



DELAYED DISCOVERY OF DEFECT: DUTY TO WARN?

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Manufacturers, distributors, and sellers are aware that they are generally obligated, at the time of distribution or sale, to provide warnings for products whose use may involve more than a reasonable degree of risk when the danger is not known or obvious to the user. They should also take notice that in a slight, but growing, majority of states they now have a continuing duty to provide warnings well past, sometimes years past, the initial distribution or sale of a product.

This “post-sale duty to warn” of potential dangers, discovered after product distribution or sale, is an area in transition. The duty does not exist in every state; and, its contours vary widely between those states that have adopted the duty. The Restatement (Third) of Torts, an influential treatise summarizing principles of U.S. tort law, provides that a post-sale duty to warn arises when a distributing entity knows or should know that a product poses a substantial risk of harm, the product’s users can be identified, a warning can be effectively communicated to the users, and the risk of harm is sufficiently great to justify the burden of providing a warning. States such as Massachusetts, Alaska and Iowa have adopted, or clearly follow, the duty set-forth in the Restatement. Others, including Mississippi, Illinois and Tennessee,

have largely rejected it.

California is one of a handful of states that has neither explicitly adopted a post-sale duty to warn nor denied that one exists. Nevertheless, case law indicates that a California court might, in time, find such a duty. In *Lunghi v. Clark Equipment Co.*, 153 Cal.App.3d 485 (1984), a lawsuit was brought to recover for the death of a worker who was crushed by a front-end loader (a heavy equipment machine used in construction). Prior to the accident at issue, but after the machine had been on the market for awhile, the manufacturer discovered that the machine had dangerous features that caused these types of injuries. In considering whether a jury should be instructed on negligence as a theory of recovery, the court concluded that even if a jury found no design defect in the machine, it could still find that the manufacturer’s knowledge of the injuries caused by the dangerous features imposed a duty to warn of the danger.

More recently, in *Rosa v. Taser Intern., Inc.*, 684 F.3d 941 (9th Cir. 2012), a federal court noted that “though California law measures the strict liability duty to warn from the time a product was distributed, a manufacturer may be liable under negligence for failure to warn of a risk that was

subsequently discovered.” Although California state courts are not required to follow a federal court’s assessment of state law, the *Rosa* court has provided California courts with persuasive authority to find a post-sale duty to warn in future cases.

The impact of a majority of states imposing, or leaving the door open for, a post-sale duty to warn is significant. Companies that distribute their products nationally, or in states that have such a duty, would be prudent to consider the impact of this duty on all aspects of their business, from design and manufacturing to customer communications. Even companies that primarily distribute in states that have explicitly denied this duty will want to consider potential liability costs should their products reach users in states that impose the duty.



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FIFTY-STATE SURVEY: POST-SALE DUTY TO WARN

State	Post-Sale Duty to Warn	Notes
ALABAMA	No	State case law has not recognized such a duty.
ALASKA	Yes	Judicially adopted the Restatement (Third) of Torts § 10.
ARIZONA	Yes, for latent defects	
ARKANSAS	No	State case law has not recognized such a duty. A federal district court rejected the theory that the duty exists under Arkansas law.
CALIFORNIA	Uncertain	State case law indicates that the duty exists. The Ninth Circuit Court of Appeals recognized the duty under California law.
COLORADO	Yes, for latent defects	Persuasive authority from the Tenth Circuit Court of Appeals indicates that the duty is limited to latent defects.
CONNECTICUT	Yes	
DELAWARE	No	State case law has not recognized such a duty.
FLORIDA	No	State case law has not recognized such a duty.
GEORGIA	Yes	
HAWAII	Yes, for latent defects	
IDAHO	Uncertain	State case law has not recognized such a duty. However, Idaho Code § 6-1406(1) implies that the duty exists.
ILLINOIS	No	See <i>Modelski v. Navistar Int'l Trans. Corp.</i> , 302 Ill. App. 3d 879 (1st Dist. 1999).
INDIANA	No	State case law has not recognized such a duty. The Seventh Circuit Court of Appeals found no such duty under Indiana law.
IOWA	Yes	Judicially adopted the Restatement (Third) of Torts § 10.
KANSAS	Yes, for latent defects	
KENTUCKY	Uncertain	Kentucky state courts have left the possibility of such a duty open; federal courts are split on whether it exists under Kentucky law.
LOUISIANA	Yes	
MAINE	Yes	
MARYLAND	Yes	
MASSACHUSETTS	Yes	Judicially adopted the Restatement (Third) of Torts § 10.
MICHIGAN	Yes, for latent defects	
MINNESOTA	Yes	The duty exists in "special cases." <i>Hodder v. Goodyear Tire & Rubber Co.</i> , 426 N.W.2d 826 (Minn. 1988), cert. denied, 492 U.S. 926 (1989).
MISSISSIPPI	No	<i>Palmer v. Volkswagen of Am., Inc.</i> , 905 So. 2d 564 (Miss. Ct. App. 2003).
MISSOURI	No	State case law has not recognized such a duty. A federal court found "no strong indication" that the state court would adopt the duty.
MONTANA	No	No state case law recognizes such a duty.
NEBRASKA	No	Case law has not recognized such a duty. The Eighth Circuit Court of Appeals predicted that the state courts would not recognize the duty.
NEVADA	No	State case law has not recognized such a duty.
NEW HAMPSHIRE	Uncertain	State case law has not recognized such a duty. A federal district court predicted that the state court would recognize the duty.
NEW JERSEY	Yes	
NEW MEXICO	Yes, for latent defects	
NEW YORK	Yes	
NORTH CAROLINA	Yes	
NORTH DAKOTA	Yes	
OHIO	Yes	
OKLAHOMA	Uncertain	State case law has not recognized such a duty. The Tenth Circuit Court of Appeals noted that it is unclear whether the duty exists.
OREGON	Uncertain	Case law leaves open the possibility of a duty to warn where there is an active and continuing relationship between the parties.
PENNSYLVANIA	Yes, for latent defects	
RHODE ISLAND	No	State case law has not recognized such a duty.
SOUTH CAROLINA	No	State case law has not recognized such a duty.
SOUTH DAKOTA	Yes	
TENNESSEE	No	See <i>Mohr v. DaimlerChrysler Corp.</i> , 2008 WL 4613584 (Tenn. Ct. App. Oct. 14, 2008).
TEXAS	No	The duty may arise where the manufacturer (1) regains significant control over the product or (2) voluntarily takes on the duty.
UTAH	Yes	The Utah Supreme Court imposed a post-sale duty to warn on a successor corporation. A federal court predicted that the state court would adopt the duty for the original manufacturer/seller.
VERMONT	Uncertain	No court has expressly recognized such a duty. However, a federal court implied that such a duty exists under Vermont law.
VIRGINIA	Uncertain	State case law has not recognized such a duty. Federal district courts have split on whether such a duty exists under Virginia law.
WASHINGTON	Yes	
WEST VIRGINIA	No	State case law has not recognized such a duty.
WISCONSIN	Yes	
WYOMING	No	State case law has not recognized such a duty.

*Developed from sources including: *Post-Sale Duty to Warn* (Kenneth Ross ed., A.B.A. Sec. Litig., 2004); and W. David Arnold, *A Manufacturer's Post Sale Duty to Warn* (Robison, Curphey & O'Connell, 2008).

**Additional case citations available upon request.