

# Warning: Sellers May Now Have a Post-Sale Duty to Warn

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## I. INTRODUCTION

Warnings are like excuses — every product manufactured today has at least one. Traditionally, a seller had a duty to warn only at the time of sale. Yet, the American Law Institute issued the Restatement (Third) of Torts: Products Liability, and in section 10 thereof recognized a post-sale duty to warn under certain circumstances.

While section 10 potentially expands a seller's liability, it is the seller's reaction to section 10 that may actually trigger a post-sale duty to warn. Through its own actions, a seller may inadvertently assume a post-sale duty to warn when none previously existed or otherwise may be imposed. This article explores the elements of section 10 and other factors that may create a post-sale duty to warn upon a seller.

## II. BACKGROUND

### A. *Duty to Warn*

Under the prior Restatement (Second), sellers could be held liable under either strict liability<sup>1</sup> or negligence principles<sup>2</sup> for harm caused by "unreasonably dangerous" products. For liability to exist the product must be "unreasonably dangerous"<sup>3</sup> or the seller must know or have reason to know that the prod-

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<sup>1</sup>RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter RESTATEMENT (SECOND)].  
<sup>2</sup>Id. § 388

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uct is likely to be dangerous<sup>4</sup> at the time it is originally sold.<sup>5</sup> A seller of a product that is not "unreasonably dangerous" at the time of sale generally has no liability.

Liability may arise even if the seller has exercised "all possible care in the preparation and sale of [its] product."<sup>6</sup> The justification for imposing strict liability upon a seller is that the seller:

by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it: that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them. . . .<sup>7</sup>

In fact, a product may be "unreasonably dangerous" because it lacked a

<sup>4</sup>*Id.* § 388. See also 63A AM. JUR. 2d *Products Liability* § 1111.

<sup>5</sup>Under section 402A, the emphasis of the inquiry rests on the "unreasonably dangerous" condition of the product. Furthermore, a court must question whether the product is defective or unreasonably unsafe and whether, after a cost-benefit analysis, the seller must provide a warning. Under section 388, the examination focuses on whether the sale of the product was reasonable. Specifically, the court questions whether the seller, in providing or failing to provide a warning, meets the reasonable person standard.

<sup>6</sup>RESTATEMENT (SECOND) § 402A, cmt. a.

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warning.<sup>8</sup> Conversely, an appropriate warning at the time of sale regarding the "unreasonably dangerous" nature of the product eliminates the "unreasonably dangerous" characterization of the product, thereby discharging a seller from liability.<sup>9</sup> To satisfy its duty to warn, a seller need only exercise reasonable care to inform foreseeable users, even if the warning never reaches those users.<sup>10</sup>

### *B. Assumption of a Post-Sale Duty to Warn*

Traditionally, a seller did not have a post-sale duty to warn a consumer. Any duty to warn existed solely at the time of sale. If the seller did not know or have reason to know of a product's dangerous nature at the time of sale, then the seller had no duty to warn at any time.

Although manufacturers avoided a judicially imposed post-sale duty to warn consumers, they<sup>11</sup> risked liability when they voluntarily improved the safety of their product.<sup>12</sup> Similarly, manufacturers could assume a post-sale duty to warn when they had undertaken not to improve product safety, but to inform potential users of dangers discovered after the time of sale.<sup>13</sup> They generally assumed a

<sup>8</sup>See 65A AM. JUR. 2d *Products Liability* §§ 1114, 1115.

<sup>9</sup>RESTATEMENT (SECOND) § 402A, cmts. h, j; § 388(b), (c).

<sup>10</sup>RESTATEMENT (SECOND) § 388, cmt. l.

<sup>11</sup>It appears that only "manufacturers" can assume a post-sale duty to warn.

<sup>12</sup>See *Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519, 532 (Tex. Ct. App. 1979).

<sup>13</sup>*Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988) (holding that Goodyear had a continuing duty to warn where it had undertaken to warn users of dangers asso-

post-sale duty by upgrading or warning about a product's safety features.

In 1995, the Eighth Circuit Court of Appeals held that the trial court properly instructed a jury to consider a manufacturer's post-sale duty to warn because the manufacturer marketed a replacement kit for a turnbuckle that caused the plaintiff's injury.<sup>14</sup> A 1967 six-row planter, one of over 100,000 manufactured, ran over and seriously injured the plaintiff.<sup>15</sup> Although the manufacturer marketed a replacement kit for the turnbuckles in 1977 or 1978, the manufacturer neither recalled the turnbuckles nor informed consumers of the alleged problem.<sup>16</sup> In fact, the manufacturer did not admit that the turnbuckles were defective.<sup>17</sup> Nonetheless, the court found that the manufacturer assumed a post-sale duty to warn by creating a new part and identifying it as a "replacement kit" that could be interchanged for the so-called defective turnbuckles.<sup>18</sup>

### III. ANALYSIS

Section 10 of the Restatement (Third) of Torts: Product Liability now imposes strict liability for a seller's post-sale failure to warn about a product-related risk, even if the product was not defective at the time of sale.<sup>19</sup> Section 10(a) states that:

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.<sup>20</sup>

According to section 10, liability may exist for "[o]ne engaged in the business of selling or otherwise distributing products."<sup>21</sup> Thus, unlike the limitation contained in section 402A of the Second Restatement, section 10 broadens the field of potential defendants by focusing on the distribution of a product, as

<sup>14</sup>Novak v. Navistar Int'l Transp. Corp., 46 F.3d 844, 850 (8th Cir. 1995).

<sup>15</sup>*Id.* at 846.

<sup>16</sup>*Id.* at 847.

<sup>17</sup>*Id.* at 850.

<sup>18</sup>*Id.*

<sup>19</sup>RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10. cmt. a (1998)[hereafter RESTATEMENT (THIRD)].

<sup>20</sup>*Id.* § 10(a).

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well as on its sale. Despite potential liability for distributors, it is the "seller's" failure to warn that actually triggers liability.<sup>23</sup>

After the time of sale or distribution, a "seller" has a duty to warn if a reasonable person in the seller's position would provide such a warning.<sup>23</sup> The Restatement (Third) states that:

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.<sup>24</sup>

Thus, due to the use of the conjunctive "and" within its laundry list of subparts, all elements must be present in order to find the duty to issue a post-sale warning. A "seller" owes a post-sale duty to warn only when a substantial risk of harm exists, the users are identifiable, a warning may be effectively communicated, and the risk of harm justified the burden.

### A. Substantial Risk of Harm

A post-sale duty to warn may exist when a seller has reasonable knowledge that a "product poses a substantial risk of harm to persons or property."<sup>25</sup> The risk of harm must be at least as great as that arising under section 2(c) of the Third Restatement.<sup>26</sup> Specifically, the risk must be at least the same risk requiring a warning when a product:

<sup>23</sup>The Restatement (Third) does not expressly include manufacturers. However, Comment f of RESTATEMENT (Second) § 402A specifically includes manufacturers in its description of sellers and Comment b of the Restatement (Third) by example includes manufacturers among those who have a responsibility to warn.

<sup>24</sup>RESTATEMENT (THIRD) § 10(b).

<sup>25</sup>*Id.*

<sup>26</sup>*Id.* § 10(b)(1)

is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.<sup>37</sup>

However, a seller does not owe a post-sale duty to warn "regarding product-related accidents that occur infrequently and are not likely to cause substantial harm."<sup>38</sup> In other words, a post-sale duty arises only when the risk of harm is significant and on a frequent basis.

The phrase "substantial risk of harm" encompasses both repetitive and gradational elements. The repetitive element of "substantial risk of harm" necessary to impose liability turns upon the degree of risk involved in the use of the product. Risk is the possibility, likelihood or chance of being exposed to a particular hazard or injury. The risk necessary for purposes of post-sale liability, however, must be a *substantial risk*<sup>39</sup> — the mere possibility of harm is not enough. The likelihood of harm must occur often enough so that its risk is real and "sufficiently great."<sup>40</sup>

Along with a sufficiently great risk, substantial risk of harm requires harm of a significant degree. The degree of harm necessary to create a post-sale duty to warn includes death<sup>41</sup> or other serious injury.<sup>42</sup> In fact, "substantial risk of harm" includes life threatening or other permanent injuries.<sup>43</sup> For example, permanent paralysis<sup>44</sup> and the amputation of one leg above the knee<sup>45</sup> are injuries of a significant enough degree to impose a post-sale duty to warn. Thus, it can be seen that a "substantial risk of harm" exists only if the risk is substantial and the harm is significant.<sup>46</sup> From a risk management perspective, the issue

<sup>37</sup>*Id.* § 2(c).

<sup>38</sup>*Id.* § 10, cmt. d.

<sup>39</sup>*Id.* § 10 (b)(1).

<sup>40</sup>*Id.* § 10 (b)(4).

<sup>41</sup>*Walton v. Avco Corp.*, 610 A.2d 454, 456 (Pa. 1992). See also *Kozłowski v. John E. Smith's Sons Co.*, 275 N.W.2d 915, 916 (Wis. 1979).

<sup>42</sup>*Crowston v. Goodyear Tire & Rubber Co.*, 521 N.W.2d 401, 405 (N.D. 1994). "Serious injury" to plaintiff occurred when a tire exploded after mismatching the size of tire and rim. The court never described the injury.

<sup>43</sup>*Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519, 524 (Tex. Ct. App. 1979). See also *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1304 (Kan. 1993).

<sup>44</sup>*Novak v. Navistar Int'l Transp. Co.*, 46 F.3d 844, 846 (8th Cir. 1995).

<sup>45</sup>*Cover v. Cohen*, 461 N.E.2d 864, 866 (N.Y. 1984).

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for the product seller to resolve is the determination of whether such an injury is reasonably foreseeable. If so, then a warning should be issued. These authors urge sellers to be pro-active and liberal in their assessment of potential significant harm so as to issue a warning, minimize the risk of injury and, thereby, limit legal liability.

### B. Identifiable Customers

If a "substantial risk of harm"<sup>37</sup> exists, then a seller must warn "[t]hose to whom a warning might be provided" and who "can be identified and can reasonably be assumed to be aware of the risk of harm."<sup>38</sup> Both the nature of a product and its marketability determine the feasibility of a post-sale warning.<sup>39</sup> The technological landscape surrounding the manufacture of a product, as well as the breadth of its use, factor into the practicability of imposing a post-sale duty to warn.

#### 1. Obsolete/State of the Art Products

Where technological changes render a product obsolete, a seller may not have a post-sale duty to warn. The seller of a non-defective product, under then-current standards, had no duty to warn previous purchasers about the development of a new safety device.<sup>40</sup> Of course, as noted above, a seller may assume a post-sale duty to warn when it markets "replacement" parts for older products.<sup>41</sup> Many states have state of the art statutes to that effect.

After the time of sale, a seller has no duty to notify its customers regarding changes in the state of the art that may make a product safer.<sup>42</sup> The court in *Lynch v. McStone*<sup>43</sup> stated that:

The clear effect of imposing a [continuing] duty . . . would be to inhibit manufacturers from developing improved designs that in any way affect the safety of their products, since the manufacturer would then be subject to the onerous, and often times impossible,

<sup>37</sup>*Id.* § 10 (b)(1).

<sup>38</sup>*Id.* § 10 (b)(2).

<sup>39</sup>*Id.*

<sup>40</sup>*Romero v. International Harvester Co.*, 979 F.2d 1444, 1450-51 (10th Cir. 1992). See also *Anderson v. Nissan Motor Co.*, 139 F.3d 599 (8th Cir. 1998) (denying a post-sale duty to warn where forklift restraint systems were not common at time of manufacture).

<sup>41</sup>See *supra* notes 11 to 18 and accompanying text.

<sup>42</sup>*Habecker v. Clark Equip. Co.*, 797 F. Supp. 381, 381 (M.D. Pa. 1992); see also *Jackson v. New Jersey Mfrs. Ins. Co.*, 400 A.2d 81, 89 (N.J. Super. Ct. App. Div.), *cert. denied*, 407 A.2d 1704 (N.J. 1979).

duty of notifying each owner of the previously sold product that the new design is available for installation, despite the fact that the already sold products are, to the manufacturer's knowledge, safe and functioning properly.<sup>44</sup>

Nevertheless, a seller is not absolved of its continuing duty to warn merely because it has ceased to manufacture a defective product.<sup>45</sup> When a product has not become obsolete, a seller may have a duty to warn if it becomes aware of a risk of danger after sale, even though it no longer manufactures the product.<sup>46</sup> However, this post-sale duty to warn is required only "to the extent practicable."<sup>47</sup>

## 2. Marketability

A seller who becomes aware of a danger regarding its product after the time of sale may also have a duty to warn those who "can be identified."<sup>48</sup> Presumably, "ordinary goods" are sold to a vast array of customers who may not be easily identifiable. On the other hand, products sold in a limited market to a specialized group of consumers increase the likelihood of consumer identification. Sellers to these limited markets can more easily trace ownership of the product, provide a subsequent warning without an unreasonable burden, and may be required to do so.

In 1992, the Pennsylvania Supreme Court imposed a post-sale duty to warn upon a helicopter manufacturer because the helicopter owners could be identified.<sup>49</sup> Although the helicopter engine manufacturer received notice of the defective oil pump and forwarded the warning to the helicopter manufacturer, the helicopter manufacturer did not forward the warning to the helicopter owners or service centers.<sup>50</sup> The court found that helicopters were not "ordinary goods"<sup>51</sup> because they "are not the type of objects that could get swept away in the currents of commerce, becoming impossible to track or difficult to locate."<sup>52</sup> It relied

<sup>44</sup>*Id.* at 1281. See also *Williams v. Monarch Machine Co.*, 26 F.3d 228, 232 (1st Cir. 1994).

<sup>45</sup>*Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 647 (Md. 1992).

<sup>46</sup>*Id.* at 645-46.

<sup>47</sup>*Id.* at 646.

<sup>48</sup>RESTATEMENT (THIRD) § 10 (b)(2). See, e.g., *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451 (2d Cir. 1969); *Downing v. Overhead Door Co.*, 707 P.2d 1027 (Col. Ct. App. 1985); *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299 (Kan. 1993); *Zenobia*, 601 A.2d 633; *Comstock v. General Motors Corp.*, 99 N.W.2d 627 (Mich. 1959); *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988); *Cover v. Cohen*, 461 N.E.2d 864 (N.Y. 1984); *Kozłowski v. John E. Smith's Sons Co.*, 275 N.W.2d 915 (Wis. 1979).

<sup>49</sup>*Walton v. Avco Corp.*, 610 A.2d 454, 459 (Pa. 1992).

<sup>50</sup>*Id.* at 456-57.

<sup>51</sup>*Id.* at 459.

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upon the fact that there were logical contact points to which the warning could be distributed.<sup>53</sup> Additionally, the court noted that the engine manufacturer remained in contact with the helicopter manufacturer for the sole purpose of updating this type of information.<sup>54</sup> Thus, easily traceable products and customers can be targeted for post-sale warnings.

On the other hand, a seller of a generic, mass-produced, or widely distributed product is less likely to have a post-sale duty to warn than a seller of a limited market product.<sup>55</sup> A typical mass-marketed product is "an over-the-counter sale of a generic product for use by an unknown consumer."<sup>56</sup> According to the courts, such "ordinary" products include forklifts,<sup>57</sup> hay balers,<sup>58</sup> and tires.<sup>59</sup>

In 1992, the District Court for the Eastern District of Pennsylvania determined that sellers of products manufactured in substantially greater quantities than limited market products, but less widespread than common goods, do not owe a duty to warn after the sale of the product.<sup>60</sup> The product at issue, a forklift, threw the driver out of his seat and then fell on him, crushing him to death.<sup>61</sup> Even though the driver died, the court denied the plaintiff's claim of post-sale failure to warn due to a lack of an operator restraint system.<sup>62</sup> "Nearly any business that has a loading dock or a warehouse has a forklift," which would make the task of warning more onerous than that for a product of limited production and marketing with logical points of contact.<sup>63</sup> While the court focused on the volume of forklifts generally in production, it did not consider forklifts by specific make, model, or manufacturer.<sup>64</sup> One would expect the plaintiffs' bar to launch such a targeted attack in an effort to attach post-sale liability.

Typically, a manufacturer of common goods sold to anonymous consumers will not be obliged to provide post-sale warnings.<sup>65</sup> Similarly, the absence of records identifying consumers by name, address, geographic markets, or

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<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

<sup>55</sup>*Crowston v. Goodyear Tire & Rubber Co.*, 521 N.W.2d 401, 408 (N.D. 1994).

<sup>56</sup>*Birchler v. Gehl Co.*, 88 F.3d 518, 521 (7th Cir. 1996) (citing *Seeyers Grain Co. v. United States Steel Corp.*, 577 N.E.2d 1364 (Ill. 1991)).

<sup>57</sup>*Habecker v. Clark Equip. Co.*, 797 F. Supp. 381, 382 (M.D. Pa. 1992).

<sup>58</sup>*Birchler*, 88 F.3d at 519.

<sup>59</sup>*Crowston*, 521 N.W.2d at 401. The *Crowston* court, however, imposed a post-sale duty to warn under negligence principles. See *infra* notes 93-101 and accompanying text.

<sup>60</sup>*Habecker*, 797 F. Supp. 381.

<sup>61</sup>*Id.* at 382.

<sup>62</sup>*Id.* at 388.

<sup>63</sup>*Id.*

<sup>64</sup>*Id.*

class of product users may prevent a post-sale duty to warn from arising.<sup>66</sup> Yet, it should be noted that this analysis only applies to section 10 post-sale liability. As discussed more fully below, "[s]imply because a product is mass-produced and widely distributed does not totally absolve a manufacturer of a post-sale duty to warn under ordinary negligence principles."<sup>67</sup> Given the recent efforts of some courts to find liability by virtue of mass consumer-directed marketing,<sup>68</sup> sellers must remain cognizant of the multi-faceted attacks regarding warning issues to which they are susceptible.

### C. Effective Communication for Action to Prevent Harm

Even though a "substantial risk of harm" exists for "identifiable" consumers, a seller does not owe a section 10 post-sale duty to warn unless "a warning can be effectively communicated to and acted on by those to whom a warning might be provided."<sup>69</sup> Effectiveness is addressed on multiple levels. For the warning to be effective, the seller must again first ascertain the appropriate recipients of the warning.

When a seller may identify an individual consumer through customer receipts or records, direct communication is appropriate and it is feasible to relay an effective post-sale warning.<sup>70</sup> When a seller cannot identify individual consumers, a seller may use the public media as a more suitable means to convey the warning.<sup>71</sup> A seller may also issue public announcements when the number of consumers exposed to the "substantial risk of harm" is significant.<sup>72</sup>

Whether a post-sale warning is "effective" also depends upon cost.<sup>73</sup> "As the group to whom warnings might be provided increases in size, costs of communicating warnings may increase and their effectiveness may decrease."<sup>74</sup> Certainly, this is a factor to be urged especially by small product sellers or weighing against the issuance of a warning.

If a seller may cost-effectively communicate to the consumers, then the

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<sup>66</sup>RESTATEMENT (THIRD) § 10, cmt. c.

<sup>67</sup>CROWSTON v. Goodyear Tire & Rubber Co., 521 N.W.2d 401, 408 (N.D. 1994). *See infra* notes 93-101 and accompanying text.

<sup>68</sup>Perez v. Wyeth Labs., Inc., 734 A.2d 1245 (N.J. 1999) (learned intermediary doctrine does not apply to direct marketing of drugs to consumers so that liability attaches if advertising fails to provide adequate warning of drug's dangerous propensities).

<sup>69</sup>RESTATEMENT (THIRD) § 10 (h)(3).

<sup>70</sup>*Id.* § 10, cmt. g.

<sup>71</sup>*Id.*

<sup>72</sup>*Id.*

<sup>73</sup>*Id.*

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post-sale warning language must be "reasonably calculated to impress upon users the gravity of the risk."<sup>75</sup> Vague warnings indicating neither the potential problem nor the possible risk of harm are inadequate.<sup>76</sup>

Not only must a warning be "effectively communicated,"<sup>77</sup> but the seller must direct the warning to those who are able act upon it.<sup>78</sup> Section 10 of the Restatement (Third) explains that:

To justify the potentially high cost of providing a post-sale warning, those to whom such warnings are provided must be in a position to reduce or prevent product-caused harm. Such recipients of warnings need not be original purchasers of the product, so long as they are able to reduce risk effectively.<sup>79</sup>

At logical contact points, like service centers or dealerships, sellers may convey a post-sale warning to those who may either reconvey the warning or take immediate action to prevent the harm or injury from occurring.<sup>80</sup> In fact, sellers may possibly be obligated to direct a post-sale warning to an "intermediary," instead of the consumer, because the intermediary may be the only one able to act upon the warning.

### D. Burden to Provide Warning

Finally, a post-sale duty to warn exists only when the "risk of harm is sufficiently great to justify the burden of providing a warning."<sup>81</sup> Not only must the exposure to possible harm or injury be a "substantial risk of harm,"<sup>82</sup> but also the risk must be "sufficiently great" to outweigh the seller's burden in providing that warning.<sup>83</sup>

Sellers face heavy burdens when courts impose a post-sale duty to warn requiring notification of consumers.<sup>84</sup> To warn a consumer after the sale of the product, the seller may have to expend large sums of money to both identify the

<sup>75</sup>*Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519, 532 (Tex. Ct. App. 1979)

<sup>76</sup>*Id.*

<sup>77</sup>RESTATEMENT (THIRD) § 10 (b)(3).

<sup>78</sup>*Id.*

<sup>79</sup>*Id.* § 10, cmt. h.

<sup>80</sup>*See, e.g., Walton v. Avco. Corp.*, 610 A.2d 454, 459 (Pa. 1992)(imposing post-sale duty to warn where there was a helicopter service center that was a "logical [point] of contact" to warn the ultimate consumer).

<sup>81</sup>RESTATEMENT (THIRD) § 10 (b)(4).

<sup>82</sup>*Id.* § 10 (b)(1).

<sup>83</sup>*Id.* § 10 (b)(1).

consumer and to effectively convey the warning.<sup>85</sup> These costs are balanced against the risk of harm, considering the severity of the potential harm and the number of consumers affected.<sup>86</sup> For example, a duty to warn prior customers of new safety developments would be too burdensome absent limitations based on feasibility or the potential harm or injury.<sup>87</sup> Additionally, individualized notice to a large population may be too burdensome. Yet, "manufacturers can satisfy that duty [to warn] by taking reasonable steps to warn foreseeable users."<sup>88</sup> Again, such reasonable steps may include notice to a distributor or seller.<sup>89</sup> "[E]ven for a substantial risk, a seller owes a duty to warn after the time of sale only if the risk of harm is sufficiently great to justify the cost of providing a post-sale warning."<sup>90</sup>

While post-sale warnings are sometimes necessary, "an unbounded post-sale duty to warn would impose unacceptable burdens on product sellers."<sup>91</sup> "[B]oundaries must be recognized" so that "product manufacturers and sellers . . . will not become the effective insurers of their product."<sup>92</sup> Accordingly, the post-sale duties placed upon manufacturers or suppliers should not be unreasonable or over-burdensome, and sellers should focus the attention of the courts on the breadth and cost of issuing the warning proffered by the plaintiff.<sup>93</sup>

#### IV. DUTY UNDER NEGLIGENCE PRINCIPLES

Although a seller may escape a post-sale duty to warn under the rigorous test of the Third Restatement, a court may still impose a post-sale duty under negligence principles.<sup>94</sup> To do so requires consideration of the following:

<sup>85</sup>RESTATEMENT (THIRD) § 10, cmt. i.

<sup>86</sup>*Id.*

<sup>87</sup>Williams v. Monarch Machine Co., 26 F.3d 228, 232 (1st Cir. 1994).

<sup>88</sup>Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401, 409 (N.D. 1994).

<sup>89</sup>*Id.*

<sup>90</sup>RESTATEMENT (THIRD) § 10, cmt. i.

<sup>91</sup>*Id.* § 10, cmt. a.

<sup>92</sup>Habecker v. Clark Equip Co., 797 F. Supp. 381, 387 (M.D. Pa. 1992).

<sup>93</sup>*Id.* at 388. Lovick v. Wil-Rich, 588 N.W.2d 688, 695 (Iowa 1999) (jury must consider factors that make it burdensome or impractical for manufacturer to provide warning so that it can appropriately consider the reasonableness of that seller's conduct.)

<sup>94</sup>See Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401, 407 (N.D. 1994). See also Patton v. Hutchinson Wil-Rich Mfg. Co., 861 P.2d 1299, 1314 (Kan. 1993). The court in Patton rejected a strict liability post-sale duty to warn, but recognized a post-sale duty under negligence principles. The court held that a seller, acquiring post-sale knowledge of a life-threatening hazard, "should not be absolved of all duty to take reasonable steps to warn the

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(1) the nature of the harm that may result from use without notice, (2) the likelihood that harm will occur . . . , (3) how many persons are affected, (4) the economic burden on the manufacturer of identifying and contacting current product users . . . , (5) the nature of the industry, (6) the type of product involved, (7) the number of units manufactured or sold, and (8) steps taken other than giving of notice to correct the problem.<sup>95</sup>

While strikingly similar to the elements of the Third Restatement, these factors potentially broaden the scope of a post-sale duty to warn.

In 1994, the Supreme Court of Nebraska specifically rejected a strict liability post-sale duty to warn, yet imposed a post-sale duty under negligence principles.<sup>96</sup> The plaintiff there was seriously injured while inflating a sixteen-inch light truck tire on a mismatched sixteen and one half inch wheel.<sup>97</sup> The court rejected the claim of strict liability because identifying individual consumers would be an "unreasonable burden" due to the fact that tires are "mass produced and widely distributed in the marketplace."<sup>98</sup> Nevertheless, the seller had a post-sale duty to warn foreseeable users about the dangers associated with its product under negligence principles.<sup>99</sup>

Despite a broader duty under negligence, a seller may discharge its duty under negligence more easily than under the Third Restatement. Whereas the latter mandates a warning to those who are able to act upon it,<sup>100</sup> a seller may satisfy a post-sale duty to warn under negligence "by taking reasonable steps to warn foreseeable users about the dangers associated with their product."<sup>101</sup> In the context of a widely marketed product, "[n]otice to the distributor or retail seller may . . . meet the reasonableness standard."<sup>102</sup> Still, to be most effective in reducing both the chance of injury or harm, as well as the risk of legal liability under any theory, the product seller should fashion and direct its warnings to the appropriate audience that can act thereon.

<sup>95</sup>Crowston, 521 N.W.2d at 409 (citing Cover v. Cohen, 461 N.E.2d 864, 872 (N.Y. 1984)).

<sup>96</sup>*Id.* at 401.

<sup>97</sup>*Id.* at 405.

<sup>98</sup>*Id.* at 408. In rejecting the strict liability claim, the court compared cases in which the sellers could easily trace the ownership of the products without imposing too harsh a burden upon the seller. *Id.*

<sup>99</sup>*Id.* at 408, 409.

<sup>100</sup>RESTATEMENT (THIRD) § 10, cmt. h.

<sup>101</sup>Crowston, 521 N.W.2d at 409.

V.  
CONCLUSION

Section 10 obviously has its limits and may eventually prove to be more hype than harm to product sellers. Nonetheless, sellers must carefully and thoughtfully traverse the labyrinth of post-sale warning obstacles. Product sellers neither desire nor should they be forced to issue needless warnings. Yet, we urge product sellers to be honest in their risk assessments and aggressive in their post-sale warnings. No matter what approach any particular seller may take, one thing is certain – section 10, coupled with negligence principles and the assumption (of duty) doctrine, will provide fertile ground for product liability litigation for years to come.