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LETTER

A Post-Sale Duty to Warn May Place a Heavy Burden on Manufacturers

September 9, 2009
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Origin of the Post-Sale Duty to Warn. Approximately fifty years ago, some courts began to impose on manufacturers a post-sale duty to warn. See *Handler v. Remington Arms Co.*, 130 A.2d 793 (Conn. 1957) (finding post-sale duty to warn in negligence) as early example of finding of post-sale duty. By the mid-1990's, the American Law Institute (ALI) determined that a sufficient number of courts had found a post-sale duty to warn that such a duty it should be included in the Third Restatement. Accordingly, the Restatement (Third) of Torts: Products Liability § 10(a) (1998) states that one engaged in the business of selling or otherwise distributing products may be liable 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. Restatement (Third) of Torts § 10 (a)(1998). Subsection (b) sets forth four requirements that must be satisfied before a court can determine that a reasonable person in the seller's position would have provided a warning after the time of sale:

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. *Id.* §10(b) (1998).

Thus, a cause of action based on post-sale duties sounds in negligence, since the objective "reasonableness" of a sellers' conduct is the focus of the post-sale inquiry and the gateway to imposition of liability. *Id.* § 10 cmt. b. (1998). However, section 10 does not include any other duty than one of warning. See *Downing v. Overhead Door Corp.*, 707 P.2d 1027, 1033 (Colo. Ct. App. 1985); *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451 (2d Cir. 1969).

Post-Sale Duty to Warn by Jurisdiction. Jurisdictions can be classified into three distinct groups with regard to their position on a post-sale duty to warn: (1) states that have adopted the Restatement Third § 10 in its entirety; (2) states that have imposed a diminished duty to warn, limited only to latent defects or particular products; (3) states that have declined to impose a post-sale duty to warn or have not issued a definitive opinion on the issue. The 26 states finding no post-sale duty or that have not addressed the issue are: Alaska, Kentucky, Nevada, Virginia, Alabama, California, Idaho, Mississippi, Nebraska, Oregon, Tennessee, Vermont, Delaware, Illinois Indiana, Missouri, New Hampshire, Rhode Island, West Virginia, Arkansas, Florida, Montana, South Carolina, Utah, Ohio, and Wyoming. Manufacturers who sell their products nationwide should assume that they have a post-sale duty to warn because a potential claim may arise in any state. The key is to determine which jurisdiction places the most stringent requirement on their particular product, then execute their duty to warn, post-sale, under that standard. Below are two categories of jurisdictions that impose either a broad or a limited post-sale duty to warn.

Jurisdictions Imposing a Broad Post-Sale Duty to Warn:

Connecticut. In *Densberger*, the Court upheld Connecticut's common law imposition of a post-sale duty to

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warn, noting that "while the duty to warn for strict product liability is attributed only at the time of sale, the duty to avoid negligence in failure to warn persists in post-sale situations." *Densberger v. United Techs. Corp.*, 297 F.3d 66, 71 (2d Cir. 2002) (citing *Prokolkin v. Gen'l Motors Corp.*, 170 Conn. 289 (1976); and *Handler v. Remington Arms Co.*, 144 Conn. 316 (1957) (finding post-sale duty to warn in negligence)).

Georgia: In *Watkins*, the Court extended a comprehensive theory of post-sale liability to the facts of the case, holding "the duty to warn is a continuing one and may arise months, years, or even decades after the date of the first sale of the product." *Watkins v. Ford Motor Co.*, 190 F.3d 1213, 1218 (11th Cir. 1999) (quoting *Chrysler Corp. v. Batten*, 264 Ga. 723 (1994) (negligent failure to warn claim)).

Iowa: The Supreme Court of Iowa adopted the Restatement Third § 10 in *Lovick v. Wil-Rich*, also recognizing that the jury shall determine whether a warning of a product danger should have been given, using the Restatement factors. *Lovick v. Wil-Rich*, 588 N.W.2d 688, 696 (1999).

Louisiana: The Louisiana Products Liability Act (LPLA) has codified a post-sale duty to warn:

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

Maine: In a recent decision, the Maine Supreme Judicial Court followed state law, and not § 10 of the Restatement Third to determine that manufacturers have a post-sale duty to warn all users. However, the Court declined to extend the duty to indirect purchasers of products. *Brown v. Crown*, 960 A.2d 1188 (Me. 2008).

Massachusetts: The Supreme Judicial Court of Massachusetts adopted § 10 of the Restatement Third in *Lewis*, imposing a rule of reasonableness on a seller's continuing duty to warn. *Lewis v. Ariens Co.*, 434 Mass. 643, 644 (2001).

Maryland: Generally, Maryland requires manufacturers to warn of product defects, even if those defects are discovered after the time of sale. 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. *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 645-646 (1992); *Gypsum Co. v. Mayor and City Council of Baltimore*, 647 A.2d 405, 412 (1994). Also, the "seller is not entitled to automatic relief from its continuing duty to warn because it no longer manufactures a defective product." *Ragin v. Porter Hayden Co.*, 754 A.2d 503, 517 (2000), cert. denied, *Porter Hayden v. Ragin*, 760 A.2d 1102 (2000) (citing *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 641 n.8 (1992)).

New Jersey: The Superior Court of New Jersey has imposed a post-sale duty to warn as soon as reasonably feasible and further noted, "Even if the danger was not recognized or recognizable at the time the machine was manufactured, if the manufacturer later learns of the danger, it must take reasonable steps to notify purchasers and consumers of the newly-discovered danger." *Lally v. Printing Machinery Sales and Service Co, Inc.* 240 N.J.Super 181, 185 (quoting *Feldman v. LederleLabs*, 97 N.J.429, 456-457 (1984)); see also, N.J. STAT. ANN. §2A:58C-4.

New York: The New York Court of Appeals held that the duty to issue warnings can extend past the delivery of the product. "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." *Cover v. Cohen*, 61 N.Y.2d 261, 275-276 (1984).

North Carolina: North Carolina has enacted a statute imposing a statutory cause of action of post-sale duty to warn in certain circumstances, notably if the manufacturer or seller becomes aware that the product posed a substantial risk of harm to foreseeable users and fails to take reasonable steps to warn. Before the enactment of the statute, the North Carolina Appellate Court similarly mandated that, "a continuing duty exists to provide post-sale warnings of any deficiencies it learns exists in the product to users." N.C. GEN. STAT., §99B-5(a)-

(2); *Smith v. Selco, Inc.*, 96 N.C. App. 151, 158 (1989).

North Dakota: The Supreme Court of North Dakota held that a manufacturer has a post-sale duty under negligence principles if they learn about dangers associated with their products. The Court further noted, "the reasonableness of post-sale warnings depends on the facts of each case looking at the nature of the harm, likelihood of harm, how many persons are affected, the economic burden of identifying product users, nature of the industry, type of product involved, number of units involved, and steps taken to correct the problem." *Crowston v. Goodyear Tire & Rubber, Co.*, 521 N.W.2d 401, 409 (N.D. 1994).

South Dakota: The Eighth Circuit Court of Appeals held that under South Dakota law, "the duty to warn includes a manufacturers' post-sale duty to warn of defects discovered after the sale." *Novak v. Navistar International Transportation Corp.*, 46 F.3d 844, 849 (8th Cir. 1995).

Oklahoma: The Supreme Court of Oklahoma held that the manufacturer has a continuing duty to warn. "This duty requires the manufacturer to maintain current information gleaned from research, adverse reaction reports, scientific literature and other available methods." *McKee v. Moore*, 648 P.2d 21, 23-24 (1982).

Washington: The Washington Legislature passed the Washington Product Liability Act (WPLA)(REV. CODE WASH. §§7.72.010-.060) which adopts a common law negligence standard for providing warnings where the manufacturer learned or should have learned about the danger after the product was manufactured. *Id.* §7.72.030(3). "The general rule is that a post-sale duty to warn arises after a manufacturer has sufficient notice about a danger associated with the product." *Esparaza v. Skyreach Equipment, Inc.*, 103 Wn. App. 916, 935 (2000).

Jurisdictions Imposing a Limited Post-Sale Duty to Warn:

Arizona: Under Arizona law, the duty to warn is a continuing duty that extends past the time of sale and includes an obligation to warn of dangers existing at the time of sale, and inherent in the product's use, that the manufacturer discovers after sale of the product. *See, Readenour v. Marion Power Shovel*, 719 P.2d 1058, 1064 (1986) (finding that defendant's failure to take post-sale safety measures was relevant to a punitive damage argument); *Rodriguez v. Besser Co.*, 565 P.2d 1315, 1320 (Ct. App. 1977) (stating that a manufacturer's duty to warn may be a continuing one applying to dangers the manufacturer discovers after sale). However, the duty is limited in that no duty to warn exists 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).

Texas: Texas law 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. *McLennan v. American Eurocopter Corp.*, 245 F.3d 403, 430 (5th Cir. 2001). The exception is that a post-sale "control-based" duty to warn does exist 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. *Arkwright-Boston Manufacturers Mutual Insurance Co. v. Westinghouse Elec. Corp.*, 844 F.2d 1174, 1185 (5th 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).

Colorado: While the Supreme Court of Colorado has not addressed the post-sale duty to warn issue, the lower courts and the 10th Circuit's interpretation of a lower court's decision found that a post-sale duty to warn is limited only to defects which existed at the time of manufacture. *Romero v. Int'l Harvester Co.*, 979 F.2d 1444 (10th Cir. 1992); *Downing v. Overhead Door Corp.*, 707 P.2d 1027 (Colo. App. 1985).

Hawaii: In *Tabieros*, the Supreme Court of Hawaii in a footnote stated "[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." *Tabieros v. Clark*, 944 P.2d 1279, n. 11 (Haw. 1997) (quoting *Downing v. Overhead Door Co.*, 707 P.2d 1027, 1033 (Colo. App. 1985)).

Michigan: A manufacturer's 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.*, 538 N.W. 2d 325 (Mich. 1995).

Minnesota: A post-sale duty to warn arises only in limited cases. "Minnesota law imposes a post-sale duty to warn of dangers associated with using a product when the following special circumstances are present: knowledge of a problem with the product, continued sale or advertising of the product, and a pre-existing duty to warn of dangers associated with the product." *Kociemba v. G.D. Searle & Co.*, 707 F.Supp. 1517, 1518 (D. Minn. 1989).

New Mexico: New Mexico's appellate courts have not addressed the issue of a post-sale 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. "A supplier who later learns, or in the exercise of ordinary care should know, of a risk of injury caused by a condition of the product or a manner in which it could be used, must then use ordinary care to avoid the risk." UJI 13-1402 NMRA 2007.

Pennsylvania: The Pennsylvania courts have limited imposition of a post-sale duty to warn in special instances where the defect existed at the time of sale. See *Walton v. Avco Corp.*, 610 A.2d 454, 459 (1992) (finding post-sale failure to warn liability where helicopter's engine contained a design defect when sold); see also *DeSantis v. Frick Co.*, 745 A.2d 624, 631 (Pa. Super. Ct. 1999) (holding that a manufacturer has no duty to warn where product was not defective when sold).

Utah: There are no reported Utah cases regarding a general continuing duty to warn. However, Utah courts have applied this principle to pharmaceutical manufacturers holding that they have a post-sale duty to warn the medical profession regarding additional side effects discovered after the sale. 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." *Barson v. E.R. Squibb & Sons, Inc.*, 682 P.2d 832, 835 (Utah 1984).

Wisconsin: Wisconsin law recognizes a post-sale duty to warn in limited circumstances. Namely, the post sale duty is most likely to be found where there is a limited market and a limited number of products in existence. See *Gracyalny v. Westinghouse Electric Corp.*, 723 F.2d 1311, 1318-1319 (7th Cir. 1983) (citation omitted); *Kozlowski v. John E. Smith's Sons Co.*, 275 N.W.2d 915, 923 -924 (1979).

Compliance with Remedial Action in Practice. Assuming a jurisdiction imposes a post-sale duty to warn, the Third Restatement section 10 definitively states that anyone engaged in the business of selling or distributing products is liable for harm to persons or property caused by a failure to provide such a warning in the appropriate circumstances. Restatement (Third) of Torts § 10(a): Products Liability (1998). This provision and applicable state laws may render a manufacturer and a distributor liable for product hazards that arose after the product was sold. A retailer, however, is generally not in a position to know or learn about any product hazards after the sale and, thus, cannot be subjected to liability until the manufacturer informs them of the risks. *Id.* § 10 cmt. b. (1998).

The Third Restatement offers no guidance on the specific type of notice that is required. Additionally, most state laws do not inform manufacturers how to conduct a post-sale remedial program that would warn of the product risk or allow the user to avoid misuse of the product.

For a post-sale duty to warn to arise, the seller must reasonably be able to communicate the warning to those identified as appropriate recipients. *Id.* § 10 cmt. e. (1998). Therefore, the first step for the manufacturer would be to identify end-users of the product and establish a means of communicating the potential product hazards to them. It is likely that end-users will include not only the customers who use the product, but also distributors, retailers, and wholesalers. The success of communicating the product hazard effectively will depend on a number of factors including the type of product, the number sold, the number of potential users, the availability of records and the available means of tracing product users. See, *Id.* cmts. e. and g. (1998).

Government agencies can also provide guidance for taking appropriate post-sale action, even if the manufacturer's product does not fall under their jurisdiction. For example, the U.S. Consumer Product Safety Commission (CPSC) guidelines for consumer product recalls identify various communication measures for reaching product users. Included are: sending out joint news releases; sending out safety notices with bills; purchasing advertisements in national and/or regional newspapers and magazines; installation of a toll-free telephone to receive calls from consumers; using warranty cards to identify users of the product; and notifying trade associations and other groups for whom the recall may have particular concern. See, U.S. Consumer Product Safety Commission, Recall Handbook (May 1999).

The CPSC recommends that companies develop an organizational policy and plan focused on the early detection of product safety problems which would be necessary in the event a product recall or similar action need be taken. *Id.* One of the most important parts of such a plan is maintaining accurate records about the design, production, distribution, and

marketing of each product for the duration of its expected life. *Id.* Proper record-keeping would enable a manufacturer to investigate potential product hazards that the manufacturer knew or should have known of. Cmt. c. to § 10 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.

Conclusion. It is critical that a manufacturer identify product hazards at the earliest possible time to protect itself from product liability claims, even if the product was safe and the warnings were adequate when sold. A manufacturer should develop a prospective program that is devoted to detection of product safety problems and if a potential problem is identified, communicate the hazard clearly to its users. By doing so, a manufacturer will likely satisfy its post-sale duty to warn.

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