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A MANUFACTURER'S POST SALE DUTY TO WARN



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This document is intended to provide general information for clients or interested individuals. The information contained herein is not intended to be and should not be construed as legal advice. Please consult your attorney for specific advice regarding your situation since every circumstance should be considered and evaluated separately.

It is common knowledge that manufacturers have certain duties to consumers who purchase their products as well as, in certain circumstances, members of the general public who may be affected by those products.¹ The duties traditionally have included such common sense requirements as avoiding designing or manufacturing products negligently or in a way that is likely to lead to an injury. An enormous body of law surrounding product liability has developed to implement these requirements.

Throughout the development of the common law, the manufacturer's duties typically ended when the product was sold to the consumer or distributor. In other words, while a manufacturer could be held liable for a failure to meet its duties with respect to designing and manufacturing the products prior to the sale of the products, and a breach of those duties could lead to liability to parties injured long after the product was sold, that liability was focused solely on the manufacturer's actions or omissions **prior to the sale** of the products, and there were no specific actions the manufacturer was required to take (or avoid) once the sale occurred. Approximately 50 years ago, courts began to consider whether any post-sale duties also should be applied to manufacturers. At that time, the Second Restatement of Torts did not address any such post-sale duties.² Despite the absence of a reference point in the Restatement, some courts began to hold that manufacturers had a post-sale duty to warn consumers in certain circumstances when the manufacturer learned **after the sale** of the product that it presented a hazard. By the mid-1990s, the American Law Institute determined that a sufficient number of state supreme courts had created a post-sale duty to warn that the topic should be addressed in the Third Restatement.

Accordingly, the Restatement (Third) of Torts: Products Liability §10 (1998) provides as follows:

(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

¹ This material was compiled for the Manufacturing Practice Group of Robison, Curphey & O'Connell by Brittny M. Shreffler, with assistance from David Arnold.

² Restatements of the law are compilations of general and generally applicable statements of law in different areas published by the American Law Institute. The Restatements are not binding but are very influential in the evolutionary progression of the law.

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.

When will this provision apply? It will apply to all products sold by a manufacturer as to which the manufacturer learns of a defect or hazard in one of its products after some or all of that model or type of products have been sold, the end users can be identified and communicated with, and the risk of injury or death resulting from the hazard is greater than the burden of providing the notice to the end users. In some cases, depending on the manufacturer's distribution system, the notice/warning will be sent through independent distributors who in turn will have to notify their customers. In other cases, the manufacturer will have information on the end users from, for example, returned warranty registration cards, and will provide the notice directly. The Third Restatement provision offers no guidance on the specific type of notice that would be required.

Note that this provision requires only a warning to consumers, not a recall. In fact, §11 of the Third Restatement makes it clear that a manufacturer is not liable for a failure to recall products unless a recall is required by a statute or regulation or unless the manufacturer voluntarily initiates a recall but implements it negligently. Accordingly, the following materials focus exclusively on the post-sale duty to warn that was recognized for the first time in the Third Restatement in 1998.

Since it has been 10 years since the Third Restatement was published, the Manufacturing Practice Group determined that it would be useful for our clients to know what states have adopted the post-sale duty to warn provisions of the Third Restatement over that 10 year period, and more generally what the status of the post-sale duty to warn is throughout the country, including in states that have implemented the concept through a statute or through common law even if the Third Restatement provision was not formally adopted. As the summary at the beginning the materials reveals, only three states have formally adopted Section 10 of the Third Restatement (and in one of those states, Maine, that adoption is pending confirmation by the highest state court). Many other states, however, have adopted some form of the post-sale duty to warn concept.

We believe that information about the marketplace and the manufacturers' duties in that marketplace is important to our clients in assessing both their responsibilities and their potential costs of producing the goods. Since the American tort system is largely one of state law, we believe that this state by state survey of where and when a post-sale duty to warn exists will assist our clients in determining what aspects of this legal concept will be applicable to them in each state where they sell their products. Since a slight majority of the states impose some form of post-sale duty to warn on manufacturers, manufacturers with a national distribution of goods should factor in this duty generally whenever they learn of a potential hazard in a product. Manufacturers with a less than national scope of sales will want to carefully calibrate their obligations in light of the status of this duty in the states where their products are sold.

As always, the members of the Manufacturing Practice Group at Robison, Curphey & O'Connell are available to discuss with you any particular situation or a planning process for identifying and managing the post-sale duty to warn.

The next section of this report is a summary depicting the status of the post-sale duty to warn in each state. A detailed explanation of the status of this legal concept in each state, including citations to the leading cases, follows this summary.

Adopted Restatement 3d § 10

Iowa
Maine (lower courts)
Massachusetts

Limited Post-Sale Duty to Warn (only for latent defects)

Arizona
Colorado

Hawaii
Kansas

Michigan
New Mexico
Pennsylvania

Post-Sale Duty to Warn (not expressly limited to latent defects)

Connecticut
Georgia
Louisiana
Maryland

Minnesota
New Jersey
New York
North Carolina

North Dakota
Ohio
South Dakota
Washington
Wisconsin

Split/Uncertain

Kentucky

Maine (only lower courts adopted 3d Restatement, question certified to Maine Supreme Judicial Court)

Nevada

Virginia

No Post-Sale Duty

(either expressly or no case law support for such duty)

Alabama

California

Idaho

Mississippi

Nebraska

Oregon

Tennessee

Vermont

Alaska

Delaware

Illinois

Missouri

New Hampshire

Rhode Island

Texas (exceptions)

West Virginia

Arkansas

Florida

Indiana

Montana

Oklahoma

South Carolina

Utah

Wyoming

STATE BY STATE ANALYSIS

Alabama

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - To establish liability under the Alabama Extended Manufacturer's Liability Doctrine, a plaintiff must show: (1) he suffered injury or damages to himself or his property by one who sells a product in a defective condition unreasonably dangerous to the plaintiff as the ultimate user or consumer, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. *Halsey v. A.B. Chance Co.* (1997), 695 So. 2d 607. The mere fact that a product has been modified by the buyer subsequent to the sale does not always relieve a manufacturer of liability. *Id.*

Alaska

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - The court has recognized a manufacturer's strict liability for failure to warn if a product is defective because of "misinformation or inadequate information about risks involved in using the product or about minimizing or avoiding harm from such risks. In such a case, a product, although faultlessly manufactured and designed, can be defective when placed in the consumers' hands without first giving an adequate warning concerning the manner in which to safely use the product." *Prince v. Parachutes, Inc.* (1984), 685 P.2d 83, 87.

Arizona

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Yes
- Case law
 - On appeal, the injured party asserted that the manufacturer had a continuing, post-sale duty to notify known purchasers of safety improvements of which it subsequently learned. *Wilson v. United States Elevator Corp.* (Ariz. App. 1998), 972 P.2d 235. The court disagreed and held that the mere subsequent development and production of an allegedly

superior safety device did not render the elevator, which was installed years earlier, unreasonably dangerous.

- “Other jurisdictions have declined to impose a continuing duty to warn, expressly holding that such a duty arises only when a manufacturer, believing it has sold a nondefective product, subsequently learns that its product was, in fact, defective when placed in the stream of commerce. This view is supported by the Restatement (Second) of Torts, which, absent any contrary precedent, Arizona courts generally follow.” *Id.* at 255.

Arkansas

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - Arkansas does not impose a post sale duty to warn. *Boatmens Trust Co. v. St. Paul Fire & Marine Ins. Co.* (D. Ark. 1998), 995 F. Supp. 956, 962.

California

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - “Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer’s conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. Thus, in strict liability, as opposed to negligence, the reasonableness of the defendant’s failure to warn is immaterial.” *Carlin v. Superior Court* (1996) 13 Cal. 4th 1104, 1112 (emphasis added), quoting *Anderson v. Owens-Corning Fiberglas Corp.* (1993) 53 Cal. 3d 987, 1002-1003.

Colorado

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Yes
- Case law
 - “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.” *Romero v. International Harvester Co.* (10th Cir. 1992), 979 F.2d 1444, 1450 (10th

Cir. 1992) (quoting *Downing v. Overhead Door Corp.*, 707 P.2d. 1027, 1033 (Colo. App. 1985)). “We read the *Downing* court's language as addressing defects in design, existing but unknown or unappreciated at the time of the original sale, which are subsequently discovered by the manufacturer.” *Id.* “Thus, under *Downing*, the 706D tractor must have been defective and unreasonably dangerous at the time it was manufactured and sold in order for Colorado law to impose a post-sale duty to warn. This view is consistent with the Restatement (Second) of Torts 402A setting forth the elements for a strict products liability claim, which Colorado has specifically adopted.” *Id.*

- Additional comments
 - Colorado Revised Statute § 13-21-404 provides that “[i]n any product liability action, evidence of any scientific advancements in technical or other knowledge or techniques, or in design theory or philosophy, or in manufacturing or testing knowledge, techniques, or processes, or in labeling, warnings of risks or hazards, or instructions for the use of such product, where such advancements were discovered subsequent to the time the product in issue was sold by the manufacturer, shall not be admissible for any purpose other than to show a duty to warn.” The statute has been interpreted to find that no post-sale duty to warn exists unless the product in question has, under standards existing at the time of manufacture, some defect that was not known or appreciated. *Perlmutter v. United States Gypsum Co.* (10th Cir. 1993), 4 F.3d 864, 870.

Connecticut

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Yes
- Case law
 - “While duty to warn for strict product liability is attributed only at the time of sale, duty to avoid negligence in failure to warn persists in post-sale situations.” *Densberger v. United Techs. Corp.* (2d Cir. 2002), 297 F.3d 66, 71 (citing *Prokolkin v. Gen'l Motors Corp.* (1976), 170 Conn. 289; and *Handler v. Remington Arms Co.* (1957), 144 Conn. 316 (finding post-sale duty to warn in negligence)). “The post-sale duty to warn exists in negligence, and is cognizable under the Connecticut Products Liability Act.” *Id.* at 71 (the negligence jury charge stated that “[a] manufacturer has a duty to exercise reasonable care in the design, manufacture and sale of its products. Reasonable care is that degree of care which a reasonably prudent manufacturer would use under like circumstances. Further, a manufacturer has a continuing duty to warn of all known or knowable dangers associated with using its product”).
- Additional comments

- The common law post sale duty has been analogized to a claim for failure to recall. *Savage v. Scripto-Tokai Corp.* (D. Conn. 2003), 266 F. Supp. 2d 344, 351

Delaware

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - Court refrains from adopting a post-sale duty to warn at this juncture. *Smith v. Daimlerchrysler Corp.* (Del. Super. Ct. Nov. 20, 2002), No. 94C-12-002-JEB, 2002 Del. Super. LEXIS 434.

Florida

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - Florida courts have adopted the doctrine of strict liability as stated by the Restatement (Second) of Torts section 402(A) 1965, but have limited the doctrine's application to manufacturers and others in the distributive chain including retailers, wholesalers, and distributors. *Clay v. Wyeth* (D. Fla. 2004), 2004 U.S. Dist. LEXIS 28727.
- Additional comments
 - Under the Second Restatement, the defect must have been in existence at the time of manufacture.

Georgia

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Yes –Ga. Code Ann. § 51-1-11(c) states that nothing in it “shall relieve a manufacturer from the duty to warn of a danger arising from the use of a product once that danger becomes known to the manufacturer.”
- Case law
 - “This 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.* (11th Cir. 1999), 190 F.3d 1213, 1218, quoting *Chrysler Corp. v. Batten* (1994), 264 Ga. 723 (negligent failure to warn claim).

Hawaii

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn

- Yes
- Case law
 - “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.” *Tabieros v. Clark Equip. Co.* (1997), 85 Haw. 336, 356 (quoting *Downing v. Overhead Door Corp.*, 707 P.2d. 1027, 1033 (Colo. App. 1985)).
- Additional comments
 - The rule above was developed from the rule in Colorado. “The United States Court of Appeals for the Tenth Circuit ‘read the *Downing* court’s language as addressing defects in design, existing but unknown or unappreciated at the time of the original sale, which are subsequently discovered by the manufacturer,’ but perceived ‘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.’” *Tabieros v. Clark Equip. Co.* (1997), 85 Haw. 336, 356 (quoting *Romero v. International Harvester Co.* (10th Cir. 1992), 979 F.2d 1444, 1450).

Idaho

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - “In order to recover damages in a products liability action based on negligence the plaintiff must prove that 1) he or she was injured by the product, 2) the injury was the result of a defective or unsafe product, and 3) that a defect existed when the product left the control of the manufacturer.” *Watson v. Navistar Int’l Transp. Corp.* (1992), 121 Idaho 643, 661, citing *Henderson v. Cominco Am., Inc.* (1973), 95 Idaho 690.
 - The Idaho Supreme Court adopted Restatement (Second) of Torts § 402A (1965) in *Shields v. Morton Chemical Co.* (1974), 95 Idaho 674, 676-77.

Illinois

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - “The plaintiff in a strict liability action predicated on a failure to warn theory against a product manufacturer was obligated to plead and 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.” *Modelski v. Navistar Int’l Transp. Corp.*, 302 Ill. App. 3d 879, 888 (1999) (citing *Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26, 33-36 (1980)).

- “[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. If such a duty were imposed, it might well ‘discourage manufacturers from developing safer products.’” *Modelski v. Navistar Int’l Transp. Corp.* (1999), 302 Ill. App. 3d 879, (quoting *Carrizales v. Rheem Mfg. Co., Inc.* (1991), 226 Ill. App. 3d 20).

Indiana

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - To be actionable, a product defect must exist at the time the product is first placed into the stream of commerce. Ind. Code §§ 34-20-4-1 and 34-20-4-2; *Miller v. Honeywell Int’l, Inc.* (D. Ind. 2002), 2002 U.S. Dist. LEXIS 20478. The Product Liability Statute treats the failure to warn as a product “defect.” *Id.* citing Ind. Code § 34-20-4-2.
 - “In our review of the [Indiana Product Liability Act] as well as state and federal case law, we too find that, although the Indiana legislature did not expressly exclude a manufacturer’s post-sale duty to warn from the IPLA, the statute does not expressly prescribe or define any cause of action arising from a post-sale duty to warn. Therefore, the [plaintiffs’] claim that [defendant] breached its post-sale duty to warn fails.” *Tober v. Graco Children’s Products, Inc.*, 431 F.3d. 572, 579 (7th Cir. 2005).

Iowa

- Adopted Restatement 3d
 - Yes
- Case law
 - *Lovick v. Wil-Rich* (1999), 588 N.W.2d 688, 696.
- Additional comments
 - The jury determines whether a warning of a product danger should have been given, using the Restatement factors. *Lovick v. Wil-Rich* (1999), 588 N.W.2d 688, 696.

Kansas

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Yes
- Case law
 - “We recognize a manufacturer’s post-sale duty to warn ultimate consumers who purchased the product who can be readily identified or traced when a defect, which originated at the time the product was

manufactured and was unforeseeable at the point of sale, is discovered to present a life-threatening hazard.” *Patton v. Hutchinson Wil-Rich Manufacturing Co.* (1993), 253 Kan. 741, 755.

- “We do not apply a strict liability theory to the post-sale duty to warn.” *Id.* at 761.
- Liability depends on reasonableness test looking at nature of harm, likelihood that harm will occur, number of persons affected, economic burden of identifying and contacting product users, nature of industry, type of product involved, number of units involved and steps taken to correct problem. *Id.* at 762.

Kentucky

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Uncertain
- Case law
 - “When a product is defective, a manufacturer may be subject to a post-sale duty. The nature of the defect will dictate the appropriate remedy: a defect that may result in a few minor injuries may only require a warning, whereas a defect that may result in serious injury or death could require more. These remedial measures can be seen as a continuum of post-sale duties which the law might impose.” *Ostendorf v. Clark Equip. Co.* (Ky. 2003), 122 S.W.3d 530. However, “if the product was not defective at the time of sale, the seller’s post sale conduct must contribute to the injury before liability will be imposed.” *Id.*
 - *Cameron v. DaimlerChrysler, Corp.* (Oct. 20, 2005), No. 5:04-CV-24-JMH, 2005 U.S. Dist. LEXIS 24361 at *17, considered *Ostendorf* in depth based on a plaintiff’s claim that Kentucky was willing to adopt a post sale duty to warn, and concluded that “Kentucky does not recognize a post-sale failure to warn claim and would not adopt such a claim if given the opportunity.”
- Additional comments
 - Even if a post-sale duty to retrofit exists, it arises or is breached only when the product was defective when sold. *Jordan v. Massey-Ferguson, Inc.* (6th Cir. 1996), 1996 U.S. App. LEXIS 29703 (applying KY law).

Louisiana

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Yes
- Statute – La. R.S. 9:2800.57
 - 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.

- Case law
 - Where a manufacturer is unaware of the whereabouts of its machine and therefore cannot warn its owners or operators, it can publish warnings in trade journals and make a reasonable effort to notify owners of the dangers of its machine and instruct them to warn their operators. *Winterrowd v. Travelers Indem. Co.* (1985), 462 So. 2d 639, 643.

Maine

- Adopted Restatement 3d
 - By the lower courts
- Post-Sale Duty to Warn
 - Uncertain – question has been certified to the Maine Supreme Judicial Court. *Brown v. Crown Equipment Corp.*, 501 F.3d 75, 80, 81 (1st Cir. 2007). Question certified: “Does Maine law incorporate the rule of Restatement (Third) Torts: Products Liability § 10 that a manufacturer has a duty to warn known but indirect purchasers where its product was not defective at the time of sale but a product hazard developed thereafter?”
- Case law
 - “Maine law recognizes a negligence-based post-sale duty to warn in products-liability cases.” *Brown v. Crown Equip. Corp.* (D. Me. 2006), 445 F. Supp. 2d 59, 63 (question certified to Maine Supreme Judicial Court).
 - Addition In *Fortunato v. Specialized Bicycle Components, Inc.* (Me. Super. Ct. 1997), 1997 Me. Super. LEXIS 355 at *4, the court stated that it agreed with the rationale underlying proposed Restatement Third of Torts § 10 and applied it in the case.
- Additional comments
 - Some discussion in *Brown* that Maine is likely to adopt the Third Restatement .

Maryland

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Yes
- Case law
 - “A manufacturer of a defective product has a duty to warn of product defects which the manufacturer discovers after the time of sale.” *United States Gypsum Co. v. Mayor of Baltimore* (1994), 336 Md. 145, 160, quoting *Owens-Illinois v. Zenobia* (1992), 325 Md. 420, 446. “This duty may continue from the point at which the product was introduced into commerce, or may arise even where the product was reasonably safe for

use at the time of manufacture and sale.” *Id.*, citing *Rekab, Inc. v. Frank Hrubetz & Co.* (1971), 261 Md. 141, 146; quoting 1 Frumer & Friedman, *Products Liability* § 8.02, at 148.3.

- “[I]f a manufacturer or a seller discovers a product defect after the time of sale, the manufacturer and/or the seller must make reasonable efforts to issue a post-sale warning if the warning would help to prevent or lessen the harm. The post-sale duty to warn requires reasonable efforts to inform users of the hazards once the manufacturer or seller is or should be aware of the need of a warning.” *Ragin v. Porter Hayden Co.* (2000), 133 Md. App. 116, 143, quoting *US Gypsum, supra*.

Massachusetts

- Adopted Restatement 3d
 - Yes
- Case law
 - *Lewis v. Ariens Co.* (2001), 434 Mass. 643, 644.

Michigan

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Yes
- Case law
 - Duty to warn of latent defects. *Gregory v. Cincinnati Inc.*, 450 Mich. 1, 11 (1995). The *Gregory* court noted that if “the manufacturer is not aware of the defect until after manufacture or sale, it has a duty to warn upon learning of the defect; if there exists a point-of-manufacture duty to warn, a post-manufacture duty to warn necessarily continues upon learning of the defect.” *Id.* at 11.
 - *Reeves v. Cincinnati, Inc.* (1995), 208 Mich. App. 556, 561 (manufacturer who produces products without defects, latent or otherwise, not required to provide notices of updated features, including “updates” to purchasers concerning state of the art safety devices).

Minnesota

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Yes
- Case law
 - *McDaniel v. Bieffe USA, Inc.* (D. Minn. 1999), 35 F.Supp. 2d 735, 742, (“[T]he fact that a product is mass-produced and widely distributed does not necessarily rule out application of the post-sale duty to warn”).
 - “On the facts of some cases, a continuing post-sale duty by a manufacturer to warn of a dangerous product may exist.” *Hodder v. Goodyear Tire & Rubber Co.* (1988), 426 N.W.2d 826.

- “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.* (D.Minn. 1989), 707 F.Supp. 1517, 1528.

Mississippi

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - Miss. Code Ann. § 11-1-63 provides that a manufacturer or seller can be held liable for failure to warn of a dangerous condition it knew or reasonably should have known of at the time the product left the manufacturer's or seller's control.
 - The court in *Palmer v. Volkswagen of Am., Inc.* (Miss. Ct. App. 2003), 905 So. 2d 564, specifically declined to apply the Third Restatement. That case was affirmed in part and reversed in part in *Palmer v. Volkswagen of Am., Inc.* (2005), 904 So. 2d 1077, without reference to the Restatement.

Missouri

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - “There is no strong indication that the Missouri Supreme Court would adopt the Restatement Third of Torts.” *Stanger v. Smith & Nephew, Inc.* (D. Mo. 2005), 401 F. Supp. 2d 974, 982.
 - *Smith v. Firestone Tire & Rubber Co.* (8th Cir. 1985), 755 F.2d 129, 135 (holding that Missouri law imposes no post-sale duty to warn of a newly discovered defect absent a federally mandated recall).

Montana

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - Montana follows the Second Restatement. *Rost v. C. F. & I. Steel Corp* (1980), 189 Mont. 485.

Nebraska

- Adopted Restatement 3d

- No
- Post-Sale Duty to Warn
 - No
- Case law
 - *Anderson v. Nissan Motor Co.* (8th Cir. 1998), 139 F.3d 599, 601-602 explored Nebraska law to find that the Nebraska Supreme Court would not impose a post sale duty to warn.

Nevada

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Assumed so in *White v. Ford Motor Co.*, 312 F.3d 998, 1019 (9th Cir. 2002) (jury instructed that “a manufacturer has a responsibility to warn of a defective product after it has been manufactured and sold, if the manufacturer becomes aware of a defect”, and, on appeal, the Court stated “while we assume that the court’s instruction in this case was correct as a matter of Nevada law (which has not been challenged), it is not the law everywhere”).
- Case law
 - Nevada follows the Second Restatement. *Outboard Marine Corp. v. Schupbach* (1977), 93 Nev. 158.

New Hampshire

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - New Hampshire follows the Second Restatement. *Chellman v. Saab-Scania AB* (1993), 138 N.H. 73.

New Jersey

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Yes
- Case law
 - “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)).
 - “A duty to warn may arise when advances in state-of-the-art have solved or tempered the risk presented by a long-known danger.” *Mandile v.*

Clark Material Handling Co., 131 Fed. Appx. 836, 840 (3d Cir. 2005) (applying New Jersey law).

- Statute
 - “In any product liability action the manufacturer or seller 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.” N.J. Stat. § 2A:58C-4.

New Mexico

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Yes
- Case law
 - New Mexico follows the Second Restatement, requiring the product defect to have been in existence at the time the product left the manufacturer’s hands. *Stang v. Hertz Corp.* (1972), 83 N.M. 730.
 - The court held that the following jury instruction was a correct statement of the law in the context of the case: “[t]he 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, of 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.” *Couch v. Astec Industries, Inc.*, 132 N.M. 631, 641, 643. The manufacturer in Couch had made a voluntary undertaking of responsibility post-sale (i.e., manufacturer set up and tested each plant it manufactured, manufacturer was available by telephone for service calls, and manufacturer hosted an annual meeting to discuss safety issues with customers) and certain critical technology was in existence at the time of manufacture. *Id.* at 643. The Couch court did not “decide whether a manufacturer has a post-sale duty to take steps to address risks that become evident only as a result of technological developments occurring after a product leaves the manufacturer’s control.” *Id.*

New York

- Adopted Restatement 3d
 - Not expressly, but it is relied on in *Liriano*.
- Post-Sale Duty to Warn
 - Yes
- Case law
 - “Although 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.”

Cover v. Cohen (1984), 61 N.Y.2d 261, 275-276. What notice to a manufacturer or vendor of problems revealed by use of the product will trigger his post-delivery duty to warn appears to be a function of the degree of danger which the problem involves and the number of instances reported. *Id.*

- Manufacturer's post sale duty to warn depends on number of factors including degree of danger product involves, number of reported incidents, burden of providing warning, and the burden or ability to track product after sale. *Liriano v. Hobart Corp.* (1998), 92 N.Y.2d 232, 241.
- "A manufacturer of a product affecting human safety has a continuing duty, after such a product has been sold and dangerous defects in design have come to the manufacturer's attention, . . . either to remedy these, or if complete remedy is not feasible, at least to give users adequate warnings and instructions concerning methods for minimizing the danger." *Adams v. Genie Industries, Inc.*, 861 N.Y.S.2d 42 (2008).
- Additional comments
 - Exceptions to duty
 - 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. *Liriano*, at 232.

North Carolina

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Yes
- Statute: N.C. Gen. Stat. § 99B-5(a)(2)
 - No manufacturer or seller of a product shall be held liable in any product liability action for a claim based upon 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, and also proves one of the following: (2) After the product left the control of the manufacturer or seller, the manufacturer or seller became aware of or in the exercise of ordinary care should have known that the product posed a substantial risk of harm to a reasonably foreseeable user or consumer and failed to take reasonable steps to give adequate warning or instruction or to take other reasonable action under the circumstances.
- Case law
 - "A manufacturer does not completely discharge its duty to warn simply by providing some warnings of some dangerous propensity of its product at the time of sale. A continuing duty exists to provide post-sale warnings of any deficiencies it learns exists in the product to users." *Smith v. Selco, Inc.* (1989), 96 N.C.App. 151, 158. A manufacturer may be held liable for negligence if he "sells a dangerous article likely to cause injury in its

ordinary use and the manufacturer fails to guard against hidden defects and fails to give notice of the concealed danger.” *Id.*, quoting *Davis v. Siloo Inc.* (1980), 47 N.C. App. 237, 244.

- “Although North Carolina recognizes that a manufacturer has a continuing post-sale duty to warn consumer of dangerous defects that it later discovers, this duty to warn of hidden defects does not extend beyond the six-year limit imposed by the Statute of Repose.” *Mills v. GM*, 1997 U.S. App. LEXIS 18839, *6 (4th Cir. 1997).

North Dakota

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Yes
- Case law
 - 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.* (1994), 521 N.W.2d 401, 409.

Ohio

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Yes
- Statute – Ohio Rev. Code § 2307.76 provides that a product is defective if
 - (1) It is defective due to inadequate warning or instruction at the time of marketing if, when 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;
 - (b) The manufacturer failed to provide the 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.
 - (2) It 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;

(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.

- Case law
 - “In a products liability case where a claimant seeks recovery for failure to warn or warn adequately, it must be proven that the manufacturer knew, or should have known, in the exercise of ordinary care, of the risk or hazard about which it failed to warn.” *Freas v. Prater Constr. Corp.* (1991), 60 Ohio St. 3d 6, 9. Further, “there will be no liability unless it be shown that the manufacturer failed to take the precautions that a reasonable person would take in presenting the product to the public.” *Id.* citing *Crislip v. TCH Liquidating Co.* (1990), 52 Ohio St. 3d 251. The standard imposed upon a manufacturer in a negligence claim grounded upon an inadequate warning is the same as that imposed in a strict liability claim based upon inadequate warning. *Id.*

Oklahoma

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - “Oklahoma does not recognize a post-sale duty to warn or retrofit a product.” *Wicker v. Ford Motor Co.* (D. Okla. 2005), 393 F. Supp. 2d 1229, 1236-1237, citing *Lee v. Volkswagen of America, Inc.* (1984), 688 P. 2d 1283, 1285; *Kirkland v. General Motors Corporation* (1974), 521 P.2d 1353,1366.
 - “It is unclear whether Oklahoma has recognized a post-sale duty to warn.” *Ahrens v. Ford Motor Co.* (10th Cir. 2003), 340 F.3d 1142, 1147.

Oregon

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - In *Cavan v. General Motors Corp.*, the Oregon Supreme Court held that the “ordinary contract relationship for the sale of goods” does not create an active and continuous relationship and consequently “does not call for the imposition of a special rule” creating a post-sale duty to warn. (1977) 280 Ore. 455, 458.

Pennsylvania

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Yes
- Case law
 - *Padilla v. Black & Decker Corp.*, 2005 U.S. Dist. LEXIS 4720, *17 (E.D. Pa. 2005) states that the “Supreme Court of Pennsylvania has recognized a manufacturer’s limited post-sale duty to warn in *Walton v. Avco Corp.*, 530 Pa. 568, 610 A.2d 454 (1992).” Post-sale duty to warn arises where a manufacturer believes it has sold a non-defective product and subsequently learns that the product was actually defective when placed in the stream of commerce. *Id.* at *18.
- Additional comments
 - No post-sale duty to warn about technological advances exists where no defect existed in the product at the time of sale. *Lynch v. McStome & Lincoln Plaza Assocs.* (Pa. Super. 1988), 548 A.2d 1276, 1280-81 (stating that an escalator manufacturer who exercised reasonable care in production, but at the time of the accident knew of a safer design, does not have a duty to retrofit its already sold products or to notify the owners of the existence of the new design).

Rhode Island

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - “In negligence, the defendant only has a duty to warn if he had reason to know about the product’s dangerous propensities which caused plaintiff’s injuries. Under strict liability, a seller need only warn of those dangers that are reasonably foreseeable. If he does not provide such a warning, then the product is rendered defective.” *Raimbeault v. Takeuchi Mfg.* (S.Ct. RI 2001) 772 A.2d 1056, 1063-1064, citing *Scittarelli v. Providence Gas Co.* (S.Ct. RI 1980), 415 A.2d 1040, 1043, and *Borel v. Fibreboard Paper Products Corp.* (5th Cir. 1973), 493 F.2d 1076, 1088-89.

South Carolina

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law

- The South Carolina legislature has currently only adopted the Restatement (Second) of Torts by statute: S.C. Code Ann. § 15-73-10, et seq. *Campbell v. Gala Indus.* (D.S.C. 2006), 2006 U.S. Dist. LEXIS 26606. The *Campbell* court refused to “legislate from the bench” by applying the Third Restatement.
- *Bragg v. Hi-Ranger, Inc.* (1995), 462 S.E.2d 321 (holding that a manufacturer has no duty to notify previous purchasers of its products about later developed safety devices or to retrofit those products if the products were non-defective under standards existing at the time of the manufacture or sale.)

South Dakota

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Yes
- Case law
 - In *Novak v. Navistar International Transportation Corp.* (8th Cir. 1995), 46 F.3d 844, 850, the court stated that under South Dakota law, a manufacturer may be charged with a post-sale duty to warn.
 - In *Engberg v. Ford Motor Co.* (1973), 87 S.D. 196, the South Dakota Supreme Court adopted the rule of strict liability as expressed in section 402 A of the Restatement (Second) of Torts. Under this rule, “[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer.” Restatement (Second) of Torts § 402A(1) (1965); *Peterson v. Safway Steel Scaffolds Co.* (S.D. 1987), 400 N.W.2d 909, 912.
- Trends
 - The Court finds *Novak* to be persuasive authority predicting that the South Dakota Supreme Court would adopt the third Restatement view regarding a post-sale duty to warn, if presented with the issue. *Robinson v. Brandtjen & Kluge, Inc.* (D.S.D. Sept. 27, 2006), No. CIV. 04-5049, 2006 U.S. Dist. LEXIS 71754 (affirmed on appeal). “Liability for a post-sale failure to warn requires a finding that product sellers can practically and efficiently discharge such an obligation and that the risks of harm are sufficiently great to justify what is typically a substantial post-sale undertaking.” *Robinson v. Brandtjen & Kluge, Inc.*, 500 F.3d 691, 697 (8th Cir. 2007).

Tennessee

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law

- “Tennessee does not recognize a post-sale duty to warn.” *Irion v. Sun Lighting, Inc.* (April 7, 2004), No. M2002-00766-COA-R3-CV, 2004 Tenn. App. LEXIS 210 at *53.
- “We express no opinion, however, as to the merits of recognizing [a post-sale failure to warn claim] in an appropriate case.” *Flax v. DaimlerChrysler Corp.*, 2008 Tenn. LEXIS 505, *55 (Tenn. S. Ct. 2008).

Texas

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No (but see two exceptions below)
- Case law
 - “With regard to post sale duty to warn, Section 402A of the Restatement Second of Torts imposes strict product liability only in those instances where the product is defective when sold and it reaches the user without substantial change.” *Jones v. SIG Arms, Inc.* (December 19, 2001), No. 04-00-00395-CV, 2001 Tex. App. LEXIS 8372, citing *McKisson v. Sales Affiliates, Inc.* (1967), 416 S.W.2d 787, 788-89 (adopting section 402A strict product liability theory). Comment g to section 402A states that “the seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed” or used. *Id.*, citing Restatement Second of Torts § 402A cmt. g (1965).
- Exceptions
 - If the manufacturer regains a significant degree of control over the product, and the product is determined to be defective during that period of control, the manufacturer can be held liable for damages resulting from that defect under the theory of post sale strict liability. *Id.* at *12-13, citing *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 240 (1996).
 - If a manufacturer assumes a post-sale duty and then does not use reasonable means to discharge that duty, the manufacturer may be liable for breach of a post-sale duty to warn. *Bryant v. Giacomini S.p.A.*, 391 F. Supp.2d 495, 503 (N.D. Texas 2005).

Utah

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - The Utah Supreme Court expressly adopted section 402A of the Second Restatement in *Ernest W. Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152, 156-58 (Utah 1979).

Vermont

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - Under Vermont’s doctrine of strict products liability, “a manufacturer has a duty to warn users and consumers when it knows or has reason to know of dangers inherent in the product at the time the product is sold, or when the product is dangerous to an extent beyond that which would be contemplated by an ordinary consumer.” *Webb v. Navistar Int’l Transp. Corp.* (1996), 166 Vt. 119, 127, citing Restatement Second § 402.

Virginia

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Split among courts
- Case law
 - “Though the duty to warn clearly is continuous from the date of manufacturer/sale, it requires the manufacturer to warn only about dangerous conditions it knew about, or in the exercise of reasonable care should have known about, at that time.” *Estate of Kimmel v. Clark Equipment Co.* (W.D. Va. 1991), 773 F. Supp. 828, 831, citing Restatement (Second) of Tort § 88 (1965). “The duty does not require a manufacturer to warn about a dangerous condition that became reasonably recognizable or apparent only at some later period of time, after industry standards and other data caused the matter to be revisited in a new light. Such later acquired information would be relevant only if a proper foundation could be laid relating such information to the time the product left the manufacturer’s hands.” *Id.*
 - The court declined to adopt a post-sale duty to warn as doing such ought to be by the General Assembly. *Hart v. Savage*, 72 Va. Cir. 41, 46 (2006).
 - “Virginia does not recognize a duty on the part of a manufacturer to warn its consumers of dangerous defects discovered by the manufacturer after the sale of its product.” *Ambrose v. Southworth Products Corp.*, 953 F. Supp. 728, 732 (W.D. Va. 1997).
 - “The Court of Appeals for the Fourth Circuit recognizes a duty to warn under a theory of negligence in Virginia.” *McAlpin v. Leeds & Northrup, Co.*, 912 F. Supp. 207, 210 (W.D. Va. 1996).

Washington

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Yes
- Statute –Rev. Code Wash. (ARCW) § 7.72.030(c):

- 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.
- Case law
 - “The general rule is that a postsale duty to warn arises after a manufacturer has sufficient notice about a specific danger associated with the product.” *Esparza v. Skyreach Equipment, Inc.*, 103 Wn. App. 916, 935 (2000).
 - The ultimate issue in a strict liability claim is whether the product is in a defective condition unreasonably dangerous to the user, at the time the product leaves the seller’s hands. *Davis v. Globe Mach. Mfg. Co.* (1984), 102 Wn.2d 68, 74, citing Restatement (Second) of Torts § 402A, comment g (1965).
 - A product manufacturer does not have a post sale duty to warn of a product hazard if the original warnings issued with the product were sufficient to warn of the hazard. *Thongchoom v. Graco* (2003), 117 Wn. App. 299, 306 (discussing Rev. Code Wash. (ARCW) § 7.72.030 (c))
- Additional comments
 - It is unclear from *Thongchoom* whether the product defect must have been present at the time of sale.
 - The trial court has discretion to admit evidence of post-sale manufacture of safety measures to show feasibility. *Davis*, at 74. If in that context, a trial court instructs a jury as to post-sale duties in order to assure that the jury does not consider the feasibility evidence for an improper purpose, the instruction is not improper. *Davis*, at 75.

West Virginia

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - Under a strict liability theory, “product unsafeness arising from failure to warn is to be tested by what the reasonably prudent manufacturer would accomplish in regard to the safety of the product, having in mind the general state of the art of the manufacturing process, including design, labels and warnings, as it relates to the economic costs, at the time the product was made.” *Johnson by Johnson v. General Motors Corp.* (1993), 190 W. Va. 236, 244-45 (emphasis added).
- Additional comments

- The above cited case notes that it has not been determined whether the defect must have been in existence at the time of sale, or if there is a post sale duty to warn under a negligence theory in a products liability case. *Id.* at 245.

Wisconsin

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - Yes
- Case law
 - The following elements are relevant in a manufacturer's post sale duty to warn: (1) the duty to warn post sale must arise in a specific context, (2) the plaintiff must show, or must have shown, that the manufacturer learned about, or should have learned about, a defect or defective condition in its product after the sale of said product, (3) it is relevant if the manufacturer has a safety feature developed after initial manufacture, in response to a known post sale defect or defective condition, (4) the manufacturer, aware of a known post sale defect or defective condition, and having developed a safety device to correct that condition, is then required to notify its circle of customers of said defect or defective condition and the safety device developed in response thereto. "Otherwise stated, the plaintiff must show that the user was unaware of the defect or defective condition and the safety device designed to prevent it." *Olsen v. Ohmeda* (E.D.Wis. 1994), 863 F.Supp. 870 (applying Wisconsin law), *aff'd*. 77 F.3d 485.
 - *Gracyalny v. Westinghouse Electric Corp.* (7th Cir 1983), 723 F.2d 1311 (applying Wisconsin law to find that a "manufacturer has a duty to warn consumers or users of defective conditions which may render its products unreasonably dangerous, as well as of any risks of injury that may be associated with its products. This duty to warn extends not only to hazards which become apparent at the time of sale, but also to dangers which arise after marketing.")

Wyoming

- Adopted Restatement 3d
 - No
- Post-Sale Duty to Warn
 - No
- Case law
 - There is no duty upon a manufacturer to adopt every possible new device which has been then conceived or invented. *Maxted v. Pacific Car & Foundry Co.* (1974), 527 P.2d 832, 835, citing *Marker v. Universal Oil Products Company* (10th Cir. 1957) 250 F.2d 603, 605. Negligence cannot be proven because there is a better way later demonstrated. *Id.* "Reasonable care does not require prescience nor is it measured with the benefit of hindsight. Tort law does not expect Saturday manufacturers to

have the insight available to Monday morning quarterbacks.” *Id.*, quoting *Dean v. General Motors Corporation* (D.C.La. 1969), 301 F. Supp. 187, 192.