilson* court said that imposing such a

burden would inhibit manufacturers from developing improved designs that in any way affected the safety of their products, since the manufacturer would then be subjected to the onerous, and oftentimes impossible, duty to notify each owner of the previously sold product of the newer design, despite the fact that the already sold products are, to the manufacturer's knowledge, safe and functioning properly. *Id.* (citing *Lynch*, 548 A.2d at 1280-81). For these reasons, the *Wilson* court held that the trial court properly granted summary judgment for the manufacturer, correctly finding that it had no legal duty to notify past customers that a new door-opening device had become available. *Id.*

### **Arkansas – Ed Bott**

No state case has specifically imposed a post-sale duty to warn, recall or retrofit in Arkansas. Pursuant to a state statute, the state of scientific knowledge available to the manufacturer *at the time the product is placed on the market, rather than at the time of the injury*, is to be considered as evidence on the duty to warn. Ark. Code Ann. § 16-116-104(a)(1); see also *Harris v. Great Dane Trailers, Inc.*, 234 F.3d 398 (8th Cir. 2000). However, one Federal District Court, applying Arkansas law, has specifically rejected the theory that a post-sale duty to warn exists. *Boatmen's Trust Co. v. St. Paul Fire & Marine Ins. Co.*, 995 F. Supp. 956 (E.D. Ark. 1998).

In *Boatmen's*, Plaintiff Middleton sued on theories of strict liability and medical negligence for the brain damage suffered by her son during a hospital operation. Ohmeda manufactured the anesthesia machine used in the procedure. Plaintiffs' experts agreed that there was no malfunction of the equipment, and that the machine was state-of-the-art when sold to the hospital. Plaintiffs argued that the lack of a "linking device," which could have prevented an attendant from misdialing the amount of oxygen to be delivered, rendered the machine's design defective. Plaintiff further argued that the facts gave rise to a post-sale duty to warn of this defect.

In granting summary judgment to Ohmeda, the Court found that there was no genuine issue of material fact for the jury regarding the alleged defect and the role that the machine played in causing the patient's injury. Moreover, the Court stated that "the plaintiffs have no cause of action under Arkansas law involving any post-sale duty to warn. The plaintiffs cite no authority and the Court finds none to support a claim based upon a legal duty to warn." The Court again noted that Arkansas law "imposes liability as of the time of sale, and the parties agree that there was no government recall." Thus, the Court declined to impose a post-sale duty to warn upon the manufacturer.

In *W. M. Bashlin Co. v. Smith*, 643 S.W.2d 526 (Ark. 1982), plaintiff Smith was a serviceman for a power company whose job entailed climbing utility poles. In doing so, Smith used a lineman's belt, which was manufactured by Defendant W. M. Bashlin Co. The practice of climbing utility poles involved using gaffs on one's shoes to climb the pole, while the worker used the belt to prevent him from falling. Workers customarily would use a disfavored procedure called "double D-ringing," by which the worker

snapped both ends of the safety belt onto a single D-ring, which attached to the worker's body belt, allowing the worker a longer reach. One day, while Smith was double D-ringing, the safety belt broke, causing Smith to fall to the ground, resulting in an injured spine and paralysis from the waist down. At trial, the jury found Bashlin to be 80% liable and Smith to be 20% liable for the injury and awarded \$1,000,000 in damages.

On appeal, Bashlin argued several points, one of which was that the jury's finding that the belt was not defective when it left Bashlin's control rendered the judgment against them improper. In response, the Arkansas Supreme Court noted:

The finding by the jury that Bashlin did not supply the lineman's body belt in a defective condition does not preclude the finding that Bashlin was negligent in some other respect. The jury may have found that Bashlin was negligent in failing to warn the plaintiff on the use of the belt, in failing to warn about double D-ringing, or that the manufacturer became aware that the belt tongue should not have been constructed of leather alone and should therefore have recalled the product.

The Court proceeded to rationalize its holding in light of two Eighth Circuit cases, *Sterner v. U.S. Plywood-Champion Paper, Inc.*, 519 F.2d 1352 (8<sup>th</sup> Cir. 1975), and *Lindsay v. McDonnell-Douglas Aircraft Corp.*, 460 F.2d 631 (8<sup>th</sup> Cir. 1972). The court noted *Lindsay's* language that product defects must have existed at the time the manufacturer parted with possession in order to find the manufacturer liable, although an exception might arise where a subsequent duty to warn or to recall existed. The court then distinguished *Lindsay* based on the facts of the case before it, and stated that *Sterner* was the more current rule. In *Sterner*, an action in negligence and strict liability, the Court had admitted evidence offered by Plaintiff of post-sale warnings. However, the *Bashlin* court did not expressly hold that a post-sale duty to warn or recall exists in Arkansas.

### **California – Mark Berry**

In a case decided in the negative, a manufacturer was found not liable to a woman whose breast prosthesis deflated six years after it was implanted based on failure to warn doctors after prosthesis had been implanted of increasing incidence of spontaneous deflations, where after the implant had been placed it would have been too late for a physician to decide not to use the product, and where no post-implant method of averting deflation was suggested. *Rosburg v. Minnesota Mining and Mfg. Co.*, 181 Cal. App. 3d 726 (1986, 1st Dist.). The court wrote, "There is no requirement that a manufacturer must give a warning which could not possibly be effective in lessening the plaintiff's risk of harm." *Id.* at 735. This implies, however, that there may be a requirement for a manufacturer to give a warning post-sale if it would be effective in lessening the

plaintiff's harm. However, this case was decided in 1986, and so far no duty has been found.

In *Lunghi v. Clark Equipment Co., Inc.*, 200 Cal.Rptr. 387, 153 Cal.App.3d 485 at 494 (1984), the court suggested in dicta that a retrofit campaign that was not adequately conducted could constitute negligence. The trial court's refusal to instruct the jury that failure to warn may be a design defect was a ground for reversal. *Id.* Appellants presented evidence on negligence pertaining to the "retrofit campaign," including defendant's effort to notify owners of the Bobcat (and the failure to notify the owner of the Bobcat involved in the instant case) about the dangerous propensities of the machine discovered after the machine had been on the market for a while, and the availability of safety devices that the manufacturer would install. *Id.* The court noted that even if properly instructed, the jury had found that none of the mechanical design features in issue constituted a defect, it could still have found that Clark's knowledge of the injuries caused by these features imposed a duty to warn of the danger and/or a duty to conduct an adequate retrofit campaign. *Id.*

Similarly, in *Hernandez v. Badger Construction Equipment Co.*, 34 Cal.Rptr.2d 732, 28 Cal.App.4th 1791 (1994), the court stated, "failure to conduct an adequate retrofit campaign may constitute negligence apart from the issue of defective design." *Id.* at 1827 (citing to *Lunghi*, 153 Cal App. at 494). In *Hernandez* a new safety design was developed for a crane. In 1981, when Badger sold the crane to the plaintiff, it did not equip cranes with this device. *Id.* at 1799. In 1988 Badger decided to equip all new cranes with the device. *Id.* The plaintiffs rented an older model when their current crane broke down. They did not order the new device because they believed it was undesirable, useless, and unreliable. *Id.* Nevertheless, the court found that evidence that Badger had decided not to retrofit the old cranes or to notify owners of previously sold cranes about its decision to make the new feature standard equipment was sufficient to support the jury's finding of negligence based on Badger's failure to take adequate steps to retrofit the cranes sold before 1988. *Id.* at 1828. The court stated, "the jury could properly conclude Badger did not do 'everything reasonably within its power to prevent injury' to plaintiffs." *Id.* (citations omitted).

The court also found that the jury's finding of negligence based upon failure to conduct an adequate retrofit campaign may be reconciled with the jury's finding there was no design defect in the crane. *Id.* The jury heard evidence that when Badger sold the crane in 1981, industry standards did not require the new safety design as standard equipment. Thus, the jury could have properly concluded the crane was not defective in 1981. *Id.* However, the jury could nonetheless have found Badger negligent because, upon determining the new design should be installed on all its new cranes, it did not adequately seek to retrofit with a new safety design the crane ultimately injuring the employee. *Id.*

Based on *Lunghi* and *Hernandez*, newly issued California Model Civil Jury Instructions include a section (§1223) on negligence for a failure to recall or retrofit a product. While this is not official law, it does put manufacturers on notice of a possible duty in California to fix a product that it now knows has a dangerous defect.

### **Colorado – Scott W. Sayler and Douglas B. Maddock, Jr.**

#### **Post-Sale Duty to Warn**

While the Colorado Supreme Court has not directly addressed the question of when a post-sale duty to warn arises, a lower court decision and its subsequent interpretation by the United States Court of Appeals for the Tenth Circuit have established a limited post-sale duty to warn of defects which existed at the time of manufacture. In *Downing v. Overhead Door Corp.*, 707 P.2d 1027 (Colo. Ct. App. 1985), a strict liability claim was brought against the manufacturer of an automatic garage door opener for placing the activator button within the reach of children after a young girl was injured when she activated the garage door. The manufacturer learned of the danger posed to children and later provided warnings to new purchasers of the product. The manufacturer conceded that it had a duty to warn of dangerous conditions but claimed that such duty applied only to “products not yet sold.”

The Colorado Court of Appeals rejected that argument, holding that “[t]he duty to warn exists where a danger concerning the product becomes known to the manufacturer subsequent to the sale and delivery of the product, even though it was not known at the time of the sale.” *Id.* at 1033. The court further explained: “After a product involving human safety has been sold and dangerous defects in design have come to the manufacturer’s attention, the manufacturer has a duty either to remedy such defects or, if a complete remedy is not feasible, to give users adequate warnings and instructions concerning methods for minimizing danger.” *Id.*

The post-sale duty to warn adopted in *Downing* has been narrowly interpreted by the United States Court of Appeals for the Tenth Circuit to apply only to products that were defective at the time of manufacture. *Romero v. Int’l Harvester Co.*, 979 F.2d 1444 (10th Cir. 1992). Specifically, *Romero* held that a manufacturer has no duty to notify prior purchasers of its products about the development of new safety devices, or to retrofit those products if the products were non-defective under standards existing at the time of manufacture. *Id.* at 1446. This view is in keeping with the majority of jurisdictions.

In *Romero*, a farm worker was killed during a tractor rollover accident. His widow brought causes of action for negligence and strict liability, claiming that the manufacturer failed to design the tractor with a roll bar or warn of the dangers of using the tractor without a roll bar, and subsequently failed to retrofit the tractor with a roll over protective system after it was sold. Though roll over protection systems were later

developed and subsequently mandated by federal regulations, the tractor involved in the accident met all applicable governmental safety standards when it was manufactured in 1963.

The court interpreted *Downing* as applying only where the defect existed at the time of the original sale and was subsequently discovered by the manufacturer. *Id.* at 1450. “We see nothing in *Downing* extending to manufacturers a duty to retrofit a product which was non-defective under standards existing at the time of manufacture, yet which could subsequently be made safer by a later-developed safety device or design improvement.” *Id.*

The Tenth Circuit has since reaffirmed the *Romero* court’s view of the post-sale duty to warn. See *Perlmutter v. United States Gypsum Co.*, 4 F.3d 864, 869-70 (10th Cir. 1993) (no post-sale duty to warn where court determined that asbestos-containing plaster product was not defective under standards existing at the time of installation); *Oja v. Howmedica, Inc.*, 111 F.3d 782, 791 (10th Cir. 1997) (citing *Perlmutter* for the proposition that under both negligence and strict liability theories, the product must have been defective at the time of sale).

The *Downing* court also addressed the admissibility of subsequent remedial measures in a post-sale failure to warn case. Because the warnings distributed with the newer garage door openers were issued *prior* to the accident rather than afterwards, the court determined that the traditional rationale for excluding evidence of post-accident improvements was inapplicable in this case. In the court’s view, such evidence was admissible to demonstrate the manufacturer’s pre-accident knowledge of the danger inherent in the product and the feasibility of providing a more effective warning. *Downing*, 707 P.2d at 1033-34; Colo. rev. stat. § 13-21-404 (2001).

### Practice Pointers

While most courts have found the post-sale duty to warn grounded in negligence, *Downing* is noteworthy for applying it to claims brought under a strict liability theory. Under Colorado law, there is no “rigid distinction” between the concepts of negligent and strict liability failure to warn. *Romero*, 979 F.2d at 1452.

*Downing* and *Romero*, taken together, indicate that manufacturers may have a duty to recall and retrofit products, rather than simply provide an adequate warning, when those products were in a dangerously defective condition at the time of manufacture. This is significant because the recall and retrofit of a product is far more costly for the manufacturer than providing additional warnings.

It should be emphasized that *Downing* is the only state court decision in Colorado on the post-sale duty to warn; the Colorado Supreme Court has not addressed the extent of such a duty. Thus, the post-sale duty to warn adopted in *Downing* and since limited

significantly by the Tenth Circuit in *Romero* is subject to further review by the state courts.

### **Connecticut – Sean Fisher**

Connecticut has not expressly recognized a manufacturer's duty to warn of latent defects discovered after the sale of the product, but has recognized a continuing duty to warn of defects in the product present at the time of sale. *See, e.g., Giglio v. Conn. Light & Power Co.*, 180 Conn. 230, 429 A.2d 486 (1980) (affirming general jury verdict in favor of plaintiff on grounds that the seller of a furnace had a continuing duty to warn the owner of the possibility of serious injury resulting from opening the furnace door while the pilot light was on); *Handler v. Remington Arms Co.*, 144 Conn. 316, 130 A.2d 793 (1957) (vacating trial court's judgment and holding that cartridge manufacturer's duty to warn users of a substantial risk of injury resulting from a defective product gave rise to a continuing duty to warn the consumer of such defects, and, therefore, the action was commenced within one year of the act or omission complained of per the statute of limitation).

Although Connecticut courts have not expressly adopted a post-sale duty to warn of latent defects discovered subsequent to the sale of the product, evidence relating to this duty has been considered in at least two cases. In *Prokolkin v. General Motors Corp.*, 170 Conn. 289, 365 A.2d 1180 (1976), the Connecticut Supreme Court affirmed the trial court's award of a directed verdict to General Motors on the grounds that Plaintiff's negligence claim was barred by the applicable statute of limitation. The product in this case was a 1959 Chevrolet Corvette, and the Plaintiff alleged that the limited slip differential system in the car was defective, that General Motors had learned, subsequent to the sale of the car, that the addition of a certain clutch plate would improve the operation of the system, and, therefore, that General Motors had a post-sale duty to inform consumers of the defect and the improvement that would alleviate the defect. *See Id.* at 291-92, 365 A.2d at 1181.

At the time, Connecticut's statutes of limitation for strict liability and negligence were different, and the Court held that Plaintiff's allegations could not be considered a strict liability claim and held the action time-barred. *See Id.* at 299, 365 A.2d at 1185. However, in its discussion, the Court stated that the allegations set forth in the Plaintiff's complaint may give rise to a viable negligence claim, and affirmed the trial court's order allowing for a subsequent trial of this claim. *See Id.* at 299-300, 305, 365 A.2d 1185, 1187. As such, the Court acknowledged the viability of Plaintiff's claim that General Motors had a duty to warn consumers of the latent defect once it was discovered and possibly inform them of the available technical solution.

The United States District Court for the District of Connecticut has recently decided a case supporting this interpretation of Connecticut law. In *Densberger v. United Technologies Corp.*, 125 F. Supp. 2d 585 (D. Conn. 2000), the Court denied Defendant's



motion for judgment as a matter of law following a jury verdict in favor of the Plaintiffs. The product in question was a Sikorsky Blackhawk helicopter sold to the U.S. Army, which was equipped with an ESSS kit, enabling it to carry additional fuel tanks. *See Id.* at 588-89. The jury returned a verdict that Defendant failed to warn the Army that the Blackhawk, as equipped with an ESSS kit, “could become uncontrollable during foreseeable flight conditions.” *Id.* at 589. The Court rejected Defendant’s argument that the Connecticut Products Liability Act (“CPLA”) barred a cause of action sounding in negligence based upon a continuing post-sale duty to warn and held that such a cause of action was viable in Connecticut. *See Id.* at 591-94.

Further, when examining the sufficiency of the evidence in support of this verdict, the Court noted that the jury could have reasonably found that the manner in which the Army was using the Blackhawk as equipped should have been anticipated by the Defendant, thereby implicitly holding that a duty to warn the user could arise subsequent to the sale based upon the Defendant’s knowledge of the Army’s actual use of the product. *See Id.* at 596.

#### **Delaware – Sean Fisher**

Delaware courts have not expressly recognized a manufacturer’s duty to warn of latent defects discovered after the sale of the product. Although at least two courts have briefly discussed the cause of action in the context of a successor company’s liability to consumers of a product manufactured by the predecessor company, these courts have declined to adopt the theory. *See Elmer v. Tenneco Resins, Inc.*, 698 F. Supp. 535, 543 (D. Del. 1988) (“Whatever the merits of the [post-sale] breach of a duty to warn theory, this Court is not prepared to adopt a new theory of recovery absent guidance from the Delaware courts or legislature.”); *Fountain v. Colonial Chevrolet Co.*, Nos. C.A. 86C-JA-117 & C.A. 85C-DE-88, 1988 WL 40019, at \*10 (Del. Super. Ct. Apr. 13, 1988) (“Notwithstanding the merits of the [post-sale] breach of a duty to warn theory, this Court is disinclined to adopt a new theory of recovery, recognized in only the minority of jurisdictions, and apply it to the facts of this case.”).

#### **District of Columbia – Dabney Carr and Gary Spahn**

No case law in the District of Columbia addresses whether there is a post-sale duty to warn. Further, no District of Columbia case imposes the duty to retrofit or recall. Maryland’s case law, though not controlling, does provide persuasive common law authority for the District of Columbia.

#### **Florida – Theodore C. Miloch, II**

No case or statutory law in Florida has addressed the issue of whether a manufacturer has a duty to warn consumers of dangers discovered post-sale or after the product has left the manufacturer’s control. Florida follows the Restatement (Second) of

Torts, which does not address the issue. See *West v. Caterpillar Tractor Co.*, 336 So.2d 80 (Fla. 1976) (adopting § 402A of the Restatement (Second) of Torts); Douglas R. Richmond, *Expanding Products Liability: Manufacturers' Post-Sale Duties to Warn, Retrofit and Recall*, 36 Idaho L. Rev. 7, 70 (1999) (“The Restatement (Second) did not address the post-sale duty to warn.”).

While there is no case in Florida that specifically addresses whether a manufacturer has a “post-sale” duty to warn consumers of dangers posed by its product, such a duty can be inferred from cases that have addressed the issue tangentially. See, e.g., *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 660 So.2d 628, 632 (Fla. 1995) (“failure to warn, without the requisite harm [i.e. physical injury or property damage], will not circumvent the economic loss rule to allow a cause of action where the plaintiffs allege a duty to warn which arose from facts which came to the knowledge of the company after the manufacturing process and after the contract.”); *High v. Westinghouse Elec. Corp.*, 610 So.2d 1259 (Fla. 1992) (manufacturer had duty to timely notify customer regarding product dangers of which manufacturer became aware post-sale so that the consumer could warn third party users); *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242 (Fla. 1st DCA 1984) (asbestos manufacturer had duty to warn post-sale of possible health hazards resulting from exposure to its product which it learned about before and after the sale).

### **Georgia – Charles R. Beans**

Georgia courts distinguish between negligent failure to warn and strict liability failure to warn. *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635 (Ga. 1993). For example, a strict liability failure to warn cause of action is subject to Georgia’s ten-year statute of repose, whereas a cause of action for negligent failure to warn escapes that time limitation. *Chrysler Corp. v. Batten*, 450 S.E.2d 208 (Ga. 1994).

In *Batten* the Georgia Supreme Court noted that while the distinction of a negligent and strict liability failure to warn case is occasionally one of semantics, “factual distinctions between the two claims are readily apparent in those cases where a duty to warn of a danger arises from a manufacturer’s post-sale knowledge acquired months, years, or even decades after the date of the first sale of the product.” *Id.* at 211 (emphasis added). Referring to The Restatement 2d of Torts, § 402A, the Georgia Supreme Court found that an actual or constructive knowledge requirement with regard to a manufacturer’s duty to warn “is consonant with Georgia tort law in general . . .” *Id.* Because subsection (c) of O.C.G.A. § 51-1-11 makes a distinction between negligent failure to warn and strict liability failure to warn, clearly excepting a negligence cause of action from the 10-year repose limitation, then any negligent failure to warn cause of action would escape the 10-year repose. Because plaintiff’s negligent failure to warn allegations fell outside the Georgia statute of repose, then the Court of Appeals was proper in reversing the grant of summary judgment to Chrysler. In so holding, the Court noted as follows:

That “nothing” relieves a manufacturer from the duty to warn reflects the legislature’s recognition of the possibility that this duty may not emerge until long after the statute of repose has extinguished any cause of action arising out of the product sale; that the duty to warn arises “once the danger becomes known” reflects the existing case law with its actual or constructive knowledge standard.

*Id.* at 727.

Georgia law can subject manufacturers to a duty to warn even if there is no product defect. In *Battersby v. Boyer*, 526 S.E.2d 159 (Ga. App. 1999), plaintiff-appellee Boyer was a passenger on a four-wheel ATV operated by her 13-year-old son when it flipped over and landed on top of her. The ATV bore a written warning label stating that no passenger should ride the vehicle. The Court of Appeals found a distinction between negligence and strict liability theories. While a manufacturer has a duty to exercise reasonable care in the manufacturing of its products, it also has a separate and distinct duty to warn of any dangers, if applicable. “Breach of these different duties hence gives rise to separate and distinct claims. Thus, a duty to warn can arise even if a product is not defective.” *Id.* at 162. Moreover, a manufacturer’s duty to warn is different from a seller’s. The seller’s duty to warn, even post-sale, may be extinguished once the manufacturer has placed the appropriate warnings on the product. However, “the consumer’s challenge to the adequacy of the manufacturer’s warning is not foreclosed.” *Id.* at 163. Therefore, the sufficiency of the manufacturer’s warning was held to be a jury question.

None of the above cases utilized the application of The Restatement (Third) of Torts. In *Watkins v. Ford Motor Co.*, 190 F.3d 1213 (11th Cir. 1999), however, the Eleventh Circuit Court of Appeals relied upon Section 10 to The Restatement (Third) of Torts. In that case, plaintiff-appellant was driving a 1986 pre-owned Bronco that flipped and killed a passenger. On appeal from the manufacturer’s summary judgment, the Eleventh Circuit reiterated that a post-sale duty to warn may arise much later. In fact, it is possible in Georgia to have a case where a plaintiff is barred from bringing a design defect claim, but can proceed on a failure to warn claim for the very same defect. Ford allegedly had knowledge of stability problems with regard to the Bronco. “The evidence concerning the vehicle’s dangerous propensities after distribution of the 1986 Bronco is greater still.” *Id.* at 1219. Ford did not issue any post-sale warnings. This necessitated reversal of summary judgment, because under Georgia law, “a manufacturer breaches its duty to warn if it fails to ‘(1) adequately communicate the warning to the ultimate user or (2) fails to provide an adequate warning of the product’s potential risks.’” *Id.* at 1219. In relying upon Section 10 of The Restatement (Third), the Court stated that “[t]he law merely requires the warning to inform the consumer of the nature and existence of the hazard, allowing him to make an informed decision whether to take on the risks warned

of.” *Id.* Section 10 urges the courts to perform a “balancing test,” so that manufacturers and sellers are not overburdened with regard to post-sale warnings.

Recently the Georgia Court of Appeals relied upon the rationale of Section 13 of the Restatement (Third) in *Smith v. Ontario Sewing Machine Co., Ltd.*, 548 S.E.2d 89 (Ga. App. 2001). Smith, a worker in a sewing machine plant, sued the defendant-appellee manufacturer for on the job injuries. Defendant had sent post-sale notices to plaintiff’s employer warning the employer to stop using the machines, but did not specify the particular machine defects. Plaintiff never learned of these notices. Ontario employees visited the plant site and saw workers using the defective machines, but never spoke to the workers, attached signs to the machines, mailed warnings, or distributed flyers, all methods referred to in Section 13(b)(2) of The Restatement (Third) of Torts.

The *Smith* court claimed that Georgia recognizes the duty to warn post-sale, even for successors of manufacturers, referring to Section 13(b)(1) of The Restatement (Third). Ontario, the manufacturer of the defective mechanism, owed such a duty. Moreover, Ontario had a duty to recall the defective product. In so holding, the court stated:

When the manufacturer subsequently learns that its products have been sold with dangerous defects, it is under a duty to recall the product from the market and to remedy the defect or replace the product in some cases in the exercise of ordinary care beyond the duty to give a post-sale warning.

*Id.* at 95. Further, in finding Ontario’s actions with regard to the recall inadequate, the court noted that:

A post-sale warning must be adequate and specific to satisfy the manufacturer-seller’s duty to the ultimate user to protect from harm; a vague or generalized warning that fails to warn of the specific defect, the danger from the defect, and remediation is not an adequate warning.

*Id.* at 96. In sum, according to the Court of Appeals Ontario “sought refuge” behind their “vague” attempt at a recall notice without following up as mandated by The Restatement. A manufacturer cannot shift the burden to recall and warn post-sale to an employer. Thus, summary judgment was reversed in favor of appellant Smith.

The Georgia Supreme Court granted certiorari and partially reversed, noting that the Court of Appeals’ decision constituted an erroneous expansion of Georgia law regarding the duties of manufacturers with respect to product defects. 572 SE2d 533 (Ga. 2002). Specifically, such a broad holding was unnecessary to the “resolution of the proximate cause issue,” since whether the employer’s failure to cooperate with the

voluntary recall, thereby causing the injuries, was a jury question. The Supreme Court let the reversal of the summary judgment to the manufacturer stand, but made it clear that as written the lower decision was not a change in Georgia law that is warranted at this time. Manufacturers should expect attempts to have the Court of Appeals language used against them by plaintiffs in the near future.

### **Hawaii – Mark Berry**

In *Tabieros v. Clark*, 944 P.2d 1279 (Haw. 1997), a dock worker’s legs were crushed when a straddle carrier used to move shipping containers struck the jitney in which he was sitting. He sued the manufacturer and the owner of the carrier. The court held that a manufacturer does not have a duty to retrofit its products with post-manufacture safety devices unavailable at the time of sale. *Id.* at 1298. In a footnote the court stated that a manufacturer does have a duty to warn of dangers discovered subsequent to sale. *Id.* at n. 11.

In Hawaii, plaintiffs in design defect cases may proceed on both a theory of negligence for negligent design and a theory of strict liability in tort for defective design.” *Id.* at 1297 (quoting *Ontai v. Straus Clinic & Hosp., Inc.*, 659 P.2d 734, 742 (Haw. 1983)). “The plaintiff’s burden in a negligent design claim is to prove that the manufacturer was negligent in not taking reasonable measures in designing its product to protect against a foreseeable risk of injury and the manufacturer’s negligence was a [legal] cause of the plaintiff’s injury.” *Id.* (quoting *Wagatsuma v. Patch*, 879 P.2d 572, 583 (Haw. 1994)). “Pursuant to either theory, it is ‘the legal duty of manufacturers . . . to exercise reasonable care in the design and incorporation of safety features to protect against foreseeable dangers.’” *Id.* (quoting *Ontai*, 659 P.2d 742).

“On the other hand, ‘in a strict products liability action, the issue of whether the seller knew or reasonably should have known of the dangers inherent in his or her product is irrelevant to the issue of liability. Although highly relevant to a negligence action, it has absolutely no bearing on the elements of a strict products liability claim.’”

*Id.* at 1298 n. 11 (quoting *Johnson v. Raybestos Manhattan, Inc.*, 74 P.2d 548, 549 (Haw. 1987)).

In a footnote the Supreme Court of Hawaii states “[i]n the context of negligence actions . . . ‘[t]he duty to warn exists where a danger concerning the product becomes known to the manufacturer subsequent to the sale and delivery of the product, even though it was not known at the time of the sale.’” *Id.* (quoting *Downing v. Overhead Door Co.*, 707 P.2d 1027, 1033 (Colo. Ct. App. 1985)).

The court goes on to note, “[a]fter a product involving human safety has been sold and dangerous defects in design have come to the manufacturer’s attention, the manufacturer has a duty either to remedy such defects, or, if a complete remedy is not feasible, to give users adequate warnings and instructions concerning methods for minimizing danger.” *Id.*

In sum, the court held” “[w]e are persuaded that it is unnecessary and unwise to impose or introduce an additional duty to retrofit or recall a product separate and apart from those duties to which manufacturers are already subject . . . we hold that manufacturers are not subject in Hawaii’ to an independent, continuing duty to retrofit its products, subsequent to their manufacture and sale, with post-manufacture safety devices that were unavailable at the time of manufacture.”

*Id.* at 1301. The court qualifies this statement with another footnote:

Of course, as noted supra, manufacturers of hazardous or unreasonably dangerous products may still be liable for failing to incorporate such safety features as were available and feasible at the time of manufacture or sale. We further emphasize that we do not decide in this appeal whether, or under what circumstances, a manufacturer who regains effective post-manufacture or post-sale control of its product would be subject to a duty to upgrade or retrofit its dangerous product with subsequently developed safety features. *See Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519 (Tex. Ct. App. 1979). The fact remains that it is undisputed in the present case that Clark had no control over the Series 510 straddle carrier for twenty-five years prior to the accident that injured Tabieros.

*Id.* at n. 15.

### **Idaho – Daniel S. Wittenberg**

The Idaho Product Liability Reform Act, Idaho Code §§6-1401 to 6-1409, is an adaptation of the Model Uniform Product Liability Act (MUPLA). Section 6-1406(1) of the Idaho Product Liability Reform Act states that:

“Evidence of changes in (a) a product's design, (b) warnings or instructions concerning the product, (c) technological feasibility, (d) "state of the art," or (e) the custom of the product seller's industry or business, occurring after the product was manufactured and delivered to its first purchaser or lessee who was not engaged in the business of either

selling such products or using them as component parts of another product to be sold, is not admissible for the purpose of proving that the product was defective in design or that a warning or instruction should have accompanied the product at the time of manufacture. *The provisions of this section shall not relieve the product seller of any duty to warn of known defects discovered after the product was designed and manufactured.*”

IDAHO CODE 6-1406(1) (2001) (emphasis added).

Thus, the Idaho Product Liability Reform Act implies that there exists a post-sale duty to warn of product defects discovered after the product was designed and manufactured. Idaho has not otherwise codified a post-sale duty to warn, nor has its case law specifically applied a post-sale duty to warn in the products liability context. However, it appears that the Idaho judiciary would apply it under the rubric of Section 6-1406(1).

The Idaho Supreme Court in *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992), discussed the application of §6-1406(1) to the admissibility of subsequent remedial measures. The Court stated that a trial court should disallow evidence of subsequent remedial measures if a party seeks to introduce such evidence to demonstrate liability under the guise of impeachment or any other purpose. *Watson*, P.2d at 677. The Court went on to state that if the trial court finds that

“the evidence [of subsequent remedial measures] has substantial probative value on the issue on which it is introduced and that the issue is genuinely in dispute, it should be allowed. A limiting instruction can aid the jury. However, if the trial court concludes that factors of undue prejudice, confusion of issues, misleading the jury or a waste of time outweigh the probative value of the evidence, it should properly be excluded.”

*Id.*

It appears that the *Watson* court was referring to impeachment or other evidentiary matters, and not substantive legal issues, when it referred to the introduction of subsequent remedial measures on “the issue on which it is introduced.” The court therefore did not create an exception to the restriction of use of subsequent remedial measures.

### **Illinois – Stephanie A. Scharf and Thomas P. Monroe**

In Illinois, the law regarding the post-sale duties to warn has evolved through judicial decisions, not legislation. Although the Illinois Supreme Court has not ruled on the issue of whether a manufacturer has post-sale duties, Illinois appellate courts have

consistently held that no such duties exist. *Collins v. Hyster*, 174 Ill. App. 3d 972, 977, 529 N.E.2d 303, 306, (3d Dist. 1988) (no post-sale duty to warn); *Modelski v. Navistar Int'l Trans. Corp.*, 302 Ill. App. 3d 879, 887-89, 707 N.E.2d 239, 246-48 (1st Dist. 1999) (no post-sale duty to warn, recall or retrofit); *Rogers v. Clark Equip. Co.*, 318 Ill. App. 3d 1128, 1136, 744 N.E.2d 364, 370 (2d Dist. 2001) (same).

Illinois law limits the manufacturer's duty to warning about a defect with an injury-causing propensity which the manufacturer knew or should have known about at the time the product left its control. *Modelski*, 302 Ill. App. at 888, 707 N.E.2d at 246 (citing *Woodill v. Parke Davis*, 79 Ill.2d 26, 33-36, 402 N.E.2d 194, 197-199 (1980)); *Compare Seegers Grain Co., Inc. v. United States Steel Corp.*, 218 Ill. App. 3d 357, 577 N.E.2d 1364 (imposing a post-sale duty to warn where the manufacturer should have known about a defect prior to the sale of the product). The manufacturer is charged with the knowledge of experts. *Modelski*, 302 Ill. App. at 888, 707 N.E.2d at 246. Federal courts applying Illinois law have reached the same conclusion. *See, e.g., Birchler v. Gehl Co.*, 88 F.3d 518 (7th Cir. 1996) (rejecting the post-sale duty to warn under Illinois law, absent a showing that the manufacturer knew or should have known of the defect at the time of sale).

Illinois courts have given several reasons for rejecting a continuing duty to warn. The *Collins* appellate court explained: “[t]he law does not contemplate placing the onerous duty on manufacturers to subsequently warn all foreseeable users of products based on increased design or manufacture expertise that was not present at the time the product left its control.” 174 Ill. App. 3d at 977, 529 N.E.2d at 306. Eleven years later, the First District provided additional guidance on the issue in *Modelski*, 302 Ill. App. 3d at 888, 707 N.E.2d at 246. The court read literally *Woodill's* mandate that a failure to warn theory was necessarily limited to allegations of a defect existing at the time of manufacture and reasoned that a post-sale duty to warn might discourage manufacturers from developing safer products. *Id.* Turning to the related issue of whether Illinois law imposes liability on a manufacturer for failing to recall or retrofit a defective product, the court noted that there were situations where federal statutes required mandatory recalls or retrofits but refused to impose a judicially created duty to do so, concluding that imposing these duties “would be the equivalent of mandating that manufacturers insure that their products will always comply with current state standards.” *Id.* at 889, 707 N.E.2d at 246-47. The court found that many products are periodically redesigned so that they become safer over time. If every improvement in product safety triggered a common law duty to recall, manufacturers would face incalculable costs every time they sought to make their products better and safer. *Id.* at 890, 707 N.E.2d at 247 (citing the Restatement (Third) of Torts: Products Liability §11 (1997)). Therefore, the court concluded, this type of duty should only be imposed by the state legislature, which could better conduct a cost-benefit analysis and effectively limit the duty to particular products and for limited time periods. *Id.* at 889, 707 N.E.2d at 247.



Notably, *Modelski* rejected Section 10 of the Restaurant (Third) <sup>2</sup> which proposes a post-sale duty to warn, although it had expressly relied on Section 11 of the Restatement (Third) as support for rejecting a post-sale duty to recall or retrofit.

While the Illinois holdings on post-sale duties expressly apply to negligence claims, there is no reason why the rationale would not apply to strict liability actions given Illinois' overlap of negligence and strict liability theories. *See generally Woodill*, 79 Ill.2d at 32-35, 402 N.E.2d at 197-98. Following *Collins*, *Modelski*, and *Rogers*, one would anticipate a court to find that a product does not become unreasonably dangerous because of information acquired post-sale, so long as the defect was not or could not have been known at the time of sale.

Although Illinois law does not impose a post-sale duty to warn, recall, or retrofit, a manufacturer may find that post-sale warnings can play an important role in minimizing damages. The defendant in *In re Salmonella Litigation*, 198 Ill. App. 3d 809, 817-19, 556 N.E.2d 593, 599-600 (1st Dist. 1990), for example, avoided a punitive damages award because of the remedial actions it took after receiving notice of a salmonella outbreak, instituting an immediate recall program, hiring a private lab to inspect its plants and test its products, fully cooperating with the Illinois Department of Public Health ("IDPH") and the Food and Drug Administration ("FDA") investigations, and immediately implementing the recommendations of the IDPH and FDA.

### **Indiana – John L. Tate and Douglas B. Bates**

No state court decision squarely decides and applies the post-sale duty to warn, but Indiana's Products Liability Act provides ample room for imposing the post-sale duty to warn on a product manufacturer. An alleged failure to provide adequate warnings or instructions regarding the use of a product requires the claimant to establish "that the manufacturer or seller failed to exercise reasonable care under the circumstances." Ind. Code Ann. § 34-20-2-2 (2) (West Supp. 2001).

In *Reed v. Ford Motor Co.*, 679 F. Supp. 873, 878-80 (S.D. Ind. 1988), decided before enactment of Ind. Code Ann. § 34-20-2-2, a federal district court denied an automobile manufacturer's motion to dismiss the plaintiff's "continuing duty to warn" claims. The court observed that the manufacturer failed to offer any statutory or precedential authority indicating that the duty to warn exists only at the time of sale. *Id.* at 879

Complicating the post-sale duty to warn, however, is Indiana's statute of repose. Ind. Code Ann. § 34-20-3-1(b)(2) (2001). In *Land v. Yamaha Motor Corp.*, 272 F. 3d 514, 517-18 (7th Cir. 2001), the ten year statute of repose for product liability actions was found to bar plaintiff's post-sale duty to warn claim because the claimed defect in a

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<sup>2</sup> Restatement (Third) of Torts: Products Liability (1997)

personal watercraft admittedly was present at the time of sale. “Unless the defect in the product was not present at the time of the initial sale, the Statute of Repose bars all claims brought more than ten years after that sale.” *Id.* at 518 , citing *Stump v. Indiana Equip. Co.*, 601 N.E.2d 398, 402 (Ind. Ct. App. 1992).

No mention of the statute of repose appears in *Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541 (Ind. Ct. App. 1979). In *Ortho Pharmaceutical*, the appellate court reversed and remanded a jury verdict for the plaintiff arising from injuries allegedly caused by an oral contraceptive. Among the issues raised by the manufacturer on appeal was the trial court’s admission into evidence of a patient warning published after the plaintiff’s physician prescribed the contraceptive. The risks and benefits of the contraceptive in question brought it under the ambit of Comment k to the *Restatement (Second) of Torts* § 402A. Noting that “Comment k is replete with language indicating that the adequacy of a warning depends in part on what was known,” the court held that “the duty to warn under Comment k does not arise until the manufacturer knows or should know of the risk.” *Id.* at 547-48. The court explained:

Because a manufacturer cannot be required to warn of a risk unknown to science, the knowledge chargeable to him must be limited to that of the period during which the plaintiff was using the product in question.

388 N.E.2d at 548.

### **Iowa – Marlon Polk**

Section 668.12 of the Iowa Code provides that an assembler, designer, supplier of specifications, distributor, manufacturer or seller has a duty to warn concerning subsequently acquired knowledge of a defect or dangerous condition that would render the product unreasonably dangerous for its foreseeable use.

The Iowa Supreme Court opined that negligence is the appropriate theory to resolve post-sale failure to warn product liability claims. *Lovick v. Wil-Rich*, 588 N.W.2d 688, 694 (Iowa. 1999). In *Lovick*, the Plaintiff farmer was injured when the wing of a farm cultivator fell on him. He filed a products liability suit against the defendant, the manufacturer of the cultivator. The trial court submitted the case to the jury on theories of strict liability for design defect and negligence for breach of a post-sale duty to warn.

The Iowa Supreme Court mandated that trial courts must incorporate the Restatement (Third) of Torts: Products Liability § 10 (1997) factors in instructing the jury on the duty to warn following the sale. *Id.* at 696. The Restatement (Third) of Torts provides four factors to guide the determination of the reasonableness of the seller’s conduct:

- 1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
- 2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
- 3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
- 4) the risk of harm is sufficiently great to justify the burden of providing a warning.

The Supreme Court of Iowa adopted the Restatement (Third) of Torts: Products Liability § 10, including the need to articulate the relevant factors to consider in determining the reasonableness of providing a warning after the sale. There was no discussion of a duty to recall or retrofit.

### **Kansas – Scott W. Sayler and Douglas B. Maddock, Jr.**

#### **Post-Sale Duty to Warn**

Under Kansas law, manufacturers have a post-sale duty to warn ultimate consumers who purchased the product who can be readily identified or traced when a defect which both existed at the time of manufacture and was unforeseeable at the time of sale poses a life-threatening hazard. *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1313 (Kan. 1993). A manufacturer's failure to provide an adequate warning creates a rebuttable presumption of causation. *Richter v. Limax Int'l, Inc.*, 45 F.3d 1464, 1471-72 (10th Cir. 1995).

In determining a manufacturer's post-sale duty to warn, Kansas courts apply a negligence analysis; a manufacturer's duty to warn under strict liability exists *only* at the time the product leaves the manufacturer's control. *Patton*, 861 P.2d at 1310. The post-sale duty to warn does not exist until the manufacturer acquires either actual or constructive knowledge of a life-threatening hazard presented by the product when the product is used for its intended purpose. *Id.* at 1314. Moreover, a manufacturer is given a reasonable period of time upon discovering the life-threatening hazard in which to issue a post-sale warning. *Id.*

The determination of whether notice of a problem with the product is sufficient to impose a post-sale duty to warn depends on the degree of danger involved and the number of instances reported. *Id.* At a minimum, a plaintiff must establish that the manufacturer learned of a defect in existence at the time of manufacture which was unknown and unforeseeable, and failed to take reasonable steps to warn of the danger. *Id.*

The Kansas Supreme Court has established a reasonableness test for determining a manufacturer's liability under the post-sale duty to warn. The reasonableness standard is

flexible and the test is applied on a case-by-case basis. *Patton*, 861 P.2d at 1314. This means, in certain circumstances, the post-sale duty to warn may require that notice be given to the ultimate consumers, whereas under a different set of facts, such notice may be impossible; thus, providing a warning to retailers or distributors might suffice. *Id.* at 1315; *Hiner v. Deere and Co., Inc.*, 340 F.3d 1190, 1196 (10th Cir. 2003) (reversing summary judgment for manufacturer where fact question existed as to feasibility of identifying the second-hand purchaser of a tractor and, in any event, plaintiff might be able to prove his claim based on the manufacturer's alleged failure to warn dealers of the hazard). *Patton* identified several factors which should be considered in this analysis: (1) the nature of the harm that could result absent notice; (2) the likelihood that harm will occur; (3) the number of persons affected; (4) the financial burden on the manufacturer in identifying and contacting product users; (5) the nature of the industry; (6) the type of product involved; (7) the number of units manufactured or sold; and (8) action taken other than giving of notice to correct the problem. *Id.* at 1314-15. Whether a manufacturer's conduct was reasonable is generally a question of fact for the jury. *Patton*, 861 P.2d at 1315; *Hiner*, 340 F.3d at 1196; *Koehn v. Yamaha Motor Corp.*, No. 94-1112-JTM, 1996 U.S. Dist. LEXIS 17942, at \*11-12 (D. Kan. Nov. 4, 1996) (denying summary judgment on post-sale duty to warn claim where there was a question of fact regarding the adequacy of the warnings). It is unclear when it would be proper for the court to rule on the issue of reasonableness as a matter of law.

The post-sale duty to warn extends beyond the original manufacturer of the product to include successor entities. *See Patton v. TIC United Corp.*, 77 F.3d 1235, 1240-41 (10th Cir. 1996) ("*Patton II*"); *Stratton v. Garvey Int'l, Inc.*, 676 P.2d 1290 (Kan. Ct. App. 1984). Such a duty may be imposed where the successor entity knows of the defect in the predecessor's product and has a "more than casual" relationship with the predecessor's customers which provides economic benefit to the successor. *Patton II*, 77 F.3d at 1240 (citing *Stratton*). Because the duties to warn imposed on the manufacturer and its successor(s) may be separate and distinct, in a given case, both may be found liable for failure to warn. *Id.* at 1241.

The continuing duty to warn imposed upon ethical drug manufacturers to warn others of drug side effects is unaffected by *Patton*. *Patton*, 861 P.2d at 1309. A drug manufacturer must warn the medical profession of dangerous side effects "of which it knows, has reason to know, or should know, based upon its position as an expert in the field, upon its research, upon cases reported to it, and upon scientific development, research, and publications in the field." *Wooderson v. Ortho Pharm. Corp.*, 681 P.2d 1038, 1057 (Kan. 1984). This duty continues as long as the marketing of the prescription product continues. *Patton*, 861 P.2d at 1309.

Kansas law imposes no duty on a manufacturer to retrofit or recall a product after it has discovered a danger associated with the product's use. *Patton*, 861 P.2d at 1304, 1315-16; *Kinser v. Gehl Co.*, 184 F.3d 1259, 1270 (10th Cir. 1999), *overruled on other grounds by Weisgram v. Marley Co.*, 528 U.S. 440 (2000). Nor does it impose a duty to

seek out past customers to notify them of changes in the state of the art, e.g., the development of new safety devices. *Patton*, 861 P.2d at 1311.

Further, there is no duty to warn of dangers actually known to the product user or of generally known or obvious risks connected with the product's use. *See* KAN. STAT. ANN. § 60-3305. However, the product user's knowledge of an obvious risk may not absolve the manufacturer of a duty to warn where the user erroneously believes that a recognized danger can be avoided by a particular safety measure. *See Hiner v. Deere and Co., Inc.*, 340 F.3d 1190, 1195 (10th Cir. 2003) (tractor owner's knowledge of general risk that objects could roll off front-end loader onto operator did not preclude warning defect claim where he was operating the front-end loader at a low level and was unaware that the loader might unexpectedly elevate on its own).

Evidence that the manufacturer changed the product's warnings or instructions *after* the product in issue was sold by the manufacturer is inadmissible in Kansas courts. Similarly excluded is evidence of advancements in technical or other knowledge, and design theory and testing methods, which occurred *after* the time the product in issue was sold. An exception to this rule exists where the evidence is offered to impeach a witness for the manufacturer who has expressly denied the feasibility of the remedial measure. *See* KAN. STAT. ANN. § 60-3307; *Patton*, 861 P.2d at 1313 (describing § 60-3307 as a "state-of-the-art" statute).

### Practice Pointers

Where the alleged defect is not life-threatening, Kansas courts have been unwilling to find a post-sale duty to warn. *See, e.g., McHenry v. ICON Health & Fitness, Inc.*, No. CIV. A. 99-2351-CM, 2001 U.S. Dist. LEXIS 5648, at \*5 (D. Kan. April 4, 2001); *Kerns v. G.A.C., Inc.*, 875 P.2d 949, 964 (Kan. 1994) (Six, J., concurring). This is in keeping with the purpose behind the Kansas Products Liability Act (KAN. STAT. ANN. § 60-3301 et seq.), which is to limit the rights of plaintiffs to recover in products liability suits. *Patton*, 861 P.2d at 1309; *Delaney v. Deere & Co.*, 999 P.2d 930, 938 (Kan. 2000).

### Kentucky – John L. Tate

A duty to warn of defects discovered after sale of a product is a duty recognized in Kentucky, but a duty to retrofit a product not defective when sold is not.

In *Clark v. Hauck Manufacturing Co.*, 910 S.W.2d 247, 251 (Ky. 1995), the state's highest court said: "The duty of ordinary care embraces such questions as the duty of the manufacturer to review design and if he knew or should have known that his design was defective to make an effort to notify the purchasers of his equipment of these findings subsequent to the sale of the product." The court held in *Hauck*, a case involving the death of a worker using an oil-fired industrial torch, that product liability plaintiffs are entitled to a separate jury instruction on each theory of liability, including failure to warn, so long as there is evidence to sustain it. *Id.* at 250.

In a recent decision, *Ostendorf v. Clark Equipment Co., et al.*, \_\_\_ S.W.3d \_\_\_ (Ky. 2003), 2003 WL 22971250, Kentucky’s Supreme Court declined to impose a common law duty to retrofit a product not defective when sold. In addition, the Court declined to adopt § 11 of the Restatement (Third) of Products Liability, a section imposing liability for so-called “negligent recall.” The Court explained its refusal by observing that “[i]mposing liability on a company for a good faith—but perhaps incomplete—effort to undertake [a retrofit campaign] might dissuade that company from acting until required to be a government directive.” *Id.* at \_\_\_\_.

In Kentucky, a product manufacturer has a non-delegable duty to warn the ultimate user of latent product dangers. This duty is not fulfilled merely by warning the immediate buyer unless the immediate buyer takes responsibility for correcting the defect. *Montgomery Elevator Co. v. McCullough*, 676 S.W.2d 776, 780-82 (Ky. 1984).

### **Louisiana – Kim Moore**

Section 9:2800.57 of the Louisiana Product Liability Act imposes a post-sale duty to warn upon product manufacturers who, after the initial sale, acquire or should acquire knowledge of a dangerous characteristic of their product. Paragraph (C) of the statute provides as follows:

A manufacturer of a product who, after the product has left his control, acquires knowledge of a characteristic of the product that may cause damage and the danger of such characteristic, or who would have acquired such knowledge had he acted as a reasonably prudent manufacturer, is liable for damage caused by his subsequent failure to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.<sup>3</sup>

In *Sisk v. Sears, Roebuck & Co.* the United States District Court for the Eastern District of Louisiana noted that the duty, to warn arising under section 9:2800.57(C) is the same as the initial duty imposed upon a manufacturer prior to a product leaving the manufacturer’s control.<sup>4</sup> This duty is expressed in La. R.S. § 9:2800.57(A), which requires a manufacturer to employ “reasonable care to provide an adequate warning” of a characteristic “that may cause damage.”<sup>5</sup> In *Sisk*, the plaintiff alleged that a radial arm saw manufactured by the defendant was unreasonably dangerous due to lack of adequate warnings.<sup>6</sup> The court dismissed plaintiff’s reliance on section 9:2800.57(C) because the plaintiff was unable to show that the defendant had become aware of dangerous

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<sup>3</sup> La. R.S. § 9:2800.57(C)(West 2002).

<sup>4</sup> 1996 WL 736967(E.D. La. 1996).

<sup>5</sup> La. R.S. § 9:2800.57(A)(West 2002).

<sup>6</sup> 1996 WL 736967 at 2.

characteristics of the product after the sale.<sup>7</sup> The court noted, however, that even where dangers are discovered after the product leaves a manufacturer's control, "an existing warning could be adequate to prevent such [sic] newly discovered dangers."<sup>8</sup> Furthermore, the court noted that "[e]ven if a manufacturer fails to reasonably provide an adequate warning of dangers he learns after the product leaves his control, he is not liable under the [Louisiana Products Liability Act] if his failure did not cause the injury at issue."<sup>9</sup>

According to the jurisprudence, a plaintiff that alleges a violation of section 9:2800.57(C) has the burden of proving each element of his claim and therefore must show: 1) that the defendant failed to use reasonable care to provide an adequate warning; 2) damages; and 3) that a reasonably anticipated use of the product was the proximate cause of the damages.<sup>10</sup> Although initially denying Defendant's Motion for Summary Judgment in *Automatique v. U-Select-It*, the United States District Court for the Eastern District of Louisiana ultimately concluded that a claim of a plaintiff with no proof of proximate causation or damages could not proceed under La. R.S. § 9:2800.57(C).<sup>11</sup>

In that case, the plaintiff purchased a number of vending machines and supplied them to local colleges.<sup>12</sup> After noticing decreased sales, the plaintiff discovered that students had been "taping" the machines—inserting dollar bills taped to one another into the machine's bill validator in order to steal the change from the machine.<sup>13</sup> The defendants who manufactured the bill validators were previously aware of the "taping" problem and had provided replacement kits to their direct customers to protect them from the taping scheme.<sup>14</sup> The plaintiff, *Automatique*, was not a direct customer and did not discover the problem until three years later.<sup>15</sup>

*Automatique* argued that as an "ultimate user" of the bill validator, the defendants should have made a reasonable effort to notify it of the problem.<sup>16</sup> The court agreed that the post-sale duty to warn imposed by the Product Liability Act requires a manufacture to reasonably warn "users and handlers," but framed the issue as whether the defendant acted reasonably in only warning its direct customers of the problem.<sup>17</sup> The court stated that a question of reasonableness is a factual inquiry to be determined by the trier of fact. This question, however, was never addressed because the court held that *Automatique* did not show any facts tending to prove that its diminishing sales were caused by

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<sup>7</sup> *Id.* at 1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Automatique New Orleans, Inc. v. U-Select-It, Inc.*, No. 94-3179, 1995 WL 569226, \*2 (E.D. La. 1995).

<sup>11</sup> *Id.* at 2, 4.

<sup>12</sup> *Id.* at 1.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 3

<sup>15</sup> *Id.* at 1, 3.

<sup>16</sup> *Id.* at 3.

<sup>17</sup> *Id.*

“taping,” or even that “taping” had occurred.<sup>18</sup> Thus, the *Automatique* holding suggests that, where a plaintiff is able to prove damages and proximate cause, a manufacturer’s post-sale duty to warn may extend beyond the manufacturer’s direct customers to the users and handlers of the product.<sup>19</sup>

It should be noted that, in order to rely on section 9:2800.57(C), a plaintiff must also establish that a manufacturer was aware or should have been aware of the alleged problem with the product. In *Welch v. Technotrim*, the Louisiana Court of Appeals for the Second Circuit refused to allow a cause of action where a plaintiff could not show that the defendant manufacturer knew that there was a problem with the product prior to the plaintiff’s injury.<sup>20</sup> In that case, the manufacturer had simply manufactured automobile seat covers to the design specifications provided by the automobile factory.<sup>21</sup> The manufacturer was not involved in the actual assembly process and had not participated in the design of the seating system and, therefore, had no post-sale duty to warn.<sup>22</sup>

Additionally, in its recent decision in *Stahl v. Novartis Pharmaceuticals Corp.*, the United States Court of Appeals for the Fifth Circuit pointedly noted that awareness of dangerous characteristics arising after a plaintiff’s injury cannot make a manufacturer liable if the product left his control in a condition which conformed with then existing reasonably available scientific and technological knowledge.<sup>23</sup> However, this case should not be interpreted as providing a defense to a manufacturer’s violation of section 9:2800.57(C).

In *Stahl*, the plaintiff was prescribed medication to treat a chronic fungus infection on his toenails.<sup>24</sup> The warning that accompanied the pharmaceutical suggested that patients should be tested for liver damage after six weeks.<sup>25</sup> The plaintiff suffered severe liver damage within 24 days.<sup>26</sup> Although the plaintiff did not allege that the defendant had violated section 9:2800.57(C), in *dicta*, the court noted that, “[w]hile a manufacturer has a duty to update warnings as new information about the risks of a product is discovered, a manufacturer’s duty to warn a particular plaintiff is measured by the state of scientific and/or technical knowledge at the time the product left the manufacturer’s control.”<sup>27</sup> The court quoted section 9:2800:59(B), which states that the manufacturer of a product shall not be liable for damage caused by a characteristic of the product that the manufacturer, in light of then existing scientific and technical knowledge, could not have known about. This should not be interpreted as a defense to claims brought under section

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<sup>18</sup> *Id.* at 4.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> 778 So.2d 728, 734 (La. App. 2d Cir. 2001).

<sup>21</sup> *Id.* at 735.

<sup>22</sup> *Id.*

<sup>23</sup> 283 F.3d 254, 272, (fn 11 5th Cir. 2002).

<sup>24</sup> *Id.* at 260.

<sup>25</sup> *Id.* at 259.

<sup>26</sup> *Id.* at 260.

<sup>27</sup> *Id.* at 272.



9:2800.57(C), as the court was emphasizing that the reasonableness of providing a post-sale warning should be based upon the state of scientific and technical knowledge at the time of the manufacturer's alleged wrongful conduct. Section 9:2800:59(B) specifically states, "[n]otwithstanding 9:2800:57(A) or (B);" thus, the exception to liability does not apply to post-sale claims under 9:2800:57(C). The Fifth Circuit, nonetheless, apparently believed it to be a pertinent consideration when determining the reasonable of a manufacturer's conduct in allegedly failing to provide a post-sale warning.

In *Stahl*, the plaintiff took the damage-causing medication for less than one month.<sup>28</sup> It was not alleged that the manufacturer became aware of and failed to warn the plaintiff of new dangers associated with the medication during this month; however, the plaintiff attempted to rely upon scientific literature that was published after the date of the plaintiff's injury.<sup>29</sup> Based on *Stahl*, if the state of scientific and technical knowledge had advanced to a point where the manufacturer should have discovered the dangerous condition in its product prior to the date of injury, section 9:2800:59(B) would not insulate the manufacturer from liability under section 9:2800:57(C), which is the reasonable interpretation of the plain language of the Louisiana Product Liability Act.

In sum, the potential liability of a product manufacturer in Louisiana is exclusively governed by the Louisiana Product Liability Act. Therein, it provides that a manufacturer must use reasonable care to provide adequate warnings about dangerous product characteristics that are discovered or should be discovered after the product leaves the manufacturer's control. According to the Act, this duty to warn extends to users and handlers of the product. However, as noted above, a manufacturer's actions in providing or failing to provide a warning will be based on a factual determination of reasonableness. Moreover, the reasonableness of manufacturer's actions in providing a warning will be governed by the state of scientific and technical knowledge that exists at the time of the alleged wrongful conduct. Therefore, in Louisiana, a manufacturer can be liable for damages for failing to conform to the post-sale duty to warn imposed by the Louisiana Product Liability Act.

### **Maine – Sean Fisher**

Maine courts have not expressly recognized a manufacturer's duty to warn of latent defects discovered after the sale of the product. However, there is language in a decision of the Supreme Judicial Court of Maine that could be construed to support such a theory. In *Maietta v. International Harvester Co.*, 496 A.2d 286 (Me. 1985), the court affirmed the trial court's decision that there was sufficient evidence to justify instructing the jury that the manufacturer had a duty to keep informed of developments in the field because the plaintiff had introduced evidence that the defendant knew of significant problems with the braking system at issue in the case, yet failed to inform the plaintiff about them. See *id.* at 297. The court's discussion of this issue is terse, and does not

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<sup>28</sup> *Id.* at 260.

<sup>29</sup> *Id.*

provide much insight into whether the court meant to embrace a post-sale duty to warn, or was limiting its holding to a pre-sale duty to warn of latent defects.

More recent cases from other Maine courts have discussed a post-sale duty to warn, but there is currently no authoritative endorsement of the theory. In an unpublished decision, the United States District Court for the District of Maine predicted that the Supreme Judicial Court “would adopt a negligence-based post-sale duty to warn in product liability cases” in accordance with decisions from other states after surveying Maine case law and finding no indication of the Supreme Judicial Court’s position on the issue. *Davies v. Datapoint Corp.*, No. CIV 94-56-P-DMC, 1996 WL 521394, at \*3 (D. Me. Jan. 19, 1996). When faced with the same question, the United States Court of Appeals for the First Circuit declined to address the issue and held that the jury’s verdict was supported by an alternate theory, see *Moulton v. Rival Co.*, 116 F.3d 22, 26 (1st Cir. 1997), and the United States District Court for the District of Maine determined that, even if there was a post-sale duty to warn, the facts of the case before it did not support its application, see *McCabe v. Allied Prods. Corp.*, No. 00-154-P-H, 2000 WL 1805687, at \*11 (D. Me. Dec. 8, 2000). In another decision, the Maine Superior Court, noting the want of case law on the issue, relied upon section 13 of the Restatement (Third) of Torts (1997), which governs the liability of a successor corporation for a post-sale failure to warn, and held that there was a material issue of fact precluding summary judgment in favor of the Defendant successor corporation. See *Jordan v. Hawker Mfg. Co.*, No. CV-97-194, 2000 WL 33675810, at \*1-2 (Me. Super Ct. Feb. 17, 2000).

### **Maryland – Dabney Carr and Gary Spahn**

#### **Post-sale Duty to Warn**

Generally, Maryland requires manufacturers to warn of product defects, even if those defects are discovered after the time of sale. *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 446, 601 A.2d 633, 645 (1992). This duty is twofold: the manufacturer must make an effort to discover any defects and must also make reasonable efforts to issue warnings to product users. *Id.*, 325 Md. at 447, 601 A.2d at 646. In *Owens-Illinois*, the manufacturer argued that its duties in these regards ceased when it stopped manufacturing the product alleged to be defective. *Id.* The court rejected that argument, holding instead that the duty to warn was not abrogated, but that the duty to discover defects may be reduced. *Id.*, 325 Md. at 447, 601 A.2d at 646.

- a. Manufacturers must discover any defects in their products

Maryland has adopted Restatement §402A, and imposes strict liability on product manufacturers. *Id.*, 325 Md. at 434. 601 A.2d at 639. Nonetheless, the courts evaluate a manufacturer’s liability for failure to warn under comment j to that restatement, and incorporate ideas of negligence into their decisions. *Id.* A manufacturer will not be held

liable for a failure to warn if the manufacturer had no knowledge of the dangerous quality of the product. *Id.* In determining whether a manufacturer should have known about a defect, manufacturers are held to the knowledge and skill level of an expert. *Id.* “The manufacturer’s status as expert means that at a minimum he must keep abreast of scientific knowledge, discoveries and advances and is presumed to know what is imparted thereby.” *Id.* The burden to prove state of the art knowledge rests with the plaintiff. *Id.*, 325 Md. at 438, 601 A.2d at 641. A manufacturer’s discontinuance of a product line, and its subsequent lack of familiarity with that product, does not absolve the manufacturer of its duty to warn. Instead, those factors are relevant to a determination of the reasonable efforts required in order to discover the danger. *Id.*, 325 Md. at 448, 601 A.2d at 647.

- b. Manufacturers must make reasonable efforts to inform users of defects in their products.

When evaluating the reasonableness of post-sale warnings, courts look to the facts of the particular case, including the gravity and likelihood of harm, the number of persons affected, as well as the costs and practical problems associated with identifying and contacting product users. *Id.*, 375 Md. at 448, 601 A.2d at 647, 647. A warning will be required to the extent practicable under the circumstances. *Id.* This reasoning mirrors the factors and reasoning set out in Restatement (Third): Products Liability §10(b) (1997). A manufacturer is not relieved from its continuing duty to warn simply because it has stopped making a product later determined to be defective. Rather, this fact should be relevant to determining the extent of the warning necessary. *Id.*

Further, a manufacturer is not relieved from its duty to warn because of the nature of damages claimed by a plaintiff. *U.S. Gypsum Co. v. Baltimore*, 336 Md. 145, 161, 647 A.2d 405, 412 (1994). A manufacturer should still warn users, therefore, of its product if users’ only potential damages are economic. *Id.* The court rejected the argument that a plaintiff’s economic damages will be fixed at sale, and that a failure to issue post-sale warnings would not cause additional (economic) injury. *Id.*

#### Duty to Retrofit/Recall

No court in Maryland has required a manufacturer to recall or retrofit its product. *Cf. Frericks v. General Motors Corp.*, 274 Md. 288, 292, 336 A.2d 118, 121 (1975).

#### **Massachusetts – Sean Fisher**

The Supreme Judicial Court of Massachusetts has expressly held that “[a] manufacturer will be held to the standard of knowledge of an expert in the appropriate field, and will remain subject to a continuing duty to warn (at least purchasers) of risks discovered following the sale of the product at issue.” *Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1, 23, 696 N.E.2d 909, 923-24 (1998). In determining the scope of this continuing duty, the Court has stated its intention to follow the principles set forth in

section 10 of the Restatement (Third) of Torts. *See Lewis v. Ariens Co.*, 434 Mass. 643, 648-49, 751 N.E.2d 862, 867 (2001).

In *Lewis*, the Court applied section 10 of the Restatement and concluded that the Defendant had no post-sale duty to warn the Plaintiff about latent defects in the product brought to light in studies done shortly after the product was sold. *See Id.* at 649-50, 751 N.E.2d 867-68. Plaintiff, in an attempt to release the clutch mechanism, slipped and thrust his hand into the impeller mechanism of a snow blower manufactured by the Defendant. *See Id.* at 644, 751 N.E.2d at 864. Plaintiff purchased the unit, second-hand, sixteen years after it was manufactured. *See Id.* at 643-44, 751 N.E.2d at 863. At trial, Plaintiff introduced technical studies and literature demonstrating that Defendant learned of the dangers inherent in its product shortly after it was manufactured, and the trial court relied upon this evidence to find that the Defendant was liable for damages under Massachusetts' unfair trade practices statute. *See Id.* at 645, 751 N.E.2d at 864-65. Under these facts, applying the principles set forth in Section 10 of the Restatement, the Court declined to adopt an absolute bar to finding that a manufacturer has a duty to remote purchaser, but nevertheless held that Plaintiff was "a 'member of a universe too diffuse and too large for manufacturers or sellers of original equipment to identify'" and entered judgment for the Defendant. *See Id.* at 649, 751 N.E.2d at 867 (quoting *Lewis v. Ariens Co.*, 49 Mass. App. Ct. 301, 306, 729 N.E.2d 323, 327 (2000)).

### **Michigan – Stephanie A. Scharf and Thomas P. Monroe**

Michigan imposes a limited post-sale duty to warn: the manufacturer must warn promptly about a defect that is "hazardous to life" if it becomes known "shortly after" sale. *Comstock v. General Motors Corp.*, 358 Mich. 163, 177-78, 99 N.W.2d 627, 634-35 (1959). The post-sale duty is restricted to situations involving a latent defect existing at the time of sale which the manufacturer did not know or could not have known about at that time. *Gregory v. Cincinnati, Inc.*, 450 Mich. 1, 17, 538 N.W.2d 325, 331 (1995). A manufacturer does not have a duty to update purchasers regarding advances in technology when the product itself was not defective. *Reeves v. Cincinnati, Inc.*, 208 Mich. App. 556, 561, 528 N.W.2d 785, 790 (Mich. App. 1995). Nor is there a post-sale duty to recall or retrofit defective products. *Gregory*, 450 Mich. at 19-25, 538 N.W.2d at 332-34. To date, the Michigan legislature has not passed legislation addressing a manufacturer's post-sale duties.

In 1959, the Michigan Supreme Court decided *Comstock*, 358 Mich. at 177-78, 99 N.W.2d at 634-35, a decision that many view as the seminal United States case on post-sale duties. In *Comstock*, a car manufacturer learned of power brake problems in several 1953 models a few weeks after releasing them for sale, but took no steps to warn buyers of the defect. After reaffirming that Michigan requires manufacturers to warn of defects known at the time of sale, the court extended this rule by holding that "a like duty to give prompt warning exists when a latent defect which makes the product hazardous to life becomes known to the manufacturer shortly after the product has been put on the

market.” *Id.* at 177-78, 99 N.W.2d at 634-35. Subsequent decisions have not given much definition to the time frame for the “shortly after” rule.

In 1995, the *Gregory* court held the line on post-sale duties by refusing to impose a post-sale duty to recall or retrofit a defective product, for several reasons. 450 Mich. at 19-29, 538 N.W.2d at 332-337. *First*, a required element of a post-sale duty to warn is that the product must contain a latent defect. *Id.* at 19-20, 538 N.W.2d at 332-33. The *Gregory* plaintiff had brought a design defect case, asserting that the manufacturer knew or should have known at the time of sale of the dangerous condition of a brake press that lacked certain safety devices. The court concluded: “If the manufacturer should have known of the problem, liability attaches at that point, not post manufacture.” *Id.* at 20, 538 N.W.2d at 333. *Second*, imposing a duty to recall or retrofit is the province of administrative agencies or the legislature, which are “better able to weigh the benefits and costs involved in locating, recalling, and retrofitting products, as well as other economic factors affecting business and consumers. *Id.* at 22-23, 538 N.W.2d at 334. *Third*, the court reasoned that imposing a duty to retrofit as technology advanced would place an unreasonable burden on manufacturers. *Id.* at 29, 538 N.W.2d at 337. Imposing a post-sale duty to recall or retrofit a product “would discourage manufacturers from developing new designs if this could form the basis for suits or result in costly repair and recall campaigns.” *Id.* The court left open the possibility of expanding the rule, in special circumstances, such as where the potential danger is “severe and widespread,” *Id.* at 25, 538 N.W.2d at 335, or where there is a “continuing relationship” with the buyer, *Id.* at 25-28, 538 N.W.2d at 335-36: “We emphasize that we are not presented with and do not decide whether manufacturers of distinct products have a continuing duty to warn consumers or learned intermediaries of dangers discovered after the product enters the market.” *Id.* at 17-18, 538 N.W.2d at 331-32, n.18.

Following this precedent, the court in *Ray v. Rheem Textile Sys., Inc.*, No. 225934, 2002 WL 433157 at \*1-2 (Mich. App. March 19, 2002) held that Michigan post-sale duty law is limited to the post-sale duty to warn and rejected a post-sale duty repair, recall, or retrofit under a “negligent assumption of duty.” Federal courts applying Michigan law are in accord. *See, e.g., Estate of Raap v. Clark Equip. Co.*, No. G88-614-CA7, 1989 WL 382091 (W.D. Mich. June 20, 1989) (knowledge acquired five to ten years after the time of sale did not fall within *Comstock*’s “shortly after” rule); *Eschenburg v. Navistar Int’l Trans. Corp.*, 829 F. Supp. 210, 214-15 (E.D. Mich. 1993) (rejecting duty to recall or retrofit); *Zettle v. Handy Mfg. Co.*, 837 F. Supp. 222, 224, (E.D. Mich. 1992) (rejecting a duty to notify consumers of post-sale safety advances when there was no allegation or proof of a defect existing at the time of sale).

### **Minnesota – George W. Soule and David S. Miller**

Under Minnesota law, whether a manufacturer has a duty to warn of the dangers associated with its product is an issue of law to be determined by the court. *Germann v.*

*F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986).<sup>30</sup> A Minnesota appellate court first addressed the post-sale duty to warn in *Balder v. Haley*, 390 N.W.2d 855, 864 (Minn. Ct. App. 1986), *rev'd*, 399 N.W.2d 77 (Minn. 1987), where the court of appeals held:

We agree that the duty to warn and instruct is continuing, not based alone on facts evident at the time of sale. . . . Where a manufacturer learns that previously distributed products pose dangers to users, its duty is mixed: the manufacturer must give additional warnings adequate for reasonable safety of users, or must take other remedial steps to the same end.

*Id.* (citations omitted). The supreme court reversed the court of appeals' decision, calling into question the lower court's expansive reading of a manufacturer's post-sale duty to warn.

Indeed, in a later decision, *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988), *cert. denied*, 492 U.S. 926 (1989) the supreme court adopted a much narrower post-sale duty to warn, than that announced by the court of appeals in *Balder*.

In *Hodder* the plaintiff was injured when he incorrectly mounted a multi-piece rim of a truck tire and the rim exploded. *Id.* at 829. The rim involved in the accident was manufactured in 1955, twenty-six years before the accident, and the defendant had been manufacturing similar multi-piece rims since the 1920s. *Id.* The rim that injured the plaintiff was not accompanied by any warnings about the possibility of explosive separation. *Id.* Sometime after 1955, however, the defendant became aware of the danger of pressurized separation of its multi-piece rims, discontinued manufacturing in 1962 the model that injured the plaintiff, and discontinued manufacturing multi-piece rims in 1969. *Id.* at 829, 833. Also, beginning in the 1970s, the defendant conducted a campaign to make potential users aware of that risk. *Id.* at 829. One of the plaintiff's allegations was that the defendant was negligent because it failed to provide adequate warnings of the dangers of multi-piece rims after discovery of those dangers. *Id.*

The supreme court affirmed the jury's verdict in favor of the plaintiff, holding the defendant liable for its failure to warn of the dangers after it became aware of those dangers. Specifically, the supreme court held: "On the facts of this case, . . . a

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<sup>30</sup> The supreme court has explained the trial court's role as follows:  
In determining whether the duty exists, the court goes to the event causing the damage and looks back to the alleged negligent act. If the connection is too remote to impose liability as a matter of public policy, the courts then hold there is no duty, and consequently no liability. On the other hand, if the consequence is direct and is the type of occurrence that was or should have been reasonably foreseeable, the courts then hold as a matter of law a duty exists.

*Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986).

We do not address the logic of this regime here. For a critique of Minnesota's law regarding the duty to warn, see George W. Soule & Jacqueline Moen, *Failure to Warn, the New Restatement on Products Liability, and the Application of the Reasonable Care Standard*, 21 WM. MITCHELL L. REV. 389 (1995).

continuing post-sale duty to warn existed . . . .” *Id.* at 833. The court considered the following facts in its decision to impose the duty:

- The defendant had been aware of the dangers<sup>31</sup> of multi-piece rims for more than two and a half decades prior to the plaintiff’s accident.
- The plaintiff presented evidence of 134 post-1955 rim explosion accidents.
- The nature of the danger was not obvious or discoverable by users of the product: “[T]he margin for error in servicing [a multi-piece] rim was dangerously small and it might explosively separate with seemingly little provocation . . . .”
- The degree of danger was high: “[W]hen explosions did occur, serious injury or death usually resulted . . . .”
- The defendant continued to produce multi-piece rims until the late 1960s, continued to advertise them into the 1970s, and continued to sell tires and tubes for use with them.
- The defendant voluntarily undertook a duty to warn about the dangers associated with multi-piece rims after the manufacture and sale of the rim involved in the plaintiff’s accident.

*Id.* at 833.

The court made clear, however, that a post-sale duty to warn did not exist in all cases: “A continuing duty to warn arises only in *special cases*. We think this is such a case.” *Id.* (emphasis added).

The supreme court next addressed the post-sale duty warn in *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96 (Minn. 1989). In *Niccum*, the defendant purchased the assets of the manufacturer of the product that injured the plaintiff. *Id.* at 97. While the law regarding successor liability precluded the plaintiff’s product design claims against the defendant-purchaser, *Id.* at 98-100, the plaintiff argued that the defendant-purchaser had an independent post-sale duty to warn of the dangers of the product. *Id.* at 100.

The supreme court held that there was no such duty in this case but identified the following criteria for deciding the issues:

Succession to a predecessor’s service contracts, coverage of the particular machine under a service contract, service of that

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<sup>31</sup> In the words of the supreme court, the rims could be “temperamental.” *Hodder*, 426 N.W.2d at 833.

machine by the purchaser corporation, a purchaser corporation's knowledge of defects and of the location or owner of that machine, are factors which may be considered in determining the presence of a nexus or relationship effective to create a duty.

*Id.* (quoting *Travis v. Harris Corp.*, 565 F.2d 443, 449 (7th Cir. 1977)).

Since the *Hodder* decision, a number of federal courts applying Minnesota law have also held that product manufacturers have a continuing post-sale duty to warn. For example, in *McDaniel v. Bieffe USA, Inc.*, 35 F. Supp. 2d 735, 736-37 (D. Minn. 1999), in deciding the defendant's motion for summary judgment, the court applied the *ad hoc* duty in a case that involved a motorcycle helmet whose strap retention system was allegedly defective in both design and warnings and instructions. After the sale and manufacture of the helmet, the defendant had been made aware of the strap's alleged defect by way of (a) receipt of a report of one substantially similar failure of the strap in another accident and (b) notification from a nonprofit helmet safety and certification foundation that the strap system "may induce users to attach the chin strap improperly." *Id.* at 736. Also, after the manufacture and sale of the helmet at issue, the defendant issued new instructions on the proper use of the strap retention system but did not undertake to provide the new instructions to "owners of previously purchased helmets." *Id.* at 737.

Stating that "Minnesota . . . recognize[s] a post-sale duty to warn," *id.* at 740 (citing *Hodder*, 426 N.W.2d at 833), the court applied the factors discussed in *Hodder* and held that the manufacturer had a post-sale duty to warn. *Id.* at 742. In particular, the court relied on the potential facts<sup>32</sup> that the defendant was aware of the strap's defect, the "hidden or unknown" nature of the danger, the likelihood that serious injury or death could result from the defect, and the defendant's continued manufacture and sale of the helmet. *Id.* at 740.

The court rejected the defendant's argument that the duty should not be imposed because not all of the *Hodder* factors were present (*e.g.*, the defendant did not continue to "service" or maintain the helmets after their sale, did not sell aftermarket parts for or attachments to the helmets, and did not remain in communication with purchasers), the helmet was a mass-produced and widely distributed consumer item, and the defendant's business did not "afford it the ability to communicate easily and continually with its customers." *Id.* The court held:

In certain circumstances, some but not all of the *Hodder* factors may be sufficient to give rise to a post-sale duty to warn. . . . [T]he fact that a product is mass produced and

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<sup>32</sup> Since it was ruling on the defendant's motion for summary judgment, the court was required to accept as true all of the plaintiff's allegations. *McDaniel*, 35 F. Supp. 2d at 738, 740 n.9.



widely distributed does not necessarily rule out application of this duty when other *Hodder* factors are present. Mass production and wide distribution may *limit the response the duty mandates* rather than *defeat the duty's existence*.

*Id.* at 742 (emphasis in original).

Other cases in which federal courts applying Minnesota law have considered applying the duty include *T.H.S. Northstar Assocs. v. W.R. Grace & Co.*, 66 F.3d 173, 177 (8th Cir. 1995) (court affirmed jury's finding of post-sale duty to warn by asbestos insulation manufacturer); *Ramstad v. Lear Siegler Diversified Holdings Corp.*, 836 F. Supp. 1511, 1517 (D. Minn. 1993) (court declined to impose duty to warn in case involving allegedly defective farm machinery when only *Hodder* factor demonstrated was "gravity of resulting harm"); *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517, 1528-29 (D. Minn. 1989) (court imposed post-sale duty to warn in case involving intrauterine devices that were known to present "special dangers for nulliparous women" yet defendant continued to market device to such women); *see also Crowston v. Goodyear Tire & Rubber Co.*, 521 N.W.2d 401, 408-09 (N.D. 1994) (relying on *Hodder*, court held defendant had a post-sale duty to warn of dangers of mass produced and widely distributed product where defendant had known of dangers long before accident at issue, number of persons exposed to danger was large and the resulting injuries were severe).

In sum, while Minnesota recognizes a post-sale duty to warn, it is the plaintiff's burden to prove the existence of facts that, as a matter of law, justify imposition of the duty. Such facts include the gravity of the potential harm; how long the manufacturer has been aware of the danger; what actions, if any, the manufacturer took upon learning of the danger; the number of products produced and how widely distributed they are; and whether the manufacturer has maintained contact with the users. It should also be noted the courts will only find a duty in "special cases."<sup>33</sup>

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<sup>33</sup> While Minnesota does have a statutory "ordinary useful life" affirmative defense, *see* Minn. Stat. § 604.03, the value of the defense is questionable. Section 604.03, subd. 1, provides as follows:

In any action for recovery of damages for personal injury, death or property damage arising out of the manufacture, sale, use or consumption of a product, it is a defense to a claim asserted against [the defendant] that the injury was sustained following the expiration of the ordinary useful life of the product.

*Id.* The statute then defines "ordinary useful life" as "the period during which with reasonable safety the product should be useful to the user," and provides the following factors by which this period is to be determined:

the experience of users of similar products, taking into account present conditions and past developments, including but not limited to (1) wear and tear or deterioration from natural causes, (2) the progress of the art, economic changes, inventions and developments within the industry, (3) the climatic and other local conditions peculiar to the user, (4) the policy of the user and similar users as to repairs, renewals and replacements, (5) the useful life as stated by the designer, manufacturer, distributor, or seller of the product in brochures or pamphlets furnished with the product or in a notice attached to the product, and (6) any modification of the product by the user.

*Id.* subd. 2.

*Hodder* demonstrates the questionable value of this defense. The jury in that case found both that the rim

Finally, while the Minnesota Supreme Court has created a post-sale duty to warn, it has not, as stated by the court in *McDaniel*, created a duty to recall. See *McDaniel*, 35 F. Supp. 2d at 743 (citing *Tabieros v. Clark Equip. Corp.*, 944 P.2d 1279, 1298-1300 (Haw. 1997); *Burke v. Deere & Co.*, 6 F.3d 497, 508 n.16 (8th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994); *Wallace v. Dorsey Trailers Southeast, Inc.*, 849 F.2d 341, 344 (8th Cir. 1988); *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 333 (Mich. 1995)).

### **Mississippi – Theodore C. Miloch, II**

Effective July 1, 1993, the Mississippi legislature enacted the Mississippi Products Liability Act (“MPLA”), which provides that in order to maintain a warning or instruction defects claim, a plaintiff must prove that a manufacturer failed to adequately warn or instruct regarding a danger associated with the product that the manufacturer knew or should have known about at the time the product left the manufacturer's control. See *Miss. Code Ann.*, Section 11-1-63(c)(i) (2002). The MLPA also provides that “the manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that *at the time the product left the control of the manufacturer or seller . . . [t]he product was defective because it failed to contain adequate warnings or instructions.*” See *Miss. Code Ann.*, Section 11-1-63(a)(i)(2) (2002) (*Emphasis added*).

Under the MLPA, an adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates sufficient information on the dangers and safe use of the product, taking into account the characteristics of and the ordinary knowledge common to an ordinary consumer who purchases the product or in the case of a prescription drug, medical device or other product that is intended to be used only under the supervision of a physician or other licensed professional person, taking into account the characteristics of, and the ordinary knowledge common to, a physician or other licensed professional who prescribes the drug, device or other product. *Miss. Code Ann.*, Section 11-1-62 (c)(ii) (2002).

The plain meaning of the MLPA imposes liability on the manufacturer or seller for warnings that were inadequate based upon information that manufacturer or seller knew or should have known only at the time the product left the manufacturer’s control or at the time of sale, not thereafter. See *Palmer v. Volkswagen of America, Inc.*, \_\_\_ So. 2d. \_\_\_, 2003 WL 22006296 (Miss. Ct. App. 2003) and *O’Flynn v. Owens Corning Fiberglass*, 759 So.2d 526, 535 (Miss. Ct. App. 2000) (holding that a manufacturer did not have a duty to warn of dangers learned about following the sale of a product prior to the enactment of the Mississippi Products Liability Act).

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at issue had outlived its useful life but that the defendant was nevertheless liable because of its failure to warn. *Hodder*, 426 N.W.2d at 830. The court held that “expiration of a product’s useful life . . . is a factor to be weighed by the jury in determining the fault of a manufacturer and the fault of the user.” *Id.* at 832.

## Missouri – Ed Bott

In Missouri, a statute provides for “state of the art” to be an affirmative defense to products liability actions based upon strict liability for failure to warn of the dangerous condition of the product. *See* §537.764 R. S. Mo. (2000). The “state of the art” defense looks to what was known or reasonably could have been discovered by the manufacturer at the time the product was placed in commerce and operates as a complete defense to strict liability failure to warn claims. Missouri state courts, and federal courts applying Missouri law, have not expressly recognized a post-sale duty to warn in negligence-based products liability actions. In addition, courts applying Missouri law have refrained from imposing any duty upon product manufacturers to recall or retrofit their products, with one exception. The Eighth Circuit Court of Appeals has held that a successor corporation maintaining a continuing “nexus” with the product has an independent duty to warn of hazards discovered after the original manufacture and sale. The rationale behind this holding arguably applies equally to original manufacturers; however, no such duty has been recognized in Missouri.

*Sherlock v. Quality Control Equipment Co., Inc.*, 79 F.3d 731 (8<sup>th</sup> Cir. 1996).

Plaintiff sued for damages after having a part of her hand severed in an older model chitterling cleaning machine. The machine had been patented and built by Strickler-DeMoss Manufacturing, but Quality had since purchased the company’s patent rights and inventory. Quality continued to manufacture the machine using the existing design. Approximately two years following Quality’s purchase of the assets of Strickler it changed the design based upon concerns of entanglement with moving components. The plaintiff’s employer continued to use the machine as originally designed and manufactured. Quality was aware the employer was using a machine with the old design and had supplied replacement parts to the machine on 24 separate occasions. Quality never notified the employer of risks associated with the previous design or of the fact that there had been a change in design. Plaintiff’s sole theory of liability against Quality was that it had an independent duty to warn of the dangerous condition it discovered in the product, even though it was not the original manufacturer.

The Eighth Circuit, applying Missouri law, held that a successor corporation like Quality may be liable for its own tortious failure to warn its predecessor’s customers of a defect in the predecessor’s product. The court cited four factors to be considered in determining whether a duty to warn should be imposed on the successor corporation: 1) succession to a predecessor’s service contracts; 2) coverage of the particular machine under the contract; 3) service of the machine by the purchaser-corporation; and 4) the purchaser-corporation’s knowledge of defects and of the location or owner of the machine.

The Court stated, “[w]hile these factors are indisputably important, and in many cases dispositive, we remain mindful that they are merely useful tools which provide guidance in resolving the *ultimate* inquiry: whether there is an adequate nexus between the successor and the predecessor’s customers.” The Court cited *Downtowner, Inc. v. Acrometal Prods., Inc.*, 347 N.W.2d 118, noting that rather than relying on the four factors above, the courts also employ a risk/benefit analysis. The focus in deciding whether the relationship between the successor corporation and the preexisting customer was sufficient to create a duty to warn, therefore, was on the actual or potential economic advantage to the successor corporation.

Applying these factors, the Eighth Circuit concluded that the trial court had properly instructed the jury to examine the relationship between the successor and the preexisting customer and to find that the successor had a duty to warn only if it knew of the dangerous condition and maintained regular, continuing contact with the customers who had purchased the product from the original seller.

One can argue that this rationale applies equally to an original manufacturer who maintains some nexus with the product in the field. However, such an extension of the law has not yet been recognized in Missouri. Moreover, a subsequent case out of the Eighth Circuit suggests that the court may refuse to recognize such a duty.

*Horstmyer v. Black & Decker*, 151 F.3d 765 (8<sup>th</sup> Cir. 1998).

*Horstmyer* was decided two years after *Sherlock*. Although the continuing nexus argument does not appear to have been raised in that case, Black & Decker had actually recalled similar saws for the same alleged defect. The case is significant because the court refused to impose a duty on Black & Decker to recall the plaintiff’s saw.

*Horstmyer* involved a plaintiff who injured his hand in a Black & Decker miter saw when the lower blade guard became stuck. Black & Decker had previously discovered this defect and recalled that model of saw for this reason, but did not recall Plaintiff’s individual saw for reasons that were contested at trial.

The district court dismissed a count for negligent failure to recall. On appeal, Plaintiff argued that Black & Decker owed a duty to recall its defective saw, especially in light of its act of recalling other saws of the same model. Plaintiffs also argued that the reasonable likelihood that injury would occur from negligent acts or omissions gave rise to a duty to recall.

After reviewing Eighth Circuit precedents applying Missouri law on the issue, including *Smith v. Firestone Tire & Rubber Co.*, 755 F.2d 129 (8<sup>th</sup> Cir. 1985), in which the court held that a manufacturer could not be liable in negligence for failure to recall defective tire rims, the court held that there was no indication, “by case law, statute, or otherwise,” that Missouri would create a common law duty to recall the saw under the

circumstances facing Black & Decker. The court further declined to impose such a duty on the basis of Black & Decker's affirmative act of recalling similar saws.

The court also stated, "Missouri case law on failure to warn suggests that, in order for appellants to pursue a negligent recall claim, the defect in the miter saw would have had to exist at the time the product left Black & Decker's control and entered the stream of commerce." Thus, the court did not find that Black & Decker owed a duty to recall its product.

The following district court opinion reaches a similar result.

*Efting v. Tokai Corp.*, 75 F. Supp. 2d 1006 (W.D. Mo. 1999).

*Efting* involved a child who discovered an unattended flicker-lighter called an Aim-n-Flame in her parents' home and, playing with it, inadvertently set the house on fire. An issue in the case was testimony alleging that the on/off switch of the lighter would gradually migrate from the "off" to "on" position when the trigger was repeatedly pulled, constituting a design defect.

Plaintiffs alleged that the manufacturer of the lighter, Tokai, owed a duty to recall and retrofit the allegedly defective lighter. Citing *Morrison v. Kubota Tractor Corp.* and *Horstmyer v. Black & Decker (U.S.) Inc.*, the court held that a showing that Tokai had notice of the defect was not enough in itself to create a common law duty to recall or retrofit the product.

The court thus granted Tokai's motion for summary judgment on the claim for failure to recall or retrofit the lighter.

Missouri state court decisions generally look to the condition of the product, and the hazards identified with the product, as of the time of sale.

*Morrison v. Kubota Tractor Corp.*, 891 S.W.2d 422 (Mo. Ct. App. W.D. 1994).

In *Morrison*, Plaintiffs' decedent was killed when the tractor he was using to mow a steep, inclined slope rolled over on top of him. The tractor lacked a Roll-Over Protection System, or ROPS. Kubota, the manufacturer of the tractor, had previously offered ROPS under a program wherein the purchaser could opt to sign a waiver and delete the ROPS from his purchase, thereby receiving a discount from the base price. The tractor at issue was purchased and originally placed in service under such a plan.

Subsequent to the initial sale of the tractor, new regulations were enacted requiring all tractors to be sold with ROPS, with limited exceptions. Kubota made ROPS mandatory with its tractor sales, unless the customer signed an agreement expressly stating that the tractor would be used exclusively in an orchard or other low-clearance

environment where the ROPS would be impractical or hazardous. Morrison bought the tractor in question used from a Kubota dealer approximately two years after the new regulations and the revised company program were put into effect.

The trial court directed a verdict for Kubota on the plaintiffs' two negligence claims, stating that it believed that Kubota did not have either a legal duty to install a ROPS at the time of the sale or to retrofit the tractor with ROPS at any time afterward. On appeal, plaintiffs argued that Kubota had breached a duty of care in failing to retrofit the tractor with ROPS.

The Missouri Court of Appeals stated that it was unable to find any Missouri authority on the question of whether a manufacturer owed a legal duty to retrofit the product with additional safety devices not required at the time of sale. It cited an Eighth Circuit case in which the court accepted a district court's determination that Missouri would not impose a duty to retrofit. (*See Wallace v. Dorsey Trailers Southwest Inc.*, 849 F.2d 341 (8<sup>th</sup> Cir. 1988) (no duty to retrofit aerial bucket lift with electrical safety features)).

In closing, the *Morrison* court was unwilling to say that a duty to retrofit could never exist in Missouri, but held that Kubota had no duty to retrofit its tractors with ROPS under the facts of this case. The facts relied on by the court include the decedent's knowledge of the availability and function of ROPS at the time of purchase, the fact he chose not to purchase ROPS when armed with this knowledge, and the fact that the absence of ROPS was obvious. *Morrison*, 819 S. W. 2d at 430.

### **Montana – Dan Wittenberg**

The Montana legislature has not created a post-sale duty to warn by statute. Montana courts clearly follow the rule that manufacturers have a duty to warn of known dangers, but are otherwise silent as to whether there exists a post-sale duty to warn. *See Tacke v. Vermeer Mfg. Co.*, 220 Mont. 1, 13, 713 P.2d 527, 535 (1986); *Brown v. North Am. Mfg. Co.*, 176 Mont. 98, 109, 576 P.2d 711, 718 (1978).

### **Nebraska – Marlon Polk**

There is no statutory authority requiring manufacturers to give post-sale warnings to consumers. Although the Nebraska Supreme Court has not addressed whether it would recognize either a post-sale duty to warn or a duty to retrofit, the United States Court of Appeals for the Eighth Circuit predicted that it would not recognize such a duty under Nebraska products liability law. *See Anderson v. Nissan Motor Co.*, 139 F.3d 599, 602 (8<sup>th</sup> Cir. 1998). In *Anderson*, the plaintiff was injured when his forklift tipped over. *See id.* at 601. The plaintiff sued the manufacturer, under negligence and strict liability theories, and argued that the manufacturer had a post-sale duty to warn or retrofit. *See id.* at 602. The Eighth Circuit affirmed the district court's dismissal of the post-sale duty

claims and held: “While the Nebraska Supreme Court has not ruled directly on either of these issues, general Nebraska products liability law leads us to conclude that the court would not impose either of the post-sale duties on product manufacturers.” *Id.*

### **Nevada – Jill Goldsmith**

There are no decisions by Nevada courts on this issue.

### **New Hampshire – Sean Fisher**

New Hampshire courts have not expressly recognized a manufacturer’s duty to warn of latent defects discovered after the sale of the product. Federal courts applying New Hampshire law have arguably supported the viability of this theory. In *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652 (1st Cir. 1981), the Court affirmed judgment for the Plaintiff entered pursuant to a jury verdict on the grounds that the jury had sufficient evidence to find that Defendant’s warning to physicians regarding its product was inadequate based upon a study conducted two years after the product was released. See *Id.* 657-58.

In *Tate v. Robbins & Meyers, Inc.*, 790 F.2d 10 (1st Cir. 1986), the Court affirmed the district court’s exclusion of a revised maintenance manual probative of the Defendant’s continuing duty to warn on the grounds that Plaintiff had not set forth a sufficient foundation for the jury to conclude that Defendant, which was a successor corporation to the original manufacturer, had knowledge that Plaintiff actually possessed the product in question, which the Court deemed a prerequisite to stating a claim based upon a successor corporation’s post-sale continuing duty to warn. See *Id.* at 11-12. In an unreported decision, the United States District Court for the District of New Hampshire denied Defendant’s motion for summary judgment on Plaintiff’s failure to warn claim and held that Plaintiff’s evidence demonstrating that Defendant had learned, subsequent to releasing the product to the general public, that its intrauterine device created an increased risk of pelvic infection was sufficient to create a material issue of fact. See *Nelson v. Dalkon Shield Claimants Trust*, No. 84-276-SD, 1994 WL 255392, at \*4 (D.N.H. Jun. 8, 1994).

### **New Jersey – Beth Kaufman**

New Jersey has adopted post-sale duty to warn by statute. See N.J. Stat. Ann. § 2A:58C-4 (West 2001). The statute provides that manufacturers and sellers shall not be liable for harm caused by a failure to warn:

if the product contains an adequate warning or instruction or, in the case of dangers a manufacturer or seller discovers or reasonably should discover after the product leaves its

control, if the manufacturer or seller provides an adequate warning or instruction.

*Id.* This statute has been interpreted as imposing a continuing duty to warn. See *Lewis v. American Cyanamid Co.*, 155 N.J. 544, 564, 715 A.2d 967, 977 (1998).

In *Dixon v. Jacobsen Mfg. Co.*, 270 N.J. Super 569, 583, 637 A.2d 915, 922 (Super. Ct. App. Div.), cert. denied, 136 N.J. 295, 642 A.2d 1004 (1994), the court held that the manufacturer of a snowthrower had a continuing duty to warn the product's user. The product at issue was a 1965 snowthrower which had been purchased at a garage sale by the plaintiff's father in 1986. See *id.* at 575, 918. The court found liability for post-sale duty to warn because the manufacturer knew the identity of the current owner of the 1965 snowthrower, who in 1986 had requested and received the 1965 owner's and parts manual for the snowthrower from the manufacturer. See *id.* at 589, 925. The manufacturer had failed to provide the snowthrower's owner with the specific warnings then being utilized with its newer snowthrowers, which warnings would have clearly specified avoidance of the danger that had harmed the plaintiff (clearing snow from the snowthrower's clogged discharge chute). See *id.* Notably, the plaintiff did not raise any issues pertaining to his design defect claim on appeal. The jury had found that the 1965 snowthrower was not defectively designed when manufactured because of its lack of a "deadman's control." See *id.* at 580, 920.

### **New Mexico – Jill Goldsmith**

New Mexico's appellate courts have not addressed the issue of whether a manufacturer has a continuing duty to warn. However, New Mexico's Uniform Jury Instruction 13-1402 describes a supplier's duty to use ordinary care after the product has left the supplier's possession. Specifically, the jury instruction states:

The supplier of a product has a duty to use ordinary care to avoid a foreseeable risk of injury caused by a condition of the product or manner in which it is used. This duty is owed [to persons who can reasonably be expected to use the product] [and] [to persons who can reasonably be expected to be in the vicinity during the use of the product.]

[The supplier's duty to use ordinary care continues after the product has left [his][her][its] possession. A supplier who later learns, or in the exercise of ordinary care should know, or a risk of injury caused by a condition of the product or manner in which it could be used must then use ordinary care to avoid the risk.]



The directions for use of this instruction state that UJI 13-1402 “must be given in any products liability case in which the court submits negligence as a theory of liability.” The second paragraph shall be given only where an issue is presented concerning a supplier’s failure to act to prevent injury after selling the product and learning of a risk.

The Committee Comments also state that the “continuing duty of the supplier is merely one application of negligence law. When a product supplier learns of a defect after supplying the product, the supplier must use reasonable prudence to protect those exposed to the risk created by the defect.” (*citing* 1 Frumer and Friedman, *Product Liability* § 8.02 (1976)). The Committee Comments also note that ordinary care is all that is required. Given that standard, the fact finder determines what should have been done under the circumstances such as a warning, product recall, etc.

### **New York – Samuel Goldblatt, Christopher Thomas and Brian Eckman**

#### **Introduction**

In New York, manufacturers have a duty to issue warnings after a product has been sold and delivered. This is so even if the product was, at the time of sale, perfectly designed and manufactured, and required no warning. Whether the duty will be found involves weighing a number of factors, including the degree of danger posed by the product, the number of reported accidents, the burden of providing the warning, the burden and ability to track the product after the sale, and advancements in the state of the art. *Cover v. Cohen*, 61 N.Y.2d 261, 275 (1984); *see also Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 240 (1998).

There are exceptions to the imposition of liability for the failure to warn. If the danger is open and obvious, the manufacturer is under no duty to warn. *Liriano*, 92 N.Y.2d at 241-42. In addition, if the user of the product is knowledgeable enough about the specific hazard that caused the injury, the failure to warn cannot be a proximate cause of the injury. *Id.*

The rationale for the creation of a post-sale duty arises “from a manufacturer’s unique (and superior) position to follow the use and adaptation of its product by consumers. Compared to purchasers and users of a product, a manufacturer is best placed to learn about post-sale defects or dangers discovered in use.” *Liriano*, 92 N.Y.2d at 240. Importantly, the post-sale duty applies whether plaintiff’s claims sound in negligence or strict liability. *Martin v. Hacker*, 83 N.Y.2d 1, 8 n.1 (1993).

#### **New York’s Post-Sale Duty to Warn**

In *Cover v. Cohen*, the New York Court of Appeals first held that “[a]lthough a product be reasonably safe when manufactured and sold and involve no then known risks

of which warning need be given, risks thereafter revealed by user operation and brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn.” 61 N.Y.2d at 275. The post-sale duty arises, ruled the *Cover* court, when a manufacturer learns of dangers in the use of a product after manufacture or sale by means of post-sale accidents or advancements in the state of the art, with which manufacturers are expected to stay abreast. *Id.* at 274-75. Interpreting its own rule in *Cover*, the Court of Appeals in *Liriano*, 92 N.Y.2d at 240 n. 3 added that “the post-sale duty of a manufacturer to warn involves the weighing of a number of factors including the degree of danger the problem involved, the number of reported incidents, the burden of providing the warning, as well as the burden and/or ability to track a product post-sale.”<sup>34</sup>

## A. What Will Trigger the Duty to Warn?

### *1. Post-Sale Accidents*

Post-sale accidents may trigger a manufacturer’s post-sale duty to warn. The duty arises when a manufacturer receives sufficient notice, measured by the degree of danger posed by the product and the number of instances reported. *See Cover*, 61 N.Y.2d at 275. The analysis is, by definition, heavily fact dependent. *Id.*

New York courts appear unwilling to impose a post-sale duty to warn if the accidents occur infrequently and are not likely to cause substantial harm.<sup>35</sup> For example, in *Haran v. Union Carbide Corporation*, 68 N.Y.2d 710 (1986), plaintiff alleged she was injured when ethyl alcohol fumes from insect repellent spray ignited upon a discharge of static electricity from a television set. Relying on *Cover*, the court excluded evidence as it related to plaintiff’s claim for a continuing duty to warn. *Id.* at 712. In particular, it excluded evidence that the manufacturer changed the warning label after manufacture and sale, but prior to the accident, because there was no evidence that, at any time before the accident, defendant was put on notice of a danger or defect in the product. *Id.* *See also Scardefield v. Telesmith, Inc.*, 267 A.D.2d 560, 562 (3d Dep’t 1999) (holding that there was no evidence that the defendant knew of the type of product modification used by plaintiff or had learned of any similar modifications since the product was sold to plaintiff’s employer over thirty-five years prior to the accident).

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<sup>34</sup> Although New York courts have imposed a duty to warn on manufacturers in the appropriate circumstances, none have undertaken to order product recalls or retrofits even if they find the product to be defective. Rather, whether a manufacturer takes steps to recall or retrofit a defective product will be considered in determining whether the manufacturer was negligent. *See, e.g., Traub v. Cornell University*, No. 94-CV-502 (RSP/GJD), 1998 WL 187401, at \*8-\*10 (N.D.N.Y. Apr. 15, 1998) (plaintiffs’ strict liability and negligence claims based, in part, upon the manufacturer’s failure to order a recall of the product); *See also Cover*, 61 N.Y.2d at 276 (in determining whether a manufacturer is liable, a court will consider, among other things, what steps the manufacturer took to correct the problem, other than the giving of notice).

<sup>35</sup> *See Restatement (Third) of Torts, Products Liability* (“Third Restatement”) § 10 cmt. d. Although New York has not explicitly adopted the Third Restatement’s formulation of the “reasonable person” standard, New York courts implicitly acknowledge the reasonableness standard when determining the existence of the duty. *See Power v. Crown Equipment Corp.*, 189 A.D.2d 310, 311 (1st Dep’t 1993) (“Of course, knowledge of the dangers inherent in its product is an essential factor in considering whether a manufacturer has acted *reasonably* in response to evidence that a product is potentially dangerous. Thus, a critical element . . . is the extent of the manufacturer’s knowledge, either actual or constructive, of the risk presented by the use of its product.” (emphasis added)).

On the other hand, accidents involving serious personal injury, even if infrequent or singular, may trigger the post-sale duty. In *Andrulonis v. United States*, 924 F.2d 1210 (2<sup>nd</sup> Cir. 1991), plaintiff contracted rabies while conducting a laboratory experiment with a rabies viral strain, leaving him with serious and permanent brain damage. The experiment was jointly supervised by scientists employed by the federal government and New York State. The federal government scientist who supplied the test virus warned the New York State supervising scientist that the test sample contained an extremely high concentration of the virus. *Id.* at 1213, 1221. The federal government argued that its duty to warn was satisfied by this initial warning.<sup>36</sup> However, the Second Circuit upheld the trial court's finding that, although the initial warning was sufficient to warn of the risk based on what the federal government scientist knew at that time, his observation of the experiment and discovery that the test sample was leaking triggered a duty to supplement the warning. *Id.* at 1221. Relying on *Cover*, the court held that the federal government scientist should have known of the dangers involved and should have then provided additional warning:

[The federal government scientist] was observing an experiment with the extremely potent rabies virus he had supplied being used in a leaky machine in a way that could potentially cause great harm to those present in the lab. In these circumstances, he should have realized the risks and warned against continuing the experiment without additional precautions.

*Id.*

Whether accidents are frequent or few, mild or severe, discovery will center around whether incidents were of a quality and frequency sufficient to cause a reasonable manufacturer or vendor to issue subsequent warnings.

## 2. *Changes in the State of the Art.*

In principle, a manufacturer may be liable for failing to warn of dangers that come to light after the sale and distribution of the product through changes in the state of the art. *Cover*, 61 N.Y.2d at 275. Therefore, a manufacturer must keep abreast of the state of the art, and places itself in harm's way if it fails to do so. There have been no reported decisions in New York, however, that provide guidance on the question of what distinction, if any, there is between a product change that is a mere safety improvement and a product change that is a result of an advancement in the state of the art that will trigger a post-sale duty to warn.

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<sup>36</sup> The fact that there was no commercial sale of the product was deemed irrelevant by the court, which held that, under New York law, a commercial transaction is not a prerequisite to liability for breach of a duty to warn. *Id.* at 1220-21.

The Third Restatement does not offer a bright line between these standards for triggering the duty to warn, but merely states that “as product designs are developed and improved over time, many risks are reduced or avoided by subsequent design changes.” Third Restatement § 10 cmt. a. However, it is also noted that, “If every post-sale improvement in a product design were to give rise to a duty to warn users of the risks of continuing to use the existing design, the burden on product sellers would be unacceptably great.” *Id.* The line between these two points is no clearer under existing New York case law.

### B. What Type of Warning is Required?

Once it has been determined that a post-sale duty exists, New York courts will undertake a risk-benefit analysis to determine whether a manufacturer’s post-sale warning was adequate. The *Cover* court provided the standard for evaluating the warning:

The nature of the warning to be given and to whom it should be given likewise turn upon a number of factors, including the harm that may result from use of the product without notice, the reliability and any possible adverse interest of the person, if other than the user, to whom notice is given, the burden on the manufacturer or vendor involved in locating the persons to whom notice is required to be given, the attention which it can be expected a notice in the form given will receive from the recipient, the kind of product involved and the number manufactured or sold, and the steps taken, other than the giving of notice, to correct the problem.

61 N.Y.2d at 276. Generally, this issue will be one of fact for the jury, which must “assess the reasonableness of the steps taken by the manufacturer or vendor in light of the evidence concerning the factors listed above presented in the particular case, as well as any expert testimony adduced on the question.” *Id.* at 277.

Manufacturers and vendors do not necessarily have the same obligations to warn of dangers learned after delivery and sale of the product. The differing duty to warn is grounded in the different information that the manufacturer and vendor may possess regarding the hazards of the product. *Id.* at 275. For example, in *Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740, 749 (2d Cir. 1984), plaintiff was injured while riding a rented Jet Ski. Plaintiff claimed that the rental shop and Kawasaki, the Jet Ski’s manufacturer, had been negligent in failing to warn of the dangers in Jet Ski operation. *Id.* at 746. The jury found that the rental shop was not negligent in renting the Jet Ski, while finding Kawasaki negligent in failing to provide adequate warnings. *Id.* at 749.

Affirming, the Second Circuit held that the verdict was not inconsistent because Kawasaki's duty to warn was different than the rental shop's. The different duties arose from the differing product information possessed by each. *Id.* The court observed that Kawasaki had designed the product and had received reports of other accidents, information that was not possessed by the vendor. *Id.* This, it held, called into question the safety of Kawasaki's design and imposed upon the manufacturer a different obligation than imposed upon the vendor. *Id.*

### C. Exceptions to the Post-Sale Duty to Warn

New York recognizes two issues that will preclude a post-sale duty to warn claim: (1) open and obvious dangers, and (2) the user's knowledge.<sup>37</sup> *Liriano*, 92 N.Y.2d 232. The first issue is an exception to the manufacturer's duty to warn, while the second goes to the analytically distinct issue of whether a putative breach of that duty was the proximate cause of the plaintiff's injury. See *Burke v. Spartanics, Ltd.*, 252 F.3d 131, 138 (2d Cir. 2001).<sup>38</sup>

#### *1. Open and Obvious Dangers.*

A manufacturer has no duty to warn of an obvious danger that could or should have been recognized as a matter of common sense. A "limited class of hazards need not be warned of as a matter of law because they are patently dangerous or pose open and obvious risks." *Liriano*, at 241-42 (noting that this is also called the 'open and obvious' danger exception). Stated differently, "when a warning would have added nothing to the user's appreciation of the danger, no duty to warn exists as no benefit would be gained by requiring a warning." *Id.* at 242. This defense does not apply, however, "when there are aspects of the hazard which are concealed or not reasonably apparent to the user." *Id.*

Whether a given risk is obvious depends in large part on what the community of users knows and understands. Thus, "[a] manufacturer has a duty to warn against latent dangers resulting from *foreseeable* uses of its product of which it knew or should have known." *Burke*, 252 F.3d at 138 (internal quotations omitted). "Accordingly, courts treat obvious danger as a condition that would ordinarily be seen and the danger of which would ordinarily be appreciated by *those who would be expected to use the product.*" *Id.*

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<sup>37</sup> These exceptions also apply to the duty to warn at the time of sale.

<sup>38</sup> Maintaining a distinction between these issues is important. See the treatment of this issue in *Burke*, 252 F.3d at 137-40, for a detailed explanation of the difference between (a) whether a hazard was sufficiently obvious to all *foreseeable users* to preclude any duty to warn (the "open and obvious" exception to imposing the duty), and (b) whether the danger was sufficiently well known to *the plaintiff* to preclude a showing of *causation* (the "knowledgeable user" causation issue). Cf. *Hutton v. Globe Hoist Co.*, 158 F. Supp. 2d 371, 376 (S.D.N.Y. 2001) ("In duty to warn cases, New York recognized two circumstances that preclude a finding of proximate cause between warning and the accident: obviousness and knowledgeable user.").

The class of reasonably foreseeable users will encompass a spectrum of people with widely varying abilities and experience bearing on their perception of the hazards at hand. *Burke*, 252 F.3d at 138. The *Burke* Court observed:

Some may be practiced and skilled operators, while others may be novices, or may use the [product] in adverse conditions that, though atypical, are still foreseeable. So long as the relevant risks are not obvious to *some* members of the class of foreseeable users, a reasonable manufacturer might well be expected to warn. And, as a result, a duty to warn will generally be said to exist. This is so notwithstanding the fact that there may also be foreseeable users for whom the warning is superfluous.

*Id.*

In *Liriano*, a seventeen-year-old employee of a supermarket meat department was injured in 1993 while he was feeding meat into a commercial meat grinder whose safety guard had been removed. 92 N.Y.2d at 236. His hand was caught in the ‘worm’ that grinds the meat, and, as a result, his right hand and lower arm were amputated. *Id.* The meat grinder was manufactured and sold in 1961 by defendant, who, at the time of sale, had affixed a safety guard that prevented the user’s hands from coming into contact with the feeding tube and the grinding ‘worm.’ There were no warnings on the machine to indicate that it was dangerous to operate the machine without the safety guard. However, after the sale, defendant became aware that a significant number of purchasers of its grinders had removed the safety guards, and in 1962, began issuing warnings concerning removal of the safety guard from its meat grinders. *Id.*

Ruling on a certified question from the Second Circuit, the court held that although there may be a substantial modification to the product which would preclude a design defect claim, a manufacturer may still be liable under a failure-to-warn theory. *Id.* at 241.<sup>39</sup> The court declined, however, to rule on the Second Circuit’s second certified question asking whether the facts of the case barred this defendant manufacturer’s liability as a matter of law. On the issue of whether the danger posed by the meat grinder’s safety guard being removed was open and obvious, the court held that:

While important to the warning law, the open and obvious danger exception is difficult to administer. The fact-specific nature of the inquiry into whether a particular risk is obvious

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<sup>39</sup> Under *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 49 N.Y.2d 471 (1980), a manufacturer is not liable for injuries caused by substantial alterations to the product by a third party that render the product defective or unsafe. If, however, a product is purposefully manufactured to permit its use without a safety feature, a plaintiff may recover for injuries suffered as a result of removing the safety feature. *Lopez v. Precision Papers*, 67 N.Y.2d 871 (1986).

renders bright-line pronouncements difficult, and in close cases it is easy to disagree about whether a particular risk is obvious. It is hard to set a standard for obviousness that is neither under- nor over- inclusive. Because of the factual nature of the inquiry, whether a danger is open and obvious is most often a jury question.

*Id.* at 242.

On the other hand, where only one conclusion can be drawn from the established facts, the issue of whether the risk was open and obvious may be decided by the court as a matter of law. *Id.*; see, e.g., *Lauber v. Sears, Roebuck and Co.*, 273 A.D.2d 922 (4th Dep't 2000) (where plaintiff injured his fingers when he placed them near tractor wheel and were caught in the chains, defendant had no duty to warn because the court found that the danger of placing fingers close to a moving wheel is among the "limited class of hazards" for which no warning is necessary); see also *Colon v. BIC USA, Inc.*, No. 00 CIV 3555(SAS), 2001 WL 1631402, at \*25 (S.D.N.Y. Dec. 19, 2001) (no warning necessary to plaintiff mother because lighter presents open and obvious risks to children; no duty to warn others).

## 2. *The Knowledgeable User.*

If the plaintiff's testimony shows that he or she was aware of the danger to the extent that a warning could not increase his awareness, and the warning would not have prevented the harm, a failure to warn cannot be the proximate cause of the injury. *Liriano*, 92 N.Y.2d at 241.

As the court stated in *Liriano*:

a safety device built into the integrated final product is often the most effective way to communicate that operation of the product without the device is hazardous. Thus, where the injured party was fully aware of the hazard through general knowledge, observation or common sense, or participated in the removal of the safety device whose purpose is obvious, lack of a warning about that danger may well obviate the failure to warn as a legal cause of an injury resulting from that danger.

*Id.* at 241 (citations omitted). It may well be the case that a given risk is not "obvious," thereby creating a duty to warn. Nevertheless, because the risk was well understood by the plaintiff, a warning would have made no difference. See *Burke*, 252 F.3d at 139. In such cases, courts may decide as a matter of law that a manufacturer's warning would have been superfluous given an injured party's actual knowledge of the specific hazard that caused the injury. *Id.*

For example, *Colon* involved a child who burned himself with his mother's cigarette lighter. The lighter's safety mechanism had been disabled. 2001 WL 1631402, at \*25. Plaintiff claimed that the manufacturer of the lighter failed to warn her about the dangers associated with disabling the safety mechanism. However, plaintiff's testimony revealed that she did not disable the device and did not have any knowledge as to how it had been disabled. *Id.* The court dismissed the claim, reasoning that the absence of a warning had no effect whatsoever on plaintiff's behavior and was not a proximate cause of injury. *Id.*

In cases where reasonable minds might disagree as to the extent of plaintiff's knowledge of the hazard, the question is one for the jury. *Liriano*, 92 N.Y.2d at 241. For instance, in *Brady v. Dunlop Tire Corp.*, 275 A.D.2d 503 (3d Dep't 2000), plaintiff was injured when he was replacing a tube in the tire of a piece of farm equipment. The rim exploded because the tire was not properly seated. *Id.* The court denied defendant's summary judgment motion, holding that defendant may have had a duty to warn if the jury found that certain aspects of the hazard—including the risk that an improperly seated tire could cause an explosion when a portion of the tube protrudes between the tire and the rim during inflation—were concealed or were not reasonably apparent to the plaintiff. *Id.* at 504. In addition, the court found that "reasonable minds could disagree" regarding plaintiff's actual knowledge of the specific hazard that caused his injury. *Id.* at 505.

## Conclusion

New York courts may impose a post-sale duty to warn after weighing of a number of factors, including the degree of danger posed by the product, the number of reported incidents, the burden of providing the warning, the burden and/or ability to track the product after the sale, and advancements in the state of the art. *Cover v. Cohen*, 61 N.Y.2d 261, 275(1984); *see also Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 240 (1998).

New York courts also recognize exceptions to the imposition of liability for the failure to warn. If the danger is open and obvious, the manufacturer is under no duty to warn. *Liriano*, 92 N.Y.2d at 241-42. In addition, if the user of the product was knowledgeable enough about the specific hazard that caused the injury, the failure to warn cannot be a proximate cause of the injury. *Id.*

The cautious product manufacturer is advised to remain abreast with developments in the state of its products' art; to not ignore incidents involving its products; and, with the assistance of seasoned counsel, address situations that may require the issuance of post-sale warnings.



## North Carolina – Charles R. Beans

North Carolina enacted the “Products Liability Act”, found at North Carolina General Stat. Section 99B-1 *et seq.* North Carolina, however, has not adopted strict liability. All claims based on allegedly defective products, including those for failure to warn, must sound in negligence. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E.2d 504 (N.C. 1980); *Foyle v. Lederle Laboratories*, 674 F. Supp. 530 (E.D. N.C. 1987). As such, because products actions are based on negligence, manufacturers are entitled to the defense of contributory negligence where “use of the product giving rise to the product liability action was contrary to any express and adequate instructions or warnings.” N.C. Gen. Stat. § 99B-4.

North Carolina recognizes a cause of action for negligent failure to warn in both case law and statute. *Davis v. Siloo, Inc.*, 267 S.E.2d 354 (N.C. App. 1980); N.C. Gen. Stat. § 99B-5. Statutorily, the legislature has provided as follows:

- (a) No manufacturer or seller of a product shall be held liable in any product liability action for a claim based upon an inadequate warning or instruction unless the claimant proves that the manufacturer or seller acted unreasonably in failing to provide such warning or instruction, that the failure to provide adequate warning or instruction was a proximate cause of the harm for which damages are sought.

§ 99B-5. The claimant must also prove that the manufacturer knew or should have known of the dangerous condition of the product or subsequently became aware (or in the exercise of ordinary care should have become aware) of the risk of harm. *Id.* The state of North Carolina relies heavily on foreseeability of harm, as noted in the statute above. Additionally, the *Davis* case reiterates that any cause of action for negligent failure to warn must be based on foreseeability of danger.

More importantly, there is a duty to warn post-sale. In *Smith v. Selco Products, Inc.*, 385 S.E.2d 173 (N.C. App. 1989), plaintiff-appellant was injured when he reached his hand into a baler manufactured by defendant-appellee. The trial court found that plaintiff’s contributory negligence precluded recovery, but the Court of Appeals reversed, determining that there was a question of fact as to whether plaintiff had exercised due care for his own safety. The evidence in that case showed that the manufacturer was in violation of various OSHA and industry standards regarding the baler. After the manufacture of the mechanism, the standards changed, but defendant did not attempt to recall the product. Instead, Selco developed a so-called “retrofit” package but did not systematically retrofit the machine sold to plaintiff’s employer. The court stated that, “[a] continuing duty exists to provide post-sale warnings of any deficiencies it learns exists in the product to users.” *Id.* at 176-77 (emphasis added). The North Carolina

Court of Appeals did not refer to any Restatement Section, nor did it specifically hold that a manufacturer or seller has a duty to recall a retrofit. However, it is certainly arguable, based on the rationale above, that such a duty exists.

Although there is only a negligence theory post-sale duty to warn, it clearly applies not only to manufacturers, but also sellers. N.C. Gen. Stat. § 99B-5. However, a seller is under no affirmative duty to inspect or test for a latent defect in a product if it has no knowledge, actual or constructive, of any defect. *Crews v. W.A. Brown & Son, Inc.*, 416 S.E.2d 924, 928 (N.C. App. 1992). Although *Crews* did not address any post-sale duty to warn a seller, based on the holding in *Smith*, if the seller does have knowledge of a defect or should have knowledge of a defect, then it is arguable that it has a duty to warn post-sale.

North Carolina has a six-year statute of repose. N.C. Gen. Stat. § 1-50(6). In *Mills v. GMC*, 1997 U.S. App. LEXIS 18839 (4th Cir. 1997)(unpublished opinion), plaintiff's decedent fell out of the rear door of a University bus that had been manufactured in 1977 by GMC, sold to the Rhode Island Transit Authority in 1978 and subsequently purchased and refurbished in 1991 by Coach Crafters. The bus was then sold to Duke University where decedent was a student. Among the various allegations were failure to warn and failure to retrofit or recall. Summary judgment was granted based on the six-year statute of repose and affirmed by the Fourth Circuit. Plaintiff argued that the duty to warn continued beyond the six-year statute of repose, but the court disagreed, finding that "this duty to warn of hidden defects does not extend beyond the six-year limit imposed by the Statute of Repose." *Id.* at 6. The Fourth Circuit did not address plaintiff's allegations of retrofit or recall, and no case has affirmatively imposed such a duty upon a manufacturer or seller. Thus, such a duty remains open in the state of North Carolina, but as noted above, it is arguable that based on foreseeability, it exists.

### **North Dakota – Marlon Polk**

Section 28-01.3-08 of the N.D. Cent. Code on Products Liability provides that manufacturers have a duty to warn "at any time" they become aware of any defect in a product. Although the language deals with the statute of limitations for products liability actions, it does not exclude a duty to warn about potential dangers that the manufacturers become aware of after the product is sold. The court said:

"It follows we must assume the Legislature intended a post-sale duty to warn under negligence principles if, subsequent to the sale of a product, manufacturers become aware of dangerous conditions associated with the use of the product, removal of the time bar to the action for this failure to warn would be, at best, illogical, if not ludicrous." *Crowston v. The Goodyear Tire & Rubber Co.*, 521 N.W.2d 401, 407 (N. D. 1994).

In *Crowston*, the injured party was hurt while inflating a customer's 16-inch tire on a mismatched 16.5-inch wheel. The court held that under a negligence theory the manufacturers had a post-sale duty to take reasonable steps to warn foreseeable users about the dangers of mismatching and whether their post-sale warnings met the reasonableness standard was a fact question which was inappropriate for summary judgment. In the present case, the manufacturer found out about the defect after the product was sold.

“Simply because a product is mass produced and widely distributed does not totally absolve a manufacturer of a post-sale duty to warn under ordinary negligence principles. *Crowston*, 521 N.W.2d at 408.

### **Ohio – Mark Hayden**

In Ohio, the post-sale duty to warn is codified in Ohio Rev. Code Ann. §2307.76. A product is defective due to inadequate post marketing warning or instruction if, at a relevant time after it left the control of its manufacturer, both of the following applied:

- (a) The manufacturer knew or, in the exercise of reasonable care, should have known about a risk that is associated with the product and that allegedly caused harm for which the claimant seeks to recover compensatory damages; and
- (b) The manufacturer failed to provide the post-marketing warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk, in light of the likelihood that the product would cause harm of the type for which the claimant seeks to recover compensatory damages and in light of the likely seriousness of that harm.

Ohio Rev. Code Ann. §2307.76(A)(2)(a-b).

There are two statutory exceptions to the general rule on inadequate post marketing warning or instruction. First, the manufacturer has no duty to warn or instruct about an open and obvious risk or a risk that is a matter of common knowledge. Ohio Rev. Code Am. §2307.76(B). Second, an ethical (prescription) drug is not defective due to inadequate warning or construction if its manufacturer provides otherwise adequate warning and instruction to the physician or other legally authorized person who prescribes or dispenses that ethical drug for a claimant in question and if the federal Food and Drug Administration has not provided that warning or instruction relative to that ethical drug is to be given directly to the ultimate user of it. Ohio Rev. Code Ann. §2307.76(C). There are no Ohio cases that specifically address post-sale duty to warn.

## Oklahoma – Ed Bott

In Oklahoma, the seminal case on the post-sale duty to warn states that the manufacturer of a product has a duty to warn the consumer of potential dangers which it knew or should have known existed, in the exercise of reasonable care. *McKee v. Moore*, 648 P.2d 21 (Okla. 1982). This duty requires the manufacturer to maintain current information gleaned from research, adverse reaction reports, scientific literature and other available methods. *Id.* The Tenth Circuit has similarly ruled that a manufacturer has a duty to warn of a defect discovered at any time after the product is manufactured and sold.

*Woolard v. JLG Industries, Inc.*, 210 F.3d 1158 (10<sup>th</sup> Cir. 2000).

In *Woolard*, the plaintiff was injured when an aerial work platform, or “lift,” collapsed. He sued the manufacturer of the lift, JLG Industries, as well as the owner, Young, and later joined Primeco, the distributor who sold the lift to Young. The trial court found Young to be forty percent negligent for failing to maintain the lift, and found Primeco sixty percent negligent for failure to maintain and repair the lift properly and to warn that the lift was unsafe.

One of the theories of liability in the case was that Primeco assumed a contractual duty to warn the owner and user of defects in the lift discovered post-sale. The service contract called for Primeco to “insure successful operation and resultant customer satisfaction,” i.e., to inspect and test the lift. Primeco was also contractually bound to notify the owner and user if it became aware that the lift required maintenance or service. The Tenth Circuit, applying Oklahoma law, found that Woolard was a third-party beneficiary to this contract. The Tenth Circuit thus found that the trial court’s denial of Primeco’s motion for summary judgment was proper, as Primeco owed a duty under the contract to warn all beneficiaries to the contract of learned defects.

*Tyler by & through Tyler v. Sterling Drug*, 19 F. Supp. 2d 1239 (N.D. Okla. 1998).

In *Tyler*, the District Court issued orders regarding expert testimony and the admissibility of evidence. The case involved a products liability claim based upon the alleged association of aspirin to Reye’s Syndrome.

Defendant sought to exclude certain case reports on the issue of notice and as a basis for expert opinions, citing numerous evidentiary grounds. Plaintiff sought permission to admit the case reports as evidence of the state of medical knowledge existing at the time that warnings allegedly should have been issued.

The Tenth Circuit noted that Oklahoma law provides that:

[t]he manufacturer has a continuing duty to warn of all potential danger, which it knew, or should have known, in the exercise of reasonable care to exist. This duty requires the manufacturer to maintain current information gleaned from research, adverse reaction reports, scientific literature and other available methods.”

(quoting *McKee v. Moore*, 648 P.2d 21 (Okla. 1982)).

The court noted that the anecdotal reports were the type of evidence that was admissible on the issue of whether the manufacturer in a product liability case had notice of whether Aspirin was potentially dangerous and whether there existed a continuing duty to warn of this hazard.

*Shuman v. Laverne Farmers Cooperative*, 809 P.2d 76 (Ct. App. Okla. 1991).

This case involved a tire that exploded on the very date it was installed on Plaintiff’s car. The explosion was caused by plaintiff spinning his new tires in an attempt to extricate the car from some ice and snow in which he had gotten stuck on his way home. Plaintiff sued the defendant Cooperative that had installed the tire. The Cooperative joined both the distributor, Farmland, and the manufacturer of the tire, Cooper.

Plaintiff presented evidence that high speed spinning of tires on ice and snow could cause tires to separate. After the manufacture of such tires but before the accident at issue in the case, Cooper had warned its dealers about this phenomenon through a bulletin, but the Cooperative denied having received it.

Quoting *McKee*, 648 P.2d 21, the appellate court noted that a manufacturer and retailer have a duty to warn the consumer of potential dangers when it is known or should be known that hazards exist. The appellate court found that sufficient evidence existed to support a finding of the Cooperative’s receipt of notice of the dangerous condition and that the Cooperative breached its continuing duty to warn.

*Smith v. FMC Corp.*, 754 F.2d 873 (10<sup>th</sup> Cir. 1985).

Plaintiffs were widows of two men who had been employed as iron workers and had been killed when a piece of steel being carried by a crane fell on them. The plaintiffs sued the manufacturer of the crane for wrongful death.

The Tenth Circuit on appeal devoted the bulk of its opinion to the defense of voluntary assumption of the risk of a known defect, as applied under Oklahoma law.

However, in a final piece of dicta, the court briefly discussed appellants' contention that the district court improperly instructed the jury on manufacturer's liability. The court concluded that "a manufacturer has a responsibility to warn of a defective product at any time after it is manufactured and sold if the manufacturer becomes aware of the defect."

McKee v. Moore, 648 P.2d 21 (Okla. 1982).

Plaintiff sued Ortho, a pharmaceutical company that manufactured an intrauterine contraceptive device (IUD). The IUD had perforated the plaintiff's uterus and migrated within her body, requiring surgical removal. The plaintiff alleged that Ortho owed a duty to warn the product's consumers about this potential problem. Ortho maintained that it had met its duty to warn through a disclosure to physicians.

The Supreme Court of Oklahoma noted that "[t]he manufacturer of a product has a duty to warn the consumer of potential dangers which may occur from the use of the product when it is known or should be known that hazards exist." The Court cited *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Ok. 1974) and the Restatement (Second) of Torts §402A, noting that "even if a product is faultlessly designed and the manufacturer has exercised all possible care in the preparation and sale of his product, it may be considered unreasonably unsafe or defective if it is placed in the hands of the ultimate consumer without adequate warnings of the dangers involved in its use."

The Court stated that a manufacturer has a continuing duty to warn of all potential danger, which it knew, or should have known, in the exercise of reasonable care to exist. However, the court concluded that the manufacturer could meet its duty to warn in this case by advising the prescribing physician of the drug's or device's potential dangers, unless contrary FDA regulations existed.

### **Oregon – Daniel S. Wittenberg**

Oregon courts have not applied a post-sale duty to warn in product liability actions, but have indicated that there does exist a continuing duty to warn of defects in a product of which the manufacturer had knowledge. *Erickson Air Crane Co. v. United Technologies Corp.*, 79 Or. App, 659, 664; 720 P.2d 389, 391 (1986).

Section 30.900 of the Oregon Revised Statutes defines a product liability civil action as "a civil action brought against a manufacturer, distributor, seller or lessor of a product for damages for personal injury, death or property damage arising out of:

- (1) Any design, inspection, testing, manufacturing or other defect in a product;
- (2) *Any failure to warn regarding a product*; or
- (3) Any failure to properly instruct in the use of a product."

OR. REV. STAT. § 30.900 (emphasis added). However, the Supreme Court of Oregon has held that this statute applies only to the failure to warn before or at the date on which the product was first purchased for use or consumption. *Erickson Air Crane Co. v. United Technologies Corp.*, 303 Or. 281, 286; 735 P.2d 614, 616 (1987). A failure to warn occurring after that date are governed by Oregon's negligence statute. *Id.* See also *Sealey v. Hicks*, 309 Or. 387, 399; 788 P.2d 435,441 (1990)

In *Josephs v. Burns and Bear*, 260 Or. 493, 491 P.2d 203 (1971), plaintiff owners, lessors, and lessees brought a negligence action against the builder of a roof that collapsed more than 10 years after its construction. *Josephs*, 260 Or. 493 at 501-02. The Court rejected the argument that the effect of the statute of limitations could be avoided by an allegation that the defendant breached a continuing duty to warn of the dangers or defects of a product. However, it expressly reserved to comment upon the duty in a situation where an "active, continuous relationship" existed between the plaintiff and defendant. *Id.* The Supreme Court of Oregon has subsequently interpreted the *Josephs* decision as a conclusion that a post-sale duty to warn does in fact exist where the plaintiff and defendant have a continuous relationship. *Little v. Wimmer, et al.*, 303 Or. 580, 585; 739 P.2d 564, 567 (1987).

### **Pennsylvania – Beth Kaufman**

The Pennsylvania courts have refused to adopt section 10 of the Restatement (Third) of Torts and accordingly do not require manufacturers to warn of a post-sale defect, unless the product was defective when sold. See *Walton v. Avco Corp.*, 530 Pa. 568, 577, 610 A.2d 454, 459 (1992) (finding post-sale failure to warn liability where helicopter's engine contained a design defect when sold); *DeSantis v. Frick Co.*, 745 A.2d 624, 631 (Pa. Super. Ct. 1999) (holding that defendant manufacturer has no duty to warn where product was not defective when sold); *Engle v. BT Indus. AB*, 41 Pa. D.& C.4th 25, 30-31 (Dauphin Com. Pl. Ct. Feb. 16, 1999) (no post-sale duty to warn, recall or retrofit allegedly defective products); see also *Lynch v. McStome & Lincoln Plaza*, 378 Pa. Super. 430, 441, 548 A.2d 1276, 1281 (Pa. Super. Ct. 1988) (no negligence duty to warn post-sale).

In *Walton*, the Supreme Court of Pennsylvania held that the helicopter manufacturer had an independent duty to warn of a design defect in the engine. See *Walton*, 530 Pa. at 577, 610 A.2d at 459. Hughes, the helicopter manufacturer, was informed by Avco, the manufacturer of the helicopter engine, that the engine's oil pump was defective and needed to be repaired. See *id.* at 571-72, 456-57. Hughes received the service bulletin from Avco but failed to forward the bulletin to the helicopters' owners and to the various helicopter service facilities. See *id.* The accident at issue occurred more than one year after Avco issued the service bulletin. See *id.* In this case, where the engine was defective at the time the helicopter was sold, the court had little difficulty in finding Hughes liable for failure to warn because Hughes incorporated the defective engine into its helicopter, had undisputed knowledge of the defect and failed to warn

about it. See *id.* at 577, 459. The court also noted that helicopters are not “ordinary goods” and their owners can be easily located for the purpose of being informed of subsequent product warnings. See *id.*

In *DeSantis*, the defendant, Frick Company, manufactured and sold an industrial freezer to Rich Products Corporation, the plaintiff’s decedent’s employer. See *DeSantis*, 745 A.2d at 624-25. The plaintiff’s decedent died as a result of inhaling anhydrous ammonia. See *id.* The ammonia was released because a valve on the freezer ruptured. Frick had stopped making this type of freezer in the late 1960s. See *id.* at 625. In the mid to late 1980s, other manufacturers of this type of freezer began installing a liquid drainer to reduce the chance of hydraulic shock, and in the early 1990s another device was developed to dissipate pressure in the valves to prevent this kind of accident from occurring. See *id.* Although Frick would have been aware of these improvements through trade publications, it did not inform Rich Product Corp. of them. See *id.* The trial court granted Frick’s motion for summary judgment on the ground that post-sale duty to warn was barred because Pennsylvania does not recognize this cause of action. See *id.* at 631.

On appeal, the Superior Court of Pennsylvania affirmed declining to adopt Section 10 of the Restatement (Third) of Torts on the ground that to do so would eliminate the requirement that a plaintiff must demonstrate that the product was defective at the time sold. See *id.* The court also noted that Section 10 injects negligence principles into strict product liability because the standard under Section 10 is whether a reasonable person in the seller’s position would provide a warning, the same standard imposed under a negligence cause of action. See *id.* The Pennsylvania Supreme Court has specifically rejected application of a “reasonable man” standard in strict liability cases. See *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975).

### **Rhode Island – Sean Fisher**

The Supreme Court of Rhode Island has expressly held that, in order for a component manufacturer to be liable for a negligent failure to warn, the component product itself must be defective at the time of its sale or distribution, thereby intimating that a cause of action based upon a post-sale duty to warn arising from the discovery of a latent defect at the time of the sale may not lie. See *Buonanno v. Colmar Belting Co.*, 733 A.2d 712, 717 (R.I. 1999). In *Buonanno*, Plaintiff injured his arm when he attempted to clear debris from a conveyor belt, slipped and fell, and caught his arm in the “nip point” of the conveyor belt system. See *Id.* at 713. Plaintiff sued the manufacturer of the pulley component of the conveyor system, EPT, and also sued the company that assembled the entire system, Colmar, alleging that the product was unreasonably dangerous without a guard, and that the component manufacturer failed to warn the user of the dangers of failing to provide a guard. See *Id.* at 714.



The court followed Section 5 of the Restatement (Third) of Torts (1998), and reversed the trial court's award of summary judgment in favor of Colmar, *see Id.* at 716 (opinion of Goldberg, J.), and affirmed the award of summary judgment against EPT, *see Id.* at 718-19 (opinion of Weisberger, J.). Regarding Colmar, the Court followed the Restatement and determined that there was an issue of fact concerning whether Colmar "substantially participate[d] in the integration of the component into the design of the product." *Id.* at 719 (opinion of Weisberger, J.). Regarding EPT, the Court held that EPT delivered a safe component to Colmar, had no involvement in the integration of its component into the conveyor system, and "should have no duty to warn, particularly in respect to conditions that are only created after the final product is assembled." *Buonanno*, 733 A.2d at 719 (opinion of Weisberger, J.).

### **South Carolina – Charles R. Beans**

South Carolina recognizes a distinction between strict liability and negligence causes of action. *See*, S.C. Code Ann. § 15-73-10, the "Defective Products Act." South Carolina has explicitly adopted the Restatement (Second) of Torts as part of this Act. S.C. Code Ann. § 15-73-30. As such, none of the cases found in South Carolina rely on the Restatement (Third) as do some other states. However, South Carolina also recognizes the defense of assumption of risk with regard to strict liability claims, to the extent that if a user or consumer discovers a defect and is aware of the danger, "and nevertheless perceives unreasonably to make use of the product," and is injured, then he is barred from recovery. S.C. Code Ann. § 15-73-20.

South Carolina distinguishes between a duty to warn in negligence and in strict liability. In *Brooks v. Medtronic, Inc.*, 750 F.2d 1227 (4th Cir. 1984), plaintiff-appellant filed a products liability action sounding in negligence, breach of warranty and strict liability against defendant-appellee manufacturer for a defective pacemaker. Plaintiff argued that the duty to warn should be extended to him directly and not stop at his physician. The trial court granted summary judgment in favor of Medtronic, and this was affirmed by the Fourth Circuit. Relying on § 402A of The Restatement 2d of Torts (1965), the Fourth Circuit reiterated the acceptance of the doctrine of strict liability. As for drugs, however, the duty to warn extends only to physicians and not the ultimate consumer; i.e., the patient. This would also apply to mechanisms used in the medical industry, such as pacemakers. Plaintiff contended that the defendant was strictly liable for failure to warn, and further, that evidence showing the availability of other leads for the pacemaker should be admissible. The court disagreed and stated as follows:

Strict liability focuses its attentions on the instrument here in question . . . and the duty to warn relates to its characteristics. The failure to inform of the existence of another apparatus might arguably generate an action in negligence, but not one for failure to disclose something about this model.

*Id.* at 1233. Thus, although the strict liability duty to warn might be based on principles of negligence, it is “conceptually a distinct cause of action.” *Id.*

The *Brooks* court did not address whether a duty to warn applies post-sale. However, in *Carolina Home Builders, Inc. v. Armstrong Furnace Co.*, 191 S.E.2d 774 (S.C. 1972), the court held it was error in a negligence cause of action to charge the jury of a manufacturer’s duty to warn after the sale. Since that case, there has been no discussion about a post-sale duty to warn; therefore, it appears to be an open question in South Carolina.

The duty to retrofit, however, has been addressed more recently. *See, Bragg v. Hi-Ranger, Inc.*, 462 S.E.2d 321 (S.C. 1995). In that case, the estate of the deceased sued the defendant manufacturer in strict liability and negligence when decedent was killed after jumping out of an aerial bucket that caught fire. Plaintiff argued that the failure to warn of the dangers was continuous, while the manufacturer argued that there was no continuing duty. The court held that the trial court administered the proper jury charge when it told the jurors that a manufacturer has no duty to recall a retrofitted product. To the contrary, a manufacturer is held only to the standards existing at the time of manufacture. Specifically, the court stated that a manufacturer “has no duty to notify previous purchasers . . . about later developed safety devices or to retrofit those products if the products were nondefective under standards existing at the time of the manufacture or sale.” *Id.* at 311. (emphasis added). Of course, the court did not answer the question whether the manufacturer has a duty to retrofit or recall a defective product if it was defective at the time of sale. That question will probably be decided by the South Carolina courts in the near future.

South Carolina recognizes the “bulk supplier” defense enunciated in § 388 of the Restatement (Second) of Torts. Basically, that provides that a supplier may be liable for failure to warn if he supplies a defective or dangerous product, has no reason to believe the user will realize the danger and he cannot rely on the purchaser and/or employer to supply the appropriate warnings. This defense is available whether plaintiff brings suit in negligent failure to warn or strict liability failure to warn. *Coffey v. Chemical Specialties*, 1993 U.S. App. LEXIS 21430 (4th Cir. 1993)(unpublished opinion). Finally, questions regarding the adequacy of failures to warn are generally jury questions, once it has been established that a product must display a warning. *See, Allen v. Long Mfg. N.C., Inc.*, 505 S.E.2d 354 (S.C. 1998).

### **South Dakota – Marlon Polk**

Under South Dakota common law, manufacturers have a post-sale duty to warn of defects. In South Dakota a “well-designed product may be found to be defective without an adequate warning.” *Peterson v. Safway Steel Scaffolds Co.*, 400 N.W.2d 909, 912 (S.D. 1987).

In Holmes the court ruled that manufacturers do have a post-sale duty to warn consumers of product defects. *Holmes v. Wegman Oil Co.*, 492 N.W. 2d 107, 112-13 (S.D. 1992). This case involved a gas water heater that exploded when a used thermostatic control knob did not operate as designed. The manufacturer had instituted a recall campaign prior to the explosion; however, the court found that it was not adequate due to other circumstances. Fraudulent concealment of a defect, as in this case, broadens the post-sale duty to warn from original purchasers to include second hand purchasers, as well.

See *Novak v. Navistar*, 46 F.3d 844, 850 (8<sup>th</sup> Cir. 1995), wherein the Eighth Circuit applying South Dakota law determined that based upon the Peterson and Holmes cases, the Supreme Court of South Dakota would find a post-sale duty to warn of the continued use of a potentially dangerous product.

### **Tennessee – John L. Tate and Dianna Baker Shew**

There are no reported decisions imposing a post-sale duty to warn for product defects. By statute, a plaintiff claiming liability on a failure to warn theory must demonstrate that the product was in a “defective condition or unreasonably dangerous at the time it left control of the manufacturer or seller.” Tenn. Code Ann. § 29-28-105(a) (2001) (emphasis added). Absent a change in the statutory language, a post-sale duty to warn claim apparently is not a remedy available under Tennessee law.

### **Texas – Theodore C. Miloch, II**

The law in Texas is clear that a manufacturer does not have a continuing duty to warn of dangers that are discovered after the allegedly defective product has been sold to the consumer. Accordingly, there is no cause of action for a failure to warn about hazards discovered after a product has been manufactured and sold or to recall products for which a safer design has been developed. See *Torrington, Co. v. Stutzman*, 46 S.W.3d 829, 836-837 (Tex. 2000); *Syrie v. Knoll Int’l*, 748 F.2d 304, 311 - 312 (5<sup>th</sup> Cir. 1984); *McLennan v. American Eurocopter Corp.*, 245 F.3d 403, 430 (5<sup>th</sup> Cir. 2001) (“Texas courts generally do not recognize any post-sale duty to warn of product hazards arising after the sale”). See also 59 Tex. Jur. 3d Products Liability § 29 (1999).

A post-sale “control-based” duty to warn does exist, however, in the limited circumstance where the manufacturer has regained control over the product after its initial sale but failed to remedy a known defect prior to the sale to a subsequent consumer. See *Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519 (Tex. Civ. App. 1979); *Arkwright-Boston Manufacturers Mut. Ins. Co. v. Westinghouse Elec. Corp.*, 844 F.2d 1174, 1185 (5<sup>th</sup> Cir. 1988) (holding that there is no post-sale common law duty to warn unless the manufacturer regains some significant degree of control over the product). Further, where a manufacturer voluntarily assumes the duty to warn consumers following the sale of a product, Texas courts have held that the manufacturer must exercise

reasonable care in exercising the voluntary post-sale warning. *See Dion v. Ford Motor Co.*, 804 S.W.2d 302, 310 (Tex. Civ. App. 1991); *Alter v. Bell Helicopter Textron, Inc.*, 944 F.Supp. 531, 537 (S.D. Tex. 1996).

### **Utah – Deborah Danilof**

The state of Utah recognizes a post-sale duty to warn and has applied that duty to pharmaceutical manufacturers. *Barson v. E.R. Squibb & Sons, Inc.*, 682 P.2d 832 (Utah 1984). In *Barson*, the Supreme Court of Utah held that a negligence standard governs a pharmaceutical manufacturer's duty to warn and that a manufacturer breaches this duty if it unreasonably fails to warn of "any dangerous side effects produced by its drugs of which it knows or has reason to know." *Id.* at 835.

The duty to warn applies to dangerous side effects discovered after the sale of the product because "the manufacturer is held to be an expert in its particular field and is under a 'continuous duty . . . to keep abreast of scientific developments touching upon the manufacturer's product.'" *Id.* at 835. The duty arises from actual knowledge gained from adverse event reports and also from constructive knowledge from scientific literature and other means of communication. *Id.* at 836.

In *Barson*, plaintiff claimed that Squibb, the manufacturer of a progestational drug called Delalutin taken during pregnancy to prevent miscarriage, caused birth defects. Plaintiff alleged that the manufacturer had a duty to warn of the potential for birth defects based on constructive knowledge of scientific information and literature in existence prior to the time plaintiff's mother took the drug. *Id.* at 836. Plaintiff contended that tests on progestational drugs other than Delalutin showing that these drugs caused birth defects, provided constructive notice of a danger with respect to Delalutin. *Id.* These tests, coupled with internal documents that indicated a concern over the lack of testing of Delalutin for teratogenicity, provided sufficient evidence to uphold the verdict in favor of the plaintiff.

Given the Supreme Court's recognition of a "continuous duty" to keep abreast of scientific developments, Utah tracks the Restatement (Third) of Torts: Product Liability §10, which imposes a duty to warn irrespective of whether a latent defect existed in the product at the time of sale. Like the rule stated in Restatement, Utah law requires manufacturers to provide warnings when a reasonable person would do so, regardless of the existence of a defect at the time of sale.

In addition, *Barson* held that compliance with FDA guidelines did not relieve the manufacturer of liability because these standards were "merely minimum." "Even after all government requirements have been met, if there are dangers that the ethical drug manufacturer knew of should have known about, the manufacturer may still be subject to liability." *Id.* at 836.

*Barson* applies a high standard of duty regarding warnings to drug manufacturers. This is evident by the Court's classification of the manufacturer as an expert in the particular field, coupled with the Court's affirmation of a verdict resting on the premise that the manufacturer should have been aware of studies concerning the side effects of different, but similar, drugs. More recently, the Utah Supreme Court described this standard as "very strict." *Grundberg v. Upjohn Co.*, 813 P.2d 89, 97 (Utah 1991). The High Court reaffirmed that manufacturers were under a "continuous duty" to be aware of scientific developments and to provide adequate warning upon actual or constructive notice of risks. *Id.*

While the standard for warnings may be strict, it does not impose a duty on manufacturers of consumer products to notify consumers of the existence of safer models of a product. *Slisze v. Stanley-Bostitch*, 979 P.2d 317 (Utah 1999). In *Slisze*, the plaintiff, asserted claims for negligent failure to warn and strict products liability against the manufacturer of a pneumatic nailer. The plaintiff claimed that the manufacturer should have warned of the availability of a safer model or should have refrained from marketing the original non-defective model when the new one became available. In affirming dismissal of the negligence claim, the Supreme Court held a manufacturer has no duty to stop marketing a non-defective product, despite the existence of a safer, improved model. Neither does a manufacturer have a duty to warn consumers of the existence of the safer model under these circumstances. *Id.* at 320.

Interestingly, the Court also held that compliance with the standards constituted "a legitimate source of determining the standard of reasonable care." *Id.* at 321. On the other hand, *Barson*, and the later Supreme Court case *Grundberg*, both found compliance with FDA standards insufficient to avoid liability based on negligent post sale warnings - - at least in the pharmaceutical context. *Barson*, 682 P.2d at 836; *Grundberg*, 813 P.2d at 97. The decisions are not contradictory. They merely demonstrate that compliance with government standards may provide evidence of reasonable care where breach of duty to warn is claimed, although such evidence is not determinative of the issue.

### **Vermont – Sean Fisher**

Vermont courts have not expressly recognized a manufacturer's duty to warn of latent defects discovered after the sale of the product. However, the Vermont Supreme Court has cited *Comstock v. General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627 (1959) with approval for the proposition that "[a]ssembler-manufacturers have long been held liable for defects in component parts manufactured by others and incorporated into their finished products where they have been negligent . . . in failing to warn of latent defects in the product of which the seller is or should be aware," *Morris v. Am. Motors Corp.*, 142 Vt. 566, 573, 459 A.2d 968, 972 (1982) (citation omitted), and has also stated that "'a purchaser corporation's knowledge of defects and of the location or owner of that machine [is a factor] which may be considered in determining the presence of a nexus or relationship effective to create a duty to warn,'" *Ostrowski v. Hydra-Tool Corp.*, 144 Vt.

305, 309, 479 A.2d 126, 128 (1984) (quoting *Travis v. Harris Corp.*, 565 F.2d 443, 449 (7th Cir. 1977)).

The United States Court of Appeals for the Second Circuit has implicitly construed Vermont law to impose a post-sale duty to warn of defects discovered after the sale of the product. In *McCulloch v. H.B. Fuller Co.*, 981 F.2d 656 (2d Cir. 1992), the Court reversed the district court's award of judgment as a matter of law to the Defendant. Plaintiff alleged that Defendant failed to warn her of the danger of working in such a close proximity to its product, a glue melting pot, caused by the toxic fumes emitted from the pot. See *Id.* at 657. The Court held that the district court's conclusion that the Defendant had no duty to warn an employee of the purchaser of its product was contrary to Vermont law, and noted that the allegations in this case pertain to Defendant's failure to warn the Plaintiff personally, including allegations that Defendant's representative had first-hand knowledge of Plaintiff's close proximity to the melting pot, yet failed to warn of her the dangers of such. See *Id.* at 658.

In addition, in *Lavoie v. Pacific Press & Shear Co., Division of Cannon Corp.*, 975 F.2d 48 (2d Cir. 1992), the Court affirmed the judgment, entered in accordance with a jury verdict, of the district court awarding damages to the Plaintiff on her negligence claim. In so holding, the Court evaluated the sufficiency of the evidence offered regarding the issue of whether Defendant, "failed to employ that degree of care, both during and after the sale, that a reasonably prudent manufacturer would have taken under similar circumstances." *Id.* at 57. Plaintiff alleged that Defendant sold the hydraulic press brake in question without any safety equipment, and left Plaintiff's employer, which lacked knowledge about the product and feasible safety features, to determine what features, if any, should be added. See *Id.* at 51. The Court specifically noted that Plaintiff had raised a "post-sale duty to warn issue" by presenting evidence that Defendant failed to warn Plaintiff's employer of the dangers associated with the lack of safety features despite several post-sale accidents similar to Plaintiff's. See *Id.* at 52.

### **Virginia – Dabney Carr and Gary Spahn**

Virginia law is unclear on the post-sale duty to warn. Although Virginia's Supreme Court has not decided the issue, several federal cases have addressed Virginia's law on a post-sale duty to warn, and reached conflicting results. While most predict that Virginia will not impose a post-sale duty to warn under *any* circumstances, those cases otherwise find that Virginia would recognize a negligence claim for post-sale duty to warn. Although Virginia has not adopted §10 of the Restatement (Third): Products Liability, those Virginia cases imposing a post-sale duty to warn appear to follow the logic of the Restatement (Third).

The Western District of Virginia, rejecting Fourth Circuit dicta,<sup>40</sup> held that Virginia does not impose a post-sale duty to warn. *Kimmel v. Clark Equip. Co.*, 773 F.

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<sup>40</sup> *Bly v. Otis Elevator Co.*, 713 F.2d 1040 (1983), different results reached at rehearing, *en banc*, *Faison v.*

Supp. 828 (1991). The *Kimmel* court found that a manufacturer's duty to warn applies only to those defects which the manufacturer knew, or had reason to know about, at the time of sale. *Id.*, 773 F. Supp. at 831 (applying the standard set forth in *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 136, 413 S.E.2d 630, 635 (1992)). "No duty arises simply because the manufacturer discovers new information about a product after the product already has left his hands." *Kimmel*, 773 F. Supp. at 831. Any evidence, therefore, of a manufacturer's post-sale knowledge of a dangerous defect "may be relevant.... to show the recklessness of the manufacturer's decision to produce the equipment without adequate warning." *Id.* Such evidence will not be used to impose a post-sale duty to warn.

The same court followed the *Kimmel* decision six years later in rejecting a post-sale duty to warn. *Ambrose v. Southworth Prods. Corp.*, 953 F. Supp. 728 (1997). In *Ambrose*, the District Court found the Fourth Circuit dicta merely persuasive, and rejected dicta from a Virginia Supreme Court case,<sup>41</sup> which had suggested that Virginia would impose a post-sale duty to warn. The court stated that it "would not extend Virginia law beyond that which the state's own courts have recognized." *Ambrose*, 953 F. Supp. 733.

A different federal judge, however, reached the opposite result. In *McAlpin v. Leeds & Northrup, Co.*, 912 F. Supp. 207 (W.D. Va. 1996), Magistrate Judge Glen Conrad ignored the *Harris* case cited by *Ambrose*, and accepted the *Bly* dicta. In following *Bly*, Judge Conrad evaluated the continuing duty to warn under separate theories of implied warranty and negligence. "Under a theory of implied warranty, the focus is on whether a lack of warning renders the product unreasonably dangerous, and, under a theory of negligence, the focus is on whether the manufacturer's failure to warn was unreasonable." *Id.*, 912 F. Supp. at 209. Because a products liability action brought under implied warranty focuses on the product itself, "the conduct of the manufacturer after the product leaves its hands is irrelevant." *Id.* Regardless of the timing of any notice of defect, therefore, *McAlpin* held that Virginia would not impose liability for a post-sale duty to warn for claims brought under a warranty theory.

By contrast, the *McAlpin* court found that, under a negligence theory, a manufacturer has a duty to warn, regardless of when it learns of a product defect. *Id.*, 912 F. Supp. at 210-11. Because the focus of a negligence claim is on the manufacturer's conduct, the manufacturer's duty to warn is not abrogated by the sale of the product. *Id.*, 912 F. Supp. at 209. A manufacturer, therefore, who does not comport with standards of reasonableness<sup>42</sup> will be held liable for the failure to provide post-sale warnings. *Id.*, 912

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*Courion Indus., Inc.*, 754 F.2d 1111, (4th Cir. Va. 1985). In *Bly*, the court evaluated, without deciding, the post-sale duty to warn under theories of negligence and implied warranty.

<sup>41</sup> *Harris v. T.I., Inc.*, 243 Va. 63, 413 S.E.2d 605 (1992).

<sup>42</sup> Virginia courts apply the standards set forth in Restatement (Second) of Torts §388 when evaluating a duty to warn. A manufacturer will be liable if (a) he knows or has reason to know the chattel is or is likely to be dangerous for the use for which it is supplied, and b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and c) fails to exercise reasonable care to inform them of its dangerous

F. Supp. at 211. The standards of reasonableness for the duty warn, as applied in Virginia, were directly adopted by the Supreme Court from the Restatement (Second) of Torts §388. *Id.* This evaluation closely resembles the evaluation set out in Restatement (Third), which holds a manufacturer liable for failure to warn, post-sale, if “a reasonable person in the seller’s position would provide such a warning.” Restatement (Third): Products Liability §10 (1997). While the standards of reasonableness set out in Restatement (Third) §10 regarding when to warn<sup>43</sup> reflect those set out in *McAlpin*, the court offered no other guidelines as to how a manufacturer should act after receiving knowledge of a defect, aside from following Restatement (Second) §388.

Virginia does not impose the duty to recall or retrofit. No Virginia court has imposed upon a manufacturer the duty to recall or retrofit its products. *Buettner v. Super Laundry Machinery*, 857 F. Supp. 471, 477 (E.D. Va. 1994) *See also, Kimmel*, 773 F. Supp. 828, 829 (W.D. Va. 1991).

### **Washington – Deborah Danilof**

The Washington Products Liability Act, codified in Revised Code Washington § 7.72.030(1)(c), imposes liability on a manufacturer who fails to warn of a danger that becomes known post-sale. The statute provides:

“A product is *not reasonably safe* because adequate warnings or instructions were not provided after the product was manufactured where a manufacturer learned or where a reasonably prudent manufacturer should have learned about a danger connected with the product *after it was manufactured*. In such a case, the manufacturer is under a *duty to act* with regard to issuing warnings or instructions concerning the danger in the manner that a *reasonably prudent manufacturer* would act in the same or similar circumstances. This duty is satisfied if the manufacturer *exercises reasonable care to inform product users*.”

WASH. REV. CODE 7.72.030(1)(c) (emphasis added).

Section 7.72.030(3) provides that in determining whether the product is "not reasonably safe," the "trier of fact shall consider whether the product was unsafe to an

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condition or of the facts that make it likely to be dangerous. *McAlpin*, 912 F. Supp. 210 (citing *Featherall v. Firestone Tire and Rubber Co.*, 219 Va. 949, 961, 252 S.E.2d 358, 366 (1979)).

<sup>43</sup> The Restatement requires a manufacturer to warn when “(1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and (4) the risk of harm is sufficiently great to justify the burden of providing a warning.” Restatement (Third) §10: Products Liability (1997).



extent beyond that which would be contemplated by the ordinary consumer." WASH. REV. CODE 7.72.030(3).

Case law confirms that post-sale warning cases are governed by a negligence standard. *Falk v. Keene Corporation*, 782 P.2d 974, 979 (1989); *Couch v. Mine Safety Appliance Company*, 728 P.2d 585, 589 n.5 (1986).

The post-sale duty to warn arises after a manufacturer has sufficient notice about a specific danger associated with the product. *Esparza v. Skyreach Equip. Inc.*, 15 P.3d 188, 198 (2000). The most convincing proof that a manufacturer knew of a dangerous condition associated with the product is knowledge of previous substantially similar accidents involving the product. *Id.* at 199.

Decisions interpreting the statute also find that a product reasonably safe as designed may, nevertheless, be not reasonably safe because of a danger connected with the product that the manufacturer learned about or should have learned about after the product was manufactured. *Timberline Air Serv. Inc. v. Bell Helicopter-Textron, Inc.*, 884 P.2d 920, 923 (1994); *Esparaza*, 15 P.3d at 198.

In *Timberline*, for example, plaintiff, the buyer of a helicopter originally designed for military use, sued the manufacturer of the helicopter after it crashed due to gear failure. *Timberline*, 884 P.2d at 922. The plaintiff claimed the manufacturer failed to warn certain operators that repetitive heavy lifting damaged the helicopter's gears. The plaintiff did not contend that the helicopter was defectively designed. In fact, the helicopter had been designed in accordance with precise mandatory government specifications, all of which it met. *Id.* at 923.

The United States government procured the helicopter, which was manufactured in 1969, pursuant to contract for wartime use. *Id.* at 922. After 17 years, it was sold and certified for use in logging operations. *Id.* at 923. However, in 1977, the manufacturer learned of adverse effects of repetitive heavy lift operations on helicopter gears. *Id.* Prior to the crash at issue, four other helicopters had failed in a similar manner. In 1981, the manufacturer began warning some, though not all, operators about the adverse effects of heavy lifting on the gears, and it also had notified the FAA. *Id.*

The manufacturer asserted that the government contractor defense, found in the Washington statutory scheme and common law, barred a post-manufacture failure to warn claim. The manufacturer argued that compliance with the mandatory government design specifications entitled it to this defense. *Id.* at 928. The Court found the defense inapplicable because the nature of the claim asserted in this case was not the type of claim (e.g. design defect) the defense was intended to eliminate. *Id.* As such, the failure to warn claim neither implicated the government's discretionary function in setting design specifications, nor created a conflict with the manufacturer's duty to design helicopters in compliance with precise design government specifications. *Id.* at 934.

In rejecting the defense, the Court affirmed the application of the post-sale duty warn to product manufacturers who knew or should have known of a post-sale risk, even if the product is not defective. *Id.* at 933-34.

Following *Timberline*, the Court of Appeals in *Esparza* reversed the lower court's order precluding an equipment leasing company from arguing that fault should be apportioned to the manufacturer based on the post-sale duty to warn. *Esparza*, 15 P.3d at 203.

In *Esparza*, the plaintiff claimed the equipment leasing company failed to inspect and test a manlift that tipped over, severely injuring the plaintiff who was working on it. *Id.* at 191. The defendant equipment company argued that fault should be allocated to the manufacturer, who knew that the circuit cards in the manlift contained transistors that tended to blow out at low levels of electrical exposure. *Id.* The evidence demonstrated that one other similar accident had occurred as a result of the faulty transistors, and that the manufacturer had designed new cards in response to customer requests for more reliable components. *Esparza*, 15 P.3d at 196.

The Court found these facts sufficient to submit the issue of post-sale failure to warn to the jury. *Id.* at 198. In reaching this decision, the Court considered the magnitude of the risk, the seriousness of the injury and the feasibility of providing a warning. *Id.* at 198-99. It found that notifying customers of the availability of the new cards would have been relatively easy, and that although the risk of the cards failing was not great, the danger was grave. *Id.* at 198. It also applied a reasonableness standard to the manufacturer that held the manufacturer up as an expert in the field. *Id.* at 199.

Washington law tracks the Restatement (Third) of Torts: Product Liability section 10, which imposes a duty to warn irrespective of whether a latent defect existed in the product at the time of sale. Like the rule stated in the Restatement, Washington law requires manufacturers to provide a post-sale warning when a reasonable person would do so, regardless of the existence of a defect at the time of sale.

Whether the facts give rise to a duty to warn is a question of law for the court. *Id.* *Esparza* indicates that a court will consider various factors in reaching this conclusion, and that even one prior similar accident may be sufficient to submit the cause of action to a jury if other factors weigh in favor of imposing a duty.

### **West Virginia – Elliot G. Hicks**

In *Johnson by Johnson v. GM Corp.*, 190 W. Va. 236, 438 S.E.2d 28 (1993), the injured parties were hurt in a two-car motor vehicle accident while driving a 1978 Oldsmobile. Plaintiffs-appellants alleged that the seatbelts in that car were defective. A jury trial was held and under both strict liability and negligence theories, plaintiffs were

awarded large verdicts. On appeal, defendant argued that the trial court erred in allowing evidence and instructing the jury that GMC had a post-sale duty to warn, because in the defendant's opinion, the defect must have been present at the time of sale. (This argument was made only as to the negligent duty to warn theory.) On the other hand, plaintiffs contended that the duty to warn was continuing. Dismissing the duty to warn under a theory of strict liability, the court recognized that it had "set boundaries for the duty to warn in products liability cases which are tried under a strict liability theory . . . ." 190 W. Va. at 245. This is because strict liability is based on facts surrounding the product when it is manufactured, and not subsequent changes that might occur. On the other hand, there is a possible post-sale duty to warn based on a negligence theory. In *Johnson*, it was unclear how the jury determined that defendant had a duty to warn, and, therefore, the evidence was lacking as to whether the verdict was appropriate.

Obviously, West Virginia recognizes a post-sale duty to warn in the negligence arena, since negligence actions center on the activities of the defendant-manufacturer. It remains to be seen whether West Virginia might recognize a duty to warn under strict liability, especially if the product was not defective when made.

### **Wisconsin – Stephanie A. Scharf and Thomas P. Monroe**

Through common law decisions, Wisconsin imposes a duty to implement post-sale warnings and remedial measures. See *Kozlowski v. John E. Smith's Sons Co.*, 87 Wis. 2d 882, 898-99, 275 N.W.2d 915, 922-23 (1979); *Sharp v. Case Corp.*, 227 Wis. 2d at 24, 595 N.W.2d at 39 (1999). The *Kozlowski* plaintiff was injured when a sausage stuffing machine, first marketed in 1938, malfunctioned in 1977. By 1971, a safety device that would have prevented the injuries had become standard equipment, although the manufacturer failed to notify the buyer about the device during sales calls to the plant. The *Kozlowski* court limited its holding by distinguishing industrial products from consumer household goods, such as fans, snowblowers or lawn mowers which become increasingly hazard-proof with each succeeding model. *Kozlowski*, 87 Wis 2d. at 901, 275 N.W.2d at 923. The court reasoned that it was "beyond reason and good judgment to hold a manufacturer responsible for a duty of annually warning of safety hazards on household items, mass produced and used in every American home, when the product is 6 to 35 years old and outdated by some 20 newer models equipped with every imaginable safety innovation known in the state of the art." *Id.* at 901, 275 N.W.2d at 924. Factors to consider in determining whether there is a continuing post-sale duty to warn include "the nature of the industry, warnings given, the intended life of the machine, safety improvements, the number of units sold and reasonable marketing practices, combined with the consumer expectations inherent therein." *Id.*

Twenty years later, in *Sharp*, 227 Wis. 2d at 23-24, 595 N.W.2d at 390, the Wisconsin Supreme Court appears to have expanded the scope of post-sale duties, although it did not expressly so state. The court affirmed a jury verdict holding a manufacturer liable because it failed to implement adequate remedial measures, such as

post-sale warnings or recalls, when such warnings were feasible and inexpensive. *Id.* at 26, 595 N.W.2d at 391.

Wisconsin federal courts have also recognized a manufacturer's post-sale duties. See *Gracyalny v. Westinghouse Elec. Corp.*, 723 F.2d 1311, 1318-19 (7th Cir. 1983) (recognizing a post-sale duty to warn or retrofit); *Olsen v. Ohmeda Div. of Boc Group, Inc.*, 863 F. Supp. 870, 873-74 (E.D. Wis. 1994) (recognizing the post-sale duty to warn but holding that the duty did not apply because the manufacturer was neither aware nor should have been aware of the defect before the injury).

### **Wyoming – Thomas P. Branigan**

There is no clear Wyoming authority recognizing a post-sale duty to warn. The Wyoming Standard Jury Instructions, 11.05 – Products Liability – Defective Condition – could be liberally interpreted to allow a post-sale duty to warn claim. This instruction reads:

A defective condition can include a defect [in the design of the product] [in the product's preparation or manufacture] [in the product's container or package] [in the instructions or warnings reasonably necessary for the product's safe use].

It is the last clause of the instruction that could arguably allow a post-sale duty to warn. However, in *Continental Ins. v. Page Engineering Co.*, 783 P.2d 641 (Wyo.1989), the Wyoming Supreme Court rejected a post-sale failure to warn claim in a subrogation case involving property damage only. *Continental Ins.* involved the failure of a drag line used in an open mining pit operation by Bridger Coal, an insured of Continental Insurance and other insurers. Page Engineering Co. manufactured and sold the drag line. Continental Insurance and other insurers paid Bridger's losses caused by the failure of the drag line.

The subrogation complaint by Continental and the other insurers alleged theories of negligence, strict liability and failure to warn. The complaint was dismissed under the "Economic Loss" doctrine. The dismissal was affirmed by the Wyoming Supreme Court.

The *Continental Ins.* case provided the Wyoming Supreme Court the opportunity to recognize a post-sale duty to warn. However, because the damages were limited to property only, the Court affirmed the trial court's dismissal of the complaint based on the Economic Loss doctrine. The dissenting opinion by Justice Urbigkit cogently analyzed case law around the country supporting a post-sale duty to warn, to no avail.

It could be argued that because the *Continental Ins.* case was based on a property damage loss versus a personal injury claim where tort law would apply and because of the broad language of W.S.J.I. § 11.05, a post-sale duty to warn claim may be pursued in

Wyoming against a product manufacturer/seller where personal injuries damages are at stake. The dissenting opinion from *Continental Ins.* could also be used to strengthen any argument that Wyoming should recognize such a theory of liability.

