

Is the Door Opening for Plaintiffs?

By Brian J. Hunt

A 50-state survey of the post-sale duty to warn.

It is well-settled in strict product liability law that “when a design defect is present *at the time of sale*, the manufacturer has a duty to take reasonable steps to warn at least the purchaser of the risk as soon as the manufacturer

learns or should have learned of the risk created by its fault.” *Jablonski v. Ford Motor Co.*, 955 N.E.2d 1138, 1159 (Ill. 2011) (emphasis added). See also *Comstock v. General Motors Corp.*, 99 N.W.2d 627, 634 (Mich. 1959); *Kozlowski v. John E. Smith’s Sons Co.*, 275 N.W.2d 915, 922 (Wis. 1979); *Downing v. Overhead Door Corp.*, 707 P.2d 1027, 1032 (Colo. Ct. App. 1985); *Wilson v. U.S. Elevator Corp.*, 972 P.2d 235, 237-38 (Ariz. 1998); *Jones v. Bowie Industries, Inc.*, 282 P.3d 316, 334 (AK 2012).

However, an issue arises when the manufacturer or seller *subsequently* learns of a latent defect in its product that could not have been reasonably known at the time of sale. Section 10 of the *Restatement (Third) of Torts: Products Liability* suggests imposing on the seller, in this instance, a post-sale duty to warn. Put simply, a post-sale duty to warn places a burden on the seller to inform consumers of its products’ dangers that become apparent to the seller after sale. Because this duty takes into account what actions a reasonable seller would take after the product has left its

control, the post-sale duty to warn is a negligence-based standard. Contrast this to the point-of-sale duty to warn, which only emphasizes whether a defect existed at the time it left the control of the seller or manufacturer and thus has its basis in strict liability.

This potential post-sale duty has important implications for manufacturers and sellers because it places upon them a potentially onerous responsibility to their consumers, exposing them to liability for dangers discovered months, and even years, after the product has left their control. This article discusses the developments in the adoption or rejection of the post-sale duty to warn. In particular, we consider what effect, if any, Section 10 has or will have on the adoption of the duty, and whether courts have been receptive to the standards suggested by the Restatement.

Pre-1998 Case Law

In 1959, the Michigan Supreme Court ruled on the seminal case *Comstock v. General Motors Corp.*, 99 N.W.2d 627 (Mich. 1959). In that case, the plaintiff was crushed while he was working as a mechanic at Ed Lawless Buick Company by a 1953 Buick Roadmaster that had defective brakes. *Id.* at 629. The employee driving the Buick forgot that



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the power brakes on the car were not working and, thus, could not stop the car before it hit the plaintiff. *Id.* The plaintiff alleged negligence on the part of the owner, the driver, and the manufacturer of the Buick automobile, General Motors. *Id.* The trial judge directed a verdict for General Motors on the basis that the employee's conduct was a superseding, intervening cause that severed any liability General Motors may have had. *Id.* at 632. On appeal, the Michigan Supreme Court considered whether there was evidence from which the jury could have found negligence on General Motors' part. *Id.*

Post-accident investigation revealed that in the fall of 1952, immediately following the release of the 1953 Buick, difficulties were experienced with the power brake system in the automobile that resulted in sudden brake failures. *Id.* at 630. A year later, Buick's service department sent out a bulletin to all Buick agencies warning them of the problem and, in 1953 and 1954, General Motors furnished all Buick agencies with two separate kits for replacement of the defective parts. *Id.* at 630-31. The agencies were also instructed to make repairs on the power brake system, without notice to the owner, whenever 1953 Buicks came into the shops. *Id.* at 631. However, no warnings were issued to the owners of the cars themselves by either the agencies or General Motors. *Id.*

In finding that the jury could have determined that General Motors was negligent, the court held that—once it discovered the latent defect in the 1953 Buicks—General Motors had a duty to take reasonable means to warn the owners of that automobile. *Id.* at 634-35. The court recognized that the duty to warn of a known danger inherent in a product has long been part of product liability law and stated that “[i]f such a duty to warn of a known danger exists at point of sale, we believe a like duty to give prompt warning exists when a latent defect which makes the product hazardous to life becomes known to the manufacturer shortly after the product has been put on the market.” *Id.* at 634. This is still good law in Michigan, and fifteen (15) other state courts have subsequently cited or mentioned this decision.

Over twenty years later, the Court of Appeals of New York decided *Cover v.*

Cohen, in which it discussed six factors for the jury to consider in determining the nature of the post-sale warning required and who should receive it. Consequently, *Cover* became another widely-referenced case to which courts looked in evaluating whether such a duty existed. See *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1306 (Kan. 1993); *Lewis v. Ariens Co.*, 751 N.E.2d 862, 867 n.18 (Mass. 2001); *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521, 549 (Tenn. 2008) (Wade, J., concurring).

In *Cover*, Cohen was driving his 1973 Chevrolet Malibu when it shot backwards and crushed the plaintiff against a wall. *Cover v. Cohen*, 461 N.E.2d 864, 866 (N.Y. 1984). Cohen alleged that, although he had his foot on the brake, the car would not stop. *Id.* The plaintiff sued Cohen for negligence and later amended his complaint to add as defendants Kinney Motors, the dealer of the car, and General Motors, the manufacturer. *Id.* The jury found General Motors negligent and 94 percent at fault because the throttle return spring in the automobile was defective, which in turn caused the brake pedal to malfunction. *Id.* at 867. On appeal, General Motors raised questions concerning the propriety of the evidentiary admission of a technical service bulletin issued by General Motors to its dealers. *Id.* This bulletin concerned the allegedly defective throttle return spring and was issued thirteen months after delivery of the plaintiff's Chevrolet. *Id.* at 867, 871.

The court of appeals found that the bulletin was not admissible as evidence on the design defect cause of action—because only the condition of the car at the time of delivery was relevant to that claim—but explained that a manufacturer may incur liability for failure to warn of dangers or advancements in the state of the art, of which it is expected to be aware, that come to its attention after sale of the product. *Id.* at 871. The court noted, however, that prior case law was not entirely clear on what constituted sufficient notice to the manufacturer to trigger this duty, or what type of warning would satisfy a post-sale duty to warn. *Id.*

To remedy this deficiency, the *Cover* court stated that the nature of the warning to be given and to whom it should be given turn upon a number of factors: (1) the

harm that may result from use of the product without notice; (2) the reliability and any possible adverse interest of the person, if other than the user, to whom notice is given; (3) the burden on the manufacturer or vendor involved in locating the persons to whom notice is required to be given; (4) the attention the recipient will give the notice; (5) the kind of product involved

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and the number manufactured or sold; and (6) the steps taken, other than the giving of notice, to correct the problem. *Id.* at 872. The case was then remanded and a new trial granted so that the jury could consider General Motors' negligence in conjunction with these factors. *Id.* at 872-73.

These two early cases helped pave the way for other states to adopt some form of a continuing duty to warn and—before the *Restatement (Third) of Torts: Products Liability* was published in 1998—a total of eighteen (18) states recognized a post-sale duty to warn by either common law, statute, or a combination of both. The breakdown of these eighteen (18) states is as follows:

Eight (8) states (Arizona, California, Colorado, Connecticut, Hawaii, Kansas, Maryland, and Minnesota) adopted the duty by common law alone. See *Rodriguez v. Besser Co.*, 565 P.2d 1315 (Ariz. Ct. App. 1977); *Lunghi v. Clark Equipment Co.*, 153 Cal.App.3d 485 (Cal. Ct. App. 1984); *Downing v. Overhead Door Corp.*, 707 P.2d 1027 (Colo. App. 1985); *Prokolkin v. General Motors Corp.*, 365 A.2d 1180 (Conn. 1976); *Tabieros v. Clark Equip. Co.*, 944 P.2d 1279 (Haw. 1997); *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299 (Kan. 1993); *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633 (Md. 1992); *Hodder v. Good-year Tire & Rubber Co.*, 426 N.W.2d 826

(Minn. 1988). Three (3) states (New Jersey, North Carolina, and Washington) recognized the duty by common law, but additionally codified this duty through explicit recognition in a statute. See *Lally v. Printing Mach. Sales & Serv. Co., Inc.*, 572 A.2d 1187 (N.J. Super. Ct. App. Div. 1990); *Smith v. Selco Prod., Inc.*, 385 S.E.2d 173 (N.C. Ct. App. 1989); *Timberline Air Serv., Inc. v.*

However, the comment also notes that an unbounded post-sale duty to warn would impose unacceptable burdens on product sellers, so courts need to examine the circumstances carefully for and against imposing a duty to provide a post-sale warning in each particular case.

Bell Helicopter-Textron, Inc., 884 P.2d 920 (Wash. 1994); N.J. Stat. Ann. §2A:58C-4; Wash. Rev. Code Ann. §7.72.030; N.C. Gen. Stat. Ann. §99B-5. Four (4) states (Georgia, Iowa, Michigan, and North Dakota) implicitly mention a duty to warn after the sale in a statute (which means that the legislature employs open-ended language such as “[t]his section does not limit a manufacturer’s or seller’s duty to use reasonable care in relation to a product after the product has left the manufacturer’s or seller’s control.” Mich. Comp. Laws Ann. §600.2948), but also have case law that imposes the duty. See *Chrysler Corp. v. Batten*, 450 S.E.2d 208 (Ga. 1994); *Fell v. Kewanee Farm Equip. Co. A Div. of Allied Prod.*, 457 N.W.2d 911 (Iowa 1990); *Comstock v. General Motors Corp.*, 99 N.W.2d

627 (Mich. 1959); *Crowston v. Goodyear Tire & Rubber Co.*, 521 N.W.2d 401 (N.D. 1994); Ga. Code Ann., §51-1-11; Mich. Comp. Laws Ann. §600.2948; Iowa Code Ann. §668.12; N.D. Cent. Code Ann. §28-01.3-08 (Idaho also has a statute that uses this language; however, there has been no interpretive case law that imposes a post-sale duty to warn, and the statute by itself is apparently insufficient to create this cause of action. See Idaho Code Ann. §6-1406). Finally, two (2) states (Ohio and Louisiana) have adopted the duty by statute alone, and one (1) state (New Mexico) recognizes the duty in its Uniform Jury Instructions. See Ohio Rev. Code Ann. §2307.76; La. Rev. Stat. Ann. §9:2800.57; NMRA, UJI 13-1402.

Section 10 of Restatement (Third) of Torts: Products Liability

In 1998, the American Law Institute released the Third Restatement of Torts. Contained in this Third Restatement is Section 10, entitled “Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Warn.” Section 10 provides that:

- 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 comment to section (a) notes that in 1998, the duty to warn of risks after

the time of sale, regardless of whether the defect existed at the time of the original sale, was relatively new. However, the comment also notes that an unbounded post-sale duty to warn would impose unacceptable burdens on product sellers, so courts need to examine the circumstances carefully for and against imposing a duty to provide a post-sale warning in each particular case.

Comment (b) explains that the standard governing liability of the seller is the objective reasonable person standard, which is traditionally applied in negligence cases. Therefore, Section 10 is a negligence-based standard. As a result, it is conceivable that one party’s conduct may be reasonable and another’s unreasonable, even with respect to the same occurrence. For example, a manufacturer may have information concerning a risk that imposes upon it a duty under Section 10, but a downstream seller may not be in a position to discover this information and, thus, not be subject to liability.

Finally, it is important to note the distinction between post-sale failures to warn and defects that exist at the time of sale. Comment (j) points out that “even when a product is defective at the time of sale a seller may have an independent obligation to issue a post-sale warning based on the rule stated in this Section. Thus, a plaintiff may seek recovery based on both a time-of-sale defect and a post-sale failure to warn.” However—for purposes of Section 10—it is *not* necessary for the defect to have existed at the time of sale.

After Section 10

After 1998, only three (3) states (Alaska, Iowa, and Massachusetts) adopted the Section 10 version of the post-sale duty to warn. Iowa previously recognized this duty in 1990, but Alaska’s and Massachusetts’s acceptance of Section 10—subsequent to the publication of the Third Restatement—was the first time that they recognized such a duty. Conversely, Maine declined the invitation to adopt Section 10 in 2008 and instead implemented its own common law version of the post-sale duty to warn.

Moreover, five (5) states (Illinois, Pennsylvania, Texas, Mississippi, and Tennessee) have rejected both Section 10 and the post-sale duty to warn in general. However,

the most indicative illustration of Section 10's influence is that while case law in Illinois, Texas, and Tennessee rejects the duty, their courts have also apparently left the door open to allow for the recognition of the post-sale duty to warn.

Adoption of Section 10

The first state to adopt Section 10 was Iowa in 1999 in *Lovick v. Wil-Rich*. Although Iowa had previously recognized the post-sale duty to warn in 1990 (see *Fell v. Kewanee Farm Equip. Co. A Div. of Allied Prod.*, 457 N.W.2d 911 (Iowa 1990)), *Lovick* was the first opportunity for Iowa to consider the implementation of Section 10. In *Lovick*, the plaintiff brought suit against the manufacturer of a cultivator for injuries he sustained while using its product. *Lovick v. Wil-Rich*, 588 N.W.2d 688, 691 (Iowa 1999). The plaintiff's cultivator was manufactured and sold by Wil-Rich in 1981 and had two wings that folded and unfolded by operation of two hydraulic cylinders. *Id.* The wings were secured in place by a metal pin that was inserted under each wing. *Id.* In May of 1993, the plaintiff was attempting to lower the left wing of his cultivator by removing the pin but, upon doing so, the wing immediately fell on him and caused severe injuries. *Id.*

Later investigation revealed that the wing fell when the pin was removed because the linkage attaching the cylinder to the wing had broken, so the pin was the only device holding the wing upright. *Id.* It was also discovered that—since 1983—Wil-Rich had received at least nine (9) reports of a cultivator wing falling and injuring the operator. *Id.* at 692. In 1987, Wil-Rich became aware that a competitor had a post-sale warning program regarding its machine's wings, but Wil-Rich did not institute its own such program on the asserted grounds of the practical difficulties of identifying and locating the owners and users of previously sold cultivators. *Id.*

The trial court instructed the jury on a negligence claim for breach of a post-sale duty to warn. *Id.* The jury returned a verdict for the plaintiff, and Wil-Rich appealed, arguing in part that the trial court's instruction to the jury was legally insufficient because the duty to warn is not absolute and the instruction did not identify the factors to consider in determining

whether the duty would be breached in a particular case. *Id.* at 692, 694.

The Iowa Supreme Court recognized that the state had joined the then-growing number of jurisdictions that recognize a post-sale duty by enacting a statutory post-sale duty to warn in 1987, but that the court had not had the occasion to consider its specific application or parameters. *Id.* at 694. See also Iowa Code §668.12 (1987). The *Lovick* decision then was, in effect, appending the requirements of Section 10 to implicit statutory recognition that occurred twelve (12) years earlier. The court also explained that most states have developed various factors to guide the implementation of the post-sale duty to warn because the particular facts of each case determine whether the manufacturer's or seller's conduct was reasonable. *Lovick*, 588 N.W.2d at 694, 695.

Additionally, the court acknowledged that special circumstances may exist after the sale of a product that inhibit or cause to be impractical the imposition of a post-sale duty to warn. *Id.* at 695. It then continued to find that a "post-sale failure to warn jury instruction must be more specific than the point of sale failure to warn instruction and inform the jury to consider those factors which make it burdensome or impractical for a manufacturer to provide a warning in determining the reasonableness of its conduct." *Id.* Accordingly, the court adopted Section 10 and held that trial courts must incorporate the Restatement factors in instructing the jury on the duty to warn following the sale; however, it did not actually discuss these various factors in the context of that specific situation. *Id.* at 696. The Iowa Supreme Court decided that the incorporation of the Restatement factors concerning the post-sale duty to warn instruction required a new trial, and the case was remanded for a trial consistent with its opinion. *Id.*

The most recent state to adopt Section 10 was Alaska in 2012 in *Jones v. Bowie Industries, Inc.* This case provides a thorough analysis of how each factor works in practice. In *Jones*, the plaintiff's leg was amputated after he attempted to force a bale of mulch into a hydromulcher with his foot, which then became caught and pulled him into the machine. *Jones v. Bowie Industries, Inc.*, 282 P.3d 316, 322–23. The

hydromulcher involved in the accident was manufactured by Bowie Industries and owned by Great Alaska. *Id.* at 321.

The plaintiff sued Bowie and Great Alaska, alleging that both corporations were negligent in failing to warn of the dangers in using the hydromulcher. *Id.* at 322. The jury found that Bowie and Great Alaska were not liable, and the plain-

Ultimately, the court found that there was more than sufficient evidence on each of the factors set out in Section 10 to justify giving the post-sale duty to warn instructions to the jury.

tiff appealed. *Id.* at 323. On cross-appeal, Bowie asserted that the trial court erred in instructing the jury on the plaintiff's post-sale duty to warn claims or, in the alternative, that the plaintiff failed to produce enough evidence to justify instructing the jury on the issue. *Id.* at 334.

Without much discussion, the Alaska Supreme Court held that a manufacturer has a duty to inform customers of dangers that became apparent after sale when the danger is potentially life threatening and also adopted Section 10 as the standard to apply in such cases. *Id.* at 335. The substantial reasoning it gave for adopting such a standard is that the manufacturer is in a unique and superior position to follow the use and adaptation of its product by consumers. *Id.* at 334-35.

After concluding that balancing the factors listed in Section 10 is the appropriate test for determining whether a seller's conduct was reasonable, the court went on to apply each factor to the specific facts in this case. Because Bowie was the sole party to cross-appeal, the court focused only on evidence relating to its alleged post-sale duty to warn and did not have the opportunity to apply the factors to Great Alaska.

The first factor the court discussed is that the seller knows or should know that the product poses a substantial risk of harm. Evidence was presented at trial that a few years after Bowie first manufactured and distributed the hydromulchers, it became aware that workers were using their feet to force mulch into the opening and were suffering serious injuries as a

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result. *Id.* at 336. In response, Bowie argued that—while these accidents were severe—they were relatively infrequent. *Id.*

The second factor is that the seller can identify recipients of the warnings and that those recipients are likely unaware of the risk. The plaintiff presented evidence that Bowie produced few hydromulchers like the one that injured the plaintiff, making identification of the class of ultimate users less burdensome. *Id.* Further, hydromulchers are specialized machines with limited users; therefore, advertisements in trade publications are a simple and viable method of contacting remote users of the machines. *Id.*

The third factor is that a warning can be effectively communicated and acted upon by those to whom it is provided. Bowie kept a list of parts customers, but had not made an effort to send warnings to those who were different from the original purchasers, and had not placed a notification in the trade publications in which it advertised. *Id.*

The final factor is that the risk of harm is sufficiently great to justify the burden of providing a warning. Even though accidents like the plaintiff's in this case were infrequent, the court concluded that they were severe. *Id.*

Ultimately, the court found that there was more than sufficient evidence on each of the factors set out in Section 10 to justify giving the post-sale duty to warn instruc-

tions to the jury. *Id.* It is worth noting that co-defendant Great Alaska was not in a position similar to Bowie. Great Alaska was not in a position to collect information about user experience with the product or the severity of any injuries and, therefore—if the procedural posture had required such an analysis—the court may well have reached a different conclusion as to the imposition of a post-sale duty to warn upon Great Alaska.

Recognizing the Duty, but Rejecting Section 10

Maine is the only state since 1998 that has recognized the post-sale duty to warn, but that has also declined to adopt the standards found in Section 10. This decision occurred in *Brown v. Crown Equipment Corp.*

In *Brown*, the plaintiff's husband, an employee at Prime Tanning (Prime), was killed while operating a forklift in Prime's warehouse. *Brown v. Crown Equip. Corp.*, 960 A.2d 1188, 1190 (Me. 2008). Crown Equipment Corporation (Crown) manufactured the forklift in 1989 and sold it to a third-party in 1990. *Id.* at 1191. Prime subsequently purchased the forklift from a used equipment dealer. *Id.*

In 1995, Crown learned that a new shelf design in many of the warehouses exposed operators of the forklifts to the risk that shelving could enter the forklift at an unshielded level and strike the operator. *Id.* Between 1989 and 1990, Crown received notices of one hundred thirty-four (134) accidents, including more than fifty (50) that resulted in serious injury or death. *Id.* In 1995, Crown developed a kit to reduce this risk but, until 1999, Crown took no action to warn customers nor did it tell anyone that operators were experiencing accidents resulting in serious injury or death. *Id.*

In 1999, Crown mailed letters to 13,000 customers informing them of the risks and of the existence of the kit; however, it did not urge the use of protective measures nor inform readers that operators had been injured. *Id.* Prime did not receive this update because it did not purchase the forklift directly from Crown. *Id.* A few months after the notice was sent out, a Crown employee visited Prime to assess OSHA-modifications for the forklift in

question, but still did not warn Prime of the risk. *Id.*

The jury found for the plaintiff on the post-sale failure to warn claim, and Crown appealed. *Id.* at 1192. Subsequently, the First Circuit Court of Appeals certified the following question to the Supreme Court of Maine: "Does Maine law incorporate the rule of Restatement (Third) of Torts: Products Liability §10 that a manufacturer has a duty to warn known but indirect purchasers where its product was not defective at the time of sale but a product hazard developed thereafter?" *Id.*

The court held that Maine law does not incorporate Section 10, but, it did recognize a post-sale duty to warn indirect, known purchasers as it applied to the facts of that case. *Id.* at 1193-94. The court reasoned that because Crown knew of the risk, was in personal contact with Prime, and performed an evaluation of that very forklift, Crown owed a duty to Brown as a known user of that forklift, and breached that duty by failing to warn Brown or his employer when it had an opportunity to do so. *Id.* at 1193. Therefore, because Crown had a duty at common law to warn Prime after the sale of the risks, the court found no reason to adopt Section 10. *Id.*

Declining the Duty and Section 10

Pennsylvania has declined to adopt Section 10 as well as the general post-sale duty to warn. In *DeSantis v. Frick*, the court rejected Section 10 as inconsistent with Pennsylvania law and stated in a footnote that Pennsylvania does not recognize a post-sale duty to warn. *DeSantis v. Frick*, 745 A.2d 624, 632 n.7 (Pa. 1999). The court declined to acknowledge a cause of action based on a duty to warn of latent defects—which may or may not have existed at the point-of-sale—because Pennsylvania law applies only strict liability principles, which require that the product be defective at the time of sale. Therefore, the negligence-based post-sale duty to warn cause of action was rejected by the court.

Mississippi has also declined the invitation to adopt both Section 10 and the post-sale duty warn. See *Palmer v. Volkswagen of America*, 905 So. 2d 567 (Miss. Ct. App. 2003) (holding that Mississippi does not recognize a post-sale duty to warn because the plain meaning of Mississippi's Prod-

ucts Liability Act is that the statute imposes liability on the manufacturer or seller for warnings that were inadequate at the time of sale, not for warnings that became inadequate at some later time).

Leaving the Door Open

There is another category of jurisdictions that is perhaps the most indicative of where

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the trend recognizing a post-sale duty to warn is headed. These are states whose precedents consistently hold that there is no duty to warn after the sale. Yet, in recent years, their state supreme courts have suggested *in dicta* that they may be willing to recognize such a duty under the appropriate circumstances.

For example, Illinois courts have found time and again that Illinois law does not impose a post-sale duty to warn. The case that first explicitly stated this rule is *Modelski v. Navistar International Transportation Corp.* In *Modelski*, the plaintiff brought action on behalf of the deceased's estate after the deceased was ejected from the seat of his Farmall 450 tractor, struck by the blade of a rotary mower that the tractor was towing, and killed. *Modelski v. Navistar Intern. Transp. Corp.*, 707 N.E.2d 239, 241 (Ill. App. Ct. 1999). The plaintiff alleged, in part, that Navistar was negligent in failing to provide post-sale warnings to foreseeable users of the Farmall 450 tractor after learning of the hazards associated with the design of the seat mounting. *Id.* at 242. Before trial, the court struck the

charge that Navistar was negligent in failing to provide a post-sale warning. *Id.* The plaintiff appealed, contending that the trial court erred in striking this allegation. *Id.*

In its reasoning, the appellate court first recognized that Illinois case law requires the plaintiff to prove that the manufacturer knew or should have known of the dangers of its product at the time the product left its control. *Id.* at 246. It reiterated that “the law does not contemplate placing the onerous duty on manufacturers to subsequently warn all foreseeable users of products based on increased design or manufacture expertise that was not present at the time the product left its control.” *Id.* (quoting *Collins v. Hyster Co.*, 529 N.E.2d 569 (Ill. App. Ct. 1988)). The danger with respect to the seat mounting that the plaintiff claimed Navistar should have warned of would not have come to its attention until after the tractor left its control. *Id.* at 246. Therefore, according to Illinois precedent, Navistar had no duty to warn of such danger. *Id.*

Other Illinois cases have also found no duty to warn post-sale. See *Kempes v. Dunlop Tire and Rubber Corp.*, 548 N.W.2d 644 (Ill. App. Ct. 1989) (finding that no Illinois authority has extended the duty to warn beyond the time when a product left its manufacturer's control unless it knew at that time that the product was defective); *Rogers v. Clark Equip. Co.*, 744 N.E.2d 364 (Ill. App. Ct. 2001) (affirming *Modelski v. Navistar Transp. Co.* and finding that imposing a continuous duty on manufacturers would be a heavy burden); *Carrizales v. Rheem Mfg. Co., Inc.*, 589 N.E.2d 569, 579 (Ill. App. Ct. 1991) (“Generally, it is a reasonable policy not to impose a continuing duty to warn against a hazard discovered subsequent to the time it left the manufacturer's control.”).

Despite the overwhelming precedent, the Illinois Supreme Court provided a soft holding when it was presented with the question of whether to adopt Section 10 in 2011 in *Jablonski v. Ford Motor Co.* In that case, the plaintiffs were driving their 1993 Lincoln Town Car on the interstate. *Jablonski v. Ford Motor Co.*, 955 N.E.2d 1138, 1142 (Ill. 2011). When they came to a complete stop in a construction zone, another car slammed into them. *Id.* As a result, a large pipe wrench in the trunk of the plaintiffs'

car penetrated the trunk and punctured the back of the vehicle's fuel tank. *Id.* The vehicle burst into flames, killing one of the passengers and severely injuring the other. *Id.*

The 1993 Lincoln Town Car that was involved in the accident was equipped with a “Panther platform,” which is a configuration that places the fuel tank aft [?] of the axle. *Id.* at 1143. In 2001, the National Highway Transportation Safety Administration (NHTSA) opened an investigation into post-crash fires in vehicles equipped with the Panther platform. *Id.* at 1148. NHTSA found that a police vehicle equipped with the Panther platform had a greater exposure to high-energy rear impacts compared to civilian Panther platform vehicles, but neither required action by Ford nor prohibited the design. *Id.*

In 2002, Ford introduced a “Trunk Pack” for the police vehicle, which instructed owners on how to place objects in their car to reduce the risk that the fuel tank would be ruptured by the trunk's contents. *Id.* at 1149. Ford informed all registered owners of the police vehicles, as well as all the Ford, Lincoln, and Mercury dealers in the United States, about the availability of the upgrade kit. *Id.* Civilian owners, including the plaintiffs, were not notified. *Id.*

In part, the plaintiffs alleged that Ford, the manufacturer, was negligent for failing to inform the plaintiffs of certain post-sale remedial measures it took in 2002, after manufacture of the vehicle but before the accident, concerning the 1993 Lincoln Town Car model; specifically, the existence of the Trunk Pack. *Id.* at 1143, 49.

The Illinois Supreme Court rejected the plaintiffs' argument and reaffirmed *Modelski*, holding that a manufacturer is under no duty to issue post-sale warnings for defects first discovered after the product has left its control. *Id.* at 1160. The court said that the plaintiffs' theory of negligence was premised upon a duty not recognized in Illinois at the time of trial. *Id.* at 1161.

Alternatively, the plaintiffs requested that—even if that duty is not presently recognized in Illinois—the court should adopt Section 10 of the Third Restatement and recognize the post-sale duty to warn. *Id.* Interestingly, the court stated: “Although we do not foreclose the possibility that a post-sale duty to warn could be recog-

nized in the future in Illinois, we decline the invitation to expand the duty in *this case under the particular facts and circumstances presented here*. ...Accordingly, we decline to consider in this case whether Illinois should adopt a post-sale duty to warn.” *Id.* at 1162 (emphasis added).

This dicta suggests that, under appropriate circumstances, the Illinois Supreme Court may be willing to depart from established Illinois case law and join the growing number of jurisdictions that recognize a duty on manufacturers to warn of defects not discovered until after the product has left its control.

What may be even more telling is that Illinois is not the first state to suggest that it would be willing to recognize this new form of seller liability. In 2008, the Supreme Court of Tennessee declared that, although a post-sale failure to warn claim has not been previously recognized in Tennessee, the court expressed no opinion as to the merits of recognizing that cause of action in an appropriate case. *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521 (Tenn. 2008).

Likewise, the Texas Supreme Court avoided expressing an opinion on whether Section 10 is consistent with Texas law by analyzing the claim under a different theory of liability in *Torrington Co. v. Stutzman*. The court stated: “[W]e express no opinion as to whether those *Restatement* sections [10, 11, 12, and 13] are consistent with establish Texas law. Instead, we will analyze Torrington’s liability under the plaintiff’s undertaking theory.” *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 836-837 (Tex. 2000).

These recent decisions convey how even when there is seemingly established case law rejecting the post-sale duty to warn, state supreme courts are reluctant to close the door completely to this (relatively) new theory of liability.

Uncertainty

Not all states have clear case law on this matter; in fact, some jurisdictions actually have conflicting case law.

For example, there are decisions applying Virginia law that both recognize and reject a post-sale duty to warn. Compare *Ambrose v. Southworth Prod. Corp.*, 953 F. Supp. 728 (W.D. VA 1997) (finding that

Virginia does not recognize a duty on the part of a manufacturer to warn its consumers of dangerous defects discovered by the manufacturer after the sale of its product) with *Rash v. Stryker Corp.*, 589 F. Supp. 2d 733 (W.D. VA 2008) (predicting that the Supreme Court of Virginia would allow a cause of action based on a negligent breach of a post-sale duty to warn to proceed).

Moreover, in the absence of state law, federal courts have predicted on which side they think the state will fall, or have declined to recognize a new cause of action without guidance from the legislature or state courts. See *Novak v. Navistar Intern. Transp. Corp.*, 46 F.3d 844 (8th Cir. 1995) (predicting that the South Dakota Supreme Court would recognize a post-sale duty to warn if given the opportunity); *White v. Ford Motor Co.*, 312 F.3d 998, 1019 (9th Cir.) (assuming without deciding that a jury instruction that imposed a responsibility to warn of a defective product after it has been manufactured and sold was correct under Nevada law); *Herrod v. Metal Powder Prods.*, 886 F. Supp. 2d 1271 (assuming Utah law generally follows the *Restatement (Third) of Torts: Products Liability*); *Boatmen’s Trust Co. v. St. Paul Fire & Marine Ins. Co.*, 995 F. Supp. 956, 962 (E.D. Ark. 1998) (failing to find a cause of action under existing Arkansas law that involves a post-sale duty to warn); *Wicker v. Ford Motor Co.*, 393 F. Supp. 2d 1229, 1236-37 (W.D. O.K. 2005) (holding that the plaintiff failed to provide persuasive authority that Oklahoma recognizes a post-sale duty to warn); *Tober v. Graco Children’s Prods., Inc.*, 431 F.3d 572, 578 (7th Cir. 2005) (declining to find a cause of action based on a post-sale duty to warn without guidance from the Indiana Supreme Court because the Indiana Products Liability Act does not explicitly state such a duty); *Anderson v. Nissan Motor Co., Ltd.*, 139 F.3d 599, 602 (8th Cir. 1998) (predicting that the Nebraska Supreme Court would not impose a post-sale duty on product manufacturers, but gave no opinion regarding the potential liabilities of other parties in the chain of distribution).

Additionally, there are states for which no reporting court has been presented with the issue. These include: Alabama, Delaware, Florida, Kentucky, Missouri, Montana, New Hampshire, Oregon, Rhode Island, South Carolina, Vermont, West Virginia, Idaho, and Wyoming.

Conclusion

It is clear that—prior to 1998—the trend recognizing the post-sale duty to warn was growing. In response, the American Law Institute included Section 10 in its publication, *Restatement (Third) of Torts: Products Liability*, to reflect the increasing popularity of the rule.

The effect that Section 10 has had on

The effect that Section 10 has had on the implementation of the post-sale duty to warn since 1998 is less than abundantly clear.

the implementation of the post-sale duty to warn since 1998 is less than abundantly clear. Only three (3) states adopted the duty subsequent to 1998, and of these, only two (2) have adopted Section 10.

Illinois and Tennessee have established case law rejecting the post-sale warning theory of liability. However, both have qualified their recent state supreme court decisions by indicating that—while the facts of the present case are not appropriate to adopt the post-sale duty to warn—they do not foreclose the possibility of doing so in the future. The fact that these courts are willing to shy away from such established precedent illustrates the tacit recognition that the duty is becoming more commonplace.

Therefore, we may expect to see states that have historically rejected the post-sale duty to warn overrule past precedent and join the trend of recognition. Additionally, states that have not yet had the opportunity to address this issue will likely find that a duty to warn after the sale exists if the court is presented with the appropriate circumstances. Ultimately, while Section 10 itself may not be uniformly adopted, the post-sale duty to warn has found its place in product liability law.

