**Post-Sale Duty to Warn: Restatement (Third) of Torts: Products Liability §10 (1998)**

**Twenty Years Later**

Presentation to Forum for Environmental and Toxic Tort Issues

September 27, 2018

Chicago, Illinois

Thomas D. Jensen

Molly de la Vega

Lind Jensen Sullivan & Peterson, P.A.

1300 AT&T Tower

901 Marquette Avenue South

Minneapolis, MN 55402

(612) 333-3637

[thomas.jensen@lindjensen.com](mailto:thomas.jensen@lindjensen.com)

molly.delavega@lindjensen.com

With increasingly widespread acceptance, the post-sale duty of reasonable care to warn is spreading broadly across the land. David G. Owen & Mary J. Davis, *Products Liability,* §10:24 (2014). Although states apply the doctrine differently, the vast majority of courts recognizing post-sale failure to warn claims agree that a claim arises when the manufacturer or seller becomes aware that a product is defective or unreasonably dangerous after the point of sale and fails to take reasonable steps to warn consumers who purchased the product.  *Fox v. Amazon.com, Inc.,* 2018 WL 2431628 \*9 (M.D. Tenn. May 30, 2018) (citing cases), *appeal pending*. “The postmarket duty to warn recognizes that "[e]ven when a product is not defective at the time of sale, a manufacturer may be subject to liability if it subsequently learns of dangers attendant to the use of the product or methods to avoid serious risks and fails reasonably to communicate that information to product users." James A. Henderson, Jr. & Aaron D. Twerski, *The Products Liability Restatement* in the *Courts: An Initial Assessment,* 27 Wm. Mitchell L. Rev. 7, 28 (2000).

The emergence of the duty was propelled by the *Restatement (Third) of Torts: Products Liability*, §10 (Am. Law Inst. 1998). Section 10 provides:

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

(b) A reasonable person in the seller's position would provide a warning after the time of sale if:

(1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and

(2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

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

In promulgating this duty members of the American Law Institute recognized what others later have labelled a “monster duty.” James A. Henderson, Jr. & Aaron Twerski, *Teacher’s Manual for Products Liability: Problems and Process* 159 (6th ed. 2008). So in commentary, ALI members sought to soften the duty’s scope:

Courts recognize that warnings about risks discovered after sale are sometimes necessary to prevent significant harm to persons or property. Nevertheless, an unbounded post-sale duty to warn would impose unacceptable burdens on product seller. The cost of identifying and communicating with product users years after sale are often daunting. Furthermore, as product designs are developed and improved over time, many risks are reduced or avoided by subsequent design changes. If every post-sale improvement in a product design were to give rise to a duty to warn users of the risks of continuing to use the existing design, the burden on product sellers would be unacceptably great.

…

In light of the serious potential for overburdening sellers in this regard, the court should carefully examine the circumstances for and against imposing a duty to provide a post-sale warning in a particular case.

*Restatement,* §10, Comment a (1998). The American Law Institute further notes that a post-sale duty should not exist if acquisition of knowledge of adverse outcomes is both infrequent and insubstantial. Otherwise sellers would face “costly and potentially crushing burdens.” *Id.,* Comment d. Moreover, a post-sale duty is not owed when the danger discovered is open and obvious to an ordinary consumer who used the product with common knowledge of its characteristics. *See Spowal v. ITW Food Equip. Grp LLC,* 943 F. Supp. 2d 550, 556 (W.D. Pa. 2013) (involving a food mixer whose paddle moved a bit (“wind-down”) after it was turned off).

The *Restatement* makes it clear that this post-sale duty is independent of a time-of-sale defect and therefore selling a defective product can result in claims of time-of-sale defect and also post-sale failure to warn. In addition, the *Restatement* adds that if the product was defective when sold, the manufacturer cannot be absolved of liability by issuing a post-sale warning for harms caused before any warning is issued. J. David Prince & Kenneth Ross, *Post-Sale Duties: The Most Expansive Theory in Products Liability,* 74 Brook. L. Rev. 963, 967 (2009).

Jurisdictions Finding a Duty

The seminal, pre-*Restatement,* case on post-sale duty to warn is [*Comstock v. General Motors Corp.,* 358 Mich. 163, 99 N.W.2d 627, 634 (1959)](https://scholar.google.com/scholar_case?case=15247176742182055492&q=%22post-sale+duty+to+warn%22+2015&hl=en&as_sdt=6,24). In *Comstock,* the court observed that the reasons for the imposition of a duty to warn at the point of sale also apply to the imposition of a duty to warn of latent defects which become known to the manufacturer after the product has been placed in the market. *Restatement* Section 10 fueled its adoption. *See, e.g.,* [*Lewis v. Ariens Co*., 434 Mass. 643, 751 N.E.2d 862,  866 (2001)](https://scholar.google.com/scholar_case?case=7725617930149649783&q=%22post-sale+duty+to+warn%22+2017&hl=en&as_sdt=6,24) (finding “the principles set forth in § 10 represent a logical and balanced embodiment of the continuing duty rule”);  *Sta-Rite Industries, Inc. v. Levey*, 909 So. 2d 901 (Fla. App. 2004) (citing Section 10); *accord* [*Patton v. Hutchinson Wil-Rich Mfg. Co.*, 253 Kan. 741, 861 P.2d 1299, 1313 (1993)](https://scholar.google.com/scholar_case?case=12513546378812185773&q=%22post-sale+duty+to+warn%22+2015&hl=en&as_sdt=6,24); [*Owens-Illinois, Inc. v. Zenobia,* 325 Md. 420, 601 A.2d 633, 645-46 (1992)](https://scholar.google.com/scholar_case?case=17610537685050847277&q=%22post-sale+duty+to+warn%22+2015&hl=en&as_sdt=6,24). The most recent endorser is Minnesota. *See Great Northern Ins. Co. v. Honeywell Int’l, Inc.,* 911 N.W.2d 510, 520-521 (Minn. 2018) (adopting the *Restatement* §10 negligence standard). On its heels is Alaska. *See* [*Jones v. Bowie Indus., Inc.,* 282 P.3d 316, 335-36 (Alaska 2012)](https://scholar.google.com/scholar_case?case=12690784383559978946&q=%22post-sale+duty+to+warn%22+2014&hl=en&as_sdt=6,24) (adopting § 10). Federal courts generally predict state court acceptance of the doctrine. *See, e.g., Jenks v. New Hampshire Motor Speedway,* 2012 WL 1393977 \*5 (D.N.H. 2012) (predicting the New Hampshire Supreme Court would adopt Section 10).

Jurisdictions adopting the duty may emphasize its grounding in negligence, not strict liability.  *See, e.g.,* [*Densberger v. United Technologies Corp.*, 297 F.3d 66, 71 (2d Cir. 2002)](https://scholar.google.com/scholar_case?case=17611613509915179789&q=%22post-sale+duty+to+warn%22+2018&hl=en&as_sdt=6,24) (recognizing that while a post-sale duty does not exist in Connecticut strict liability law, it does exist in negligence); *Estate of McDermed v. Ford Motor Co.,* 2016 WL 4142107 \*4 (D. Kan. Aug. 3, 2016) (recognizing that Kansas adopted the duty only as to negligence - not strict liability - claims); [*Lovick v. Wil-Rich,* 588 N.W.2d 688, 693 (Iowa 1999)](https://scholar.google.com/scholar_case?case=17800657952629024309&q=%22post-sale+duty+to+warn%22+2015&hl=en&as_sdt=6,24) (grounding its adoption in negligence). *But see Koker v. Armstrong Cork, Inc.*, 60 Wash. App. 466, 804 P.2d 659, 666 (1991) (finding that asbestos product manufacturer had post-sale duty even if the dangers were unforeseeable at the time of sale). Other jurisdictions tweak acceptance. *See, e.g., Talarico v. Skyjack, Inc.,* 191 F. Supp. 3d 394, 399 (M.D. Pa. 2016) (recognizing Pennsylvania’s rule that the duty exists but only if the defect existed at the time of sale).

It matters not that the manufacturer no longer makes the product. *Ragin v. Porter Hayden Co.,* 133 Md. App. 116, 754 A.2d 503, 518 (2000) (noting the post-sale duty exists even when the manufacturer no longer makes the product). Manufacturers selling products in which others may incorporate a defective component are held to the duty. *See* [*Berkowitz v A.C. & S., Inc.*, 288 A.D.2d 148, 149, 733 N.Y.S.2d 410](https://scholar.google.com/scholar_case?case=1374941423572583147&q=%22post-sale+duty+to+warn%22+2017&hl=en&as_sdt=6,24) (2001) (noting that even though defendant sold a bare metal product, it had a duty to warn about the conspicuous hazards of asbestos-containing materials third-parties foreseeably manufactured and/or used therewith subsequent to that sale).

Some cases evaluate whether the duty extends throughout the supply chain. *See, e.g.,* *Coleman v. Anco Insulations, Inc.,* 2017 WL 1854988 \*9 (M.D. La. May 8, 2017) (agreeing the duty extends to manufacturers under Louisiana law and leaving open whether it also extends to others in the supply chain); *Gomez v. Harbor Freight Tools USA, Inc.,* 2018 WL 3430685 \*5 (M.D. Ga. July 16, 2018) (recognizing Georgia law adopts the rule as to manufacturers but not as to others in the supply chain).

Jurisdictions Finding No Duty

Not all jurisdictions have been willing to adopt the duty. They include South Carolina. *See, e.g., Davenport v. Goodyear Dunlop Tires No. Am., Ltd.,* 2018 WL 1166091 \*3 (D.S.C. Mar. 6, 2018) (noting that South Carolina has not recognized the post-sale duty); *Campbell v. Gala Industries Inc.,* [2006 WL 1073796, \*5 (D.S.C. Apr. 20, 2006)](https://scholar.google.com/scholar_case?about=11861392856344412717&q=%22post-sale+duty+to+warn%22+2018&hl=en&as_sdt=6,24) (noting that while the South Carolina Legislature had adopted the *Restatement (Second) of Torts* it had not adopted the post-sale duty to warn provision). Texas has not recognized a general duty to warn of product defects not discovered until after manufacture and sale. *See* [*Torrington Co. v. Stutzman*, 46 S.W.3d 829, 836 (Tex. 2000)](https://scholar.google.com/scholar_case?case=416542418017590600&q=%22post-sale+duty+to+warn%22+2018&hl=en&as_sdt=6,24) (stating "we are not called on to recognize any post-sale duty to warn"). Neither has Indiana. *See* *Timm v. Goodyear Dunlop Tires No. Am. Ltd*. 309 F. Supp. 3d 595, 602 (N.D. Ind. 2018) (stating “Indiana courts haven't recognized a post-sale duty to warn under the IPLA”), *appeal pending*. Nor has Mississippi. *See* [*Murray v. General Motors,* *LLC,* 478 Fed. App'x 175, 182 (5th Cir. 2012)](https://scholar.google.com/scholar_case?about=8194299145738858342&q=%22post-sale+duty+to+warn%22+2016&hl=en&as_sdt=6,24) (stating there is no post-sale duty to warn under Mississippi law); and *Palmer v. Volkswagen of America, Inc.,* 905 So. 2d 564, 601 (Miss. App. 2003) (ruling no post-sale duty existed under the MPLA even though the manufacturer knew that air bags were killing children).

Illinois law also does not impose any duty to inform purchasers about defects that arise after the date of sale.  *See* [*Jablonski v. Ford Motor Co.*, 353 Ill. Dec. 327, 955 N.E.2d 1138, 1161-62 (2011)](https://scholar.google.com/scholar_case?case=12684787594706797330&q=%22post-sale+duty+to+warn%22+2015&hl=en&as_sdt=6,24). Federal courts evaluating state law agree. *See, e.g.,* [*Estate of Wicker v. Ford Motor Co.,* 393 F. Supp. 2d 1229, 1236 (W.D. Okla. 2005)](https://scholar.google.com/scholar_case?case=13383820143360752713&q=%22post-sale+duty+to+warn%22+2015&hl=en&as_sdt=6,24) (stating "Oklahoma does not recognize a post-sale duty to warn or retrofit a product."); *Vallejo v. Amgen, Inc.,* 2014 WL 4922901 \*4 (D. Neb. Sept. 29, 2014) (predicting that the Nebraska Supreme Court would not impose a post-sale duty-to-warn on product manufacturers); and *Bachtel v. Taser Int’l, Inc.,* 2013 WL 317538 \*6 (E.D. Mo. Jan. 28, 2013) (stating “there is no post-sale duty to warn under Missouri law”).

Undecided Jurisdictions

Some states remain undecided. *See,* *e.g., Flax v. DaimlerChrysler Corp.,* 272 SW 3d 521, 542 (Tenn. 2008) (stating “[w]e express no opinion, however, as to the merits of recognizing that cause of action in an appropriate case”). Virginia federal courts have called it both ways. *Compare Estate of Kimmel v. Clark Equip. Co.*, 773 F. Supp. 828, 831 (W.D. Va. 1991) (concluding the duty ends at the point of manufacturer or sale) *with Powell v. Diehl Woodworking Machinery, Inc.,* 198 F. Supp. 3d 628, 634-635 (E.D. Va. 2016) (presuming Virginia would adopt the duty) and *Russell v. Wright,* 916 F. Supp. 2d 629, 650 (W.D. Va. 2013) (same).

Can It Extend to Successor Corporations?

Courts evaluating whether a sufficient relationship exists between a successor corporation and the predecessor corporation's customers to impose a duty to warn generally consider four factors. These elements include: "(1) succession to a predecessor's service contracts; (2) coverage of the particular machine under the contract; (3) service of that machine by the purchaser-corporation; and (4) the purchaser-corporation's knowledge of defects and of the location or owner of that machine."  *Klynsma v. Hydradyne, LLC,* 2015 WL 5773703 \*15 (D.S.D. Sept. 30, 2015) (ruling the successor had no duty to warn of dangers affecting the predecessor’s product).

Authorities also split on the question whether a successor corporation has a duty to warn of product dangers present in products manufactured by the predecessor. The *Restatement* suggests the duty may continue. *See Restatement (Third) of Torts: Products Liability* § 13 (Am. Law Inst. 1998) (providing in certain circumstances that a "successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity" may be "subject to liability for harm to persons or property caused by the successor's failure to warn of a risk created by a product sold or distributed by the predecessor").

Court acceptance of extension of the duty differ. Decisions on the “Yes” side include *In Re General Motors LLC Ignition Switch Litig.*, 2017 WL 2664199 \*8 (S.D.N.Y. June 20, 2017) (predicting Arizona would adopt *Restatement* §13 on post-sale duty to warn of a successor corporation or asset purchaser); *In re: Gen. Motors LLC Ignition Switch Litig.,* 154 F. Supp. 3d 30, 37-41 (S.D.N.Y. 2015) (predicting Oklahoma would adopt the duty); *In re: Gen. Motors LLC Ignition Switch Litig.,*  202 F. Supp. 3d 362, 365-72 (S.D.N.Y. Aug. 15, 2016) (predicting Virginia would adopt the duty); *Tabor v. Metal Ware Corp.,* 2007 UT 71, 168 P.3d 814, 816, 818 (2007) relying upon Section 13 and adding the duty extends to end users and not merely retail distributors); *Ramos v. Foam America, Inc.,* 2018 WL 1684327 \*7 (D. New Mexico Apr. 5, 2018) (recognizing that New Mexico found such a duty affecting successors in certain factual contexts); and *Farmer v. Air and Liquid Sys. Corp.* 2018 WL 1528202 \*8 (M.D. Ga. Mar. 28, 2018) (recognizing Georgia’s acceptance of the Section 13 successor liability theory).

Some courts evaluate the duty based upon whether the successor agrees to provide services for the predecessor’s products. *See, e.g.*, [*Herrod v. Metal Powder Products,* 413 Fed. Appx. 7,](https://scholar.google.com/scholar_case?about=4064817700257647653&q=%22post-sale%22+%22duty+to+warn%22+2018&hl=en&as_sdt=6,24) \*13-15 (10th Cir. 2010) (finding the successor corporation had a duty to warn of defects in the predecessor's products because the successor expressly agreed to provide services for maintenance and repair of the products, and the predecessor provided the successor with a list of known product failures); *Campbell v. Davol, Inc.,* 620 F.3d 887, 894 (8th Cir. 2010) (ruling that regardless whether Arkansas would decide to adopt the post-sale duty, it could not exist where no contractual duty required the successor to provide services to the predecessor’s customers).

Decisions on the “No” side include for example *In re: Gen. Motors LLC Ignition Switch Litig.,* 2016 WL 874778, \*6 (S.D.N.Y. Mar. 3, 2016) (predicting Louisiana would not adopt the duty as to successors).

Can It Extend to Manufacturers Using Others’ Component Parts?

*In re New York City Asbestos Litig.,* 59 N.E.3d 458, 470, 472 (N.Y. 2016) the court ruled that a steam pipe valve manufacturer had a post-sale duty when its asbestos-free valves specified use of asbestos as a component to enable the valves to function as intended.

Methods of Warning

Just how would one satisfy the duty, recognizing the potential difficulties involved in finding product users? The *Restatement* offers guidance:

“To succeed on such a claim, [plaintiff] must establish that (1) [the seller] ‘kn[ew] or reasonably should have known of product dangers discovered post-sale,’ (2) ‘a reasonable person in [seller's] position would provide a warning,’ (3) ‘those to whom a warning might be provided can be identified,’ and (4) the warning can be ‘effectively communicated’ to them.”

[*Lewis v. Ariens Co.,* 434 Mass. 643, 751 N.E.2d 862, 866 (2001)](https://scholar.google.com/scholar_case?case=7725617930149649783&q=%22That+Monsanto+maintained+a+list+of+direct+customers+has+no+bearing%22&hl=en&as_sdt=6,24) (quoting *Restatement* §§ 10(b)(2),(3) (1998)). Other courts and commentators have offered guidance on the manner in which product sellers ought to be judged in getting the warning out.

“The question of whether such a duty arises in a particular case will depend on the facts of that case. The passage of time from manufacture and initial sale to the discovery of previously unknown hazards may reflect that the product has changed ownership many times. The original purchaser may have moved. The length of product life will vary. What is reasonably prudent post-sale conduct for one manufacturer and one type of product may not be reasonable for another manufacturer of an entirely different type of product. The sale of the farm cultivator was made to Patton's father on a one-time basis 13 years before the injury. What sales records will be available to the manufacturer? Notification by a manufacturer to all prior purchasers of a product may be extremely burdensome, if not impossible. In the case at bar, the manufacturer's retailer has continuing contact with the consumers. We reason that a manufacturer who was unaware of a hazard at the time of sale and has since acquired knowledge of a life-threatening hazard should not be absolved of all duty to take reasonable steps to warn the ultimate consumer who purchased the product; however, the warning of unforeseeable dangers is neither required nor possible at the time of sale. A manufacturer is to be given a reasonable period of time after discovery of the life-threatening hazard in which to issue any post-sale warning that might reasonably be required.”

*Patton v. Hutchinson Wil-Rich Mfg. Co.,* 253 Kan. 741, 760-61, 861 P.2d 1299 (1993). Compliance is tested essentially per the “A for effort” idiom. *See, e.g., Jackson v. Ez-Go Div of Textron, Inc.*, 2015 WL 4464098 \*3 (W.D. Ky. Jul. 21, 2015) (stating Kentucky law holds that in post-sale contexts the manufacturer must "make an effort to notify the purchasers"); *see also Kenneth Ross, Post-Sale Duty to Warn: A Critical Cause of Action*, 27 Wm. Mitchell L. Rev. 339, 355 (2000) (discussing various ways in which manufacturers can warn of hazards). *See also Tom Stilwell, Warning: You May Possess Continuing Duties After the Sale of Your Product!* (An Evaluation of the Restatement (Third) of Torts: Products Liability's Treatment of Post-Sale Duties), 26 Rev. Litig. 1035, 1054-55 (2007) (noting that "[s]ales of machinery, vehicles, or durable goods will likely possess information such as serial numbers, registration data, warranty information, or dealer records that will aid in tracing purchasers or current users."); *Restatement*, §10, Comment g (1998) (pointing out that use of public media may be required to disseminate risks of substantial harm).

Supply chain complexity can work in the defendant’s favor:

“That Monsanto maintained a list of direct customers has no bearing on whether it could have identified all end users. Given Monsanto's complex supply chain, tracing the caulk used at WMS back to PCR (based on documents containing WMS's specifications and communications from WMS's contractor) is not the same as being able to identify WMS as an end user in the first place. As such, Westport's assertion that WMS was an identifiable end user is mere speculation.”

*Town of Westport v. Monsanto Co.,* 877 F. 3d 58, 68 (1st Cir. 2017) (granting defendant’s summary judgment motion). Courts have evaluated the duty in the internet sales context. *See, e.g., Groesbeck v. Bumbo Int’l Trust,* 718 Fed Appx. 604, 621 (10th Cir. 2017) (noting that while retailers may be able to identify online customers, and analyzing whether in-store postings in brick-and-mortar retailers would suffice).

In the end, when customer records are essentially unavailable, a post-sale duty likely should not arise. *See Restatement,* §10, Comment e (1998).

Can the Duty Abate When the Sale is Simply Too Old?

Courts have focused on whether a sale simply gets too old to trigger the duty. Thus, for example, a manufacturer of a printing press sold 50 years before plaintiff’s employer acquired it was not liable for a post-sale duty to warn due to the passage of time. *See Robinson v. Brandtjen & Kluge, Inc.,* 500 F.3d 691, 697 (8th Cir. 2007). A similar case noted:

“Ariens owed no continuing duty to Lewis, who purchased the product at least second hand, sixteen years after it was originally sold, and did not own the product until years after a duty to provide additional warnings arguably arose. In these circumstances, he is a ‘member of a universe too diffuse and too large for manufacturers or sellers of original equipment to identify.’  [*Lewis v. Ariens Co*., 49 Mass. App. Ct. 301, 306 (2000)](https://scholar.google.com/scholar_case?case=11755322949891179200&q=lewis+ariens&hl=en&as_sdt=4,22). It would be unreasonable to require a manufacturer to provide warnings to an individual in Lewis's circumstances. Therefore, Ariens did not breach its implied warranty of merchantability by failing to warn him in 1982 or 1988 of product dangers discovered in the early 1970s shortly after the product was sold to the original purchaser.”

*Lewis v. Ariens,* 434 Mass. 643, 751 N.E.2d 862, 867 (2001). *See also Linert v. Foutz,* 149 Ohio St. 3d 469, 477, 479, 75 N.E.3d 1218, 1227 (2016) (approving trial court’s refusal to instruct on post-sale duty because “the jury would have been left to speculate, or to fling a `plank of hypothesis' over `an abyss of uncertainty’" to evaluate whether the duty had been breached).

Conclusion

Twenty years post-*Restatement*, the post-sale duty to warn has been well fleshed out by courts and commentators. Courts recognize reasonable limits on this “monster” duty. The tests of duty bear with them elementary notions of common sense. Post-sale duty jurisprudence is one area of products liability law in which the pendulum of liability exposure drifts toward defense interests.