The Most Expansive Theory in Product Liability

Post-Sale Duty to Warn

By Kenneth Ross

Post-sale duties have been expanding in the United States by court decision and legislative action. *Restatement (Third) of Torts: Products Liability* affirms and expands them.

In a significant number of jurisdictions in the United States, manufacturing, designing, and selling safe products does not totally satisfy a product manufacturer's legal duties. United States courts, starting in 1959, have held

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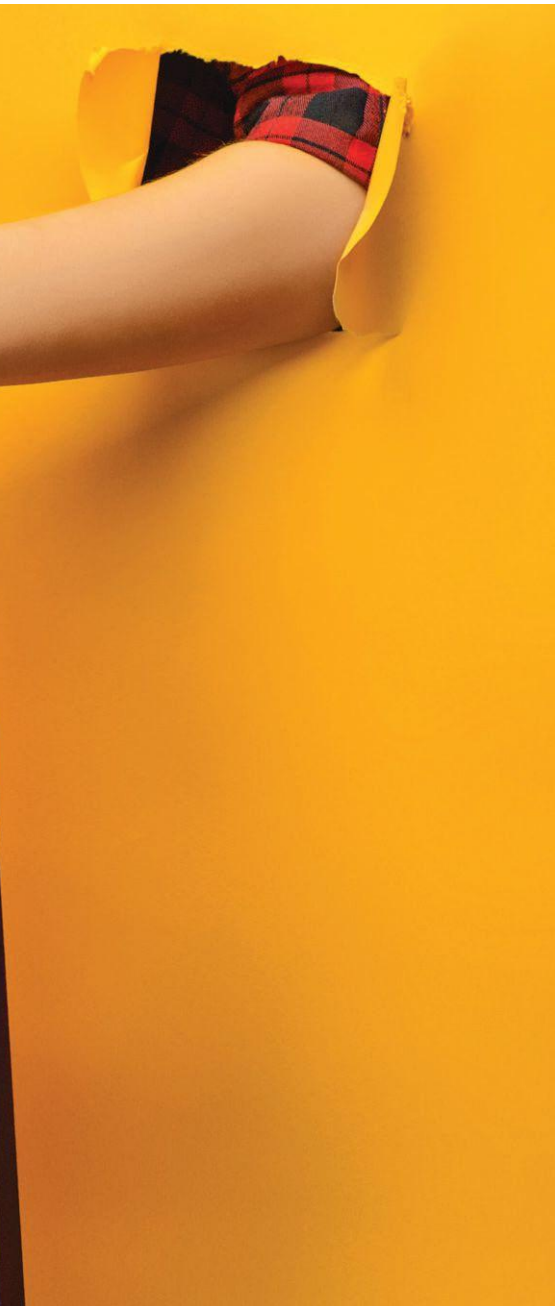

that manufacturers have a duty to warn product users when they learn of risks in their product after sale, even if the product was not defective when it was sold. *Cover v. Cohen*, 461 N.E.2d 864, 871 (N.Y. 1984); *Comstock v. Gen. Motors Corp.*, 99 N.W.2d 627, 634 (Mich. 1959). Some courts, on the other hand, held that there was no such duty. *Williams v. Monarch Mach. Tool Co.*, 26 F.3d 228 (1st Cir. 1994).

In the 1990s, the American Law Institute (ALI) considered the status of product liability law in the United States. This culminated in the 1998 publication of the *Restatement (Third) of Torts: Products Liability* (*Restatement (Third)*). In one substantive area, the ALI had to decide whether enough precedent existed to support a section on the "post-sale duty to warn" in this enunciation of product liability law.

The law professors who served as the drafters (reporters) of the *Restatement (Third)*, considered all of the cases through 1997, and despite a split of authority, they felt that there was sufficient support in case law and common sense to support a "post-sale duty to warn" in the *Restatement (Third)*. This proposed inclusion resulted in widespread debate. The plaintiff-oriented members of the ALI wanted this section included, while some of the defense-oriented members wanted it omitted or severely limited. Post-sale duty to warn was ultimately included in the final *Restatement (Third)*.

The *Restatement (Third)* and supporting case law require manufacturers or product suppliers, in certain instances, to provide post-sale warnings or possibly to recall or repair their products. In analyzing possible post-sale liability, it is important that manufacturers and product suppliers be aware of the factors that may trigger a post-sale duty under the common law. In addition, manufacturers and product suppliers need to be familiar with post-sale duties imposed on them by U.S. government agencies, and if the product is sold outside the United States, by foreign government agencies.

Armed with this knowledge, they can establish procedures to identify and quantify the existence of the duty and implement appropriate post-sale remedial measures to prevent or limit their post-sale exposure.

This article will discuss the *Restatement (Third)* sections adopting post-sale duties and the case law as it has developed over the last 20 years. A specific discussion of the case law and statutory law, state by state, is not included in this article, which is available in the just published third edition of the *DRI Product Liability Compendium: Warnings, Instructions and Recalls.*

Restatement (Third): Sections 10, 11, and 13

The *Restatement (Second) of Torts: Products Liability* (*Restatement (Second)*) added section 402A in 1965 to adopt newly developed common law rules making product manufacturers strictly liable for harms caused by defective products. But section 402A did not contain post-sale duty provisions. According to section 388 of the *Restatement (Second)*, warnings were required only if a risk associated with a product was known or should have been known at the time of sale. The post-sale duty section in the *Restatement (Third)* was truly new when it was written, not merely a revision of section 388. It provides as follows:

> §10. Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Warn
>
> (a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning.
>
> (b) A reasonable person in the seller's position would provide a warning after the time of sale if:
>
> (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
>
> (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
>
> (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
>
> (4) the risk of harm is sufficiently great to justify the burden of providing a warning.

The reporters considered post-sale warnings to be the "most expansive area in the law of products liability" and a "monster duty." However, the reporters felt that section 10 limited this monster duty by requiring a plaintiff to prove all four factors before the plaintiff would be allowed to pursue this claim.

Section 10 does not include a duty to do anything other than warn. However, since there was case law holding that in certain narrow instances a manufacturer may have a duty to recall or retrofit a product, the

ALI decided to also deal with this precedent. Given the great burden of any post-sale activities, especially recall, the ALI included a section severely limiting the duty to recall a product. Section 11 of the *Restatement (Third)* provides as follows:

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

Section 11 basically provides that the seller or distributor is not liable for a failure to recall the product unless the recall is required by statute or regulation or the seller or distributor voluntarily undertakes to recall the product and does so negligently. The main reason for including section 11 was to make it clear that section 10 does not include a duty to recall the product. However, section 11 also included the so-called "Good Samaritan" doctrine, under which liability can attach for a negligent recall, even if it is voluntary.

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

> §13. Liability of Successor for Harm Caused by Successor's Own Post-Sale Failure to Warn
>
> (a) A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity, whether or not liable under the rule stated in §12, is subject to liability for harm to persons or property caused by the successor's failure to warn of a risk created by a product sold or distributed by the predecessor if:
>
> (1) the successor undertakes or agrees to provide services for maintenance or repair of the product or enters into a similar relationship with purchasers of the predecessor's products giving rise to actual or potential economic advantage to the successor, and
>
> (2) a reasonable person in the position of the successor would provide a warning.

Section 13 further states that a reasonable person in the successor's position would provide such a warning if the four conditions in section 10 are met.

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

Distinguishing Post-Sale Duty from Time-of-Sale Duty

In examining the case law before publication of the *Restatement (Third)*, it became apparent to the reporters that there was great confusion by juries, judges, and scholars. Many of the decisions in the cases reviewed were unclear about whether the jury or judge believed that the product was defective when it was sold or whether the product only became defective after sale.

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

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

While the *Restatement (Third)* is generally viewed as favorable to product manufacturers and sellers, section 10 clearly establishes a cause of action that creates opportunities for plaintiffs to argue for further discovery of post-sale actions and greater admissibility of post-sale accidents, thereby providing a greater chance of an award of punitive damages. This is a real risk: researchers analyzing punitive damage cases have found almost 75 percent of such awards to be based on the failure of a manufacturer to take appropriate post-sale actions. Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 66 (1992).

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

A Cause of Action Based on Post-Sale Duty Sounds in Negligence

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

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

Judging post-sale conduct through the lens of negligence is consistent with the case law that had developed before the *Restatement (Third)* was adopted. Actual or constructive knowledge of a post-sale risk is necessary to impose a post-sale duty. *Patton v. Hutchinson Wil-Rich Mfg.*

Co., 861 P.2d 1299, 1314 (Kan. 1993). Also, negligence is the correct legal theory when a manufacturer's conduct is at issue, and as such, the application of a post-sale duty depends on the reasonableness of the manufacturer's conduct. *Crowston v. Goodyear Tire & Rubber Co.,* 521 N.W.2d 401, 409 (N.D. 1994). Consequently, a product supplier cannot be strictly liable for post-sale conduct under section 10.

Acquisition of Post-Sale Knowledge

Section 10, by confirming the existence of post-sale duties in the law, created an affirmative duty for product suppliers to exercise reasonable care to learn of post-sale problems with their products. Section 10(a) bases a post-sale duty, in part, on suppliers who know or reasonably should know that their products pose a substantial risk of harm to persons or property. In addition, comment c to section 10 states that the general duty of reasonable care may require manufacturers to investigate when reasonable grounds exist for the seller to suspect that a previously unknown risk exists.

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

Many courts, however, reflected concerns similar to those raised in the *Restatement (Third)* about imposing too heavy of a burden on manufacturers to monitor field performance. In *Patton v. Hutchinson Wil-Rich Manufacturing Company*, 861 P.2d at 1314, the Kansas Supreme Court held that plaintiffs who allege post-sale duty claims must prove that manufacturers "acquired knowledge of a [post-sale] defect." The case did not, however, impose an affirmative duty on suppliers to take reasonable steps to learn of post-sale problems that were not brought to their attention. This is consistent with earlier opinions.

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

Existence of the Defect: A Question of Timing

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

Any attempt to use the improvement as evidence of a time-of-sale defect will generally be precluded by evidentiary rules that prevent the introduction of "remedial measures" evidence.

The position of section 10—that it is immaterial whether the defect existed at the time of sale—conflicts with many decisions in which courts have refused to impose post-sale duties when products were not defective when sold.

Product Users: Can They Be Identified?

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

These factors formed the basis for the Wisconsin Supreme Court's holding that the manufacturer of a sausage-stuffing machine had a duty to provide users with information about a new safety by-pass valve. *Kozlowski v. John E. Smith's Sons Co.,* 275 N.W.2d 915, 923 (Wis. 1979).

The machines were sold to a limited market where the manufacturer knew all the product's owners. The Wisconsin court made it clear, however, that it was not crafting an absolute post-sale duty for all manufacturers to warn of safety improvements year after year, since many products are mass produced and tracing users to warn of safety improvements would place an undue burden on manufacturers.

Similarly, the North Dakota Supreme Court held that it would be difficult to require the manufacturer of mass-produced tire rims to trace individual users if the rims were not unique or sold to a specialized group of customers. *Crowston v. Goodyear Tire & Rubber Co.,* 521 N.W.2d 401, 408 (N.D. 1994). While recognizing the problem associated with providing individual notice to the original purchasers, this court nevertheless held that the defendant had a duty to warn foreseeable product users about dangers that were discovered after the product was originally sold.

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

Duty to Inform of Safety Improvements

Manufacturers should always strive to improve the safety of their products. But does a manufacturer have a duty to inform previous customers of each safety improvement made in similar products that are manufactured after the sale of the less-safe product? Before drafting the *Restatement (Third)*, some courts found it reasonable to impose a duty to inform purchasers of safety improvements when

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

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

Before 1998, however, most courts found that there was no post-sale duty to inform customers of safety improvements when the original product had been properly designed and manufactured.

Section 10 did not foreclose the imposition of a post-sale duty to inform about safety improvements but made it clear that the four factors in that section must be met. However, it said that "in most cases it will be difficult to establish each of the four section 10 factors that are a necessary predicate for a post-sale duty to warn if the warning is merely to inform of the availability of a product-safety improvement." Section 10 (Reporter's Note to comment a).

It is certain that plaintiffs have tried to use a manufacturer's post-sale warning of a product safety improvement to argue that the original product, without the safety improvement, was defective at the time of sale. However, any attempt to use the improvement as evidence of a time-of-sale defect will generally be precluded by evidentiary rules that prevent the introduction of "remedial measures" evidence.

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

can easily find its customers, the manufacturer should consider informing its prior customers about the safety improvement.

Post-Sale Duty to Recall

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

This limited duty is based mostly on a government directive specifically requiring the manufacturer to recall an imminently hazardous product. The Michigan Supreme Court declined an invitation to impose a common law duty to recall or repair in a negligent design claim case when a plaintiff alleged that a manufacturer knew or should have known of a defect at the time of sale. *Gregory v. Cincinnati Inc.,* 538 N.W.2d 325, 333–34 (Mich. 1995). While Michigan required a warning in such circumstances, the court concluded that "the duty to repair or recall is more properly a consideration for administrative agencies and the Legislature."

However, the *Restatement (Third)* incorporated the "Good Samaritan" or "volunteer" rule that one who undertakes a rescue must act reasonably so as not to put the rescued party in worse shape than before. This rule, in the context of product liability, comes from the belief that voluntary recalls are typically undertaken in the anticipation that a government agency will require one anyway. Section 11, comment c.

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

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

Development of Post-Sale Duty Law After 1998

As our earlier discussion suggests, the case law before and after 1998 is confusing and certainly inconsistent. This trend continues. Courts have issued opinions with the following results:

- Accepted section 10 and maybe other sections of the *Restatement (Third)* (duty exists even if product is not defective at the time of sale);
- Rejected the adoption of section 10;
- Accepted a post-sale duty if the product was defective at the time of sale;
- Rejected a post-sale duty to warn without reference to section 10;
- Accepted a post-sale duty without reference to the *Restatement (Third)*; and
- Ruled that there is a post-sale duty if latent risks exist at time of sale and were revealed later.

Among the states that issued these decisions, a majority have adopted some form of a post-sale duty, either through the common law or statutory law. And approximately 10 states have not addressed this issue in any of their opinions.

Since 2012, three states (Alabama, Minnesota, and New Hampshire) have adopted section 10 of the *Restatement (Third)*. New Hampshire also adopted the *Restatement (Third)* law that there is no duty on behalf of a manufacturer to inform users of post-sale safety improvements on an otherwise non-defective product.

However, three states (Connecticut, Nebraska, and Tennessee) made it clear that there is no post-sale duty to warn for manufacturers that have safety issues in their states. Tennessee also ruled that internet sales distributors have no post-sale duty to warn.

Effect on Legal Liability

Of course, specific case law is important for cases litigated in a particular state. However, given the inconsistencies and lack of clarity or relevant decisions, a manufacturer cannot rely on the case law to decide what its post-sale duties are.

Most manufacturers sell nationwide or at least in as many states as possible. As long as there are a large number of states that have imposed a post-sale duty, a manufacturer must assume that it has the duty nationwide. Of course, they will not know where an accident will occur and therefore where the case will be brought. Unless the manufacturer decides to only sell in a state that does not have a post-sale duty (a ridiculous decision), it must just consider that the duty does or could exist wherever the product is sold.

As long as there are a large number of states that have imposed a post-sale duty, a manufacturer must assume that it has the duty nationwide.

Plus, of course, the case law only affects common law duties, and there are still rigorous regulatory requirements for most products, except industrial products, to report to various government agencies, which then may require manufacturers to recall their products or warn consumers. That law is national and international and would supplement any state's common law.

Conclusion

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

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