

# Seller Beware: The Post-Sale Duty to Warn

BY BRIAN J. HUNT

## INTRODUCTION

The American Law Institute, which consists of judges, law professors, and practitioners, has again “restated” the law of torts with respect to product liability. The *Restatement (Third) of Torts: Products Liability* applies to all products, ranging from toaster ovens to industrial presses to prescription drugs. Although the Third Restatement generally reflects the prevailing rules, some provisions would effect changes in substantive legal principles. While the Restatement does not, by itself, carry the force of law, most ALI Restatements have, over the years, had great influence on the courts.

Lawyers who defend products liability actions should be aware of one particular provision in the Third Restatement that has not yet received much attention. It is contained in Section 10, and states that a product seller should be liable if it fails to warn—after the sale—the purchaser about a possible hazard or defect in the product it learns about after the sale that poses a substantial risk of harm to persons or property.

Thus, Section 10 would impose liability upon sellers for post-sale failure to warn. The imposition of such a duty to warn does not reflect the law in many jurisdictions, which rejects outright the notion that a seller has a duty to warn about defects it learns about after the sale is completed. If the product was not defective at the time of sale, and the seller was not aware of any defect, there should be no duty on the seller. Some courts have held that, although there may be a post-sale duty to warn, there is no post-sale duty to inform about safety improvements.

Judicial recognition of a post-sale duty to warn is relatively recent and, accordingly, the scope of that duty is not yet well defined by case law. Furthermore, while Section 10 provides a framework for analysis of this duty and its breach, the scope of the duty is not well defined therein either. It can be anticipated that, if many

courts adopt the essence of Section 10, plaintiffs will allege that the seller had a duty to warn after the sale, either to broaden the scope of discovery and evidentiary relevance (*e.g.*, to introduce more evidence with respect to prior occurrences) or to gain negotiating leverage (*e.g.*, to trigger additional insurance coverage). This article will identify potential problems for sellers and their counsel with respect to allegations of a post-sale failure to warn and provide practical and preventive methods to address them.

## THE RESTATEMENT STANDARD

Section 10 of the Third Restatement 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 when 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 when:
  - (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 may reasonably be assumed to be unaware of the risk of the harm; and
  - (3) a warning can be effectively communicated to and acted upon 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.

Thus, Section 10 sets forth an objective standard for determining whether a post-sale duty to warn exists and whether such a duty has been breached. It should be noted that the term “seller” is broad enough to encompass any person in the distributive chain, including manufacturers, wholesalers, distributors, and retailers. It should also be noted that any post-sale duty to warn is determined by a negligence, as opposed to a strict liability, standard. The imposition of this negligence standard is acknowledged in the Comment to Section 10 to be a case-specific inquiry.

The Comment points out that courts must make the threshold decision as to whether the trier of fact could reasonably find that the seller can practically and effectively discharge its duty and that the risk of harm is sufficient to justify a substantial post-sale undertaking. The Comment urges courts to carefully examine the circumstances for and against imposing the duty in light of the serious potential for overburdening sellers. Accordingly, sellers



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and their counsel should be prepared to attack each of the four elements of Section 10(b) with respect to the particular product at issue. Counsel must be ready to refute the allegation that a product seller has a duty to provide a warning after a sale is completed, and then, if necessary, to refute allegations of any breach of that duty.

### 1) Did the Seller have Actual or Constructive Knowledge that the Product Posed a Substantial Risk of Harm to Persons or Property?

The first element of the duty as set forth in Section 10 of the Third Restatement is that the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property. The element relies not only on the seller's actual knowledge, but also on what the seller reasonably ought to know about the particular product. Great potential for overburdening the seller lies in this constructive knowledge standard. This first element is worthy of discussion with respect to both the seller's constructive knowledge of the product-related risk and the substantial risk of harm.

#### *Constructive knowledge of the product-related risk*

An initial question is: to what extent do current product changes give rise to an obligation to warn users about previously purchased products? Section 10 itself does not address whether the post-sale duty to warn arises with respect to every product development, every safety improvement, or advances in the state of the art. Indeed, the Reporters' Note states that the Restatement draws no sharp distinction between a failure to warn and a failure to inform about safety improvements. However, the Comment notes that every post-sale product improvement does not give rise to a duty to warn prior purchasers, because the burden upon sellers (and presumably the chill upon product development) would be too great. Section 10 leaves a vast undefined area between post-sale product improvements which do not give rise to a duty to warn and those that do. It may be anticipated that, with respect to product improvements, the imposition of a post-sale duty to warn will be guided by the fact that the standard is negligence-based and, accordingly, determined by the rule of reason.

Another question is: how broad is the seller's obligation to monitor user experience with a product? The Comment points out that the burden of constantly monitoring product performance is usually too great to support a post-sale duty to warn when risks are not actually brought to the seller's attention. The Comment also points out that certain classes of sellers (*e.g.*, sellers of prescription drugs and medical devices) have an obligation to constantly monitor because the seller has reasonable cause to suspect that a hitherto unknown risk exists. Left open is the question of the seller's responsibility to monitor once a risk is brought to its attention. Sellers will, almost inevitably, gain more information about a product and its attendant risk the longer the product is on the market. Again, it may be anticipated that this determination will be informed by the negligence standard and the measure of reasonableness.

#### *Substantial risk of harm*

If the seller of a product is to have an obligation to warn about the product after it has sold the product, the risk of harm, taking into account the frequency and the severity of possible injury, must be substantial. This measure allows for the consideration of all harm on a spectrum, which may run, for example, from the relatively infrequent finger cut to the relatively more common loss of a hand. The Comment notes that the risk of harm must be at least as great as the level of risk that would require a warning under Section 2(c) of the Third Restatement (which provides that a product is defective when foreseeable risks of harm could have been reduced or avoided by the provision of reasonable warnings). In the event that the product poses no substantial risk of harm, no duty to make a post-sale warning arises.

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### 2) Can the Users be Identified? Were they Unaware of the Risk?

The second element of Section 10 is that those to whom a warning might be provided can be identified and may reasonably be assumed to be unaware of the risk of harm. In certain instances, customer records may identify the users to whom warnings should be provided. Note, however, that the ability to identify product users need not be individual-specific. The obligation created by Section 10 is potentially much broader. The Comment points out that sellers may be able to identify classes of users or able to identify users in a specific geographic region. The ability of a seller to identify users will depend on the size of the market in which the product is sold, the durability of the product, the manner in which it is distributed, and the extent to which the seller maintains contact with the users. These are all significant variables that will determine the seller's ability to identify users. The Comment points out that a seller's inability to identify users, or users' general awareness of the risk, may prevent a post-sale duty to warn from arising.

### 3) Can the Warning be Effectively Communicated to Users?

The third element of Section 10 is that the warning can be effectively communicated to and acted upon by those to whom a warning might be provided. The assessment of this element will likely be measured by reasonableness. In instances where the users can be identified by sales records, direct communication may be feasible. In instances where all service providers for the product can be identified, and the product is of a type where regular servicing is necessary, dissemination through service centers may be appropriate. In some instances the use of public media to disseminate information regarding risks of substantial harm may be appropriate. As the group to whom warnings might be provided increases in size, costs of communicating warnings may increase and the warnings' effectiveness may decrease. In the event the warning cannot be effectively communicated to users, presumably no post-sale duty to warn arises.

### 4) Does the Risk of Harm Justify a Warning?

The fourth element is that the risk of harm justifies the burden of

providing a warning. This element essentially requires that the substantial risk of harm identified under the first element is “balanced” against the costs imposed under the second and third elements. In the event that the risk of harm does not outweigh the costs of identifying the users and of effectively communicating the warning, no duty arises.

### **PRACTICING UNDER SECTION 10'S REQUIREMENTS**

The defense practitioner should note each of the four elements of Section 10 of the Third Restatement must be established by the plaintiff, both to impose the duty and to prove any breach.

It is important to distinguish a post-sale duty to warn from defects existing at the time of sale. A seller of a product which is defective at the time of sale cannot absolve itself from liability merely by issuing a post-sale warning. Conversely, the duty to provide a post-sale warning may arise even when the product was defective at the time of sale. Furthermore, courts which have previously found a duty to provide a post-sale warning have based that result, in part, on a seller's provision of warnings at the time of sale.

Of course, the reasonableness of a seller's conduct with respect to post-sale warnings may differ according to the particular seller's position in the chain of distribution. For instance, a manufacturer may be in possession of information, or have a reasonable opportunity to obtain the information, satisfying the four elements which would give rise to a duty on the part of the manufacturer. On the other hand, a retailer, for instance, may not be able to discover, post-sale, the risk posed by the product and, accordingly, would not be subject to liability under this provision.

In light of the fact that the post-sale duty is a negligence standard, the potential for overburdening the seller will be a defense

theme with respect to both the duty and the breach analysis. The seller will argue that the imposition of an obligation to monitor a particular product (to the extent the plaintiff will claim is necessary) is an undue burden. Likewise, the seller will argue that the cost of identifying product users and effectively communicating the warning is overly burdensome. In anticipation of these arguments, sellers should marshal facts to support their position and, to the extent feasible, provide concrete examples.

Future conduct will likely be measured assuming the seller's knowledge of the requirements of Section 10. Accordingly, sellers will want to document the elements of Section 10, particularly with respect to product monitoring and user identification, or be prepared to explain why it is not reasonable to require them to do so.

### **PROSCRIPTION**

In light of the potential obligations of sellers to make post-sale warnings, sellers will want to analyze and document each of the four elements of Section 10. It may be true that many, or most, of a seller's products require no continuing action because the product poses a small risk of harm. For products that do pose a substantial risk of harm, a seller may want to implement or upgrade mechanisms to identify users and to monitor the likelihood, frequency, and severity of injury. The seller should also have a complete program in place to address all four elements of the post-sale duty to warn.

In terms of preventive law, the most important step is to perform the analysis, document it, and update the analysis at regular intervals. In that fashion, a seller, and its attorneys, will be best prepared to address the fact-specific inquiries which a judge, and perhaps a jury, will have to make. ■

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