

# Post-Sale Duties

## THE MOST EXPANSIVE THEORY IN PRODUCTS LIABILITY

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### I. INTRODUCTION

Manufacturing, designing, and selling safe products does not totally satisfy a product manufacturer's legal duties. A few U.S. courts, starting in 1959, held that manufacturers have a duty to warn product users when they learn of risks in their product after sale even if the product was not defective when sold.<sup>1</sup> A number of courts, on the other hand, held that there was no such duty.<sup>2</sup>

In the 1990s, the American Law Institute ("ALI") considered the status of products liability law in the United States. This culminated in the publication of the *Restatement (Third) of Torts: Products Liability* ("*Restatement (Third)*").<sup>3</sup> The Institute had to decide whether enough precedent existed to support a section on the "post-sale duty to warn" in this enunciation of products liability law.

The law professors who served as the drafters of the *Restatement (Third)* ("Reporters"), considered all of the cases through 1997, and despite a split of authority, felt there was sufficient support in case law and common sense to support a "post-sale duty to warn in the

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<sup>1</sup> *Cover v. Cohen*, 461 N.E.2d 864, 871 (N.Y. 1984) ("Although a product [may] 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." (citations omitted)); *see also* *Comstock v. Gen. Motors Corp.*, 99 N.W.2d 627, 634 (Mich. 1959); *Walton v. Avco Corp.*, 610 A.2d 454, 459 (Pa. 1992).

<sup>2</sup> *Williams v. Monarch Mach. Tool Co.*, 26 F.3d 228 (1st Cir. 1994) (no post sale duty to warn if product was reasonably safe at the time of sale); *see also* *Romero v. Int'l Harvester Co.*, 979 F.2d 1444, 1449 (10th Cir. 1992); *Carrizales v. Rheem Mfg. Co.*, 589 N.E.2d 569, 579 (Ill. App. Ct. 1991).

<sup>3</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998).

*Restatement (Third)*.<sup>4</sup> This proposed inclusion resulted in widespread debate. The plaintiff-oriented members of the Institute wanted this section included while some of the defense-oriented members wanted it omitted or severely limited.<sup>5</sup> Post-sale duty to warn was ultimately included in the final *Restatement (Third)*.<sup>6</sup>

The *Restatement (Third)* and supporting case law require manufacturers or product suppliers, in certain instances to provide post-sale warnings or possibly to recall or repair products.<sup>7</sup> In analyzing possible post-sale liability, it is important that manufacturers and product suppliers be aware of the factors that may trigger a post-sale duty under the common law. In addition, manufacturers and product suppliers need to be very familiar with post-sale duties imposed on them by U.S. agencies and, if the product is sold outside the U.S., by foreign government agencies. Armed with this knowledge, they can establish procedures to identify the existence of the duty and implement appropriate post-sale remedial measures to prevent or limit exposure based on post-sale conduct.

This Article provides an overview of the *Restatement (Third)*'s post-sale duty sections. In addition, it discusses relevant case law and the impact of the *Restatement (Third)* on developing case law. Part II provides a background of the post-sale duty sections of the *Restatement (Third)*. Parts III-IX look back to case law prior to the *Restatement (Third)* and analyze how courts at that time dealt with post-sale duty issues including negligence standards, post-sale knowledge, defect timing questions, identification of product users, the duty to inform of safety improvements, and the duty to recall. Part X examines case law decisions that post-date the *Restatement (Third)*'s drafting, divided according to whether the court accepted, rejected, or adopted some variation of the Restatement sections. And lastly, Part XI provides a brief discussion of regulatory post-sale duties.

## II. *RESTATEMENT (THIRD)*: SECTIONS 10, 11, AND 13

The *Restatement (Second) of Torts: Products Liability* (“*Restatement (Second)*”) added section 402A in 1965 to adopt newly-developed common law rules making product manufacturers strictly liable for harms caused by defective products. But section 402A did not contain post-sale duty provisions.<sup>8</sup> According to section 388 of the *Restatement (Second)*, warnings were required only if a risk associated

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<sup>4</sup> See James A. Henderson, Jr. & Aaron D. Twerski, *The Politics of the Products Liability Restatement*, 26 HOFSTRA L. REV. 667 (1998), for a general discussion of the process by which the Reporters and the American Law Institute decided which sections to include.

<sup>5</sup> *Id.*

<sup>6</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 (1998).

<sup>7</sup> *Id.* §§ 10-11, 13.

<sup>8</sup> RESTATEMENT (SECOND) OF TORTS 2D § 402A (1965).

with a product was known or should have been known at the time of sale.<sup>9</sup> The post-sale duty section in the *Restatement (Third)* was truly new when written, not merely a revision of section 388. It provides as follows:

§ 10. 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 if 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 if:

- (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.<sup>10</sup>

The Reporters considered post-sale warnings to be the “most expansive area in the law of products liability” and a “monster duty.”<sup>11</sup> However, the Reporters felt that section 10 limited this monster duty by requiring the plaintiff to prove all four factors before they would be allowed to pursue this claim.<sup>12</sup>

Section 10 does not include a duty to do anything other than warn.<sup>13</sup> However, since there was case law holding that, in certain narrow instances, a manufacturer may have a duty to recall or retrofit a product, the ALI decided to also deal with this precedent.<sup>14</sup> Given the great burden of any post-sale activities, especially recall, the Institute included a section severely limiting the duty to recall a product.<sup>15</sup> Section 11 of the *Restatement (Third)* provides as follows:

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

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<sup>9</sup> *Id.* § 388.

<sup>10</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 (1998).

<sup>11</sup> JAMES A. HENDERSON, JR. & AARON TWERSKI, *TEACHER'S MANUAL FOR PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 159 (6th ed. 2008).

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

<sup>13</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 (1998), cmt. a.

<sup>14</sup> *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451, 453 (2d Cir. 1969); *Downing v. Overhead Door Corp.*, 707 P.2d 1027, 1033 (Colo. Ct. App. 1985).

<sup>15</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 11 (1998).

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 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 person in recalling the product.<sup>16</sup>

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.<sup>17</sup> The main reason for including section 11 was to make it clear that section 10 does not include a duty to recall the product. However, section 11 also included the so-called "Good Samaritan" doctrine where liability can attach for a negligent recall, even if it is voluntary.<sup>18</sup>

The last section pertaining to the post-sale duty to warn is section 13.<sup>19</sup> This section, which concerns a successor's liability for a failure to issue a post-sale warning, states in part:

§ 13. Liability of Successor for Harm Caused by Successor's Own Post-Sale Failure to Warn

(a) A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity, whether or not liable under the rule stated in § 12,<sup>20</sup> is subject to liability for harm to persons or property caused by the successor's failure to warn of a risk created by a product sold or distributed by the predecessor if:

- (1) the successor undertakes or agrees to provide services for maintenance or repair of the product or enters into a similar relationship with purchasers of the predecessor's products 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>21</sup>

The section further states that a reasonable person in the successor's position would provide such a warning if the four conditions in section 10 are met.<sup>22</sup>

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

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

<sup>18</sup> *Id.* §§ 11(a)(2)-11(b) & cmt. c (1998).

<sup>19</sup> *Id.* § 13.

<sup>20</sup> *Id.* § 12. Section 12 provides for liability for a successor manufacturer even if a predecessor manufacturer sold the product in a defective condition. *Id.*

<sup>21</sup> *Id.* § 13.

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

Case law supported the inclusion of section 13 into the *Restatement (Third)*'s post-sale duty sections and emphasizes the same important factors for finding successor liability.<sup>23</sup>

### III. DISTINGUISHING POST-SALE DUTY FROM TIME-OF-SALE DUTY

In examining case law prior to publication of the *Restatement (Third)*, it became apparent to the Reporters that there was great confusion by juries, judges, and scholars.<sup>24</sup> Many of the cases reviewed were unclear as to whether the jury or judge believed that the product was defective when sold or whether the product only became defective after sale.

If it was defective when sold, then it was judged under section 402A (or now section 2 of the *Restatement (Third)*).<sup>25</sup> Since the *Restatement (Second)* did not have a post-sale duty section, courts that discussed this new theory of liability simply assumed that the defect became known after sale without considering whether it was defective when sold.<sup>26</sup>

The *Restatement (Third)* makes it clear that this post-sale duty is independent of a time-of-sale defect and therefore selling a defective product can result in claims of time-of-sale defect and also post-sale failure to warn.<sup>27</sup> In addition, the *Restatement (Third)* makes it clear that if the product was defective when sold, the manufacturer cannot be absolved of liability by issuing a post-sale warning for harms caused before any warning is issued.<sup>28</sup>

While the *Restatement (Third)* is generally viewed as favorable to product manufacturers and sellers, section 10 clearly establishes a cause of action that creates opportunities for plaintiffs to argue for further discovery of post-sale actions and greater admissibility of post-sale accidents, thereby providing a greater chance of an award of punitive damages.<sup>29</sup>

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<sup>23</sup> *Sherlock v. Quality Control Equip. Co.*, 79 F.3d 731, 734 (8th Cir. 1996) ("The critical element required for the imposition of the duty is a continuing relationship between the successor and the predecessor's customers for the benefit of the successor."); *Patton v. TIC United Corp.*, 77 F.3d 1235, 1240 (10th Cir. 1996) ("[A] 'successor entity' . . . may incur a duty to warn if it has knowledge of the defective condition of the predecessor's product, and has a 'more than casual' relationship with the customers of the predecessor entity that is an 'economic benefit' to the successor." (quoting *Stratton v. Garvey Int'l, Inc.*, 676 P.2d 1290, 1294 (Kan. Ct. App. 1984))).

<sup>24</sup> *Henderson & Twerski*, *supra* note 4, at 669.

<sup>25</sup> RESTATEMENT (SECOND) OF TORTS 2D § 402A (1965); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998).

<sup>26</sup> *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 835 (Minn. 1988).

<sup>27</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 cmt. j (1998).

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

<sup>29</sup> Researchers analyzing punitive damage cases have found almost 75% of such awards to be based on the failure of a manufacturer to take appropriate post-sale actions. Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 66 (1992).

In addition, by stating that a manufacturer cannot cut off liability no matter how effective the post-sale warning program, this section almost creates absolute liability for injuries sustained by a product defect that was known after sale and where the manufacturer undertakes a less than reasonable post-sale warning program.<sup>30</sup> Plaintiffs can now argue that a program that was not successful in warning them was not reasonable. And, arguably, when it comes to post-sale programs, the manufacturer or product supplier can always do more.

#### IV. A CAUSE OF ACTION BASED ON POST-SALE DUTY SOUNDS IN NEGLIGENCE

While synthesizing years of judicial consideration of post-sale issues, section 10 still raises many questions that have been and will be litigated for years.<sup>31</sup> One aspect of section 10, however, is clear: A cause of action based on post-sale duties must sound in negligence, since the reasonableness of a product supplier's conduct is the focus of the post-sale inquiry.<sup>32</sup>

According to section 10(b), a seller can only be subject to post-sale duties if a "reasonable" person would have supplied such a warning.<sup>33</sup> The four factors of section 10(b) are fact-based, making the reasonableness of supplying a post-sale warning the key to establishing a post-sale duty.<sup>34</sup>

Judging post-sale conduct through the lens of negligence is consistent with case law prior to the adoption of the *Restatement (Third)*.<sup>35</sup> Actual or constructive knowledge of a post-sale risk is necessary to impose a post-sale duty.<sup>36</sup> Also, negligence is the correct legal theory when a manufacturer's conduct is at issue,<sup>37</sup> and as such, application of a post-sale duty depends on the reasonableness of the manufacturer's conduct.<sup>38</sup> Consequently, a product supplier cannot be strictly liable for post-sale conduct under section 10.

#### V. ACQUISITION OF POST-SALE KNOWLEDGE

Section 10, by confirming the existence of post-sale duties in the law, created an affirmative duty for product suppliers to exercise

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<sup>30</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 cmt. j (1998).

<sup>31</sup> See *infra* Parts III and X.

<sup>32</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 cmt. b (1998).

<sup>33</sup> *Id.* § 10(a).

<sup>34</sup> *Id.* § 10(b).

<sup>35</sup> See *id.* § 10 cmt. b (1998).

<sup>36</sup> *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1314 (Kan. 1993); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10(b)(1) (1998).

<sup>37</sup> *Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d at 1310.

<sup>38</sup> *Crowston v. Goodyear Tire & Rubber Co.*, 521 N.W.2d 401, 409 (N.D. 1994).

reasonable care to learn of post-sale problems with their products. Section 10(a) bases a post-sale duty, in part, on suppliers who know or reasonably should know that their products pose a substantial risk of harm to persons or property.<sup>39</sup> In addition, comment c states that the general duty of reasonable care may require manufacturers to investigate when reasonable grounds exist for the seller to suspect that a hitherto unknown risk exists.<sup>40</sup>

However, comment c to section 10 also makes it clear that, except for prescription drugs and medical devices,<sup>41</sup> “constantly monitoring product performance in the field is usually too burdensome” and will not support a post-sale duty.<sup>42</sup> Despite this language, plaintiffs have tried to use section 10 and comment c to impose a broader duty on product suppliers to establish systems to obtain information from the field. The failure of a manufacturer to set up a system to gather post-sale information and then claim a lack of knowledge, may appear unreasonable to a jury, especially when one could be set up with little effort and expense.

Many courts, however, reflected concerns similar to those raised in the *Restatement (Third)* about imposing too heavy of a burden on manufacturers to monitor field performance. In *Patton v. Hutchinson Wil-Rich Manufacturing Company*, the Kansas Supreme Court held that plaintiffs who allege post-sale duty claims must prove that manufacturers “acquired knowledge of a [post-sale] defect.”<sup>43</sup> The case did not, however, impose an affirmative duty on suppliers to take reasonable steps to learn of post-sale problems that were not brought to their attention. This is consistent with earlier opinions.<sup>44</sup>

The language in section 10 could be used to argue that the scope of other manufacturers’ and suppliers’ legal duties are extended by requiring reasonable affirmative actions to learn of post-sale product risks. Regardless of the legal duty, affirmatively trying to learn of post-sale risks is a beneficial activity for enhancing product safety and preventing accidents.

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<sup>39</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10(a) (1998).

<sup>40</sup> *Id.* § 10 cmt. c.

<sup>39</sup> Long-standing case law requires prescription drug and medical device manufacturers to keep themselves informed of scientific developments and provide the medical profession with information about the risks of drugs already on the market. This affirmative duty for drug and device manufacturers is consistent with the language in section 10 and may also be imposed by the Code of Federal Regulations for other products. *See, e.g.*, *Tinnerholm v. Parke Davis & Co.*, 285 F. Supp. 432, 451 (S.D.N.Y. 1968); *Baker v. St. Agnes Hosp.*, 421 N.Y.S.2d 81, 85 (N.Y. App. Div. 1979).

<sup>42</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 cmt. c (1998).

<sup>43</sup> *Hutchinson Wil-Rich Mfg.*, 861 P.2d at 1314.

<sup>44</sup> *McAlpin v. Leeds & Northrup Co.*, 912 F. Supp. 207, 210 (W.D. Va. 1996) (“ends of justice” require a manufacturer to warn if the manufacturer is made aware of the defect (quoting *Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d 274, 280 (4th Cir. 1987))); *Comstock v. Gen. Motors Corp.*, 99 N.W.2d 627, 634 (Mich. 1959) (duty triggered when knowledge of post-sale risk “becomes known” to manufacturers); *Cover v. Cohen*, 461 N.E.2d 864, 871 (N.Y. 1984) (post-sale duty triggered by knowledge “brought to the attention of” manufacturers and vendors).

## VI. EXISTENCE OF THE DEFECT: A QUESTION OF TIMING

Section 10(a) obviously contemplated that knowledge of a risk or defect acquired by a supplier must be obtained after the sale.<sup>45</sup> The section is less clear about when the defect must actually come into existence. Comment a to section 10 explains that a post-sale duty may be imposed “...whether or not the product is defective at the time of original sale...”<sup>46</sup> The Institute acknowledged in comment a that imposing a post-sale duty, even if the product was not defective when sold, was relatively new.<sup>47</sup> It was quick to point out, however, that the requirement that the plaintiff prove section 10’s four factors should prevent “unbounded” and onerous post-sale burdens on product sellers.<sup>48</sup>

The position of section 10—that it is immaterial whether the defect existed at the time of sale—contrasts with many decisions where courts have refused to impose post-sale duties when products were not defective when sold.<sup>49</sup>

## VII. PRODUCT USERS: CAN THEY BE IDENTIFIED?

Section 10(b) requires proof that people to whom a post-sale warning should be provided can be identified before a post-sale duty is triggered.<sup>50</sup> This case-specific inquiry depends on a number of factors including the type of product, the number of units sold, the number of potential users, the availability of records, and the available means of tracing product users.<sup>51</sup> Comment e makes it clear that when no records identifying the customers are available, a post-sale duty does not arise.<sup>52</sup>

These factors formed the basis for the Wisconsin Supreme Court’s holding that the manufacturer of a sausage stuffing machine had a duty to provide users with information about a new safety by-pass valve.<sup>53</sup> The machines were sold to a limited market where the manufacturer knew all of the product’s owners.<sup>54</sup> The Wisconsin court made it clear, however, that it was not crafting an absolute post-sale duty for all manufacturers to warn of safety improvements year after year since many products are mass-produced and tracing users to warn of safety improvements would place an undue burden on manufacturers.<sup>55</sup>

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<sup>45</sup> See discussion *supra* Part V.

<sup>46</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 cmt. a (1998).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See *infra* Part X.F.

<sup>50</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10(b)(2) (1998).

<sup>51</sup> *Id.* § 10 (Reporter’s Note to cmt. a).

<sup>52</sup> *Id.* § 10 cmt. e.

<sup>53</sup> *Kozlowski v. John E. Smith’s Sons Co.*, 275 N.W.2d 915, 923 (Wis. 1979).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 923-24.



Similarly, the North Dakota Supreme Court held that it would be difficult to require the manufacturer of mass-produced tire rims to trace individual users if the rims were not unique or sold to a specialized group of customers.<sup>56</sup> While recognizing the problem of providing individual notice to the original purchasers, this court nevertheless held that the defendant had a duty to warn foreseeable product users about dangers which were discovered after the product was originally sold.<sup>57</sup>

An interesting question remains as to how far a manufacturer must go to identify its customers. What would a reasonable manufacturer concerned about safety do? Establishing a “traceability” system before the product is sold is the most effective way to find customers. However, such systems take planning, considerable effort, and substantial cost.<sup>58</sup> The question of whether a particular defendant’s actions are “reasonable” will be case-specific and decided by the jury. The ALI continually stresses in comments to section 10 that this duty should not be “unbounded” and onerous and that courts need to be careful before imposing such a duty.<sup>59</sup>

The federal government has jurisdiction over many products and Congress recently “raised the bar” in this area. In August 2008, the President signed the Consumer Product Safety Improvement Act,<sup>60</sup> which contains several new provisions to enhance the identification and tracking of children’s products.<sup>61</sup> The federal government already mandates customer tracking for products such as car seats<sup>62</sup> and medical devices.<sup>63</sup>

### VIII. DUTY TO INFORM OF SAFETY IMPROVEMENTS

Manufacturers should always strive to improve the safety of their products. But does the manufacturer have a duty to inform prior customers of each safety improvement made in similar products manufactured after the sale of the less safe product? Prior to the drafting

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<sup>56</sup> *Crowston v. Goodyear Tire & Rubber Co.*, 521 N.W.2d 401, 408 (N.D. 1994).

<sup>57</sup> *Id.* at 409; *see also* *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 832 (Minn. 1988) (holding tire rim manufacturer had a post-sale duty to instruct and warn, so that potential users of its product would be apprised of safety hazards which, at an earlier time, were not fully appreciated).

<sup>58</sup> PROD. SAFETY AND LIAB. PREVENTION INTEREST GROUP, AMERICAN SOCIETY FOR QUALITY, *THE PRODUCT RECALL PLANNING GUIDE* (2d ed. 1999).

<sup>59</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 cmts. a & d (1998). There are also several federal guidelines, as well as industry guidelines, describing what might be considered a reasonable program. For a recent example of an industry produced guideline, *see* PROD. SAFETY AND LIAB. PREVENTION INTEREST GROUP, *supra* note 58.

<sup>60</sup> Consumer Product Safety Improvement Act (CPSIA) of 2008, H.R. 4040, 110th Cong. (2008).

<sup>61</sup> 15 U.S.C. § 2063(a)(5) (2006); Consumer Product Safety Improvement Act (CPSIA) of 2008, Pub. L. No. 110-314, § 104(d)(2)-(d)(3), 122 Stat. 3016, 3030 (2008) (to be codified at 15 U.S.C. § 2056a).

<sup>62</sup> 49 C.F.R. § 588.5-6 (2007).

<sup>63</sup> 21 U.S.C. § 360i(e) (2006).

of *Restatement (Third)*, some courts found it reasonable to impose a duty to inform purchasers of safety improvements when:

1. There is a continuing relationship between the manufacturer and the purchaser;
2. The market is limited; and
3. The cost of providing notice of the safety improvement is negligible.<sup>64</sup>

Most courts prior to 1998, however, found that there was no post-sale duty to inform customers of safety improvements when the original product had been properly designed and manufactured.<sup>65</sup>

Section 10 did not foreclose the imposition of a post-sale duty to inform about safety improvements but made it clear that the four factors in that section must be met.<sup>66</sup> However, it said that “. . . in most cases it will be difficult to establish each of the four section 10 factors that are a necessary predicate for a post-sale duty to warn if the warning is merely to inform of the availability of a product-safety improvement.”<sup>67</sup>

It is certain that plaintiffs have tried to use a manufacturer’s post-sale warning of a product safety improvement to argue that the original product, without the safety improvement, was defective at the time of sale. However, any attempt to use the improvement as evidence of a time-of-sale defect will generally run afoul of evidentiary rules that preclude the introduction of “remedial measures” evidence.<sup>68</sup>

A manufacturer must carefully consider whether it is reasonable and prudent to notify prior customers of safety improvements. The manufacturer should perform the kind of analysis that is done under section 10 in deciding whether a duty arises in the first place. If the manufacturer’s post-sale improvement significantly improves safety and the manufacturer can easily find its customers, the manufacturer should consider informing its prior customers about the safety improvement.

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<sup>64</sup> *Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519 (Tex. Civ. App. 1979) (holding a duty to retrofit where manufacturer assumed duty to notify users of safety improvements), *overruled in part by* *Torrington Co. v. Stutzman*, 46 S.W.3d 829 (Tex. 2000); *Kozlowski v. John E. Smith’s Sons Co.*, 275 N.W.2d 915, 923-24 (Wis. 1979) (holding a duty to inform users of machine of post-sale safety improvements where users were traceable).

<sup>65</sup> *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1311 (Kan. 1993); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 cmt. a (1998).

<sup>66</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10, cmt. a (1998).

<sup>67</sup> *Id.* § 10 (Reporter’s Note to cmt. a).

<sup>68</sup> Rule 407 of the Federal Rules of Evidence provides that evidence of measures taken after an injury “is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction.” FED. R. EVID. 407. Most state rules of evidence also bar the introduction of such evidence to prove a time-of-sale defect.

## IX. POST-SALE DUTY TO RECALL

Section 11 set forth a limited duty to recall a defective product.<sup>69</sup> *Comment a* made it clear that this duty is different from the post-sale duty in section 10.<sup>70</sup> This comment also says that improvements in product safety do not trigger a duty to recall or retrofit a product because that would discourage manufacturers from making safer products.<sup>71</sup>

This limited duty is based mostly on a government directive specifically requiring the manufacturer to recall an imminently hazardous product.<sup>72</sup> The Michigan Supreme Court declined an invitation to impose a common law duty to recall or repair in a negligent design claim where a plaintiff alleged that a manufacturer knew or should have known of a defect at the time of sale.<sup>73</sup> While Michigan required a warning in such circumstances, the court concluded that “the duty to repair or recall is more properly a consideration for administrative agencies and the Legislature.”<sup>74</sup>

However, the *Restatement (Third)* incorporated the “Good Samaritan” or “volunteer” rule that one who undertakes a rescue must act reasonably so as not to put the rescued party in worse shape than before.<sup>75</sup> This rule, in the context of products liability, comes from the belief that voluntary recalls are typically undertaken in the anticipation that a government agency will require one anyway.<sup>76</sup>

This belief by the ALI and some courts may be correct in a general sense. However, there are many voluntary recalls, retrofits, or even post-sale warning programs that are done to enhance safety and would not constitute a post-sale duty under section 10. With this doctrine incorporated into the *Restatement (Third)*, it is likely, though impossible to prove for certain, that only those manufacturers who undertook truly voluntary programs were prepared to do so in a way that would not be considered negligent. This determination is difficult and case-specific.

Hopefully, more manufacturers will “do the right thing” and try to improve the safety of their products and try to anticipate what might be considered reasonable. Unfortunately, the fact that an accident happened means, by definition, that the post-sale remedial program was arguably ineffective for the injured party.

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<sup>69</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 11 (1998).

<sup>70</sup> *Id.* cmt. a (“The duty to recall or repair should be distinguished from a post-sale duty to warn about product hazards discovered after sale.”).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* (“Moreover, even when a product is defective within the meaning of § 2, § 3, or § 4, an involuntary duty to recall should be imposed on the seller only by a governmental directive issued pursuant to statute or regulation.”); *see also* 15 U.S.C. § 2061(b)(1) (2006).

<sup>73</sup> Gregory v. Cincinnati Inc., 538 N.W.2d 325, 333-34 (Mich. 1995).

<sup>74</sup> *Id.* at 334; *accord* Patton v. Hutchinson Wil-Rich Mfg. Co., 861 P.2d 1299, 1315 (Kan. 1993); Morrison v. Kubota Tractor Corp., 891 S.W.2d 422, 429-30 (Mo. Ct. App. 1994).

<sup>75</sup> *See supra* note 18.

<sup>76</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 11 cmt. c (1998).

## X. DEVELOPMENT OF POST-SALE DUTY LAW AFTER 1998

As our earlier discussion suggests, the rules that have evolved regarding a post-sale duty to warn fall into three general categories: (1) no duty if the product was reasonably safe at the time of sale; (2) a duty to warn only of risks that existed at the time of sale but were only later revealed; and (3) a duty to warn when a reasonable manufacturer would do so. This last rule is the broadest and is the one reflected in Section 10.

Under the Restatement's rule, a manufacturer could have a duty to warn even of risks that did not exist at the time of the product's sale. There may be a duty to warn under Section 10 if, for example, new safety technology becomes available that was not available at the time the product was originally sold, the new design eliminates a substantial risk arising from the product's original design, and the manufacturer can readily identify and communicate an effective warning to the product's current users.

Even under this rule, however, there will typically be no post-sale duty to inform of the availability of a product-safety improvement because the product users would be difficult to trace, the warning would not effectively reduce the risk inherent in the original design, or a reasonable manufacturer may find other reasons to decide against attempts to warn.<sup>77</sup>

An examination of the cases reveals that a few courts have specifically adopted as the law of their jurisdiction the *Restatement (Third)*'s negligence-based post-sale duty to warn and its section 10 factors for determining when that duty arises. Other courts that have essentially adopted the section 10 reasonable manufacturer rule did so before the adoption of the *Restatement (Third)*. Since the *Restatement (Third)*'s adoption, other courts have recognized a post-sale duty to warn without actually mentioning the *Restatement*. Some jurisdictions have specifically rejected section 10 and others have refused to adopt a post-sale duty to warn without mentioning the *Restatement (Third)*. A fair number of cases decided both before and after ALI's adoption of the *Restatement (Third)* have imposed a post-sale duty to warn, limited to latent risks that existed at the time of sale. And finally, a few cases have specifically adopted section 13.

We have organized our brief discussion of the post-*Restatement (Third)* case law into the categories just described.

### A. Cases Specifically Adopting Section 10

In *Lewis v. Ariens Company*, the Supreme Judicial Court of Massachusetts specifically adopted "the principles set forth in the

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<sup>77</sup> See *id.* § 10 (Reporter's Note to cmt. a).

Restatement (Third) . . . regarding a manufacturer's continuing duty to warn users of substantial product risks or dangers discovered postsale."<sup>78</sup>

Lewis injured his hand in the impeller blades of a snow blower when he slipped and fell causing his hand to enter the machine's discharge chute. The snow blower was manufactured and originally sold in 1966 by Ariens Company. Studies published in 1971 and 1975 identified the dangers of the snow blower as it was originally designed. Lewis had purchased the machine from the sister of a friend in 1982, sixteen years after it was sold by Ariens. The accident occurred in 1988.

In an earlier holding, the court had abandoned a strict liability approach in favor of negligence principles and revised Massachusetts' law to say that a manufacturer is subject to a continuing duty to warn of risks discovered following the sale of a product.<sup>79</sup> Ariens Company argued, however, that any post-sale duty to warn did not extend to remote purchasers. In response, the court pointed out that section 10 does not limit the duty to warn to direct purchasers only.<sup>80</sup> But the court also observed that comment e to section 10 says that a seller's inability to identify those for whom warnings may be useful may prevent a duty from arising, and that comment a to section 10 notes that the costs of identifying and communicating with product users years after sale are often daunting. On the facts of this case, the court found that Ariens had no duty to warn 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 additional 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."<sup>81</sup>

Nevertheless, the court concluded that "the principles set forth in [section] 10 represent a logical and balanced embodiment" of Massachusetts' post-sale duty to warn rule.<sup>82</sup>

Even earlier, the Supreme Court of Iowa had specifically adopted section 10 and its factors for determining whether a product seller has a post-sale duty to warn. In *Lovick v. Wil-Rich*,<sup>83</sup> a farmer was injured when he attempted to lower the wings of a cultivator into position to begin cultivation. When Lovick removed a pin designed to hold the

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<sup>78</sup> 751 N.E.2d 862, 864 (Mass. 2001).

<sup>79</sup> *Vassallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909, 923 (Mass. 1998). Both *Lewis* and *Vassallo* involved the issue of whether the product manufacturer had breached the implied warranty of merchantability by failing to warn of the risk giving rise to the injury. But in *Hoffman v. Houghton Chemical Corp.*, 751 N.E.2d 848, 859 (Mass. 2001), the Massachusetts court expressly recognized that negligent failure to warn and failure to warn under breach of warranty are to be judged by the same standard: the reasonableness of the defendant's actions in the circumstances.

<sup>80</sup> 751 N.E.2d at 866.

<sup>81</sup> *Id.* at 867.

<sup>82</sup> *Id.*

<sup>83</sup> 588 N.W.2d 688 (Iowa 1999).

wing in a vertical position in the event of a hydraulic or mechanical failure, the wing immediately fell on him because the linkage holding the hydraulic cylinder to the wing was broken. The cultivator that injured Lovick was manufactured and sold by Wil-Rich in 1981 and then sold by the original buyer to a second owner in the late 1980s. Lovick, an experienced farmer, was using the cultivator to cultivate a field belonging to the machine's owner.<sup>84</sup>

The cultivator bore a warning sign which cautioned users to remove the pin prior to lowering the wings. The operator's manual warned against going under the wings to remove the pins. In 1983, Wil-Rich learned that a wing of one of its cultivators had fallen and injured the operator. The company subsequently received several other such reports. In 1988, the company began to affix a warning label to its cultivators warning of the danger of going under the wing to remove the pin. In 1994, Wil-Rich began a campaign to notify owners of its cultivators of the danger of falling wings and also made a backup safety-latch kit available for installation on the wings. At trial, Lovick introduced evidence that a competitor of Wil-Rich instituted a safety program in 1983 for its similarly designed cultivator after learning of instances of the wing falling on the operator. The competitor's safety program included efforts to locate the cultivator owners and equip the machines with a safety latch and an upgraded warning label.<sup>85</sup>

The Iowa legislature had enacted a products liability state-of-the-art defense statute in 1986 that provided, inter alia, that "[n]othing in this section shall diminish the duty . . . to warn concerning subsequently acquired knowledge of a defect or dangerous condition that would . . . diminish the liability for failure to warn."<sup>86</sup> Although the post-sale duty to warn is rooted in general negligence principles, the *Lovick* court said that "there are some distinctions which are important to recognize in considering the scope and nature of the post-sale duty [to warn]. Foremost, the burden of a manufacturer to warn product users can radically change after the sale has occurred and the manufacturer no longer has control over the product."<sup>87</sup> The "fighting question," said the court, "is whether it is necessary to articulate the various factors to consider in analyzing the reasonableness of a manufacturer's conduct once it acquires knowledge of a defect in the product following the sale."<sup>88</sup> Concluding that the trial court's general negligence instructions to the jury had failed to give adequate guidance as to how to assess the reasonableness of the manufacturer's post-sale conduct, the court said that a jury must be instructed to consider those factors which make it

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> IOWA CODE § 688.12 (1987).

<sup>87</sup> *Lovick*, 588 N.W.2d at 694.

<sup>88</sup> *Id.* at 695.

burdensome or impractical to provide a post-sale warning. Consequently, the court said “we adopt the Restatement (Third) of Torts: Products Liability section 10, including the need to articulate the relevant factors to consider in determining the reasonableness of providing a warning after the sale.”<sup>89</sup>

The New York Court of Appeals, in *Liriano v. Hobart Corp.*, also specifically cited section 10 for the proposition that a manufacturer may have a post-sale duty to warn in certain circumstances, including instances in which a product’s designed-in safety features have been circumvented or removed by product users and this fact is known to the manufacturer.<sup>90</sup> *Liriano*, a grocery store employee, was injured in 1993 while using the store’s meat grinder without its safety guard. The meat grinder was manufactured and sold in 1961 with a safety guard affixed that prevented a user’s hands from coming into contact with the grinding “worm.” No warnings were placed on the meat grinder to indicate that it was dangerous to operate the machine without the safety guard in place. Hobart began to include such warnings in 1962. At the time of the accident, the safety guard had been removed and Hobart knew, before the accident, that removals of this sort were occurring.<sup>91</sup> The court concluded that a post-sale modification of the product was not in and of itself a defense to a post-sale duty to warn claim.<sup>92</sup> The court said that “[s]uch a duty will generally arise where a defect or danger is revealed by user operation and brought to the attention of the manufacturer; the existence and scope of such a duty are generally fact-specific.”<sup>93</sup> But it did not decide whether, on the facts of the case, Hobart had a post-sale duty to warn.

In *Robinson v. Brandtjen & Kluge, Inc.*,<sup>94</sup> the U.S. Court of Appeals for the Eighth Circuit reaffirmed its earlier holding in another case that South Dakota law permits recovery for a negligent post-sale duty to warn.<sup>95</sup> Referring specifically to section 10, the court concluded that the product manufacturer “did not breach a post-sale duty to warn in this case”<sup>96</sup> involving a printing press sold in the 1940s, more than 50 years before being acquired by the injured party’s employer. Though the court found there was no breach,<sup>97</sup> it likely meant that there was simply

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<sup>89</sup> *Id.* at 695-96; *see also* *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 633 (8th Cir. 2007) (“[I]n Iowa both a pre- and a post-sale duty to warn have been recognized as separate negligence theories of recovery.”).

<sup>90</sup> 700 N.E.2d 303, 307 n.3 (N.Y. 1998) (manufacturer’s post sale duty to warn depends on a number of factors including degree of danger product involves, number of reported incidents, burden of providing warning, and burden or ability to track product after sale).

<sup>91</sup> *Id.* at 305.

<sup>92</sup> *Id.* at 306.

<sup>93</sup> *Id.* at 307.

<sup>94</sup> 500 F.3d 691 (8th Cir. 2007).

<sup>95</sup> *Novak v. Navistar Int’l. Trans. Corp.*, 46 F.3d 844, 850 (8th Cir. 1995).

<sup>96</sup> *Brandtjen*, 500 F.3d at 697.

<sup>97</sup> *Id.*

no post-sale duty to warn in this case. It does say that, given the passage of time, it would be unreasonable to require the manufacturer to identify and warn all of the owners of its products.<sup>98</sup> The difficulty of identifying those who need to be warned is an important factor under section 10 in determining whether a duty exists in the first place.

Section 10 is also cited by the Florida District Court of Appeals in *Sta-Rite Industries, Inc. v. Levey* as authority for the proposition that a swimming pool pump manufacturer had a duty to warn of the dangers of an unsecured protective grate covering the pool drain.<sup>99</sup> However, *Sta-Rite* is not a post-sale duty case; the duty to warn in that case existed at the time the pump was first sold by the manufacturer.<sup>100</sup>

Finally, in *Brown v. Crown Equipment Corp.*,<sup>101</sup> a federal district court ruling on a defense motion in limine concluded that Maine would recognize a negligence-based post-sale duty to warn where a manufacturer's product is not defective at the time of sale but a hazard later develops because of a change in the user environment. It subsequently affirmed that view in ruling against the defendant's motion for judgment as a matter of law after a jury had returned a verdict in the plaintiff's favor, resting its conclusion specifically on the view taken by the Restatement in section 10.<sup>102</sup> In *Brown*, the plaintiff was killed while operating a forklift in a warehouse. The forklift was manufactured in 1989. In 1995, the manufacturer learned that new shelf design in many warehouses exposed forklift operators to the risk of shelving entering the forklift operator's area at an unshielded level and striking the operator. The manufacturer developed an upgrade kit for the forklift that extended the height of the operator's backrest thus reducing the risk of intrusions into the operator's area. However, the manufacturer did not convey this information to the forklift owner who was the plaintiff's employer.<sup>103</sup> On appeal, the U.S. Court of Appeals for the First Circuit said that, because other jurisdictions have disagreed on this question and the Maine Supreme Judicial Court had not spoken, the issue should be certified to the Maine court.<sup>104</sup> In response, the Maine Supreme Judicial Court said that "in limited circumstances . . . there can be a post-sale duty to warn indirect purchasers, but we have not and do not now adopt . . . § 10."<sup>105</sup> The Maine court went on to rule, however, that under the ordinary

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<sup>98</sup> *Id.*

<sup>99</sup> 909 So. 2d 901, 905 (Fla. Dist. Ct. App. 2005).

<sup>100</sup> The court says that a jury question was presented as to whether the defendant had a duty to warn the "purchaser," clearly implying that the duty existed at the time of sale. *Sta-Rite*, 909 So. 2d at 905.

<sup>101</sup> 460 F. Supp. 2d 188 (D. Me. 2006).

<sup>102</sup> *Id.* at 192-93.

<sup>103</sup> *Brown v. Crown Equip. Co.*, 501 F.3d 75, 76 (1st Cir. 2007).

<sup>104</sup> *Id.* at 78.

<sup>105</sup> *Brown v. Crown Equip. Corp.*, 960 A.2d 1188, 1190 (Me. 2008).



common law principles of Maine negligence law, the manufacturer owed the plaintiff a post-sale duty to warn on the facts of this case.<sup>106</sup>

*B. Cases Adopting a Reasonable Manufacturer Rule Decided Prior to the Adoption of the Restatement (Third)*

Several other jurisdictions, in cases decided before the ALI's final approval of section 10, have adopted a reasonable manufacturer standard for determining when a post-sale duty exists and utilized similar factors in deciding reasonableness.<sup>107</sup>

*Robinson v. Brandtjen & Kluge, Inc.* is a case in which the product's design was state-of-the-art and was not defective at the time of manufacture but subsequent improvements in technology had made a safer design feasible at the time the injury occurred.<sup>108</sup> *Brown v. Crown Equipment* is arguably a case in which there was no risk in the original product design but a risk arose when the operating environment for the product was subsequently changed. Both *Lewis v. Ariens* and *Lovick v. Wil-Rich* are examples of cases in which the product as originally designed carried a latent risk that did not become reasonably apparent until after the product had left the manufacturer's control. However, nothing in either opinion suggests that the post-sale duty to warn is limited to cases involving latent risks, and the courts' specific adoption of section 10's principles indicate that there is no such limit on the duty.

*C. Cases Recognizing Post-Sale Duty to Warn Decided After Adoption of Restatement (Third) but Not Mentioning Section 10*

Since the *Restatement (Third)*'s adoption, other courts have recognized a post-sale duty to warn without mentioning section 10. The

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<sup>106</sup> *Id.* at 1193.

<sup>107</sup> *See, e.g., Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1314-15 (Kan. 1993) (liability depends on reasonableness test, which looks at "(1) the nature of the harm that may result from use without notice, (2) the likelihood that harm will occur . . . (3) how many persons are affected, (4) the economic burden on the manufacturer of identifying and contacting current product users . . . (5) the nature of the industry, (6) the type of product involved, (7) the number of units manufactured or sold, and (8) steps taken other than giving of notice to correct the problem"); *Cover v. Cohen*, 461 N.E.2d 864, 872 (N.Y. 1984) ("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."); *Crowston v. Goodyear Tire & Rubber Co.*, 521 N.W.2d 401, 409 (N.D. 1994) ("The reasonableness of the post-sale warnings depend on the facts of each particular case" looking at "(1) the nature of the harm . . . (2) the likelihood that harm will occur . . . (3) how many persons are affected . . . (4) the economic burden on the manufacturer of identifying and contacting current product users . . . (5) the nature of the industry, (6) the type of product involved, (7) the number of units manufactured or sold, and (8) steps taken other than giving of notice to correct the problem.").

<sup>108</sup> *See Brandtjen*, 500 F.3d at 696.

Court of Appeals of Louisiana has observed that the Louisiana Products Liability Act has a provision that states:

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>109</sup>

Connecticut imposes liability for a negligent breach of a manufacturer's continuing, post-sale duty to warn of "known or knowable dangers associated with using its product."<sup>110</sup> Georgia law imposes on product manufacturers "a duty to exercise ordinary care to warn users of a known or reasonably foreseeable risk of injury or death after a product's sale."<sup>111</sup> And under North Dakota law, "when a manufacturer learns about the dangers associated with the use of its product after it is manufactured and sold, the manufacturer has a post-sale duty to warn about these dangers."<sup>112</sup> All of these jurisdictions appear to reflect the Restatement's negligence-based duty to warn post-sale but do not make clear whether section 10's factors for determining reasonableness are the relevant factors for making the duty determination.

#### *D. Cases Specifically Rejecting Section 10*

A few courts have rejected section 10 and have done so for different reasons. In *Palmer v. Volkswagen of America, Inc.*, the Mississippi Court of Appeals concluded that there is no post-sale duty to warn under that state's products liability act,<sup>113</sup> the relevant portion of which provides:

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.*<sup>114</sup>

In *Modelski v. Navistar International Transportation Corp.*, the Appellate Court of Illinois phrased the question as "whether such a duty [to warn] includes an obligation to issue post-sale warnings of dangers

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<sup>109</sup> LA. REV. STAT. ANN. § 9:2800.57(C) (2008); *Welch v. Technotrim, Inc.*, 778 So. 2d 728, 734 (La. Ct. App. 2001).

<sup>110</sup> *Densberger v. United Techs. Corp.*, 297 F.3d 66, 69-70 n.3 (2d Cir. 2002).

<sup>111</sup> *Watkins v. Ford Motor Co.*, 190 F.3d 1213, 1219 (11th Cir. 1999) (applying Georgia law); *Smith v. Ontario Sewing Machine Co.*, 548 S.E.2d 89, 94 (Ga. Ct. App. 2001).

<sup>112</sup> *Olson v. Ford Motor Co.*, 410 F. Supp. 2d 855, 863 (D.N.D. 2006) (quoting North Dakota Pattern Jury Instruction C-21.25 (1996)).

<sup>113</sup> 905 So.2d 564, 601 (Miss. Ct. App. 2003), *rev'd in part on other grounds*, 904 So.2d 1077 (Miss. 2005).

<sup>114</sup> MISS. CODE ANN. § 11-1-63(a)(i)(2) (Rev. 2002) (emphasis added).

which were not known, nor should they have been known, at the time the product left the manufacturer's control."<sup>115</sup> Modelski was killed when the seat on his Farmall tractor tilted backwards and he fell into the blades of a rotary mower that he was towing. The tractor seat was mounted atop the battery box cover that was hinged at the rear and secured at the front by two bolts. The tractor carried no warning of the consequences that might result if the bolts holding the front of the battery box cover failed or somehow became disengaged. The bolts did fail, allowing the battery box cover and seat to tilt to the rear. The tractor was manufactured in 1957.<sup>116</sup> Modelski had bought the tractor in 1989, two years before his fatal 1991 accident, from someone who had acquired it in 1983 at a farm auction.<sup>117</sup> The appellate court concluded that there was no post-sale duty to warn in negligence actions in Illinois, citing the Illinois Supreme Court's 1980 opinion in *Woodill v. Parke Davis & Co.*, holding that in a strict liability action for failure to warn the plaintiff must prove that the manufacturer knew or should have known of the injury-causing propensity of its product at the time the product left its control.<sup>118</sup> The *Modelski* court concluded that there was "no reason to lessen that burden in a negligence action."<sup>119</sup> It is impossible to tell if the court was influenced by the fact that the tractor was first sold thirty-four years before the accident and had passed through the hands of several owners. That fact alone could support a conclusion that it was not possible to effectively communicate a warning of the risk to current tractor users and that thus there was no post-sale duty to warn in these circumstances. But the court did not limit its ruling to the facts of the case at hand, declaring instead that there is simply no post-sale duty to warn in either strict liability or negligence actions in Illinois.<sup>120</sup>

The Tennessee Court of Appeals declared, in a case where a fire was caused when a pillow came into contact with the unshielded bulb of a halogen lamp, that "Tennessee does not recognize a post-sale duty to warn. Although the Restatement (Third) of Torts adopts some post-sale duties, Tennessee [has] not adopted these provisions . . . ."<sup>121</sup> And in *Stanger v. Smith & Nephew, Inc.*, a federal district court concluded that even though "there is no strong indication that the Missouri Supreme Court would adopt the RESTATEMENT (THIRD) OF TORTS, which imposes

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<sup>115</sup> 707 N.E.2d 239, 246 (Ill. App. Ct. 1999).

<sup>116</sup> *Id.* at 241-42.

<sup>117</sup> *Id.* at 241.

<sup>118</sup> *Woodill v. Parke Davis & Co.*, 402 N.E.2d 194, 199 (Ill. 1980).

<sup>119</sup> *Modelski*, 707 N.E.2d at 246; *see also* *Birchler v. Gehl Co.*, 88 F.3d 518, 521 (7th Cir. 1996) ("The well established and generally accepted law in Illinois is that manufacturers do not have a continuing duty to warn.").

<sup>120</sup> *Modelski*, 707 N.E.2d at 247.

<sup>121</sup> *Irion v. Sun Lighting, Inc.*, No. M2002-00766-COA-R3-CV, 2004 WL 746823, at \*17 (Tenn. Ct. App. Apr. 7, 2004); *see also* *Mohr v. DaimlerChrysler Corp.*, No. W2006-01382-COA-R3-CV, 2008 WL 4613584, at \*19 (Tenn. Ct. App. Oct. 14, 2008) ("Tennessee does not recognize a manufacturer's post-sale duty to warn.").

a continuous duty to warn” as the general rule,<sup>122</sup> the defendants in the case *sub judice* did owe a post-sale duty to warn. The product that caused the injury was a medical device for which, as with prescription drugs, there is an already established continuing duty to keep abreast of scientific developments affecting the manufacturer’s product and warn the medical community of any newly discovered risks.<sup>123</sup>

*E. Other Cases Refusing to Adopt a Post-Sale Duty to Warn*

Other jurisdictions have decided against creating a post-sale duty to warn without reference to the *Restatement (Third)*. In *Anderson v. Nissan Motor Co., Ltd.*, the U.S. Court of Appeals for the Eighth Circuit found that Nebraska would not impose a post-sale duty to warn.<sup>124</sup> The primary reason for this conclusion was Nebraska case law emphasizing that Nebraska’s rules of evidence generally prohibit evidence of remedial measures taken subsequent to an injury causing event.<sup>125</sup> No reference was made in the court’s opinion to section 10.

In Oklahoma, plaintiffs in products liability actions must prove, *inter alia*, “that the defect existed in the product at the time it left the control of the defendant[.]”<sup>126</sup> There may be liability for failure to warn at the time of sale but Oklahoma law “does not recognize a post-sale duty to warn or retrofit a product[.]”<sup>127</sup> a rule established before adoption of section 10. And “[u]nder Texas products liability law, a manufacturer has no duty to warn about a product after it has been manufactured and sold.”<sup>128</sup>

*F. Cases Adopting a Post-Sale Duty to Warn but Only of Latent Risks*

In cases decided both before and after ALI’s adoption of the *Restatement (Third)*, some courts have adopted a post-sale duty to warn but have limited the scope of that duty to warning of only those risks that existed at the time of the product’s sale but were not then reasonably

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<sup>122</sup> 401 F. Supp. 2d 974, 982 (E.D. Mo. 2005) (citations omitted).

<sup>123</sup> *Id.* at 983.

<sup>124</sup> 139 F.3d 599, 602 (8th Cir. 1998).

<sup>125</sup> *Id.* at 601-02 (citing *Rahmig v. Mosley Mach. Co.*, 412 N.W.2d 56, 82 (Neb. 1987)).

<sup>126</sup> *Lee v. Volkswagen of America, Inc.*, 688 P.2d 1283, 1285 (Okla. 1984).

<sup>127</sup> *Wicker v. Ford Motor Co.*, 393 F. Supp. 2d 1229, 1236 (W.D. Okla. 2005).

<sup>128</sup> *Bryant v. Giacomini, S.p.A.*, 391 F. Supp. 2d 495, 503 (N.D. Tex. 2005); *McLennan v. Am. Eurocopter Corp., Inc.*, 245 F.3d 403, 430 (5th Cir. 2001) (“Texas courts generally do not recognize any post-sale duty to warn of product hazards arising after the sale.”); *see also* *Moore v. Ford Motor Co.*, No. 08-02092, 2008 WL 3981839, at \*3 (S.D. Tex. Aug. 22, 2008) (“Texas does not recognize a post-sale duty to warn . . . .”); *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 836 (Tex. 2000) (“Texas does not recognize post-sale duty to warn of product defects not discovered until after manufacture and sale.”).

discoverable.<sup>129</sup> When a manufacturer discovers or should have discovered such a latent risk, a duty to warn of the risk then arises.

The rule in Arizona is that there is a duty to warn post-sale but only “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.”<sup>130</sup> Colorado, applying *Restatement (Second)*’s section 402A strict liability principles, limits the post-sale duty to warn to cases “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.”<sup>131</sup> Under Maryland law, “[e]ven if there is no duty to warn at the time of the sale, facts may thereafter come to the attention of the manufacturer which make it imperative that a warning then be given.”<sup>132</sup> Michigan law, using negligence principles, says that a post-sale duty to warn may arise—but only if a latent defect existed in the product at the point of manufacture.<sup>133</sup> In Ohio, “a manufacturer or vendor is negligent when he has knowledge of a latent defect rendering a product unsafe and fails to provide a warning of such defect.”<sup>134</sup> The scope of the post-sale duty to warn in these states is more limited than the duty under section 10 which may impose a post-sale warning duty even if there was no undiscovered risk in the product at the time of sale.

A few states still embrace a strict liability standard for failure to warn cases. Pennsylvania has rejected the rule set forth in section 10 but does impose a post-sale duty to warn of defects existing at the time of sale.<sup>135</sup> In *Walton v. Avco Corp.*, the Pennsylvania Supreme Court ruled that a helicopter manufacturer had a post-sale duty to warn of a defective engine when the manufacturer learned after the sale of the helicopter, but before the injury, that the defect existed at the time the helicopter left the manufacturer’s hands.<sup>136</sup> In *Lynch v. McStome and Lincoln Plaza Associates*, however, the Superior Court of Pennsylvania ruled that no post-sale duty to warn exists where no defect existed in the product at the time of sale.<sup>137</sup> Lynch was injured when an escalator on which she was riding came to an abrupt stop.<sup>138</sup> She appealed from a jury verdict in

<sup>129</sup> See *infra* notes 130-140.

<sup>130</sup> *Wilson v. U.S. Elevator Corp.*, 972 P.2d 235, 240 (Ariz. Ct. App. 1998) (emphasis omitted).

<sup>131</sup> *Romero v. Int’l Harvester Co.*, 979 F.2d 1444, 1449 (10th Cir. 1992) (emphasis omitted) (applying Colorado law).

<sup>132</sup> *Ragin v. Porter Hayden Co.*, 754 A.2d 503, 516-17 (Md. Ct. Spec. App. 2000).

<sup>133</sup> *See Gregory v. Cincinnati, Inc.*, 538 N.W.2d 325, 331 (Mich. 1995).

<sup>134</sup> *Temple v. Wean United Inc.*, 364 N.E.2d 267, 273 (Ohio 1977).

<sup>135</sup> *DeSantis v. Frick Co.*, 745 A.2d 624, 631 (Pa. Super. Ct. 1999).

<sup>136</sup> 610 A.2d 454, 458-59 (Pa. 1992).

<sup>137</sup> 548 A.2d 1276, 1281 (Pa. Super. Ct. 1988); see also *Padilla v. Black & Decker Corp.*, No. Civ.A. 04-CV-4466, 2005 WL 697479, at \*5 (E.D. Pa. Mar. 24, 2005) (most important question, for purposes of determining whether a cause of action for post-sale failure to warn will lie under Pennsylvania law, is whether product had a latent defect at the time of sale).

<sup>138</sup> *Lynch*, 548 A.2d at 1281.

favor of the defendants, arguing that she should have been allowed to introduce evidence showing that the manufacturer had failed to notify the owner that a new escalator braking system, used by the manufacturer on its newer escalators, would have avoided the abrupt stop.<sup>139</sup> But the court ruled that there was no post-sale duty to warn about changes in technology if the product was not defective at the time of sale.<sup>140</sup>

### G. *Cases Specifically Adopting Section 13*

Finally, a few cases have adopted section 13 of the *Restatement (Third)* as the governing rule. In *Gamradt v. Federal Laboratories, Inc.*,<sup>141</sup> the U.S. Court of Appeals for the Eighth Circuit said that under Minnesota law, a duty to warn will be imposed on a successor corporation only after considering the following, non-exhaustive list of relevant factors: (1) succession to a predecessor's service contracts, (2) coverage of the particular machine under a service contract, (3) service of that machine by the purchaser corporation, and (4) a purchaser corporation's knowledge of defects and of the location or owner of that machine. The court then cited to section 13, comment b: "The crux of the inquiry is whether the successor corporation has benefited economically from its relationship with the predecessor's customers."<sup>142</sup> And in *Tabor v. Metal Ware Corp.*, the Supreme Court of Utah said that "Utah imposes on a successor corporation an independent post-sale duty to warn of a predecessor corporation's product defects under the conditions outlined in section 13 of the *Restatement (Third) of Torts*."<sup>143</sup>

### H. *Summary*

In sum, those sections of the *Restatement (Third)* dealing with post-sale duties have received a mixed but generally favorable reception in the law since 1998. Where the post-sale duty issue was one of first impression, the *Restatement* position has been adopted more often than rejected. No need has apparently been felt to formally adopt section 10 in the several states whose law had already developed along the lines of that section's principles but before the adoption of the *Restatement*. At least one state has rejected section 10 but does impose a post-sale duty to warn of risks that were inherent in the product at the time of sale. And a few states have explicitly rejected section 10 either because their statutes or rules of evidence limit liability to situations where there was a failure to warn at the time the product left the control of the manufacturer or seller,

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<sup>139</sup> *Id.* at 1278.

<sup>140</sup> *Id.* at 1281.

<sup>141</sup> 380 F.3d 416 (8th Cir. 2004).

<sup>142</sup> *Id.* at 421.

<sup>143</sup> 168 P.3d 814, 816 (Utah 2007).

or under “strict liability” principles, liability can only be imposed for warning failures at the time of sale. A few states that had earlier decided against adopting a post-sale duty to warn have not been influenced by section 10 to change their minds.

#### XI. REGULATORY POST-SALE DUTIES

The above discussion pertains to the common law of post-sale duties as it exists in the United States. While it is beyond the scope of this Article, it is appropriate to briefly mention the ever-expanding regulatory requirements in the United States and around the world.

Regulatory agencies in the United States have been in existence for decades. Each agency that deals with post-sale duties has been expanding and refining the responsibility of the manufacturer, product seller, and product user to report safety issues to the government and possibly to engage in some post-sale remedial program.

The main U.S. agencies are the Consumer Product Safety Commission (“CPSC”), the National Highway Traffic Safety Administration (“NHTSA”), and the Food and Drug Administration (“FDA”). Most recently, Congress revised the CPSC’s laws and regulations to expand reporting responsibilities and increase the fines for not reporting.<sup>144</sup>

In addition, the European Union, Japan, Canada, Australia, and other countries have enacted or enhanced reporting and recall responsibilities for manufacturers and product sellers.<sup>145</sup>

These government reporting responsibilities are generally more stringent than the common law post-sale duties and, therefore, manufacturers of regulated products will first look to regulatory requirements before even considering any common law duties. Considering both regulatory and common law requirements is important, however, since any products liability case will allege a violation of common law post-sale duties and not a violation of some government reporting responsibility.

Also, since compliance with the government’s recall requirements will not normally be a defense in a products liability case, the manufacturer and product seller will need to consider how far to go in the recall to defend itself against a negligent recall claim.

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<sup>144</sup> Consumer Product Safety Improvement Act (CPSIA) of 2008, Pub. L. No. 110-314, § 207, 122 Stat. 3016, 3044 (2008); *see also* 15 U.S.C. § 2064 (section 15(b)); 15 U.S.C. § 2069 (section 20).

<sup>145</sup> For more, see *European Product Liability Review*, LOVELLS NEWSLETTER (Lovells LLP, New York, N.Y.), available at <http://www.lovells.com/Lovells/Publications/Newsletters/412/European+Product+Liability+Review>.

## XI. CONCLUSION

Post-sale duties have been expanding in the United States by court decision and legislative action. The *Restatement (Third)* affirms this expansion and, in some respects, broadens the common law post-sale responsibilities of manufacturers. Manufacturers must act now to put into place an appropriate post-sale monitoring system and establish appropriate committees or trained personnel who can analyze the gathered information to determine whether post-sale actions might be appropriate.

A failure to take timely and adequate remedial actions can result in huge liability, including punitive damages, which could eventually result in large numbers of injured people and lead to the demise of the manufacturer.