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PRODUCT LIABILITY

Consider Yourself Warned: Evolution and Future of the Post-Sale Duty

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INTRODUCTION

The post-sale duty to warn has been the subject of intense debate ever since it was included in the Restatement (Third) of Torts: Products Liability (1997) (hereinafter "Third Restatement"). This article provides an overview of the history and nature of the post-sale duty, summarizes some of the challenges it creates for practitioners, and seeks to predict where the law may develop in the future. Appendix A to this article also provides a state-by-state quick-reference guide to current law relating to the post-sale duty to warn.

I. THE NATURE OF THE POST-SALE DUTY TO WARN

The post-sale duty to warn is not universally accepted. Some states have rejected a post-sale duty to warn. Many other states do not appear to have addressed the question. *See* Appendix A. In jurisdictions where it has been adopted, nuances of the obligation vary significantly from state to state. Generally, however, states that impose a post-sale obligation do so under one of two approaches.[†]

The more expansive approach is the one taken by the Third Restatement. States adopting this approach recognize a general duty of a seller to act reasonably and, therefore, impose a post-sale duty to warn when "a reasonable person in the seller's position would provide such a warning." Third Restatement §10.

The less expansive approach is what this author refers to as the "latent product defect" approach. States that have adopted the latent product defect approach generally impose a post-sale duty to warn when a latent defect existed in the product at the time of sale is first discovered after sale.

a. The Third Restatement or "Reasonable Seller" Approach

The Third Restatement takes a negligence "reasonable seller" approach to the post-sale duty to warn. It provides:

[†] Some commentators also talk about cases imposing a post-sale duty to warn under a voluntary undertaking theory or a theory involving a continuing relationship, where the seller is providing ongoing maintenance and support for the product. E.g., Kevin R, Boyle, The Expanding Post-Sale Duty of a Manufacturer: Does a Manufacturer have a Duty to Retrofit Its Products? 38 Ariz. L. Rev. 1033, 1041 (1996). These specialized circumstances are beyond the scope of this article.

§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;
>
> (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.

Third Restatement §10

Importantly, the Third Restatement approach does not require that the product be defective at the time of sale. Instead, its sole focus is on whether the post-sale circumstances would prompt a reasonable seller to provide notice.

b. The Latent Product Defect Approach

The latent product defect approach is narrower than the Third Restatement Approach. Courts adopting the latent product defect approach have held that a post-sale duty to warn exists only when a manufacturer learns or should have learned, after the initial sale of a product, that the product contained a latent product defect at the point of sale. *E.g., Patton v. Hutchinson Wil-Rich Mfg. Co*., 253 Kan. 741, 861 P.2d 1299, (1993); *Tabieros v. Clark Equip. Co*., 85 Haw. 336, 944 P.2d 1279 (1997). The scenario under which these courts impose a duty generally involves: (1) a product that is defective at the time of sale; (2) a defect that due to its latent nature is undetected prior to sale; and (3) that the manufacturer either discovered or should have discovered the defect through information that became available, typically after the initial sale. *Patton,* 253 Kan. 741, 742, 861 P.2d 1299, 1303.

Because a defect in the product at the time of sale can create a duty to warn (or to correct the defect) at the time of sale, it is easy to confuse the latent product defect approach with a continuation of the original duty from the time of sale. A well accepted tenant of product liability law is that a seller will incur liability for harm caused by a defect existing at the point of sale. Accordingly, if the post-sale obligation were simply a continuation of the point-of-sale obligation, an argument could be made that any cause of action based upon the post-sale obligation would be subsumed in or duplicative of the point-of-sale obligation. After all, if a seller sells the product that is defective at the time of sale, the seller generally may be liable regardless of whether the seller meets any post-sale duty to warn. As explained in the comments to the Third Restatement:

> When a product is defective at the time of sale, liability can be established without reference to a post-sale duty to warn. A seller who discovers after sale that its product was defective at the time of sale … cannot generally absolve itself of liability by issuing a post-sale warning. As long as the original defect is causally related to the harm suffered by the plaintiff, a prima facie case … can be established notwithstanding reasonable post- sale efforts to warn."

Third Restatement §10, comment j.

Some courts have made clear that the continuing duty to warn and the post-sale duty upon receipt of information relating to a latent defect are two separate duties. The first arises at the time of sale (either in negligence or strict product liability). The second (although preconditioned on a time-of-sale defect) arises in negligence for the first time after the sale when information is brought to the attention of the seller indicating that the latent defect exists.

In *Simonsen v. Ford Motor Co.*, 196 Or. App. 460, 473, 102 P.3d 710, 718 (2004) the Court distinguished these two separate duties. First, it discussed allegations relating to Ford's obligation to discover an alleged latent defect at the time of sale. *Id. at* 472, 102 P.3d at 717-718. The Court concluded that certain allegations of post-sale conduct, including that Ford had failed or delayed a recall notice, were subsumed or duplicative of the point-of-sale duty because the recall was simply a fix of the problem that Ford allegedly created at the time of sale. Separately, the Court considered other allegations that, when Ford received post- sale reports of serious injury and fatalities, Ford failed to investigate, discover, and to warn about the latent defect. The Court concluded that – even though the defect was the same – the duty to discover and warn about the defect at the time of sale was distinct from the duty to investigate and warn upon receiving new reports of injury after the sale. *Id. See also, Linert v. Foutz*, 2016-Ohio-8445, ¶ 29, 149 Ohio St. 3d 469, 477, 75 N.E.3d 1218, 1226, reconsideration denied, 2017-Ohio-573, ¶ 29, 148 Ohio St. 3d 1413, 69 N.E.3d 752 ("a claim for failing to warn after the product is sold is separate from a claim that a warning should have been given at the point of sale").

Courts can easily confuse a continuing point-of-sale duty and a post-sale duty to warn. Indeed, that appears to have happened in *Jablonski v. Ford Motor Co.*, 398 Ill. App. 3d 222, 254, 923 N.E.2d 347, 376 (2010), rev'd, 2011 IL

110096, 955 N.E.2d 1138. In *Jablonski*, the plaintiff sued Ford alleging that the defective placement of the fuel tank in plaintiff's 1993 Lincoln Town Car had caused the contents of the trunk of the car to puncture the fuel tank during an accident, resulting in a fire causing plaintiff's injuries. In 2002, after the conclusion of a blue-ribbon panel Ford convened with various police agencies nearly a decade after the manufacture of Plaintiff's vehicle, Ford: (i) introduced an optional "Trunk Pack" liner that required users to place objects in the trunk laterally, rather than longitudinally, reducing the likelihood of a fuel tank puncture; and (ii) recommended "Trunk Packing Considerations" which advised police officers on the safest way to pack equipment in the trunk. The plaintiff claimed, among other things, that Ford had negligently failed to inform the plaintiff of the existence of the Trunk Pack and/or Trunk Packing Recommendations. The trial court instructed the jury that a seller is subject to liability for harm caused by the seller's failure to provide a post-sale warning "if a reasonably careful person in the seller's position would provide such a warning under the circumstances." The Appellate Court affirmed the instruction, noting that Illinois recognizes the "continuing" duty to warn of a hazard known at the time of sale, but the Illinois Supreme Court reversed. The Illinois Supreme Court stated that, although the appellate court justified the instruction based upon a "continuing" duty to warn, the jury instruction represented a post-sale duty to

warn. *Jablonski v. Ford Motor Co*., 2011 IL 110096, ¶¶ 113-119, 955 N.E.2d 1138, 1160–62. The Illinois Supreme Court declined to adopt a post-sale duty to warn at that time.

II. CHALLENGES CREATED BY POST-SALE DUTIES TO WARN

Many states still have yet to consider whether to adopt a post-sale duty to warn and, if so, whether to adopt the Restatement Approach or Continuing Duty approach discussed above. In determining whether to adopt a post-sale obligation, states should consider the many challenges that arise from imposition of this responsibility and the many questions that must be answered in its application.

a. Must a Judge Determine the Existence of a Post-Sale Duty on a Case-by-Case Basis?

The existence or non-existence of a duty, including a post-sale duty to warn, generally is a question of law to be determined by the judge. The Third Restatement indicates that in determining whether a post-sale duty exists, "courts must make the threshold decisions that, in a particular case, a trier of fact could reasonably find that product sellers can practically and effectively discharge such an obligation and that the risks of harm are sufficiently great to justify what is typically a substantial post-sale undertaking." Third Restatement §10, Comment

c. Some courts have held that "the existence … of such a duty [is] generally fact- specific". *Liriano v. Hobart Corp.,* 92 N.Y.2d 232, 240, 700 N.E.2d 303, 307 (1998). Some courts also have indicated that the duty may exist only in certain industries or under certain factual situations, but not in other industries or other factual situations. *E.g., Kozlowski v. John E. Smith's Sons Co.*, 87 Wis. 2d 882, 901, 275 N.W.2d 915, 923–24 (1979) (differentiating post-sale obligations for common household items and industrial "sausage stuffer machine"); *See also, Patton v. Hutchinson Wil-Rich Mfg. Co.*, 253 Kan. 741, 762, 861 P.2d 1299, 1315 (1993) ("We cannot fashion a 'bright line' rule from a farm cultivator case that applies with interpretative ease to the infinite variety of products that inhabit the marketplace. Each trial judge will necessarily be required to make a determination as to whether the record presents a fact question as to knowledge and reasonableness whenever a plaintiff's claim of negligent breach of a post-sale duty to warn is alleged").

The Iowa Supreme Court determined that a judge may, in any given case, weigh the factors set out in the Third Restatement to determine that no duty existed as a matter of law.

> We recognize the comments to the Restatement refer to the need for the court to consider the four factors in deciding whether a post-sale breach of duty to warn claim should reach the jury. *See* Restatement (Third) of Torts: Products Liability § 10 cmt.
>
> a. Clearly, the particular circumstances of a case may permit a trial court to utilize the factors to determine as a matter of law no duty existed.

Lovick v. Wil-Rich, 588 N.W.2d 688, 696 (Iowa 1999), as amended on denial of reh'g (Mar. 25, 1999), amended on denial of reh'g (Apr. 12, 1999).

Many Courts do not appear to have fully explored or clarified the extent to which the judge may act as a gatekeeper, imposing a post-sale duty only when the factual circumstances warrant it. Even if a jurisdiction already has adopted a duty in past cases, practitioners should consider whether an argument can be made that the duty is inapplicable in the circumstances of their specific case.

b. Evidentiary Issues and Increased Potential for Punitive Damages

Practitioners are very familiar with fights to exclude evidence of post-sale product improvements, *E.g.,* Kan. Stat. § 60-3307 (precluding admission in a product liability claim of evidence of any advancements or changes in technical or other knowledge or techniques in warning of risks or hazards subsequent to the time the product in issue was sold); *See also, Padilla v. Hunter Douglas Window Coverings, Inc.,* No. 09 CV 1222, 2014 WL 595051, at *1 (N.D. Ill. Feb. 13, 2014) (barring evidence of accidents that took place post-manufacturer and post- sale because "the salient time of inquiry with respect to what Defendant knew or should have known is when the [product] at issue were manufactured and sold"). Federal Rule of Evidence 407 provides that such evidence is not admissible to prove negligence, culpable conduct, a defect in a product or its design, or a need for a warning or instruction, but that the court may admit such evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

When a state adopts a post-sale duty to warn, however, practitioners can face much more complex questions about the admissibility and relevance of post- sale activity. While evidence of post-sale incidents, investigations, communications, and decisions may continue to have a significant likelihood of creating jury confusion and prejudicial effect, the same evidence may have increased probative value because it now relates to a separate breach of post-sale duty to warn cause of action. When significant evidence of post-sale activity is admitted, practitioners may need to adopt a more nuanced trial strategy which helps the jury put the evidence into context with the factual and legal arguments being presented. Post-sale evidence, for example, can change the risks associated with the outcome and increase or decrease the likelihood of an award of punitive damages. *See* Michael Rustad, *in Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data,* 78, Iowa L. Rev. 1, 66 (1992) (tying probability of punitive damages to jury perception that a manufacturer failed to take appropriate post-sale actions).

c. To Whom Does the Duty Apply?

The Third Restatement separately discusses the obligations of a successor corporation to warn of product defects in its predecessor's products. Third Restatement §13. While a full discussion of successor liability for post-sale warnings is beyond the scope of this article, in general, the Third Restatement would impose such liability only when: (i) the successor undertakes or agrees to service, maintain, or repair the product or enters into some other relationship with purchasers giving rise to economic advantage to the successor, and (ii) a reasonable successor would provide a warning under the circumstances.

The Third Restatement also acknowledges that the post-sale duty to warn should apply differently to manufacturers and others in the chain of distribution:

> In applying the reasonableness standard to members of the chain of distribution it is possible that one party's conduct may be reasonable and another's unreasonable. For example a manufacturer may discover information under circumstances satisfying Subsection (b)(1) through (4) and thus be required to provide a post-sale warning. In contract, a retailer is generally not in a position to know about the risk discovered by the manufacturer after sale and thus is not subject to liability because it neither knows nor should know of the risk.

Third Restatement §10, Comment b. Some states, adopting this approach, now impose higher post-sale obligations on manufacturers than on other sellers. *E.g., DeLoach v. Rovema Corp.*, 241 Ga. App. 802, 804, 527 S.E.2d 882, 883 (2000)

("Georgia law recognizes a manufacturer's duty to warn consumers of danger arising from the use of a product based on knowledge acquired after the product is sold. But Georgia law imposes a duty on a seller to warn only of dangers actually or constructively known at the time of the sale"). *See also,* Wash. Rev. Code Ann. § 7.72.030-040 (differentiating post-sale duties between manufacturers and sellers other than the manufacturer). Thus, practitioners in a jurisdiction that has adopted a post-sale duty by a manufacturer should carefully consider whether that duty is shared by non-manufacturer clients.

d. When Does the Duty to Warn Kick In?

Information about an existing products safety record during use does not flood to the manufacturer all at once. It trickles in, one small piece at a time, triggering additional inquiries, that in turn provide additional pieces of an overall picture of what may be happening to cause incidents of injury.

For Plaintiffs' attorneys, the timing of a post-sale warning is easy. They argue that their client was injured because the manufacturer failed to warn early enough. So, for them, regardless of when the warning was issued, it came too late. For courts, the timing is easy. Courts will instruct a jury that the duty is applicative when a reasonable manufacturer or seller would have issued a warning. *See* 4A *Minnesota Practice* CIVJIG 75.40 ("manufacturer has a duty to use reasonable care to provide post-sale warnings of product dangers"); *See also*, Florida Pattern Jury Instruction 403.10, Note 2 ("A special instruction may be needed in cases raising issues of post-manufacture or post-sale duty to warn").

For manufacturers and sellers, evaluating the product risk and making a decision whether and when to issue a post-sale warning can be a difficult struggle. First, the manufacturer has to understand what information is available and, in Court, manufacturers will be charged with understanding the full impact of all of the information available. Here are just a few the possible sources of information a manufacturer may struggle to integrate into a coherent picture of the risks:

- Reports of incidents from customer complaints;
- Warranty Returns;
- Internal quality control data;
- Replacement part orders;
- Marketing consumer feedback;
- Retailer feedback;
- Online consumer product comments;
- Online product ratings or comparison;
- Reports of incidents from international divisions;
- Proposed or discussed changes to safety standards;
- Alternative product designs launched by competitors;
- Publicly available reports of incidents with similar competitor products;
- Online published video, pictures, or other information regarding consumer use;

Furthermore, poor timing can be costly. Issuing a warning without a full investigation may risk misidentifying the cause or scope of the problem. This can result in repeated corrections, confusion, and poor publicity of the warning. Issuing a warning too late may risk litigation and potential liability as well as reputational risk from someone whose injury might have been avoided if the seller had acted earlier.

Complicating the timing is the separate reporting obligations to regulators. The Consumer Product Safety Act ("CPSA"), Section 15(b), requires manufacturers, importers, distributors and retailers to notify the Consumer Product Safety Commission ("CPSC") immediately if they obtain information that reasonably supports the conclusion that a product distributed in commerce:

(1) fails to comply with an applicable consumer product safety rule or a voluntary standard upon which the CPSC has relied; (2) fails to comply with any other rule, regulation, standard, or ban under the CPSA or any other Act enforced by the Commission; (3) contains a defect which could create a substantial product hazard; or (4) creates an unreasonable risk of serious injury or death. 15 USC §2064. *See also,* Child Safety Protection Act §102 (requiring reporting of incidents of children choking small parts). The CPSC Recall Handbook (2012) (available at https://www.cpsc.gov/s3fs-public/pdfs/blk_pdf_8002.pdf) presumes a company's investigation can be completed in ten working days and makes clear that "a company in doubt as to whether a defect exists should still report if the potential defect could create a substantial product hazard."

When a company reports to the CPSC, the CPSC performs an analysis of whether and what kind of remedial measures, including a post-sale warning, may be necessary. After a company notifies the CPSC, the company should consult with the CPSC and obtain their input before taking any steps to issue a warning to the general public. Indeed, the CPSC cautions companies that the CPSC staff "must review and agree upon" press releases, social media based communications, and "all other notice to be disseminated." *See* The CPSC Recall Handbook, p. 19.

e. To Whom and How Must the Warning be Published?

The Third Restatement recognizes that "the problem of identifying those to whom product warnings might be provided is especially relevant in the post- sale context." Some products, like children's furniture, may be passed on from the original user shortly after they are outgrown, but still be in the marketplace being used by someone for many years thereafter. The Third Restatement contemplates that a post-sale duty may still exist to warn "classes of product users" through means such as purchased public media, but acknowledges that "[a]s the group to whom warnings might be provided increases in size, costs of communicating warnings may increase and their effectiveness may decrease." Third Restatement §10, Comment g.

Again, for Plaintiffs' attorneys, the question is easy. They will argue that, regardless of who the manufacturer warned and what means were used, the plaintiff was injured because the manufacturer did not do enough. For courts, the timing is easy. Courts will instruct a jury that the manufacturer was obligated to do what "a reasonable manufacturer would do". For manufacturers and sellers, however, identifying who to warn and how to reach them can be incredibly complex. The CPSC encourages companies to be creative in developing ways to reach owners and motivate them to respond, but provides a wide range of possible examples of notice that may be appropriate:

- written and video news releases;
- national news conference, television and radio announcements;
- firm website and social media presence, including Facebook, Google +, YouTube, Twitter, Flickr, Pinterest, company blogger networks, and blog announcements;
- direct notice to purchasers — identified through registration cards, sales records, catalog orders, retailer loyalty cards, etc.;
- notices to distributors, dealers, sales representatives, retailers (traditional brick and mortar and on-

line), service personnel, installers, repair shops, etc.;

- notices to repair/parts shops and included with product replacement parts and accessories;
- service bulletins;
- notices to day care centers, thrift stores and other secondhand retailers;

Practitioners must treat each post-sale campaign as unique. Who and how to warn will depend upon countless factors including the nature of the product, the risk of injury, the seriousness of an injury if one occurs, the price of the product, age of the product, the number of products in the marketplace, the expected lifespan of the product, the availability of purchaser and consumer information, the ability of consumers to understand and heed the potential warning, the obviousness of the risk, the likelihood of risk if the warning is heeded, and the cost of issuing the warning.

f. Product Safety Improvements

The Third Restatement recognizes that "[i]f every post-sale improvement in a product design were to give rise to a duty to warn users of the risks of continuing to use the existing design, the burden on product sellers would be unacceptably great." Third Restatement §10, Comment a. Notwithstanding, the Third Restatement still would impose a duty to warn of such safety improvements if a "reasonable seller" would do so.

Most states, noting the distinction between discovering a previously unknown defect versus simply making product improvement, have held that post-sale duty to warn does not extend to advisory notification of post-sale improvements. *See Wilson v. United States Elevator Corp*., 972 P.2d 235, 237, 241 (Ariz. Ct. App. 1998) (no duty to provide post-sale advisories of improvements in elevator door closing mechanism), *See also Patton v. Hutchinson WilRich Mfg. Co*., 972 P.2d 235, 1311 (Kan. 1993) (declining to "impose a requirement that a manufacturer seek out past customers and notify them of changes in the state of the art.").

Imposing potential liability each time a manufacturer sold a safer product would undoubtedly stifle innovation. Accordingly, only certain industries, such as pharmaceutical manufacturers, operate under a heightened duty to warn. *See Proctor v. Davis*, 291 Ill. App. 3d 265, 273 (1997). For expert manufacturers such as these, courts have required them to warn of improvements in their product, even if the product was reasonably safe when it was sold.

g. Statutes of Repose

Many states have adopted statutes of repose which preclude product liability claims based upon passage of time following the initial sale of a product. For example, Georgia's O.C.G.A. § 51-1-11(b)(2) and (c) bar product liability actions based on strict liability and negligence after ten years from the date of the first sale of the product that causes the alleged injury. Statutes such as this have a number of advantages, including providing finality to manufacturers and to contain the cost of insuring over such risks. The post-sale duty to warn, however, can thwart these advantages.

In *Sharp ex rel. Gordon v. Case Corp.*, 227 Wis. 2d 1, 13, 595 N.W.2d 380, 385 (1999), for example, the Wisconsin Supreme Court, "after studying the applicable Oregon cases" concluded "that Oregon's statute of repose is not applicable to the post-sale warning claim" in that case. *See also Chrysler Corp. v. Batten*, 264 Ga. 723, 727, 450 S.E.2d 208, 213 (1994), *citing* O.C.G.A. § 51-1-11(c) (Noting that negligent failure to warn claims, are expressly excluded from Georgia's ten-year statute of repose).

Oregon similarly concluded that a statute of repose applicable to pre-sale conduct did not bar a failure to warn claim based upon subsequent knowledge of post-sale incidents. *Simonsen v. Ford Motor Co.*, 196 Or. App. 460, 473, 102 P.3d 710, 718 (2004) (finding an automobile manufacturer could be held liable for negligently failing to test for latent defects after receiving reports of injury received after the date of sale); *See also, Nat'l Interstate Ins. v. Beall Corp.*, No. 3:14-CV-01245-JE, 2015 WL 1137440, at *3 (D. Or. Mar. 11, 2015) (finding that negligence claims can be pursued for failing, post-sale, to investigate and discover latent product defects and "issue[ing] recall notices or other warnings").

h. Post-Sale Duty to Recall

A discussion of post-sale duty to warn cannot be complete without mention of the post-sale duty to recall. The Third Restatement imposes upon a manufacturer or seller a duty to conduct a reasonable recall when a government agency requires a recall or when the manufacturer voluntarily undertakes one:

§11. LIABILITY OF COMMERCIAL PRODUCT SELLER OR DISTRIBUTOR FOR HARM CAUSED BY POST-SALE FAILURE TO RECALL PRODUCT

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

(a)(1) a 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.

The duty to recall applies to significantly more limited circumstances than the duty to warn. In practice, however, when factors indicate that a reasonable manufacturer would issue a post-sale warning (i.e., the manufacturer knows that the product poses a substantial risk of harm, can identified and effectively reach the users, and the risk of harm outweighs the benefits of a warning), practitioners should advise the manufacturer to consider issuing a recall rather than just a warning.

III. THE FUTURE OF THE POST-SALE DUTY TO WARN

While no one has a crystal ball, the history of the post-sale duty to warn and the trend in technology and advances in product design provide insights into the future of the post-sale obligations. This author predicts that post-sale obligations are likely to gain increased acceptance and, in the future, manufacturers will be expected to take increasingly strong post-sale remedial measures toward product safety.

a. The Post-Sale Duty to Warn Continues an Expansion of Manufacturer Liability

The obligations of manufacturers and sellers for the safety of consumers have been expanding throughout the history of product liability law evolution. About a century ago, courts first started to abandon the bounds of *privity* and to recognize a seller's obligation not only to its immediate vendee, but also to remote vendees who may purchase or use its product. *See MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050 (1916). About a half-century ago, courts began to lift the requirements of negligence, forging the path for the evolution of the strict product liability theory. *See e.g., Greenman v. Yba Power Products, Inc.,* 59 Ca.2d 57, Cal.Rptr. 697, 377 P.2d 897 (1963). These expansions are likely to continue.

The justifications for expanding the obligations of manufacturers and sellers has been: (i) that the seller, by marketing his products, undertook and assumed special responsibility toward any member of the consuming public who may be injured by it; (ii) the public has the right to and does expect "reputable sellers" will know the products being sold and will stand behind the safety of their goods, and (iii) public policy demands that the burden of accidental injuries caused by products to be placed on those who

market them so that they can be treated as a cost of production against which liability insurance can be obtained. Second Restatement §402A, Comment c. These same justifications have been cited as support for the expansion of the post-sale duty to warn. *See e.g. Liriano v. Hobart Corp*., 92 N.Y.2d 232, 240 (1998) ("The justification for the post-sale duty to warn arises from a manufacturer's unique (and superior) position to follow the use and adaptation of its product by consumers.").

b. Technological Advances will Drive Expansion of Post-Sale Obligations

Technology and advances in product design will decrease the cost of consumer contact and increase the effectiveness of post-sale obligations.

We also live in an age of technological complexity. Cell phones, watches, and many more products now have computers imbedded in them. Wooden toys have been replaced with electronic ones. As products become more complex, the disparity of knowledge between consumers and manufacturers about the limitations and safety of products has increased. That increase in knowledge disparity forces consumers to increase their reliance on manufacturers and sellers and helps drive the expansion of post-sale obligations.

We also live in the age of big data and the dawn of the "internet of things." Internet purchases and electronic payment has become the norm, making it increasingly easy to identify consumers. Companies are collecting an increasing amount of data not only on the initial purchaser, but also on the end or current users of products. As users are easier to identify, the cost of warning those users about potential hazards lowers and the expectation that companies will endure that cost increases.

As more and more products are connected directly to the internet, companies are collecting an increasing amount of data about the state of the product itself in real time. As companies increase their knowledge about the way that consumers are using products, users will impose upon companies an increasingly paternalistic role to provide information to consumers about possible dangers. People already are accustomed to receiving automated messages and even updates relating to their computers and iPhones over the internet. It won't be long before this expands to other products. Several automakers now provide automated Cloud-based updates of vehicle software. *See,* Eric A. Taub, *Your Car's New Software Is Ready. Update Now?* The New York Times, September 9, 2016.

Similar automated updates are being explored in household appliances and other less expensive products. As more and more products become tied to the internet, the role of manufacturers and sellers will no longer end at the time of sale. This ongoing post-sale relationship will increase the justification to impose post-sale obligations. Furthermore, as manufacturers increasingly maintain a connection to the "internet of things", their ability to take effective post-sale actions will follow. One could predict the day when a manufacturer, upon learning of a substantial safety defect, is expected to issue a failsafe software update either: (i) to place a warning right on the product itself; or (ii) to stop further use of the product entirely until the safety defect is corrected.

IV. CONCLUSION

At present, the post-sale duty to warn is inconsistent across different jurisdictions and still evolving. Where it has not been adopted, practitioners are advised to understand the policy considerations in favor and against its adoption. Where it has been adopted, practitioners are advised to understand its limitations and to adopt nuanced litigation and trial strategies to help the judge and the jury understand the application of the legal questions to the factual evidence being presented. As products increase in

complexity and the flow of information between manufacturers and consumers continues to grow, however, more jurisdictions are likely to impose post-sale obligations.

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