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Modern Post-Sale Warnings and Related Obligations

M. Stuart Madden

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MODERN POST-SALE WARNINGS AND RELATED OBLIGATIONS

M. Stuart Madden[†]

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I. GENERALLY

In broad terms, a product seller's obligations to purchasers and product users are discharged by its introduction into commerce of a duly safe product.¹ If warnings or instructions for judicious use are necessary for the product to be used with no more than a reasonable degree of risk, then the failure to provide such warnings or instructions renders the product defective.² In a limited number of settings, however, a seller's warnings or instructions obligations will survive the product's initial sale.³ The

[†] Distinguished Professor of Law, Pace University School of Law.

1. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. a (1997) (defining "Liability of Commercial Sellers Based on Product Defect at Time of Sale"); *see also id.* at § 2 (setting forth the categories for when a product is defective at the time of sale). Other non-seller participants in the distribution of a product may be treated as sellers for the purposes of informational obligations. For the most part, these departures from the orthodox application of products liability to sellers alone occurs when the participant undertakes activities ordinarily associated with the activities of sellers. An example of such a non-seller that often is treated as a seller for the purposes of products liability might be a commercial automobile lessor.

2. *Id.* at § 2(c).

3. *See generally* AM. LAW PROD. LIAB. 3d § 79 ("Post-Sale or Continuing Duty to Warn").

presence or absence of a duty in tort, including a post-sale duty to provide warnings or instructions, is usually decided by the trial court as a matter of law.⁴

The decisional law suggests that post-sale (often also described as "continuing") advisory duties may arise in four circumstances. In the first, a seller may be obligated to warn consumers of a latent defective and unreasonably dangerous condition associated with the product that was unknown at the time of initial sale, but which was discovered after sale.⁵ This is the position taken by the majority of courts that recognize such a duty in the first place.⁶ An alternative tack is that taken by the Restatement (Third) of Torts: Products Liability section 10, which states a rule that irrespective of whether there exists a latent point-of-sale defect, a post-sale advisory obligation may be imposed when "a reasonable person in the seller's position would provide such a warning."⁷

A third position recognizes a post-sale warning obligation

4. *E.g.*, *Wilson v. United States Elevator Corp.*, 972 P.2d 235 (Ariz. Ct. App. 1998) (affirming summary judgment in elevator accident claim, finding manufacturer of elevator had no continuing duty to notify known purchasers of technological advancements in door-closing mechanisms). *See also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10 cmt. a (1997):

As with all rules that raise the question whether a duty exists, courts must make the threshold decisions that, in particular cases, triers of fact could reasonably find that product sellers can practically and effectively discharge such an obligation and that the risks of harm are sufficiently great to justify what is typically a substantial post-sale undertaking. . . . In light of the serious potential for overburdening sellers in this regard, the court should carefully examine the circumstances for and against imposing a duty to provide a post-sale warning in a particular case.

5. *Canto v. Ametek, Inc.*, 328 N.E.2d 873, 878 (Mass. 1975) (imposing post-sale duty to warn of latent design defect "to eliminate the risk created by the manufacturer's initial fault"); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10 cmt. a (1997) (stating "[c]ourts recognize that warnings about risks discovered after sale are sometimes necessary to prevent significant harm to persons and property."); *see generally* Michael L. Matula, *Manufacturer's Post-Sale Obligations in the 1990's*, 32 TORT & INS. L.J., 87-88 (1996). *E.g.*, *Vasallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909 (Mass. 1998). In *Vasallo* the Massachusetts Supreme Judicial Court, "abrogating" prior precedent, wrote: "A manufacturer will be held to the standard of knowledge of an expert in the appropriate field, and will remain subject to a continuing duty to warn, at least purchasers, of risks discovered following the sale of the product at issue." *Id.* at 923.

6. *Infra* Part II.

7. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10(a) (1997). *Id.* at § 10 cmt. a ("Judicial recognition of the seller's duty to warn of a product-related risk after the time of sale, whether or not the product is defective at the time of original sale within the meaning of other Sections of this Restatement, is relatively new.").

when a seller learns or should have learned of significant hazards associated with product misuse or alteration. Be the misuse or modification of the product caused by the user or by third parties, if it renders the foreseeable use of the product unreasonably unsafe, at least one influential court has held that the seller may be required to advise purchasers even in circumstances where the misuse or alteration might provide the seller a successful defense in a design defect claim.⁸

The fourth approach, which a few courts have evaluated either independently or in conjunction with one or more of the positions stated above, focuses upon the relationship between the seller and the vendee, or as appropriate, users or consumers. Some courts adopting this approach propose that a post-sale duty will be appropriate only when, following the initial sale, the seller has commenced or continued activities, ranging from continued servicing of like products to undertaking safety-related research, sufficient to induce the purchaser or the user to reasonably expect the seller's duty to disseminate hazard information to continue. Along similar logic, some claimants have alleged that a post-sale failure to warn constitutes actionable negligence pursuant to the common law doctrine of "negligent undertaking."⁹

In contrast to the substantial minority of jurisdictions that have recognized one or another rationales for a continuing informational obligation, a far more restrictive approach prevails regarding claims that the seller should have recalled, retrofitted, or otherwise acted to remedy an unreasonable product hazard. When such a claim is posed by a plaintiff, it is often paired with an allegation that the seller also breached a continuing warning obligation. The profile of such claims fall into two broad categories. In the first category, plaintiff alleges that there exists a post-sale duty to recall or otherwise endeavor proactively to remedy a product flaw upon the seller's post-sale discovery of unreasonable risks not known to it at the time of initial sale. The second category of such claims arises when post-sale advancements in technology might permit or have permitted introduction and sale of an

8. See generally *Liriano v. Hobart Corp.*, 700 N.E.2d 303 (N.Y. 1998). The plaintiff in *Liriano*, a teenaged grocery store employee, suffered amputation of his right hand and lower forearm while using defendant's commercial meat grinder, from which the safety guard had been removed. *Id.* at 305.

9. See generally *Artiglio v. Corning Inc.*, 957 P.2d 1313 (Cal. 1998)(claim brought by recipients of silicone breast implants).

alternatively-designed and safer product.¹⁰

Courts and legislatures have generally declined to impose such latter obligations, even in jurisdictions recognizing one or another form of continuing warning obligation. A frequently stated rationale for resisting calls for post-sale recall or repair duties has been the high costs associated with recalls and retrofitting. Accordingly, there is virtual unanimity that such a duty will ordinarily only be triggered in two limited circumstances. The first is when such action is required by statute, regulation or governmental order, and the seller has failed to execute such an obligation.¹¹ The second is when, even absent a governmentally imposed obligation, the seller has "undertak[en] to recall the product[,]" and has failed to perform this undertaking as would a reasonable man.¹² Products Liability Restatement section 11 proposes recognition of these two limited exceptions, and none other, to a broader "no duty" rule for recall and similar asserted obligations.

II. POST-SALE DUTY TO WARN

In a quite significant expansion of the law of seller warning and instructions duties, a growing number of jurisdictions now recognize one or another post-sale or continuing seller informational duties. As with warnings duties generally, when a post-sale warning obligation is imposed, the question of to whom the warning should be given will turn upon the facts of a particular case, and will contemplate evaluation of the risks involved, the efficacy and feasibility of one warning strategy over another, and the likelihood that any warning will be conveyed to the users of the product or those vulnerable to injury or loss due to the product's unsafe condition.¹³ State by state authority as to the

10. See generally RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 11 (1997) ("Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Recall Product"); see also *id.* at § 11(Reports' Note (a)) (collecting authority).

11. *Id.* at § 11(a)(1) (1997) (proposing liability for harm when the seller fails to recall a product if "a governmental directive issued pursuant to a statute or administrative regulation specifically requires the seller or distributor to recall the product").

12. *Id.* at § 11 (2) (a) (1), (2).

13. See generally *Walton v. Avco Corp.*, 610 A.2d 454, 459 (Pa. 1992) (stating "[t]he responsibility to warn of known defects cannot be satisfied merely by alerting participating service centers. Because of the likelihood that a purchaser

appropriateness of such duties remains split, with a substantial number of jurisdictions finding or predicting that no such general obligation should be imposed absent a showing of a point-of-sale defect.¹⁴ Still other jurisdictions have reached no decisions on the matter.

Evaluation of the efficacy or adequacy of any post-sale warning is similar, but not identical to that pertaining to point-of-sale warnings. As with point-of-sale warnings, the seller's duty is owed generally to foreseeable product users or to intermediaries who can reasonably be expected to pass on the warning.¹⁵ However, a quite particularized and polycentric evaluation may ensue in weighing the need for and the anticipated efficacy of a post sale warning. Read in the aggregate, the decisional law suggests that this evaluation of nature of the warning and to whom it should be given are guided properly by evaluation of the harm that may follow from use of the product without an advisory from the seller; the reliability of any intermediary who may be enlisted to convey the warnings to the current user; the burden on the vendor or manufacturer in locating the persons to be warned; the attention that a notice of the type contemplated would likely receive from the recipient; the nature of the product involved; and the corrective actions, if any, taken by the seller in addition to the post-sale warning.¹⁶

will have a product serviced by its own technicians or by an unaffiliated service center...sellers must take reasonable steps to warn the user or consumer directly."); see also *Cover v. Cohen*, 461 N.E.2d 864, 872 (N.Y. 1984) (commenting that the "nature of the warning to be given and to whom it should be given likewise turn upon a number of factors, including the harm which may result. . .").

14. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10 (Reporters' Note (a)) (citing, among other decisions, *Birchler v. Gehl Co.*, 88 F.3d 518 (7th Cir. 1996) (Illinois law imposes no general continuing duty to warn)); *Romero v. Int'l Harvester Co.*, 979 F.2d 1444 (10th Cir. 1992) (applying Colorado law); *Carrizales v. Rheem Mfg. Co.*, 589 N.E.2d 569, 579 (Ill. Ct. App. 1991); *Syrie v. Knoll Int'l*, 748 F.2d 304, 311-12 (5th Cir. 1984) (applying Texas law). Even without applicable Nebraska state court decisions, the Eighth Circuit Court of Appeals in *Anderson v. Nissan Motors Co.*, 139 F.3d 599 (8th Cir. 1998) predicted that no such general post-sale warning duty would be imposed under Nebraska law. *Id.* at 602. In that action, involving injuries to a forklift operator, the plaintiff claimed that the manufacturer owed a post-sale duty to warn of dangers of operating the forklift without an operator restraint system. *Id.*

15. RESTATEMENT (SECOND) OF TORTS § 388 cmt. n (1965) (stating a method of warning should give "reasonable assurance that the information will reach those whose safety depends upon their having it").

16. *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1314-15 (Kan.

Distinct issues are raised by claims that a successor corporation breached a duty to warn of product defects that it discovers, after sale, in its predecessor's product. In *Harris v. T.I., Inc.*,¹⁷ the Virginia Supreme Court, "assuming without deciding that in the proper case [the court] would recognize a successor corporation's post-sale duty to warn[.]" found nevertheless that the plaintiff had not proved a "special relationship" between the consumer and the successor that would support finding such a duty.¹⁸ The Restatement (Third) of Torts: Products Liability states a rule proposing successor liability for failure to provide post-sale warnings when:

(1) the successor undertakes or agrees to provide services for maintenance or repair of the product or enters into a similar relationship with the purchasers of the predecessor's product giving rise to actual or potential economic advantage to the successor, and (2) a reasonable person in the position of the successor would provide a warning.¹⁹

Many states have by statute adopted statutes of repose that operate to extinguish any potential products liability claim upon passage of a certain number of years following a product's initial sale, without regard to whether or not a product has caused an injurious accident or illness by that time. Among the cluster of rationales for such legislation is that a statute of repose can give

1993). The *Patton* court noted, however, that ordinarily the manufacturer has no duty to take the additional measure(s) of retrofitting or recalling the product. *Id.* at 1315. See also discussion *infra* Part III.

17. 413 S.E.2d 605 (Va. 1992).

18. *Id.* at 610, explained in *Ambrose v. Southworth Products, Inc.*, 953 F. Supp. 728, 733 (W.D. Va. 1997) (claim against successor of industrial elevator manufacturer).

19. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 13(a)(1), (2) (1997). The Products Liability Restatement Section 13(b) provides indicia for determining whether "[a] reasonable person in the position of the successor would provide a warning[.]" and states:

(b) A reasonable person in the position of the successor would provide a warning if:

(1) the successor 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.

finality to a seller's potential liability, with the advantages for business planning and efficient procurement of insurance that such finality brings. It would, therefore, seem to follow that upon exhaustion of an applicable state repose period, a seller's potential liability for any post-sale warning or other product-related obligation would likewise cease. The Wisconsin Supreme Court decided otherwise in *Sharp v. Case Corp.*²⁰ *Sharp* involved a suit brought by a minor, an Oregon resident, and his parents against the tractor manufacturer, alleging that a defect in the tractor's power take-off (PYO) shaft caused it to engage without warning, causing the seventeen year-old farm worker's arms to be drawn into the baling mechanism, and amputating both beneath the elbow.²¹ While ultimately deciding that the juxtaposition of Oregon law and Wisconsin law on the issue presented only a false conflict, the Wisconsin court adopted as authoritative the Oregon Supreme Court's interpretation of its statute of repose as germane only to a seller's acts or omissions to acts occurring before sale, and as not "intend[ed]...to immunize defendants for claims based upon negligent acts or omissions committed after the sale of a product."²²

It is necessary to note that the general post-sale warning propositions regarding seller inquiry and advisory duties have little applicability to the specialized duties of sellers of prescription products.²³ By statute and by decisional law, the seller of prescription products has always been held to have a continuing duty to advise governmental authorities of new information regarding risk levels in use of his products, and to employ on an ongoing basis their scientific and medical expertise to discover and

20. 595 N.W.2d 380 (Wis. 1999).

21. *Id.* at 383.

22. *Id.* at 385. The *Sharp* court continued by quoting the Oregon Supreme Court's decision in *Erickson Air-Crane v. United Tech. Corp.*, 735 P.2d 614, 618 (Or. 1987), to this effect:

[The legislature], in enacting [Oregon Statute] 30.905, contemplated placing limits only on a defendant's exposure to liability for acts or omissions taking place before or at the time the defendant places the product in the stream of commerce. Nothing in [Oregon Statute] 30.905 or its legislative history indicates that the legislative intent was to allow a manufacturer to retreat to the date of "first purchase for use or consumption" and raise the defense of [Oregon Statute] 30-905 for negligent acts committed after the date of the first purchase[.]

23. "[C]ourts traditionally impose a continuing duty of reasonable care to test and monitor after sale to discover product-related risks" of prescription drugs and devices. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY RESTATEMENT § 10 cmt. c (1997).

advise health care professionals of new hazard related information. Thus, with regard to manufacturers of pharmaceuticals, most jurisdictions recognize a "continuous duty" to remain apprised of new scientific and medical developments and to inform the medical profession of pertinent information related to treatment and side effects.²⁴ This continuing informational obligation imposed upon the manufacturer even after the marketing of the product is not confined to the passive interpretation of scientific, medical, or technical advances or revelations explored by third parties. Under certain circumstances, the pharmaceutical manufacturer's continuing post-sale duties have been found to include the initiation of further investigations, studies or tests.²⁵

Because the law of most states has essentially fused the concept of strict liability failure to warn with that of negligent failure to warn, some states recognizing post-sale advisory duties make no distinction between claims brought in negligence and those brought in strict tort liability. Decisions in other jurisdictions have concluded, however, that important distinctions remain between

24. *Id.* ("With regard to...prescription drugs, courts traditionally impose a continuing duty to test and monitor after sale to discover product-related risks."). *E.g.*, *Wooderson v. Ortho Pharmaceutical Corp.*, 681 P.2d 1038, 1049-50 (Kan. 1984). In cases involving prescription drugs the courts have imposed a "continuous duty to keep abreast of scientific developments touching upon the manufacturer's product and to notify the medical profession of any additional side effects discovered from its use...." The drug manufacturer's duty to warn is, therefore, commensurate not only with its actual knowledge gained from research and adverse reaction reports, but also with its constructive knowledge as measured by the scientific literature and other available means of communication. *Id.* (quoting *Schenebeck v. Sterling Drug, Inc.*, 423 F.2d 919, 922 (8th Cir. 1970)). Subsequently, the Kansas Supreme Court held that the continuing investigational duty described in *Wooderson* "should be narrowly applied to the facts peculiar to the manufacture and distribution of ethical drugs." *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1308 (Kan. 1993); *see also* *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 428 (Tenn. 1994) ("Manufacturers of prescription drugs, like manufacturers of any other unavoidably dangerous product, have a duty to market and distribute their products in a way that minimizes the risk or danger."); *Stanback v. Parke Davis & Co.*, 502 F. Supp. 767, 769-70 (W.D.Va. 1980) (involving suit brought by a patient who, after receiving flu vaccine, contracted Guillane-Barre Syndrome). In *Stanback*, the court stated, at *id.*:

Although the duty of the ethical drug manufacturer to warn is limited to those dangers which the manufacturer knows or should know are inherent in the use of the drug, the manufacturer is treated as an expert in its particular field and is under a continuing duty to notify the medical profession of any side effects subsequently discovered from its use.

25. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10 cmt. c (1997); *supra* note 23 and accompanying text.

negligence and strict liability claims, and that those distinctions commend recognition of a continuing duty in negligence, but not in strict tort liability. As the Kansas Supreme Court explained in *Patton v. Hutchinson Wil-Rich Manufacturing Co.*,²⁶ "[a] negligence analysis is more appropriate than an application of strict liability in the post-sale context" because "the emphasis in strict liability upon the danger of the product rather than the conduct of the manufacturer" requires recognition that if "a product is not . . . unreasonably dangerous by the absence of warnings when it leaves the manufacturer's control, it cannot at some later date become unreasonably dangerous due to the lack of warnings."²⁷

Whether a continuous seller advisory duty is recognized in strict liability, in negligence or in both doctrines, the state by state formulations—usually judicial—of the duty, explicitly or implicitly, fall into four broad categories. In the first category, a seller may have a duty to advise purchasers of latent product defects of which the seller learns subsequent to initial sale. In the second category, which is that adopted by Products Liability Restatement section 10, a seller may have such a continuing duty without regard to whether the product was defective at the time of sale, if a reasonable seller would recognize a substantial product risk and take measures to warn of it. A third position is that even should the post-sale product risk be occasioned by product modification or misuse, where such misuse or modification becomes known to the seller a duty to warn of the risks may attach even if the misuse or alteration would serve as a defense to a design defect claim. A fourth and final basis for a continuing duty provides for recognition of a duty that is triggered when a seller has sustained a level of contact with the buyer or the user, or has undertaken initial remedial, ameliorative or informational responsibilities, and the purchaser or third parties have placed reliance upon its continuation. Each of these four approaches will be discussed in order.

Latent Defect Not Discovered Until After Initial Sale. Both by statute²⁸ and by decisional law a "growing number" of jurisdictions

26. 861 P.2d 1299 (Kan. 1993).

27. *Id.* at 1310.

28. The pertinent provision of the Iowa Code states:

Nothing contained in this section shall diminish the duty of an assembler, designer, supplier of specifications, distributor, manufacturer or seller to warn of subsequently acquired knowledge of a defect or dangerous condition that would render the product unreasonably dangerous for its foreseeable use or diminish the liability for failure to

have expanded a seller's point-of-sale warning responsibilities "to require warnings after the sale when the product later reveals a defect not known at the time of sale."²⁹ As the following discussion will demonstrate, where not required by statute, imposition of a post-sale obligation will most frequently turn on consideration of the nature and degree of the potential harm, and the feasibility of undertaking such post-sale efforts.³⁰

While many states have yet to rule on the issue, a sturdy minority have concluded that "[w]hen a manufacturer learns . . . of the dangers associated with a reasonably foreseeable use of its products after they are distributed . . . [it] must take reasonable steps to warn reasonably foreseeable users about those dangers..."³¹ Under this emerging body of law of post-sale duties, a manufacturer who, after the initial sale of the product, learns or should have learned of latent product defects that render the product not duly safe for foreseeable uses and who fails to warn the purchaser or the consumer when a reasonable seller would have done so may be liable for personal injury or property damage proximately caused thereby.³² As suggested, this scenario typically

warn.

IOWA CODE § 668.12 (1999).

29. *Lovick v. Wil-Rich*, 588 N.W.2d 688, 693 (Iowa 1999) (noting Iowa adoption of doctrine by statute).

30. *Crowston v. Goodyear Tire & Rubber Co.*, 521 N.W.2d 401, 409 (N.D. 1994) (allegedly defective tire and wheel); *Patton v. Wil-Rich Mfg. Co.*, 861 P.2d at 1314-15 (allegedly defective farm equipment, with court writing that factors to consider in deciding presence or absence of duty include nature and likelihood of the injury, feasibility, expense, effectiveness of potential warning, and ability to identify past purchasers); *Cover v. Cohen*, 461 N.E.2d 864, 866 (N.Y. 1984) (alleged malfunction of acceleration system & brake failure).

31. *Moulton v. Rival Co.*, 116 F.3d 22, 25-26 (1st Cir. 1997) (Maine law).

32. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY RESTATEMENT § 10 cmt. b (1997) ("The standard governing the liability of the seller is objective: whether a reasonable person in the seller's position would provide a warning."). While Products Liability Restatement § 10 speaks in terms of sellers, cmt. b thereto recognizes that manufacturers and non-manufacturing sellers are not similarly situated:

In applying the reasonableness standard to members of the chain of distribution it is possible that one party's conduct may be reasonable and another's unreasonable. For example, a manufacturer may discover information under circumstances satisfying [§10(b)(1)-(4)] and thus be required to provide a post-sale warning. In contrast, a retailer is generally not in a position to know about the risk discovered by the manufacturer after sale and thus is not subject to liability because it neither knows nor should know of the risk. Once the retailer is made aware of the risk, however, whether the retailer is subject to liability for

involves (1) a product that is defective at the time of sale; (2) the defect, due to its latent nature, is undetected prior to sale; and (3) the defect becomes known or knowable—by consumer complaints, related accidents or otherwise—only after the original sale.³³

An early and influential decision identifying a manufacturer's post-sale duty to warn was entered in *Comstock v. General Motors Corp.*,³⁴ which involved the alleged failure of the automobile manufacturer to take remedial measures after learning, soon after the model was put on the market, of a vulnerability of the vehicles' brakes to failure. A personal injury claim was brought by a mechanic at an automobile dealership who suffered severe injuries when a car rolled unimpeded into him in a service bay. The court, after first describing the manufacturer's general duty to warn at the point of sale, stated that "a like duty to give prompt warning exists when a latent defect which makes the product hazardous becomes known to the manufacturer shortly after the product has been put on the market."³⁵

The Kansas Supreme Court took a harmonious approach in *Patton v. Hutchinson Wil-Rich Manufacturing Co.*,³⁶ and while highlighting the importance of the gravity of the harm, stated: "We recognize a manufacturer's post-sale duty to warn ultimate consumers...when a defect, which originated at the time the product was manufactured, is discovered to present a life-threatening hazard."³⁷ To like effect is *Kozlowski v. John E. Smith Sons Co.*,³⁸ in which plaintiff alleged defective design and inadequate warnings at the time of sale.³⁹

failing to issue a post-sale warning depends on whether a reasonable person in the retailer's position would warn under the criteria set forth in [§10(b)(1)-(4)].

33. *Id.* at § 10 cmt. c (noting that a post-sale duty to warn may arise "when new information is brought to the attention of the seller, after the time of sale, concerning risks accompanying the product's use or consumption.").

34. 99 N.W.2d 627 (Mich. 1959).

35. *Id.* at 632; *see also* *Crowston v. Goodyear Tire & Rubber*, 521 N.W.2d 401, 407 (N.D. 1994) ("[i]nterpreting our products liability law to allow manufacturers to ignore post-sale knowledge about dangers associated with products is . . . contrary to prevailing principles of negligence law").

36. 861 P.2d 1299 (Kan. 1993).

37. *Id.* at 1313.

38. 275 N.W.2d 915 (Wis. 1979).

39. *Accord* *Gracyalny v. Westinghouse Elec. Corp.*, 723 F.2d 1311 (7th Cir. 1983) (claim that manufacturer failed to provide adequate warnings regarding post point-of-sale discovery of hidden defect); *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 328 (Mich. 1995) ("[B]efore there can be a true continuing duty—

After-Discovered Product Risks Irrespective of Point of Sale Defect. A post-sale duty to warn may attach when the product, through use or operation, has betrayed hazards not earlier known to the seller, or to other sellers of like products.⁴⁰ Products Liability Restatement section 10 adopts a conventional "reasonable seller" approach to gauging whether such a duty exists on any particular set of facts.⁴¹ The section states that such a duty to provide post-sale warnings is triggered "when a reasonable person in the seller's position would provide such a warning."⁴² In assessing the reasonableness standard, subsection (b) thereto suggests considering a number of factors such as whether:

(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 harm; and (3) a warning can be effectively communicated to and acted on by those to whom the warning might be provided; and (4) the risk of harm is sufficiently great to justify the burden of providing a warning.⁴³

On reasoning that can be reconciled with the Products Liability Restatement emphasis upon hazard recognition and warning feasibility, a New Jersey appeals court in *Dixon v. Jacobsen Mfg. Co.*⁴⁴ stated: "Where the manufacturer knew the identity of the

whether it be to warn, repair or recall—there must be a defect or actionable problem at the point of manufacture."); *see also* *Reeves v. Cincinnati, Inc.*, 528 N.W.2d 787 (Mich. Ct. App. 1995) (held: manufacturer had no post-sale duty when products were produced without defects; manufacturer not required to provide notice of updated features).

40. *Straley v. United States*, 887 F. Supp 728, 748 (D.N.J. 1995) (held: manufacturer of garbage truck lacking safety decals warning of dangers posed by using riding step while truck operating in reverse, a manufacturer had duty to warn of dangers revealed by developing state of the art); *see also* *Koker v. Armstrong Cork, Inc.*, 804 P.2d 659, 666 (Wash. Ct. App. 1991) (in shipyardworker's products liability action brought against manufacturers of asbestos products manufacturers, held: "[the] duty to warn attaches, not when scientific certainty of harm is established, but whenever a reasonable person using the product would want to be informed of the risk of harm in order to decide whether to expose himself to it."); *see generally* Robert E. Manchester, *Consequences of Failure to Recall Defective Product at Earliest Possible Moment*, 1 PROD.LIAB.L.J. 76 (1988); Matula, *supra* note 5 at 3.

41. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10(a) (1997).

42. *Id.*

43. *Id.* at § 10(b)(1)-(4).

44. 637 A.2d 915, 923-24 (N.J. App. Div. 1994).

owner of its product, we have no hesitation in holding that such [post-sale] duty existed, and it was for the jury to determine whether that duty had been discharged."⁴⁵ The Products Liability Restatement "reasonable seller" position can be recognized as providing for a duty that may be broader than that advanced in *Comstock* and the cases following *Comstock's* approach, which is to say, adoption of a requirement that plaintiff show that the product had a point-of-sale (and presumably latent) defect. Products Liability Restatement section 10 contains no such requirement. Thus a warning duty may, of course, be found when a pre-existing defect is or should have been discovered, but also when, irrespective of defect, the hazard and the circumstances set forth in section 10(b)(1)-(4) are such that a reasonable seller would provide a post-sale warning.

The majority of jurisdictions have held that the manufacturer of a non-defective product has no duty to warn prior purchasers of new safety devices that are employed by the manufacturer or by manufacturers of like product. In the words of one federal trial court applying Pennsylvania law: "there is no cause of action for a continuing duty to warn purchasers of new developments which may make the product more safe."⁴⁶ Products Liability Restatement section 10 makes clear its recognition that even if the product had no latent defect at the time of initial sale, many products, while non-defective and reasonably or duly safe at the time of sale, later become recognized to pose avoidable (though not necessarily unreasonable) risks of injury because later post-manufacture advancements in science or technology permit an alternative and

45. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10 cmt. a (1997), Reporters' Note.

46. *Habecker v. Clark Equip. Co.*, 797 F. Supp. 381, 386 (M.D. Pa. 1992); *see also* *Reeves v. Cincinnati, Inc.*, 528 N.W.2d 787 (Mich. Ct. App. 1995), appeal denied, 549 N.W.2d 563 (1996); *Romero v. Int'l Harvester Co.*, 979 F.2d 1444, 1446 (10th Cir. 1992) (applying Colorado law) (held: duty to provide prior purchasers with advisories only appropriate upon proof that the product was defective under standards existing at the time of manufacture) (collecting authority); *Moorehead v. Clark Equip. Co.*, No. 86 C 1442, 1987 WL 26158, at *5 (N.D. Ill. 1987) (applying Illinois law) (court rejects plaintiff's argument that there existed a "continuing duty of a manufacturer to notify prior purchasers of new safety devices"); *see generally* Comment, *Gregory v. Cincinnati Incorporated: Searching for Continuing Duty to Recall or Retrofit Products Under Michigan Law*, 1996 DET. C.L. MICH. ST. U. L. REV. 721 (1996). *E.g.*, *Williams v. Monarch Machine Tool Co.*, 26 F.3d 228, 223 (1st Cir. 1994) (applying Maine law) (held: no manufacturer duty "to advise purchasers about post-sale safety improvements that have been made to a machine that was reasonably safe at the time of sale.").

safer design. Still and all, section 10 should be interpreted as suggesting that when a product is duly safe at the point of sale, based upon then extant scientific, medical or technological knowledge, even upon a plaintiff's showing that advancements in knowledge would permit the product to be made more safely, courts ought not make manufacturers responsible for advising purchasers or consumers of the virtues of the safer product unless "a reasonable person in the seller's position" would do so.⁴⁷

The decisional law supports this position, and one finds ample authority that a reasonable seller is not obligated to advise purchasers or others regarding advancements in safety. This is particularly so in settings in which the product, at the time of initial sale, was not conspicuously obsolete and conformed to established industry standards.⁴⁸ One rationale underlying the refusal of courts to impose a general duty to advise past purchasers of technological or safety advances is that an obligation upon manufacturers to identify, locate and warn all users of safety improvements would unreasonably burden a manufacturer.⁴⁹ As most technologically advanced products are regularly improved upon in terms of either their effectiveness or their safety, one official comment to section 10 states plainly that it does not propose a post-sale warning duty every time a subsequent design modification results in improved safety.⁵⁰ In this respect the official comments to Products Liability Restatement section 10 adopt the prevailing rule that post-sale warning duties do not extend to advisory notification of post-sale safety improvements.⁵¹ Products Liability Restatement section 10

47. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10(a) (1997).

48. *Wilson v. United States Elevator Corp.*, 972 P.2d 235, 237, 241 (Ariz. Ct. App. 1998) (no duty to provide post-sale advisories of improvements in elevator door closing mechanism).

49. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10(a) cmt. c (1997) ("When risks are not actually brought to the attention of sellers, the cost of constantly monitoring product performance in the field is usually too burdensome to support a post-sale duty to warn."); *see also* *Williams v. Monarch Machine Tool Co.*, 26 F.3d 228, 232 (1st Cir. 1994) (applying Massachusetts law) (holding latent defects must exist before any post-sale duty arises); *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1311 (Kan. 1993) (declining to "impose a requirement that a manufacturer seek out past customers and notify them of changes in the state of the art.").

50. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10 cmt. a. (1997).

51. *Accord Wilson v. United States Elevator Corp.*, 972 P.2d 235 (Ariz. Ct. App. 1998). In *Wilson*, which involved a plaintiff's injury when his hand was caught in the doors of an elevator, plaintiff claimed that the manufacturer had a duty to advise the elevator purchaser (the premises manager) of a "shield sensor"

comments caution, however, that such a post-sale inquiry and potential warning obligation may exist "when reasonable grounds exist for the seller to suspect that a hitherto unknown risk exists, especially when the risk involved is great[.]"⁵²

Products Liability Restatement subsections 10(b)(2) & (3) suggest that the assessment of the presence or absence of duty take into account that there will be varying degrees of feasibility in identifying purchasers or current users. A motor vehicle, a piece of capital equipment, or a durable and relatively expensive product such as a meat slicer used in a sandwich shop, will often be traceable through the location of product identification numbers, returned warranty cards, dealer records, or other fairly accessible means. For such products, where the other criteria of section 10(b) are met, application of the liability rule that section imposes will be appropriate. For other classes of products, price, perishability, limited useful life, or the availability of such products through typical over-the-counter markets which characteristically do not involve recording the purchasers' name, will militate against finding a post-sale duty to warn individual product users or consumers. Products Liability Restatement section 10 comment (e) observes that when customer records are not available, it becomes more difficult for sellers to identify its product users for whom warnings would be useful and may prevent a post-sale duty from arising.⁵³ In some circumstances, nonetheless, the absence of means for individual consumer identification will not obviate the appropriateness of a post-sale warning duty, such as, for example, if "customer records...identify the population to whom warnings should be provided...[or] indicate classes of product users, or geographically limited markets[.]" thereby permitting post-sale warnings by public notice.⁵⁴

Products Liability Restatement section 10(b)(4), which emphasizes the centrality of considering the severity of the potential injury in assessing continuing seller duties, is in

available after the manufacture and sale of the elevator in question. *Id.* at 237-38. Held: "the fact that other safety methods were available imposed no duty on the manufacturer to 'produce a machine which incorporated only the ultimate in safety features.'" *Id.* at 238 (quoting *Rodriguez v. Besser Co.*, 115 Ariz. 454, P.2d 1315 (Ariz. Ct. App. 1977).

52. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY at § 10 cmt. c. (1997).

53. *Id.* at § 10 (b) (3) cmt. e.

54. *Id.*

agreement with the decisional law holding that where the severity of the potential injury is modest (as opposed to substantial, or serious), a continuing duty to provide warnings should not be imposed. While adopting in general terms a post-sale duty identified by the Products Liability Restatement, courts in some jurisdictions place particular emphasis upon the magnitude of danger factor. For example, in *Crowston v. Goodyear Tire & Rubber*,⁵⁵ the plaintiff, a service station employee, was injured while inflating a 16 inch truck tire on a mismatched 16.5 inch wheel.⁵⁶ He sued Goodyear, the tire manufacturer, and Kelsey-Hayes Co., the wheel manufacturer, arguing that they had a post-sale duty to warn consumers and users about dangers of mismatching.⁵⁷ The North Dakota Supreme Court acknowledged that the law of that state recognized post-sale advisory duties in "special" circumstances.⁵⁸ On the facts before it, the state high court held that the peril of tire rim and wheel mismatching was sufficiently great in terms of seriousness of injury and the large number of persons who might be exposed to the risk as to warrant imposition of a post-sale informational duty upon the manufacturer.⁵⁹

Applying Minnesota law, a federal district court in *McDaniel v. Bieffe USA, Inc.*⁶⁰ found that the manufacturer of a motorcycle helmet had a post-sale duty to warn of the risks of misusing the helmet's Velcro strap by employing it as a substitute for proper fastening of the helmet's actual chin strap.⁶¹ The claim arose following a fatal accident in which a motorcyclist's helmet dislodged in an accident in which he was hit by a van that ran a red light.⁶² The specific risk pertaining to the Velcro strip on the helmet's chin strap was that the strip was a feature intended only "to give the rider a means of fastening down the loose end of the strap after it [had] been passed through the retaining bar."⁶³ Decedent's representatives claimed that from a human factors standpoint, the design was defective, in that it "induce[d]...users

55. 521 N.W.2d 401, 405 (N.D. 1994).

56. *Id.* at 405.

57. *Id.* at 405-06.

58. *Id.* at 409.

59. *Id.*

60. 35 F. Supp. 2d 735 (D. Minn. 1999).

61. *Id.* at 736, 743.

62. *Id.* at 737.

63. *Id.* at 736.

to fasten the strap" improperly,"⁶⁴ which is to say, users might employ the Velcro surface to actually fasten the helmet, and forego passing the strap through the retaining bar.

The federal trial court noted that the Minnesota Supreme Court had explicitly recognized a post-sale duty to warn in "special cases."⁶⁵ The "special cases" language derived from the state high court decision in *Hodder v. Goodyear Tire & Rubber Co.*,⁶⁶ also a tire rim personal injury case, in which the Minnesota high court emphasized the following findings: (1) the manufacturer had known for years that the rims "could be temperamental"; (2) "that the margin for error in servicing [the rims] was dangerously small;" (3) that when accidents occurred they usually resulted in death or serious bodily injury; and (4) that the defendant had plied the tire rim trade for many years, and even after ceasing production of the rim, had continued to sell tires and other products for use with the rims.⁶⁷

Since *Hodder*, the *McDaniel* court noted, observed, Minnesota courts and federal courts applying Minnesota law had found a post-sale duty to warn based upon the relative presence or absence of "*Hodder* factors."⁶⁸ Finding that the *McDaniel* facts included some *Hodder* factors,⁶⁹ and did not include others,⁷⁰ and noting further

64. *Id.*

65. *Id.* at 739-40.

66. 426 N.W.2d 826, 823 (Minn. 1988).

67. *Id.* at 833.

68. *McDaniel*, 35 F. Supp.2d at 740:

Relying upon *Hodder*, a few Minnesota courts, and federal courts applying Minnesota law, have recognized or discussed post-sale warning duties, e.g., *T.H.S. Northstar Assocs. v. W. R. Grace & Co.*, 66 F.3d 173, 177 (8th Cir. 1995) (affirming district court decision to allow jury determination of whether asbestos manufacturer breached its post-sale duty to warn); *Ramstad v. Lear Siegler Diversified Holdings Corp.*, 836 F. Supp. 1511, 1517 (D. Minn. 1993) (holding auger manufacturer had no post-sale duty to warn of dangers associated with auger because numerous *Hodder* factors not present); *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517, 1528 (D. Minn. 1989) (recognizing post-sale duty to warn, and corresponding duty to test for alleged dangers associated with intrauterine contraceptive device); *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 100-01 (Minn. 1989) (holding a successor corporation has no post-sale duty to warn of product defects where successor never succeeded to any service contracts, was not aware of claimed defects, and did not know of location of the product at time of plaintiff's injury).

69. The court noted specifically issues of fact as to whether the manufacturer had reason to know of the risk, including (1) the latency of the risk; (2) the potential for death or serious bodily injury; and (3) the continued sale of similar products. *McDaniel*, 35 F. Supp. at 740.

70. Bieffe had not continued to service the product, had not remained in

the absence of an explanation in *Hodder* of "what factors are determinative in deciding when to impose a post-sale duty-to warn[.]"⁷¹ the *McDaniel* court denied defendant Bieffe's motion for summary judgment as to the post-sale duty to warn count, concluding that under Minnesota law, material issues of fact existed as to the manufacturer's warning obligations.⁷²

Crowston,⁷³ referenced above, placed reliance upon *Hodder* in reaching its holding that Goodyear Tire & Rubber Co. had a duty to advise past purchasers of a post-point of sale discovery of the danger of mismatching a sixteen-inch tire with a sixteen-and-one-half inch rim.⁷⁴ Deciding that the logic of *Hodder* was sufficiently broad to commend its application to mass market consumer products,⁷⁵ the South Dakota Supreme Court found the facts before it were aligned significantly with those considered by the Minnesota Supreme Court in *Hodder*.

In both cases, serious injury was a consequence of the dangers associated with the use of the product. The defendants became aware of those dangers after the manufacture and sale of the product, and those dangers may have been eliminated by appropriate post-sale warnings. The number of individuals exposed to the potential dangers in both cases was significant. Although the number of...[the products] produced militates against individualized notice to the original purchasers, that same factor suggests that manufacturers cannot totally ignore post-sale information which has the potential to prevent serious injury to so many people.⁷⁶

A continuing duty to warn was found in *Alexander v. Morning Pride Manufacturing, Inc.*,⁷⁷ a suit brought by fire fighters against the manufacturer of fire fighting "bunker gear" that allegedly failed to protect plaintiffs adequately against burns when they knelt on hot surfaces.⁷⁸ The plaintiffs complained that the material in the knees

contact with users, and had not undertaken a duty to keep purchasers advised of product developments. *Id.* at 740-41.

71. *Id.* at 741.

72. *Id.* at 741-743.

73. 521 N.W.2d 401, 408-09 (N.D. 1994).

74. *Id.* at 409.

75. *Id.* at 408 ("Simply 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.").

76. *Id.* at 409.

77. 913 F. Supp. 362 (E.D. Pa. 1995).

78. *Id.* at 364.

of the bunker gear, when compressed by the firefighters' kneeling, lost its heat-protective characteristics, and that in use, the defendant's protective gear bunker gear gave them no physical notice, such as by gradual warming, of the need to move their knees from the source of the heat. Rather, the complaint contended, the condition of the product created an unreasonable risk of serious burns before the fire fighters could take ordinary measures to protect themselves.⁷⁹ Denying the manufacturer's motion for summary judgment, the federal trial court wrote:

As the Court instructed the jury, a manufacturer's duty to warn of inherent limitations in a product is a continuing one. Nevertheless, the testimony was clear that even after Morning Pride learned the 'horrendous' news that Philadelphia fire fighters were being burned, [it] never warned them, although it could easily have contacted [them] directly and warned them of the gear's limitations.⁸⁰

Post-Sale Duties Surviving Modification or Misuse of Product. Noteworthy as well are the situations in which the manufacturer has knowledge that its product is subject to systematic modification or misuse that elevates the risk of harm. When the manufacturer has actual or constructive knowledge that its product has been subject to widespread user modification, and there is information suggesting that such modifications create a risk of injury to persons or damage to property, the manufacturer's obligation to issue post point-of-sale advisories will depend upon the foreseeability of harm that may be occasioned by such modifications or alterations.⁸¹

79. *Id.* at 367. As explained by a 1991 revised sheet issued by defendant: "Wetness and compression both reduce system insulation. When the system is BOTH wet and compressed, (i.e., the fire fighter kneeling after sweating in his liner; the increase in protection is even more pronounced (even worse the decrease is in the area of warning time). According to the evidence, no fire fighters received this user sheet, and the manufacturer withdrew it from use three years later." *Id.* at 368-69.

80. *Id.* at 368.

81. *E.g.*, *Piper v. Bear Med. Sys. Inc.*, 883 P.2d 407, 414 (Ariz. Ct. App. 1993) ("[A] manufacturer may be liable for a failure to warn of dangers of product modifications that it knew or had reason to know were occurring."); *Village of Groton v. Tokheim Corp.*, 608 N.Y.S.2d 565, 568 (App.Div. 1994) (imposing upon manufacturer duty to warn authorized and unauthorized distributors after learning that product was being used with another product in a dangerous manner); *see also* *Perry v. Rockwell Graphics Systems, Inc.*, Prod.Liab.Rep. (CCH) ¶ 27,445 (D. Mass.1985) (not reported in F. Supp.). *Perry* involved a worker's injuries, sustained in 1982, while using a cardboard cutting machine

In many instances a post-sale product modification or the misuse of a product may be of a sufficient order of magnitude and so unforeseeable as to itself become the producing cause of the plaintiff's harm. One might first suppose that in such circumstances the manufacturer could not possibly be found liable for failing to provide warnings against a plaintiff's action that might, in ordinary circumstances, be shown to be a superceding cause of his harm, and a thus complete defense to any design defect claim that might be brought against the manufacturer. The issue then arises as to whether and in what circumstances a continuing warning duty might nevertheless be imposed even when product alteration or misuse would preclude a finding of defective design.

A leading decision in this regard is that reached by the New York Court of Appeals in *Liriano v. Hobart Corp.*⁸² *Liriano* involved a seventeen year-old grocery store employee who had his right hand and lower forearm amputated following an injury while using the store's meat grinder.⁸³ A safety device sold as original equipment with the product, and designed to prevent a user's hand from coming into contact with the grinder's feeding tube and "worm," had been removed⁸⁴. No warnings were on the machine indicating the dangers of using the machine without the safety guard.⁸⁵ Removal of the guard by persons unknown had taken place during the time of its operation on the grocery store premises.⁸⁶

The evidence showed that Hobart, the manufacturer, had learned "that a significant number of purchasers of its meat grinders had removed the safety guards[,] and had commenced to affix warnings to new machines being sold, but had taken no effort to advise earlier purchasers of the risk."⁸⁷ The Second Circuit Court of Appeals certified to the New York high court the question of whether or not "manufacturer liability exist under a failure to warn theory in cases in which the substantial modification defense would

manufactured by defendant in 1914. Held: the manufacturer's "actual or imputed" knowledge of "widespread modification" of its presses in the cardboard industry "could be the basis for liability for failure to warn of hazards discovered after manufacture of the machine." *Id.* at 27,719.

82. 700 N.E.2d 303 (N.Y. 1998).

83. *Id.* at 305.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

preclude liability under a design defect theory...."⁸⁸ The New York Court of Appeals answered in the affirmative. It commented that under New York law, a manufacturer has "a duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable"⁸⁹ and explained:

The justification for the post-sale duty to warn arises from the manufacturer's unique (and superior) position to follow use and adaptation of its product by consumers. Compared to purchasers and users of a product, a manufacturer is best placed to learn about the post-sale defects or dangers discovered in use. A manufacturer's superior position to garner information and its corresponding duty to warn is no less with respect to the ability to learn of modifications made to or misuse of a product.... This Court therefore concludes that manufacturer liability can exist under a failure to warn theory in cases in which a substantial modification defense...might otherwise preclude a design defect claim.⁹⁰

Post-Sale Duties Arising From Seller Conduct. Some decisions falling within this final category seemingly recognize that upon particular facts, continuing advisory duties may arise when a seller has undertaken some level of cautionary effort upon which a product user has relied, thereby creating, plaintiff alleges, an obligation to continue to advise or warn on an ongoing basis.⁹¹ The fourth category of decisions that have evaluated post-sale warning or advisory duties have employed criteria similar in ways to those adopted in *Hodder v. Goodyear Tire & Rubber Co.*⁹² and *McDaniel v. Bieffe USA, Inc.*,⁹³ discussed above. However in these cases, the courts have adopted the analysis of Restatement (Second) of Torts section 324A, which states a rule that:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as

88. *Id.* at 304.

89. *Id.* at 305 (citations omitted).

90. *Id.* at 307-08 (citations omitted).

91. See generally *Artiglio v. Corning Incorporated*, 957 P.2d 1313 (Cal. 1998) (alleging defendant's toxicology research established such an "undertaking"); *Walton v. Avco. Corp.*, 610 A.2d 454, 459 (Pa. 1992) (held: post-sale duty to warn where the manufacturer of a crucial component part of a helicopter was notified of product defect by subcontractor and had remained in contact with the owner).

92. 426 N.W.2d 826 (Minn. 1988).

93. 35 F. Supp. 2d 735 (D. Minn. 1999) (applying Minnesota law).

necessary for the protection of the third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform]⁹⁴ his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.⁹⁵

Illustrative of such a "negligent undertaking" claim is that resolved by the California Supreme Court decision in *Artiglio v. Corning, Inc.*,⁹⁶ the review of an action brought by recipients of silicone gel breast implants against the manufacturer of the implants and its parent corporation. With specific regard to the claim against one of two parent corporations, Dow Chemical Company, plaintiffs asserted that (1) Dow had conducted toxicology research concerning various silicone products; (2) it had provided this research to the manufacturing subsidiary, Dow Corning Corp.; (3) the research "implicate[d] the well-being and protection of third parties [the implant recipients]"; and (4) the manufacturer's various undertakings with the research were conducted negligently.⁹⁷ The trial court granted summary judgment, and the appellate court affirmed.⁹⁸ The California Supreme Court affirmed the appellate decision, and in its holding emphasized two shortcomings of plaintiff's "negligent undertaking" count. First, the court found that once Dow had undertaken and shared its toxicological research, it did not incur thereby an obligation to conduct additional research and to advise either its subsidiary or the third party implant recipients indefinitely.⁹⁹ In reaching this conclusion, the court quoted authority suggesting that "[t]he duty of a 'good Samaritan' is limited. Once he has performed his voluntary act he is not required to continue to render aid indefinitely[,]" and that an initial act taken to protect another does not make the actor "the guarantor of [the third

94. In the published Restatement provision, the bracketed word appears as "protect." Use of that word has been widely recognized as mistaken, and courts have instead substituted the word "provide."

95. RESTATEMENT (SECOND) OF TORTS § 324A (1965).

96. 957 P.2d 1313 (Cal. 1998).

97. *Id.* at 1319-20.

98. *Id.* at 1316.

99. *Id.* at 1319.

party's] future safety."¹⁰⁰ Secondly, the court wrote, the record revealed that other than the provision of early studies, Dow had engaged in no operational contact with Dow Corning, such as inspecting or testing the devices manufactured by its subsidiary that might form the basis for a relational argument for a post-sale duty, or the basis for any claim of detrimental reliance.¹⁰¹

Whatever obstacles may stand in the way of a plaintiff's recovery under a "negligent undertaking" theory, there is broad authority for the proposition that the presence or absence of a post-sale warning obligation may turn upon the manufacturer's post-sale activities. Where a manufacturer has continued, for example, to promote a product as safe, a warning obligation may attach upon its learning of information indicating the contrary. For example, in *T.H.S. Northstar & Assoc. v. W.R. Grace & Co.*,¹⁰² a Minneapolis building owner sued for cleanup and abatement costs, alleging that Grace's Monokote 3 fireproofing product contaminated the premises with asbestos.¹⁰³ Subsequently, the federal appeals court affirmed an award of damages to plaintiff entered by a jury that had been instructed as to a limited manufacturer continuing duty to warn.¹⁰⁴ Grace argued that evidence adduced at trial fell short of a showing of "special circumstances" that would create an *ex post* warning obligation.¹⁰⁵ The appeals court disagreed, finding that under applicable Minnesota law, such a "special circumstances" duty could be found to exist when "(1) the manufacturer insisted that its product was safe if used properly; (2) it became evident to the manufacturer over time that great care was required in the handling and servicing of the product, or serious injury would occur; and (3) the manufacturer continued in the business of selling related products

100. *Id.*

101. *Id.* at 1320 (citing Temporomandibular Joints (TMJ) Implants, 113 F.3d 1184, 1194 (8th Cir. 1997)).

102. 66 F.3d 173 (8th Cir. 1995).

103. *Id.* at 174.

104. The trial court's instruction read, *id.* at 176:

[I]f a manufacturer learns that a previously distributed product poses a danger to users, it must give additional warnings or instructions that will enable users to make informed decisions and use the product safely. . . . A manufacturer has no duty to warn, however, if the user is or should be fully aware of the dangers inherent in a product, but past experience or familiarity with the product does not necessarily alert a user to all of the dangers associated with the product.

105. *Id.*

and undertook a duty to warn users of post-sale hazards."¹⁰⁶

Along a similar line of reasoning is *Calderon v. Machinenfabriek Bollegraff Appingedam BV*.¹⁰⁷ *Calderon* was a suit brought by a paper baling machine operator against a service distributor whose agent made a post-sale service call, during which the service distributor's agent observed the hazardous condition created by the machine owner's removal of safety gates. An operator thereafter sustained severe injuries while reaching into the machine to untangle wires as the machine was still running, and suit was brought claiming that the service distributor had a duty to advise the operator or the operator's employer of the hazardous condition. The New Jersey court found that the trial court's removal of plaintiff's failure to warn count was error, as a jury might have found that the service distributor "had assumed an obligation to warn" the machine owner.¹⁰⁸ It found the error harmless, however, in light of persuasive evidence that any failure of the service distributor to provide post-sale cautionary information was the legal cause of plaintiff's harm, as the weight of the evidence supported the conclusion that any warning from defendant would not have been heeded by the plaintiff's employer.¹⁰⁹

The "special relationship" or "special circumstances" rationale for evaluating a claimed warning duty was developed further in *Birchler v. Gehl Co.*¹¹⁰ In that decision, the Seventh Circuit, applying Illinois law, considered appellant's assignment of error to the trial court's refusal to instruct the jury that a hay bailer manufacturer had a post-sale duty to warn of the risks created by the fact, appellant claimed, that the baler took in hay faster than an operator could release it. Affirming a defense verdict, the appeals court noted first that Illinois law does not recognize a general post-sale duty to warn.¹¹¹ The court distinguished *Seegers Grain Co., Inc. v. United States Steel Corp.*,¹¹² which involved the explosion of a grain storage tank, which due to its steel construction, was unable to

106. *Id.* (relying upon *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988)).

107. 667 A.2d 1111 (N.J. Super. 1995).

108. *Id.* at 1115.

109. *Id.* at 1116.

110. 88 F.3d 518 (7th Cir. 1996).

111. *Id.* at 521 (citing *Carrizales v. Rheem Mfg. Co.*, 589 N.E.2d 569, 579 (Ill. App. Ct. 1991)); *Kempes v. Dunlop Tire & Rubber Co.*, 548 N.E.2d 644, 649 (Ill. App. Ct. 1989); *Collins v. Hyster Co.*, 529 N.E.2d 303, 306 (Ill. App. Ct. 1988).

112. 577 N.E.2d 1364 (Ill. App. Ct. 1991).

withstand the cold Illinois winter temperatures. Plaintiffs therein claimed that the seller knew of a prior accident that was virtually indistinguishable from the accident that caused their loss, and that their vendor knew specifically that the steel seller knew precisely the use to which the steel it sold would be put.¹¹³ In contrast, the *Birchler* court continued, the appellant's claim before it involved "no personal relationship" between seller and buyer that would permit the seller to know how the product would be used, and sounded instead in the very language the *Seegers* court had used to distinguish its facts in such a way as to permit its departure from Illinois authority finding no post-sale warning obligation, i.e., settings in which courts declined to impose a continuing advisory duty in claims involving "an over-the-counter sale of a generic product for use by an unknown consumer."¹¹⁴

III. POST-SALE DUTY TO RECALL

Plaintiffs often allege simultaneously that a manufacturer has breached both (1) a potential post-sale warning obligation; and (2) a potential recall or retrofit obligation. Courts and commentators, in turn, often discuss the *bona fides* of such claims as though are related closely, or even allied. However, the two claims are markedly different, and require separate analysis. Perhaps most fundamentally, in terms of the burden upon the manufacturer, the practical consequences of imposing a recall or retrofit obligation would typically be, and in several orders of magnitude, far greater than would be a requirement of even the most extensive continuing duty to warn.

The far more costly and complex obligation to recall a product is readily distinguishable from, and more costly than, a post-sale duty to warn, as the would require the manufacturer to regain control over the entire product line, and to retrofit or upgrade it, incurring far higher internal and external costs than would be involved with a post-sale duty to warn.¹¹⁵ As, through technological

113. *Id.* at 1374.

114. *Id.* at 1373-74.

115. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 11 cmt. a ("Duties to recall products impose significant burdens on manufacturers. Many product lines are periodically redesigned so that they become safer over time. If every improvement in product safety were to trigger a common-law duty to recall, manufacturers would face incalculable costs every time they sought to make their product lines better and safer.").

advancements, products are continually being made safer and better, manufacturers would confront "incalculable costs" if they had to upgrade a product every time an improvement was made.¹¹⁶ Accordingly, the decisional law has adopted without deviation the rule that progress in technology that would permit, or have permitted, the design and manufacture of an improved and safer product will not trigger a seller duty to undertake a recall or other refitting efforts.¹¹⁷

Restatement (Third) of Torts: Products Liability section 11 suggests a rule in which a seller incurs no recall duty unless such action is required by statute or regulation,¹¹⁸ or the seller, having voluntarily commenced to recall a product, "fails to act as a reasonable person in recalling the product."¹¹⁹ Section 11 would impose a duty upon the seller to recall a defective product after the time of sale when a statute or other governmental regulation

116. *Id.*

117. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 11 cmt. a, illus. 1 states this hypothetical:

MNO Corp. has manufactured and distributed washing machines for five years. MNO develops and improved model that includes a safety device that reduces the risk of harm to users. The washing machines sold previously conformed to the best technology available at the time of sale and were not defective when sold. MNO is under no common-law obligation to recall previously-distributed machines in order to retrofit them with the new safety device.

118. Restatement (Third) of Torts: Products Liability section 11 provides: One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by a seller's failure to recall a product after the time of sale or distribution if:

(a)(1) a governmental directive issued pursuant to a statute or administrative regulation specifically requires the seller or distributor to recall the product; or

(2) the seller or distributor, in the absence of a recall requirement under Subsection (a)(1), undertakes to recall the product; and

(b) the seller or distributor fails to act as a reasonable man in recalling the product.

Id. at § 11 cmt. a ("Issues relating to product recalls are best evaluated by governmental agencies capable of gathering adequate data regarding the ramifications of such undertakings."). Examples of decisions finding no common law recall or related duty are *Anderson v. Nissan Motor Co.*, 139 F.3d 599 (8th Cir. 1998) (predicting Nebraska law in claim alleging manufacturer duty to equip previously sold forklift with operator restraint); *Habecker v. Copperly Corp.*, 893 F.2d 49 (3d Cir. 1990) ("[N]o Pennsylvania case has recognized a duty to retrofit, and, indeed, one has suggested that such a duty would be inappropriate under established principles of Pennsylvania law.") (citing *Lynch v. McStome & Lincoln Plaza Assoc.*, 548 A.2d 1276, 1281 (Pa. Super. 1988)).

119. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 11(2)(b) (1997).

specifically requires a recall or when the seller voluntarily recalls the product and fails to act as would a reasonable person in recalling the product.¹²⁰

The rationale for a rule that would impose liability only when the supplier is required specifically by statute or regulation to recall the product is based upon the recognition that the origination of any such duty would require a complex and polycentric evaluation of (1) breadth of risk; (2) severity of risk; (3) examination of alternative remedial measures; (4) financial and other costs to the manufacturer; and (5) the logistics, management and practicality of such an obligation. Such an evaluation, the logic continues, is best left to such government agencies as enjoy supervisory authority over the safety of like products, as they are (1) most practiced in the collection of risk and incident data; and (2) more expert than would be the manufacturer in assessing the benefits and the burdens of a recall; and (3) should a recall obligation be imposed, most able to work with the manufacturer to design and delimit the initiative in order to secure optimal results.¹²¹

When a seller undertakes a voluntary recall, the Products Liability Restatement commends a rule for tort liability should the seller "fail to act as a reasonable man in recalling the product."¹²² Products Liability Restatement section 11 comment c explains that the reasoning for such an approach "lies partly in the general rule that one who undertakes a rescue, and thus induces other would-be-rescuers to forbear, must act reasonably in following through."¹²³ Comment c notes tellingly that "courts appear to assume that voluntary recalls are typically undertaken in the anticipation that, if the seller does not recall voluntarily, it will be required to do so by a government regulator."¹²⁴ Comment c concludes: "Having presumably forestalled the regulatory requirement, the seller should be under a common law duty to follow through in its commitment to recall."¹²⁵

Informative in this connection, albeit in the context of an accident following a mandatory recall, in *Springmeyer v. Ford Motor Co.*¹²⁶ a California appeals court considered the claim of a mechanic

120. *Id.*

121. *Id.* at § 11 cmt. a.

122. *Id.* at § 11 cmt. c

123. *Id.*

124. *Id.*

125. *Id.*

126. 71 Cal. Rptr. 2d 190 (Cal. Ct. App. 1998).

who was injured when a truck fan blade disengaged and struck him. The evidence suggested that the truck's prior owner, the lessor Avis, might not have responded to the manufacturer's timely recall initiatives. While stating the general proposition that a manufacturer's duty to produce a duly safe product is non-delegable,¹²⁷ the California court reversed judgment for the mechanic, relying in part upon Ford's showing that its follow-up procedures for its recall showed due care, and included, among other efforts, an original recall notice to the prior owner, and two follow-up notices to the new owner, even absent a regulatory obligation to do so.¹²⁸

Similarly, in *Tabieros v. Clark Equipment Co.*,¹²⁹ the claim of a dockworker whose legs were crushed by a straddle carrier used to move shipping containers, the Hawaii Supreme Court reversed plaintiff's damage award on his claim that the manufacturer had a duty to retrofit its product with safety devices unavailable at the time of initial sale.¹³⁰ The court stated: "[W]e hold that a manufacturer has no duty to 'retrofit' its products with 'after-manufacture' safety equipment, although it may be found negligent or strictly liable for failing to install such equipment—or not otherwise making its product safer—existing at the time of manufacture."¹³¹ Likewise, the Third Circuit Court of Appeals, assessing Pennsylvania law, has noted that "no Pennsylvania case has recognized a duty to retrofit[.]"¹³² As the court explained: "A majority of jurisdictions hold that a duty to recall or retrofit will be

127. *Id.* at 202.

128. *Id.* at 204-05 (noting that third-party negligence may constitute superseding cause when so extraordinary as to be unforeseeable).

129. 944 P.2d 1279 (Haw. 1997).

130. *Id.* at 1291.

131. *Id.*

132. *Habecker v. Copperloy Corp.*, 893 F.2d 49, 54 (3d Cir. 1990); *see also* *Lynch v. McStome & Lincoln Plaza Assoc.*, 548 A.2d 1276, 1281 (Pa. Super 1988). The *Habecker* court stated at *id.*:

[T]he precise question presented for decision is this—in a negligence product liability case, where a manufacturer exercises reasonable care in producing a product which functions properly until the time of the accident and does not retain any post-sale responsibility for or control over its product, but where it is proven that at the time of the accident the manufacturer knew or should have known of an alternative design, which may be safer, is the manufacturer negligent if it does not retrofit its already sold products, or at least notify the owners of the product of the new design? [We do not] think that the imposition of such a duty would be appropriate under established principles of negligence liability.

Id.

recognized only where the product was sold in a dangerously defective condition, the risks of which only came to the manufacturer's attention after initial sale."¹³³

Reaching a conflicting decision, but on facts distinguishable in significant respects from the above authority is the decision in *Downing v. Overhead Door Corp.*,¹³⁴ a suit against the manufacturer of a garage door opener that had an activator button within the reach of children. Learning of the risks involved, the manufacturer undertook to warn new purchasers of the product, but did not warn previous purchasers. Rejecting the defendant's argument that its warning duties extended only to new purchasers, the Colorado Appeals Court stated, in terms applicable to warning and recall obligations alike:

The duty to warn exists where a danger concerning the product becomes known to the manufacturer subsequent to the sale and delivery of the product, even though it was not known at the time of the sale. After a product involving human safety has been sold and dangerous defects in design have come to the manufacturer's attention, the manufacturer has a duty either to remedy such defects, or, if a complete remedy is not feasible, to give users adequate warnings and instructions concerning methods for minimizing danger.¹³⁵

Downing has been interpreted as pertaining only to products that were defective at the time of manufacture, not to products "which could subsequently be made safer by a later developed safety device or design improvement."¹³⁶ In agreement with this limiting assessment of *Downing* is the Tenth Circuit decision in *Romero v. International Harvester Co.*,¹³⁷ an action arising from the

133. See generally *Romero v. Int'l Harvester Co.*, 979 F.2d 1444 (10th Cir. 1992). E.g., *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 337 (4th Cir. 1991) ("[A] product can only be defective if it is imperfect when measured against a standard existing at the time of sale or against reasonable consumer expectations held at the time of sale."); *Dion v. Ford Motor Co.*, 804 S.W.2d 302, 310 (Tex. Ct. App. 1991) ("Ford did not have a duty to improve upon the safety of its tractor by replacing an existing rollover protection system within improved rollover protection systems."); *Wallace v. Dorsey Trailers Southeast, Inc.*, 849 F.2d 341, 344 (8th Cir. 1988) (applying Missouri law, and holding that defendant was "not negligent as a matter of law in failing to retrofit the allegedly defective aerial bucket lift").

134. 707 P.2d 1027 (Colo. Ct. App. 1985).

135. *Id.* at 1033 (citations omitted).

136. *Romero v. Int'l Harvester Co.*, 979 F. 2d 1444, 1450 (10th Cir. 1992) (applying Colorado law).

137. *Id.*

death of a farm worker while using a tractor, manufactured and sold in 1963 without a roll bar (or ROPS - Roll-Over Protection System). Although at the time of its manufacture the tractor met all of the applicable government and industry standards for safety, plaintiff, noting later-developed rollover protection devices, claimed the manufacturer was negligent in failing to retrofit the equipment. Observing that Colorado law recognized no "rigid distinction" between claims in negligent failure to warn and strict liability failure to warn, and further interpreting plaintiff's warnings claims as co-extensive with the claims in failure to retrofit, the court concluded that no Colorado authority supported the proposition that a claim against a manufacturer "should be exempted from having to show a negligent or defective design under standards existing at the time of manufacture and sale. . . ."¹³⁸ In *Oja v. Howmedica, Inc.*,¹³⁹ the Tenth Circuit reaffirmed its decision in *Romero*, and held that no post-sale duty to warn or otherwise remedy a claimed hazard extended to a manufacturer when the product was not defective at the point of initial sale."¹⁴⁰

The Michigan Supreme Court confirmed the absence of a manufacturer's post-sale duty to recall or repair an allegedly defective product in *Gregory v. Cincinnati, Inc.*,¹⁴¹ an action deriving from a sheet metal worker's injuries while operating a press brake. The defect pleaded was in the brake's allegedly inadequate guarding of the "point of operation," and also the lack of a guard to prevent inadvertent activation of the product with its foot pedal.¹⁴² At trial, the jury was instructed that a manufacturer "has a duty to incorporate new advances in technology[,] and that 'a manufacturer who learns of a design defect after the product has

138. *Id.* at 1452.

139. 111 F.3d 782 (10th Cir. 1997).

140. *Id.* at 791 (quoting *Perlmutter v. United States Gypsum Co.*, 4 F.3d 864, 869 (10th Cir. 1993)) (claim alleging defective hip prosthesis). *Accord* *Anderson v. Nissan Motor Co.*, 139 F.3d 599 (8th Cir. 1998) (applying Nebraska law to a claim brought by an injured employee who alleged that defendant's forklift was defective for want of an operator restraint system). The court stated:

The Nebraska Supreme Court has not specifically addressed the issue of whether it would recognize either a post-sale duty to warn or a duty to retrofit. The district court determined that, when called upon to decide the issue, the Nebraska Supreme Court would not be likely to recognize either cause of action. After a de novo review, we agree with the district court's determination....

Id. at 602.

141. 538 N.W.2d 325 (Mich. 1995).

142. *Id.* at 327.

been sold has a duty to take reasonable steps to correct the defect."¹⁴³ A Michigan appeals court reversed and remanded, and, reviewing *Comstock. v. General Motors Corp.*,¹⁴⁴ held that while "a manufacturer has a duty to warn of a latent defect, [it] does not have a duty to repair a latent defect."¹⁴⁵ Noting that the issue presented was one of "public policy," appropriate for the legislature to address,¹⁴⁶ the court distinguished the settings in which this issue might arise: (1) a defect known to the manufacturer at the point of manufacture, i.e., while the product was yet in the manufacturer's control; and (2) the absence of a defect, in terms of the state of the art at the time of manufacture, but with post-sale advancements in technology rendering the product arguably defective under subsequent analysis.¹⁴⁷ Finding that appellant's allegation of defect did not pertain to a latent point-of-manufacture defect, but rather a "defect" by dint of technological advances, the Michigan Supreme Court distinguished *Comstock*, and found no duty to repair or recall under Michigan law.¹⁴⁸

The Michigan court further noted that adoption of a recall or retrofit duty would muddy the factfinder consideration of the issue of design defect, and explained: "Because a prima facie case [of design defect] is established once the risk-utility test is proven, we are persuaded that it is unnecessary and unwise to impose or introduce an additional duty to retrofit or recall a product. Focusing on post-manufacture conduct in a negligent design case improperly shifts the focus from point-of-manufacture conduct and considers post-manufacture conduct and technology that accordingly has the potential to taint a jury's verdict regarding a defect."¹⁴⁹

Similarly, when a product is not defective at the time of

143. *Id.* at 328.

144. 99 N.W.2d 627 (Mich. 1959).

145. *Gregory*, 538 N.W.2d at 328.

146. *Id.* at 330.

147. *Id.*

148. *Id.* at 334. The court stated:

At issue in this case is the propriety of a continuing duty to repair or recall theory of products liability in a negligent design case. The inquiry is whether Michigan law recognizes a continuing duty to repair or recall...We hold that there is no continuing duty to repair or recall...a product.

Id. at 336; see also *Patton v. Wil-Rich Mfg. Co.*, 861 P.2d 1299 (Kan. 1993) (interpreting Kansas law in reaching conclusion similar to that in *Gregory*).

149. *Gregory*, 538 N.W.2d at 333.

manufacture, but is subsequently made safer by advancements in technology, the Michigan Supreme Court held in *Reeves v. Cincinnati, Inc.*¹⁵⁰ that a manufacturer has no duty to advise former purchasers of the existence or the availability of such advancements.¹⁵¹ The *Reeves* court relied on *Gregory* and reasoned that as Michigan does not impose a duty upon manufacturers to remedy defects after sale, it follows that the manufacturer should have no duty to inform consumers of new safety features for non-defective products.¹⁵² The court concluded by observing that the party in control of the product, not the manufacturer, was in the best position to know of the advisability of incorporating any later-developed safety features.¹⁵³

As discussed in the previous section, in *McDaniel v. Bieffe*,¹⁵⁴ a federal trial court, applying Minnesota law, held that Minnesota would recognize a post-sale duty to warn in the context of a later-discovered latent defect in a mass-produced product, in that instance a motorcycle helmet, only upon a demonstration that the harm that could be suffered was grave, and that there were present other "special circumstances" identified by the Minnesota Supreme Court in an earlier holding. Plaintiffs in that suit also opposed defendant's motion for summary judgment on the count of plaintiffs' complaint alleging that the manufacturer had breached a post-sale duty to recall the product.

In contrast to its denial of summary judgment on plaintiff's post-sale warnings count, the trial court granted defendant summary judgment on the recall count, stating: "While no Minnesota court has addressed this issue directly, this Court is convinced that Minnesota would refuse to impose a duty on manufacturers to recall and/or retrofit a defective product because the overwhelming minority of other jurisdictions have rejected such an obligation."¹⁵⁵ To similar effect is the decision of the Third

150. 528 N.W.2d 787 (1995) (injury sustained in operation of press brake).

151. *Id.* at 788.

152. *Id.*

153. *Id.* at 790.

154. 35 F. Supp. 2d 735 (D. Minn. 1999).

155. *Id.* at 743, and summarizing this authority: *Tabieros v. Clark Equip. Co.*, 944 P.2d 1279, 1298-1300 (Haw. 1997) (collecting authority and stating that "virtually every court that has confronted the issue head-on" has rejected this duty); *Burke v. Deere & Co.*, 6 F.3d 497, 508 n.16 (8th Cir. 1993) (no duty under Iowa law), cert. denied, 510 U.S. 1115 (1994); *Wallace v. Dorsey Trailers Southeast, Inc.*, 849 F.2d 341, 344 (8th Cir. 1988) (affirming district court's conclusion that Missouri does not recognize a duty to retrofit); *Gregory v.*

Circuit Court of Appeals in *Habecher v. Copperloy, Corp.*¹⁵⁶

That a manufacturer has no general duty to redesign a product was reiterated in the Third Circuit opinion of *LeJeune v. Bliss-Salem, Inc.*,¹⁵⁷ a claim arising from injuries suffered by a worker in the course of operating a steel mill's transport line. Plaintiff alleged that the supplier of the mill's electrical drive and control system, and the general contractor, had a duty to redesign the line in the course of their work in furtherance of reopening the mill. Defendants countered that the contracts governing the work "simply required them to put the mill machinery back into working order and that any duty on their part did not extend to reevaluating the safety aspects of the various machinery involved."¹⁵⁸ Affirming summary judgment, the appeals court wrote: "Due to the limited nature of the contractual undertaking in this case, no duty in tort arose on the part of [a]ppellees to redesign safety features of the equipment or to warn of potential hazards."¹⁵⁹

A special relationship between the seller and the buyer may, in limited circumstances, be interpreted as triggering a duty to recall or repair. A leading decision supporting this proposition is *Bell Helicopter v. Bradshaw*,¹⁶⁰ in which the defendant manufactured and sold a helicopter with rotor blades that were, at the time of the 1961 sale, state of the art. In 1968, the defendant undertook the safety measure of updating the blades. Following a 1975 accident, the court found that the manufacturer's conduct in replacing the blades had created a post-sale duty to remediate unreasonable product risks. In the court's words:

Where the record reflects, as in this case, an apparent assumption of such a duty by a manufacturer, it is not wholly improper for us to measure its conduct against such a duty with respect to plaintiff's allegations of post-manufacture negligence. Here, the defendant assumed the duty to improve the safety of its helicopter by replacing the 102 system with the 117 system. Once the duty was assumed, the defendant had an obligation to complete the remedy by using reasonable means available to it to cause replacement of the 102 systems with 117

Cincinnati, 538 N.W.2d 325, 334 (Mich. 1995) (no continuing duty to recall).

156. 893 F.2d 49 (3d Cir. 1990) (applying Pennsylvania law).

157. 85 F.3d 1069 (3d Cir. 1996) (applying Delaware law).

158. *Id.* at 1071.

159. *Id.* at 1074.

160. 594 S.W.2d 519 (Tex. Ct. App. 1979).

systems.¹⁶¹

IV. STATUTORY RECALL, REPAIR, REPORTING OR REFUND OBLIGATIONS UNDER CONSUMER PRODUCT SAFETY ACT SECTION 15

The first sections to this article discuss a seller's limited post-sale duties to warn regarding a product's unreasonably dangerous condition, and in even more limited settings, a post-sale duty to recall or repair. This section describes federal post-sale informational or remedial obligations to which a manufacturer may be subject, and specifically, recall, repair, or refund obligations under the Consumer Product Safety Act ("CPSA").¹⁶² Consumer Product Safety Act section 15 requires firms to report to the Commission whenever a product is or even might create a "substantial product hazard," and gives the Commission broad powers to command product recalls under certain circumstances.¹⁶³

Both recall and reporting requirements are keyed to the phrase "substantial product hazard." A recall can be required when a product is found "actually" to constitute a substantial product hazard, but a report to the Commission is also required when a product "could" be a substantial product hazard. Specifically, CPSA section 15 requires a subject firm to notify the Commission that its product: (1) does not comply with an applicable consumer product safety rule, or (2) contains a "defect" which could create a "substantial risk of injury to the public" and therefore presents a substantial product hazard.¹⁶⁴ When either the failure to comply

161. *Id.* at 532.

162. Consumer Product Safety Act, Pub. L. 92-573, 86 Stat. 1207 (1972) (codified as amended at 15 U.S.C.A. §§ 2051-2084 (1994)).

163. *Id.*

164. 15 U.S.C.A. section 2064(a) (1998) defines "substantial product hazard" as:

- (1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or
- (2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates substantial risk of injury to the public.

Section 2064(b) describes action to be taken upon discovery of potentially unsafe products:

Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product: (1) fails to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard upon which the Commission has relied under [15 U.S.C.A. § 2058] of this title; or (2) contains a defect

with the rule or the actual defect creates a substantial risk of injury to the public and therefore constitutes a substantial product hazard, CPSA section 15 further authorizes the Commission, after a hearing, to order a firm to provide notice of any such hazard to the public, manufacturers, distributors, retailers, and purchasers (including consumers), and further to order replacement, repair, or refund of the purchase price, less a reasonable allowance for use. In addition to providing for voluntary remedial action, including "corrective action plans" and consent agreements, CPSA section 15 gives the Commission authority to seek injunctive relief to prevent further distribution of an allegedly dangerous product.

Failure to furnish information required by CPSA section 15(b) is prohibited under section 19(a)(4) of the Act, and a knowing violation of CPSA section 19(a)(4) may subject the violator to civil penalties.¹⁶⁵ A separate violation can be found with respect to each consumer product involved. A knowing violation of CPSA section 19 following a Commission Notice of Noncompliance can subject the violator to criminal penalties under CPSA section 21.¹⁶⁶ No private cause of action accrues against the manufacturer or seller

which could create a substantial product hazard described in subsection (a)(2) of this section; or (3) creates an unreasonable risk of serious injury or death, shall immediately inform the Commission of such failure to comply, of such defect, or of such risk, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect, failure to comply, or such risk.

Id. at § 2064(b).

165. 15 U.S.C.A. § 2068, provides in pertinent part:

(a) It shall be unlawful for any person to: (1) manufacture for sale, offer for sale, distribute in commerce, or import into the United States any consumer product which is not in conformity with an applicable consumer product safety standard under this chapter; (2) manufacture for sale, offer for sale, distribute in commerce, or import into the United States any consumer product which has been declared a banned hazardous product by a rule under this chapter; (3) fail or refuse to permit access to or copying of records, or fail or refuse to establish or maintain records, or fail or refuse to make reports or provide information, or fail or refuse to permit entry or inspection, as required under this Act or rule thereunder; (4) fail to furnish information required by section 2064(b); (5) fail to comply with an order issued (relating to notification, and to repair, replacement, and refund, and to prohibited acts).

166. 15 U.S.C.A. § 2070(a) (1998), provides that "(a) Any person who knowingly and willfully violates § 2068 of this Act after having received notice of noncompliance from the Commission shall be fined not more than \$50,000 or be imprisoned not more than one year, or both."

for failure to notify the Commission in a timely manner.¹⁶⁷

The first prong of the definition of "substantial product hazard" sets up an automatic reporting requirement: if the product fails to comply with an applicable consumer product safety rule, it must be reported whether or not the non-compliance is likely to cause injury. A consumer product safety rule is defined to include "a consumer product safety standard described in [16 U.S.C. § 2056], or a rule under this chapter declaring a consumer product a banned hazardous product."¹⁶⁸ Thus, standards such as the architectural glass standard¹⁶⁹ and bans such as that governing some refuse bins¹⁷⁰ are both included under the rubric of a consumer product safety standard or rule.

Because of the limited number of product safety standards and product bans, Commission enforcement of CPSA section 15 has focused primarily on the provisions of section 15(b)(2).¹⁷¹ Section 15(b)(2) requires a report when a product "contains a defect which could create a substantial product hazard" as described in section 15(a). Section 15(a) defines a substantial product hazard as:

- (1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or
- (2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.¹⁷²

Under sections 15(a)(2) and 15(b)(2), therefore, two principal questions must be resolved in determining whether a particular product could create a substantial product hazard: First, is there a product "defect"? Second, if so, does this defect create a substantial risk of injury to the public because of the pattern of the defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise? Both of these questions will be treated in order, followed by a discussion of various other questions raised by the statute and implementing regulations, such

167. *E.g.*, *Kloepfer v. Honda Motor Co., Ltd.*, 898 F.2d 1452, 1457 (10th Cir.1990) (survivors of six-year-old girl killed in ATV accident had no private cause of action under CPSA for alleged manufacturer's failure to report).

168. 15 U.S.C.A. § 2052 (1998).

169. 16 C.F.R. § 1201 (2000).

170. *Id.* at § 1301.

171. CPSA section 15(b); 15 U.S.C.A. § 2064(b).

172. 15 U.S.C.A. § 2064(b)(1), (2) (1998).

as who must make a report, and what information must be reported.

Absent an applicable consumer product safety rule, the first question to be resolved in deciding whether a section 15 report is needed is whether the product contains a "defect." The Commission's section 15 rules do not attempt to define "defect,"¹⁷³ but opt for a brief interpretation accompanied by illustrative examples. The section describes defect as including, at a minimum, the commonly accepted dictionary meaning of the word. In general terms, the rules continue, a defect is a "fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function."¹⁷⁴

The rules set out several representative illustrations of product defects: (1) manufacturing or production defects, such as an electric-appliance casing that can, through manufacturing error, be electrically charged by full-line voltage; (2) labeling and marketing defects¹⁷⁵ such as athletic shoes advertised for, but unsuited to,

173. In preparing the final regulations the Commission was persuaded by the concern of many commentators that a comprehensive Commission definition of "defect" would be applied by courts in civil products liability disputes, possibly increasing the financial exposure of subject firms. The Commission accordingly included the following language in the final version of the regulation: "Defect, as discussed in this section and as used by the Commission and staff, pertains only to interpreting and enforcing the Consumer Product Safety Act. The criteria and discussion in this section are not intended to apply to any other areas of law." 16 C.F.R. § 1115.4 (1980) (2000).

174. *Id.* The section continues:

A defect, for example, may be the result of a manufacturing or production error, that is, the consumer product as manufactured is not in the form intended by, or fails to perform in accordance with, its design. In addition, the design of and the materials used in a consumer product may also result in a defect. Thus, a product may contain a defect even if the product is manufactured exactly in accordance with its design and specifications, if the design presents a risk of injury to the public. A design defect may also be present if the risk of injury occurs as a result of the operation or use of the product or the failure of the product to operate as intended. A defect can also occur in a product's contents, construction, finish, packaging, warnings, and/or instructions. With respect to instructions, a consumer product may contain a defect if the instructions for assembly or use could allow the product, otherwise safely designed and manufactured, to present a risk of injury.

Id.

175. The term "marketing" is the Commission's. While the CPSA does not vest the Commission with authority to impose "marketing" requirements as such, it does, in CPSA section 7(a)(2)(B), authorize Commission promulgation of standards which may include "[r]equirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or

running and that cause muscle or tendon injury; (3) defects due to inadequate warnings and instructions, such as a power tool without adequate instructions or safety warnings, even in the absence of reported injuries, where foreseeable use or misuse could result in injury based in part on such informational inadequacies; and (4) defects due to consumer reliance and product non-performance, such as a garage exhaust fan advertised to activate when fumes reach a dangerous level, but that fails, for whatever reason, to do so.¹⁷⁶

In addition to describing manufacturing, design, labeling (including warning labels), and marketing defects, the Commission's discussion of defects implies a balancing test of utility and risk, using the example of a metalized kite and an ordinary kitchen knife to illustrate the risk/utility evaluation. According to the Commission, while the foil finish of a metalized kite may be attractive, and the kite may fly better for its added weight, because the kite can conduct electricity from air to ground and can foreseeably become tangled with power lines, it is defective within the meaning of section 15(a), even if designed, manufactured, and marketed as intended.¹⁷⁷

Consumer Product Safety Act section 15 applies to all "consumer products".¹⁷⁸ Section 15(b) imposes reporting requirements upon "[e]very manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product." Importers are included in the section 3(a)(4) definition of "manufacturers."¹⁷⁹

Firms which have received reportable information must file an Initial Report.¹⁸⁰ Manufacturers and importers must also file a subsequent Full Report.¹⁸¹ Distributors or retailers who are neither manufacturers nor importers of the products in question are

requirements respecting the form of warnings or instructions." 15 U.S.C.A. § 2056(a)(2) (1998).

176. 16 C.F.R. § 1115.4 (a)(b)(d) & (e).

177. *Id.* at § 1115.4(c).

178. Consumer products are defined by the Act to include: "[A]ny article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise. . . ." CPSA § 3(a)(1), 15 U.S.C.A. § 2052(a)(1).

179. 15 U.S.C.A. § 2052(a)(4) (1976).

180. 16 C.F.R. at § 1115.13(c).

181. *Id.* at § 1115.13(d).

subject to the reporting requirements of section 15(b) but can satisfy their notification obligations by complying with the less comprehensive reporting requirements of an Initial Report.¹⁸² Additionally, reporting is required of a firm when it has obtained information which reasonably supports the conclusion that a product fails to comply with a voluntary consumer product safety standard upon which the Commission has relied under section 9 of the CPSA, or creates an unreasonable risk of serious injury or death. A manufacturer, distributor, or retailer is not relieved of this obligation unless it has actual knowledge that the Commission has already been adequately informed.¹⁸³

Reporting obligations under section 15(b) are triggered by product noncompliance or by the existence of a substantial product hazard in any consumer product "distributed in commerce." Section 3(a)(11) of the Act states that "[t]he terms 'to distribute in commerce' and 'distribution in commerce' means to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce."¹⁸⁴

A firm must immediately, i.e., within twenty-four hours, report information which reasonably supports the conclusion that a substantial product hazard may exist.¹⁸⁵ In recognition of variable weight that is properly attached to different types of product safety related information, the rules set out certain information which, in the Commission's view, reasonably supports the conclusion that a report is necessary.¹⁸⁶ Other categories of information which are of uncertain substantiality must nevertheless be probed to determine if they "reasonably support the conclusion" that a substantial product hazard may exist.¹⁸⁷ A subject firm must immediately report information which indicates "that a noncompliance or a

182. *Id.* at § 1115.13(b).

183. The Consumer Product Safety Improvement Act of 1990 ("Improvement Act"), Pub. L. 101-608, § 1, 104 Stat. 3110, amended section 15(b) of the CPSA, broadening its triggering mechanisms with the inclusion of the two provisions above. Prior to the 1990 Amendments, reporting noncompliance or risk of serious injury or death was not required unless the noncompliance or risk created a product defect which could create a substantial product hazard as described in CPSA subsection 15(a)(2).

184. 15 U.S.C.A. § 2052(a)(11).

185. CPSA § 15(b), 15 U.S.C.A. § 2064(b); 16 C.F.R. § 1115.14(e).

186. Examples of the kind of information required are set out in 16 C.F.R. § 1115.12(a).

187. 16 C.F.R. §§ 1115.12(a)-1115.12(e) (1980).

defect in a consumer product has caused, may have caused, or contributed to the causing, or could cause or contribute to the causing of a death or grievous bodily injury . . . unless the firm has "investigated and determined that the information is not reportable."¹⁸⁸

The reporting requirements attached to the risk of serious injury or death from a product are preventative by design. The fact that, absent an actual serious injury or death, no final determination as to the existence of such risks may be possible has no bearing on a firm's obligation to evaluate whatever information is available to it in terms of whether it reasonably supports a finding that the risks do exist.¹⁸⁹ The standard regarding a potential obligation to report risk of serious injury or death is this: could a reasonable person conclude, given the information available, that a product creates an unreasonable risk of serious injury or death. In making such a determination, a firm is permitted to balance a series of risk-utility factors, as well as to determine the reasonableness of a conclusion that a product violates a standard or ban promulgated under the FHSA, FFA, PPPA or RSA, to the extent that it could result in a serious injury or death.¹⁹⁰

Even in the absence of a death or grievous bodily injury, the rules state that "other information may indicate a reportable defect or noncompliance," and that the subject firm may be held responsible for knowledge which could be derived by a "reasonable and prudent manufacturer."¹⁹¹ The regulations offer specific illustrations of the types of information a firm should consider in deciding whether or not to report. These include information

188. *Id.* at § 1115.12(c). The regulations set out the following examples of grievous bodily injury: "[M]utilation, amputation/dismemberment, disfigurement, loss of important bodily functions, debilitating internal disorders, severe burns, severe electrical shocks, and injuries likely to require extended hospitalization." *Id.*

189. 16 C.F.R. § 1115.6(a).

190. *Id.* at § (b).

191. "In evaluating whether or when a subject firm should have reported, the Commission will deem a subject firm to know what a reasonable and prudent manufacturer (including an importer) distributor, or retailer would know." 16 C.F.R. § 1115.12(e). In addition, the fact that a product fails to comply with a standard must immediately be reported to the CPSC under § 15(b), pursuant to the guidance of 16 C.F.R. § 1115.2(b), "unless the manufacturer (including an importer), distributor or retailer has actual knowledge that the Commission has been adequately informed of such failure to comply, defect, or risk. This provision indicates that a broad spectrum of safety related information should be reported under section 15(b) of the CPSA."

concerning:

[E]ngineering, quality control, or production data...safety-related production or design change(s)... [p]roduct liability suits...independent testing laboratory [results]...[c]omplaints from a consumer or consumer group...[i]nformation received from the Commission or other governmental agency...[or] [i]nformation received from other firms, including requests to return a product or for replacement or credit.¹⁹²

The last-described category, the regulations provide, "includes both requests made by distributors and retailers to the manufacturer and requests from the manufacturer that products be returned."¹⁹³

Unless the information is clearly reportable, the firm can spend a reasonable time, not to exceed ten days, for investigation and evaluation.¹⁹⁴ Recognizing that reportable information may be sketchy or unconfirmed, and to encourage the earliest possible reporting, the regulations state in its report to the CPSA "[a] subject firm . . . need not admit, or may specifically deny, that the information it submits reasonably supports the conclusion that its consumer product is non-complying, contains a defect that could create a substantial product hazard within the meaning of [CPSA section 15(b)], or creates an unreasonable risk of serious injury or death."¹⁹⁵

Initial reports must be filed immediately, that is, within 24 hours,¹⁹⁶ after a subject firm has obtained information which reasonably supports the conclusion" that a product "fails to comply with an applicable consumer product safety rule or voluntary consumer product safety standard, contains a defect which could create a substantial risk of injury to the public, or creates an unreasonable risk of serious injury or death."¹⁹⁷ Initial reports which are not in writing must be confirmed in writing within forty-eight hours of the non-written report.¹⁹⁸

192. 16 C.F.R. § 1115.12(f).

193. *Id.* at § 1115.12(f)(7).

194. 16 C.F.R. § 1115.14(d).

195. 16 C.F.R. § 1115.12(a).

196. Weekends and holidays are excluded from these calculations. *Id.* at § 1115.14(a).

197. *Id.* at § 1115.14(e).

198. *Id.* at § 1115.13(c). The earlier rules required a covered firm to make an initial notification to the Commission within 24 hours of receiving information which reasonably supported the conclusion that there was a substantial product hazard. *Id.* § 1115.14(e). The initial notification would identify the product in

Where the subject firm learns of a death, grievous bodily injury, or other possibly reportable information, the regulations state that the firm must investigate and evaluate the information within ten days unless the firm "can demonstrate that a longer period is reasonable."¹⁹⁹ The Commission deems that "at the end of ten days, a subject firm has received and considered all information which would have been available to it had a reasonable, expeditious, and diligent investigation been undertaken."²⁰⁰ When a subject firm has not notified the Commission in a timely fashion within the meaning of section 15 and the regulations, the Commission may seek assessment of civil penalties under section 20.

A firm is not required to file a section 15(b) report if it possesses "actual knowledge that the Commission has been adequately informed of such defect, failure to comply, or such risk."²⁰¹ The Commission is adequately informed when "the Commission staff has received the information (provided in Initial Reports and Final Reports) *** insofar as it is reasonably available and applicable[, or] the staff has informed the subject firm that the staff is adequately informed."²⁰²

V. RETURN OR REPAIR UNDER THE UNIFORM COMMERCIAL CODE

Part 6 of UCC Article 2 pertains to breach, repudiation and excuse under the UCC sales provisions, and provides special buyer remedies where the buyer receives one or more products that are non-conforming. As defective products not duly safe for their intended use have been considered "not for their ordinary purpose" within the meaning of UCC § 2-314(c), so too the Code provisions governing "non-conforming" goods have been interpreted as including within their compass products that create an unreasonable risk of injury to persons or property.

In a single delivery contract, upon the seller's tender of the defective product, the buyer may reject the product if it "fail[s] in any respect to conform to the contract."²⁰³ When the contract

question, describe the course of distribution, and "[s]pecify the nature and extent of the defect or failure to comply." *Id.* §§ 1115.5(a) - 1115.5(e).

199. 16 C.F.R. § 1115.14(d).

200. *Id.*

201. CPSA § 15(b)(2), 15 U.S.C.A. § 2064 (1998).

202. C.F.R. § 1115.3(a).

203. U.C.C. § 2-601. Official Comment 2 thereto states in part: "[T]he buyer's

between the buyer and the seller is one providing for delivery of more than one commercial unit, the buyer may accept one or more of the units and reject the remainder.²⁰⁴

Where the contract between the buyer and seller is one providing for satisfaction by installment, the buyer may reject an installment only where the defect "substantially impairs the value of the installment and cannot be cured. . . ."²⁰⁵ Whether the nature of the defect, its scope, or both constitute a substantial impairment of the contract is a very fact-specific question. For example, in *Continental Forest Products, Inc. v. White Lumber Sales, Inc.*,²⁰⁶ in which the installment contract called for rejection of goods revealing more than 5% deviation from the terms of the contract, and the seller's first carload showed 9% deviation, while the second had less than 5%, the court held that the seller's non-conformity was a minor deviation not amounting to a substantial impairment.

The buyer's remedy of rejection must be exercised within a reasonable time after delivery of the goods, and will be ineffective unless the buyer "seasonably" notifies the seller of the rejection.²⁰⁷ The notification must identify the product inadequacies with particularity.²⁰⁸ What constitutes a reasonable time is ordinarily a question of fact²⁰⁹ and will be affected by the nature of the product.²¹⁰ It has been held that a buyer makes a timely rejection

attempts in good faith to dispose of defective goods where the seller has failed to give instructions within a reasonable time are not to be regarded as an acceptance." *Id.* See generally discussion of these warranty remedies in Alperin & Chase, Consumer Law, Sales Practices and Credit Regulation § 251 et seq.

204. U.C.C. § 2-601(c).

205. U.C.C. § 2-612(2). Subsection (3) to U.C.C. § 2-612 states in pertinent part: "Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole."

206. 474 P.2d 1 (Or. 1970).

207. U.C.C. § 2-602; see generally *Knac Agencies v. Masterpiece Apparel, Ltd.*, No. 94 CIV. 1073(LMM), 1999 WL 156379, at *7 (S.D.N.Y. March 22, 1999) (rejection seasonably made as recipient did not particularize defects).

208. *Id.*; see also U.C.C. § 2-605 (stating "[t]he buyer's failure to state in connection with rejection a particular defect that is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach . . . (a)where the seller could have cured it if stated seasonably").

209. *Buckeye Trophy, Inc. v. S. Bowling & Billiard Supply Co.*, 443 N.E.2d 1043, 1046 (Ohio Ct. App. 1982) (finding the passage of 65 days does not, by itself, establish that rejection thereafter was not within reasonable time); U.C.C. § 1-204(2) (stating "what is a reasonable time for taking any action depends upon the nature, purpose and circumstances of such action.").

210. See generally 4 Anderson, Uniform Commercial Code § 2-602:17. *E.g.*,

of goods where the rejection is made within twenty-four hours of tender,²¹¹ or within one week.²¹² Even a delay of two months has been held to present a jury issue as to timeliness when the nonconformity or defect was not patent and the product was shipped unassembled.²¹³

The UCC also sets forth the means by which the seller, in certain circumstances, may "cure" its delivery of a defective product. The seller's "cure" must be in accordance with UCC section 2-508, which provides that upon delivery of a product that is defective or otherwise non-conforming, and when the time for compliance with the terms of the contract of sale has not expired, the seller "may reasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery."²¹⁴

Lastly, the buyer in receipt of a defective product may revoke acceptance of the tender.²¹⁵ A valid "revocation of acceptance" vests in the buyer "the same rights and duties with regards to the duties

Miron v. Yonkers Raceway, Inc., 400 F.2d 112 (2d Cir. 1968), affirming 531 F.Supp. 1048 (S.D.N.Y. 1968) (time for rejecting live animal shorter than that for inanimate object).

211. *Traynor v. Walters*, 342 F. Supp. 455, 459 (M.D. Pa. 1972).

212. *Glen O'Brien Moveable Partition Co., Inc. v. McMullen*, 608 S.W.2d 512, 520 (Mo. Ct. App. 1980).

213. *Sherkate Sahami Khass Rapol (Rapol Contr. Co.) v. Henry R. Jahn & Son, Inc.*, 701 F.2d 1049, 1051-52 (2d Cir. 1983).

214. U.C.C. § 2-508(1); see also RAY D. HENSON, *THE LAW OF SALES* § 4.02 at 125-28 (1985); ROBERT J. NORDSTROM, *HANDBOOK OF THE LAW OF SALES* § 105 at 317-22 (1970).

215. For example, Maryland Commercial Code Article 6 § 2-608 provides:

(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he as accepted it:

(a) On the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) Without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in the condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

See also discussion in *Hardy v. Winnebago Indus., Inc.*, 706 A.2d 1086, 1091-92 (Md. Ct. Spec. App. 1998).

involved as if he had rejected them[;]"²¹⁶ thus, in effect, reinstating the seller as the owner of the chattel. A breach of warranty may establish a non-conformity sufficient to trigger the buyer's right to revoke acceptance.²¹⁷ The revocation of acceptance remedy remains, however, conceptually distinct from that of a claim for breach of warranty,²¹⁸ and a jury instruction that "intertwine[s]" the warranty remedy and the revocation of acceptance remedy constitutes reversible error.²¹⁹

Unlike rejection, which the UCC provides as a remedy for ordinary non-conformity of the goods, revocation of acceptance may only be had where the non-conformity or defective nature of the goods "substantially impairs its value" to the buyer.²²⁰ In addition to requiring a showing of substantial impairment, the revocation of acceptance remedy differs from the antecedent right to reject the goods in these respects: the buyer (1) in accepting initially, (a) must, if the defect had already been discovered, have proceeded on the reasonable assumption that the seller would cure; or (b) if the defect had not been discovered, must have been induced to the acceptance by the difficulty in ascertainment of the defect or by the conduct of the seller; (2) must revoke acceptance within a reasonable time; and (3) must revoke before a substantial

216. *Id.* at 1091.

217. *Campbell Farms v. Wald*, 578 N.W.2d 96, 99 (N.D. 1998). *Campbell Farms* was a suit brought by bull buyers for damages and return of the purchase price of a bull whose reproductive capacity, the buyers claimed, fell short of a sales brochure's representation of the animal as an "active breeder. . . ." *Id.*

218. *Murray v. D & J Motor Co. Inc.*, 958 P.2d 823, 828 (Okla. Ct. App. 1998) ("The right to revoke does not depend upon the existence or breach of any warranty. The buyer may revoke . . . even though all warranties are excluded. . . .") (quoting *Seekings v. Jimmy GMC of Tucson, Inc.* 638 P.2d 210 (1981)); *Breitung v. Canzano*, 660 N.Y.S.2d 765, 766 (N.Y. App. Div. 1997) (involving claimed breach of warranty of title and buyer's endeavor to revoke acceptance of an automobile, with court commenting that breach of warranty and revocation of acceptance "constitute separate causes of action, have independent notice and procedure requirements, and if successful, result in different remedies.").

219. *Breitung v. Canzano*, 660 N.Y.S.2d 765, 766 (N.Y. App. Div. 1997) (claim alleging false representation of vehicle mileage and vehicle registration number).

220. U.C.C. § 2-608; *Campbell v. Pollack*, 221 A.2d 615, 619 (R.I. 1966) (discussing the meaning of substantial impairment); *see also* *Conte v. Dwan Lincoln-Mercury, Inc.*, 374 A.2d 144, 148 (Conn. 1976) (noting that revocation is possible when the impairment substantially reduces value of a good); *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349, 354-55 (Minn. 1977) (revocation is acceptable if seller does not correct impairment within a "reasonable time"); *Performance Motors, Inc. v. Allen*, 186 S.E.2d 161 (N.C. 1972), appeal after remand, 201 S.E.2d 513 (N.C. Ct. App. 1974); Lee R. Russ, Annotation, *What Constitutes "Substantial Impairment"*, 38 A.L.R.5TH 191 (1996).

change not related to the defect occurs in the goods.²²¹ Issues of non-conformity with contract, substantial impairment, and timeliness of notice to the seller are ordinarily questions of fact.²²²

VI. AUTOMOBILE LEMON LAWS

Prior to the widespread adoption of lemon laws²²³ courts in many jurisdictions demonstrated a solicitude towards the claims of purchasers whose vehicles, most frequently automobiles, were discovered to have a material and incurable defect.²²⁴ In so doing, some decisions seemingly stretched into unrecognizability the UCC section 2-608(2) requirement that revocation be within a "reasonable time."²²⁵ Another means by which courts favored the automobile owner whose warranty limited the remedy to repair and replacement of any inoperable parts was to examine the

221. *E.g.*, *The Inn Between, Inc. v. Remanco Metro., Inc.*, 662 N.Y.S.2d 1011 (N.Y. Dist. Ct. 1997). *Inn Between* involved the buyer's suit to revoke acceptance of a used restaurant computer system. The court held that the facts established that the product had sufficient non-conformities to justify remedy of revocation; that such non-conformities substantially impaired product's value; that seller failed to seasonably cure the non-conformities; and that the buyer revoked acceptance within a reasonable time. *Id.* at 1013-14.

222. *E.g.*, *Murray v. D & J Motor Co., Inc.*, 958 P.2d 823, 826 (Okla. Ct. App. 1998); *see also* *Marine Mart, Inc. v. Pearce*, 480 S.W.2d 133, 137 (Ark. 1972) ("What constitutes a non-conforming delivery, acceptance, rejection, or revocation of acceptance are questions of fact. . . ."); *Ford Motor Credit Co. v. Caizzo*, 564 A.2d 931, 936 (Pa. Super. Ct. 1989) (stating that determining what is a reasonable time for rejection of goods after delivery is generally a question of fact).

223. *See generally* Comment, *Sweetening the Fate of the "Lemon" Owner: California and Connecticut Pass Legislation Dealing With Defective New Cars*, 14 U. TOL. L. REV. 341 (1983). *See also* HOWARD J. ALPERIN & ROLAND F. CHASE, *CONSUMER LAW: SALES PRACTICES AND CREDIT REGULATION* § 218 (1986).

224. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1293 (1993), defines "lemon" as "something or someone that proves to be unsatisfactory or undesirable: [synonymous with] dud, failure..."

225. *Tiger Motor Co. v. McMurtry*, 224 So. 2d 638, 647 (Ala. 1969) ("Repeated attempts at adjustments having failed, we hold the buyer McMurtry revoked his acceptance of the automobile within a reasonable time."); *Gen. Motors Corp. v. Earnest*, 184 So. 2d 811, 814 (Ala. 1966) ("We can agree with the appellee's contention that at some point after the purchase of a new automobile, the same should be put in good running condition.... This is no more than saying that at some point in time, it must become obvious to all people that a particular vehicle simply cannot be repaired or parts replaced so that the same is made free from defect."); *Conte v. Dawn Lincoln-Mercury, Inc.*, 374 A.2d 144, 149 (Conn. 1976) ("Under the circumstances of this case, involving an almost continuous [fourteen-month] series of negotiations and repairs, the delay in the notice [to revoke] did not prejudice the dealer and was not unreasonable."); *see also* Douglas L. Elden, *Revocation of Acceptance: Interpretation and Application*, 8 U.C.C. L.J. 14 (1975).

enforcement of such a limitation in the context of the product's overall failure. The warrantor's provision of the exclusive remedy of repair or replacement was often understood to "give the seller an opportunity to make the goods conforming while limiting the risks to which he is subject by excluding direct and consequential damages that might otherwise arise."²²⁶ Courts favoring the equities of the buyer's position frequently concluded that where the warrantor failed to correct the defect as promised within a reasonable time, he should be liable for breach of that warranty,²²⁷ or that and the limited, purportedly exclusive remedy of the seller failed of its essential purpose and was therefor avoidable under UCC section 2-719.²²⁸

Illustrative on this point is the South Dakota decision in *Johnson v. John Deere Co.*²²⁹ an action brought by the purchaser of a tractor which was built with the wrong sized bolts on the front wheels, and which suffered from oil leaks, transmission problems, internal engine malfunctions, and miscellaneous problems with water hoses, the fuel injection system, and the injector pump shaft.²³⁰ The trial court declined to identify any limitation upon the period of time within which the seller could successfully perform its

226. *Beal v. Gen. Motors Corp.*, 354 F. Supp. 423, 426 (D. Del. 1973).

227. *Seely v. White Motor Co.*, 403 P.2d 145, 150 (Cal.1965); *Steele v. J.I. Case Co.*, 419 P.2d 902, 908 (Kan. 1966).

228. *Jones & McKnight Corp. v. Birdsboro Corp.*, 320 F. Supp. 39, 43-44 (N.D. Ill.1970):

Although the plaintiff-buyer purchased and accepted the machinery and equipment with the apparent knowledge that the seller had limited its liability to repair or replacement, and although the plaintiff does not allege any form of unconscionability in the transactions which led to the purchase, plaintiff also was entitled to assume that defendants would not be unreasonable or wilfully dilatory in making good their warranty in the event of defects in the machinery and equipment. It is the specific breach of the warranty to repair that plaintiff alleges caused the bulk of its damages. This Court would be in an untenable position if it allowed the defendant to shelter itself behind one segment of the warranty when it has allegedly repudiated and ignored its very limited obligations under another segment of the same warranty, which alleged repudiation has caused the very need for relief which the defendant is attempting to avoid. If the plaintiff is capable of sustaining its burden of proof as to the allegations it has made, the defendant will be deemed to have repudiated the warranty agreement so far as restricting plaintiff's warranties, and the exclusive remedy provision of the contract will be deemed under the circumstances to have failed of its essential purpose, thus allowing plaintiff the general array of remedies under the Code.

229. 306 N.W.2d 231 (S.D. 1981).

230. *Id.* at 234.

duties under the warranty's exclusive repair and replacement remedy, adding: "Now, you know the law won't protect you from a lemon, we know that. They will protect you from a breach of warranty. [A]nd I think under the state of this record that there [has been] no unreasonable delay" in effectuating successful repairs.²³¹

In its review of the decisions below, the South Dakota Supreme Court examined the official notes to the UCC, as well as decisional law suggesting that the existence of the repair and replacement remedy was no license for the seller to make a career of unsuccessful efforts to make plaintiff's car operational.²³² Reversing and remanding for trial the issue of whether unreasonable delay made the seller's warranty fail of its essential purpose, the state high court wrote: "After reviewing the record, we are inclined to agree with the trial court's characterization of the tractor as a 'lemon,' but we disagree that the law will not protect the purchaser of a lemon." Interestingly, the court decided against the purchaser on the claim that the exclusive remedy provision was unconscionable under UCC section 2-302.²³³

231. *Id.* at 233.

232. *Steele*, 419 P.2d at 907 ("An unsuccessful effort to remedy the defect renders the seller liable on his warranty; and the buyer is not bound to allow him a second opportunity, or to permit him to tinker with the article indefinitely in the hope that it may ultimately be made to comply with the warranty. . . . The vendor does not have an unlimited time for performance of its obligation to replace."); *Beal*, 354 F. Supp. at 427 n. 2 ("The limited remedy fails of its essential purpose whenever the seller fails to repair the goods within a reasonable time; good faith attempts to repair might be relevant to the issue of what constitutes a reasonable time.").

233. *Johnson*, 306 N.W.2d at 238. The court stated:

The record clearly supports appellant's argument as to buyer's background, experience, and business acumen. More importantly, it supports their assertion that buyer had examined the New Equipment Warranty and was fully aware and willing to trade off the remedy for consequential loss for the warranty of replacement and repair. At trial appellant testified that when he purchased the tractor he realized that under the warranty, repairs would be made for most things within a given period of time, but that he was more interested in the service that he would receive once he had purchased the tractor. Thus, although the repair and replacement warranty may have subsequently failed of its essential purpose, thereby entitling him to general damages for breach of contract as outlined in the code, the limitation on remedy was not unconscionable at the time the contract was made, either procedurally or substantively, and he would not be entitled to recover consequential damages.

Id.; see generally Arthur Allen Leff, *Unconscionability and the Code: The Emperor's New*

While the commercial code of most states restricts the seller's ability to limit or exclude the implied warranty of merchantability,²³⁴ an increasing number of others, in conjunction with or independent of that particular warranty reform, have passed so-called lemon laws to provide an expedited and intelligible remedy for the purchaser of an unmerchantable automobile, the problems with which the dealer and the manufacturer are unable to correct within a reasonable time. Ordinarily, remedies under such laws are predicated upon a showing that the defect or defects "substantially impair" the function, safety or value of the vehicle.²³⁵ Lemon laws are perhaps unique among consumer protection and products liability laws in their enjoyment of significant support from both consumers and from product manufacturers and other sellers.²³⁶

Clause, 115 U. PA. L. REV. 485 (1967).

234. E.g., Kansas Consumer Protection Act, K.S.A. 50-639:

(a) Notwithstanding any other provisions of law with respect to property which is the subject of or is intended to become the subject of a consumer transaction in this state, no supplier shall: (1) Exclude, modify, or otherwise attempt to limit . . . the implied warranty of merchantability and fitness for a particular purpose...or (2) exclude, modify, or attempt to limit any remedy provided by law, including the measure of damages available, for a breach of implied warranty of merchantability and fitness for a particular purpose... (c) A supplier may limit the supplier's implied warranty of merchantability and fitness for a particular purpose with respect to a defect or defects in the property only if the supplier established that the consumer had knowledge of the defect or defects, which became the basis of the bargain between the parties... (d) Nothing in this section shall be construed to expand the implied warranty of merchantability as defined in K.S.A. 84-2-314... to involve obligations in excess of those which are appropriate to the property... (e) A disclaimer or limitation in violation of this section is void. If a consumer prevails in an action based upon a breach of warranty, and the supplier has violated this section, the court may, in addition to any damages recovered, award reasonable attorney's fees and a civil penalty under K.S.A. 50-636, and amendments thereto, or both to be paid by the supplier who gave the improper disclaimer. (f) The making of a limited express warranty is not in itself a violation of this section.

235. *Jarvis v. Safari Motor Coaches, Inc.*, 670 N.Y.S.2d 927, 928-929 (N.Y. App. Div. 1998) (showing of substantial impairment notwithstanding petitioner's ability "to use the motor home for some purposes").

236. Note, *L.B. 155: Nebraska's "Lemon Law": Synthesizing Remedies for the Owner of a Lemon*, 17 CREIGHTON L. REV. 345, 346 n.13 (1984) (quoting debate on floor of state legislature). In this article, one senator commented:

We, as franchised dealers, could not be advocating any more strongly the consumer's position than in our presentation of this legislation. We value our customers' reputations and we resent being placed in the middleman position trying to attempt to help these customers and

A primary impetus for the promulgation of lemon laws was a desire on the part of legislatures to simplify the automobile owner's cause of action for recovery of economic loss due to a defective automobile,²³⁷ and to permit owner recovery of direct economic loss, including recovery for damage the defective condition caused to the automobile itself.²³⁸ In the words of the Supreme Court of Vermont, a typical lemon law is passed "in order to facilitate an expeditious and inexpensive resolution of automobile warranty problems."²³⁹ Pennsylvania's lemon law, for example, provides that the "manufacturer of a new vehicle sold in the Commonwealth shall repair or correct, at no cost to the purchaser, a nonconformity which substantially impairs the use, value or safety of said motor vehicle which may occur within a period of one year following actual delivery of the vehicle to the purchaser, within the first 12,000 miles of use or during the term of the warranty, whichever may first occur."²⁴⁰ The lemon laws passed by many jurisdictions²⁴¹ enjoy marked similarities, with a large number modeled on the Connecticut lemon law.²⁴²

Most lemon law apply only to new vehicles.²⁴³ Moreover, most

ourselves resolve these problems. Everyone, the public, the dealers, the manufacturers, should appreciate having clearcut and not arbitrary parameters in this matter within which we can still operate.

Id.

237. Hearings on House Bill 5729 Before Connecticut General Law Comm. 235 (March 11, 1982) ("[The bill would] release the consumer from the legal burdens and difficulties that exist when one brings suit under our present law.") (comments of Rep. Woodcock, bill sponsor).

238. ALPERIN & CHASE, *supra* note 227, at p.325 n.1 (noting that 33 states plus the District of Columbia have lemon laws, and collecting law review commentary); Note, *Lemon Law: Putting the Squeeze on Automobile Manufacturers*, 61 WASH. U. L.Q. 1125, 1149 n.125 (1984).

239. *In re Villeneuve*, 709 A.2d 1067, 1068 (Vt. 1998) (referencing 9 VT. STAT. ANN. §§ 4170-81).

240. 73 PA. CONST. STAT. ANN. § 1954, analyzed in *Pavese v. Gen. Motors Corp.*, No. CIV. A. 97-3688, 1998 WL 57761 (E.D. Pa. 1998).

241. CAL. CIV. CODE § 1793.2 (1998); 6 DEL. CODE §§ 5001-5009; FLA. STAT. ANN. §§ 681.10-681.108 (1990); 10 ME. REV. STAT. ANN. §§ 1161-1165 (1999); MASS. GEN. LAWS ANN. ch. 90, §§ 7N-7N 1/2 (2000); MINN. STAT. ANN. § 325F.665 (2000); MONT. CODE ANN. §§ 61-4-501 to 61-4-505 (1999); NEB. REV. STAT. §§ 60-2702 to 60-2709 (1995); NEV. REV. STAT. § 598 (1999); N.H. REV. STAT. ANN. § 357-D (1995); N.Y. GEN. BUS. LAW § 198-a; 1983 Or. Laws Adv. Sh. No. 8, 176; TEX. CIV. CODE ANN. art. 4413(36) (2000); 1983 Wash. Legis. Serv. 2472; WIS. STAT. ANN. § 218.015 (1994); WYO. STAT. ANN. § 40-17-101 (1999).

242. CONN. GEN. STAT. ANN. § 42-179 (2000).

243. See generally *Jarvis v. Safari Motor Coaches, Inc.*, 670 N.Y.S.2d 927 (N.Y. App. Div. 1998) (interpreting New York's General Business Law § 198-a, the state's

lemon laws restrict their remedies to "consumers," which is to say, purchasers of vehicles for personal use.²⁴⁴ Some lemon laws apply only sales,²⁴⁵ while others cover lease agreements.²⁴⁶ For whatever state-by-state distinctions may exist between lemon laws, several elements are common to practically all. The lemon laws: (1) state that their remedies are nonexclusive;²⁴⁷ (2) extend the manufacturer's repair obligations beyond the temporal limitations in any express warranty when repair efforts during the warranty period have failed;²⁴⁸ (3) provide a purchaser remedy of refund or replacement upon failure of a reasonable number of attempts to repair, and specify the number of repair attempts that will be considered reasonable;²⁴⁹ (4) vest in the consumer a direct action against the manufacturer;²⁵⁰ and (5) require the consumer to resort first to a "qualified third-party dispute resolution process," or arbitration.²⁵¹ Many lemon laws have been interpreted to create a rebuttable presumption that four repair initiatives, or a designated number of days out of commission, represent a reasonable number of attempts to bring the vehicle into conformity with its warranty.²⁵²

"New Car Lemon Law."). *E.g.*, N.M. STAT. ANN. § 57-16A-2(C) (1995) (defining consumer as a buyer of "a new motor vehicle" for purposes other than resale), discussed in *Jones v. Gen. Motors Corp.*, 953 P.2d 1104, 1107 (N.M. 1998). The *Jones* court references approvingly Joseph Goldberg, *New Mexico's "Lemon Law": Consumer Protection or Consumer Frustration*, 16 N.M. L. REV. 251, 264 (1986) ("[T]he law largely, though not exclusively, is confined to the sale of new vehicles for personal (as opposed to business) use.").

244. *E.g.*, ALA. CODE § 8-20A-1(1) (1999) (discussed in *Lipham v. Gen. Motors Corp.*, 665 So. 2d 190, 193 (Ala. 1995)); N.M. STAT. ANN. § 57-16A-2(C) (1995) (defining consumer as "the purchaser, other than for purposes of resale, of a new motor vehicle for personal, family or household purposes, any person to whom such motor vehicle has been transferred during the duration of an express warranty applicable to the motor vehicle and any other person entitle by the terms of the warranty to enforce the terms of the warranty").

245. *E.g.*, *Pavese v. Gen. Motors Corp.*, No. CIV. A. 97-3688., 1998 WL 57761 (E.D. Pa. 1998) (interpreting 73 PA. CONST. STAT. ANN. § 1954).

246. *E.g.*, TENN. COD. ANN. §§ 55-24-201, 55-24-204 (1998); MO. ANN. STAT. § 407.560. See other statutes collected at *Pavese*, 1998 WL 57761, at *3.

247. *E.g.*, CONN. GEN. STAT. ANN. § 1.

248. *Id.* at § 1(d).

249. *Id.* at § 18 & subsection (d).

250. *Id.* at § 2.

251. *E.g.*, CAL. CIVIL CODE § 1793.2(e)(2) (1998); *Ford Motor Co. v. Fowler*, 705 So. 2d 662 (Fla. D. Ct. App. 1998) (appeal of determination of Florida Motor Vehicle Arbitration Board under auspices of that state's lemon law dispute settlement procedure process).

252. CONN. GEN. STAT. ANN. §§ 42-179("out of service by reason of repair for a

A complainant must bring his claim, including any appeal of the decision of an arbitration board, in a timely fashion.²⁵³ However, a manufacturer may waive any defense of untimeliness by its voluntary participation in the dispute settlement process.²⁵⁴ A lemon law may permit the prevailing complainant reasonable attorneys fees and costs.²⁵⁵ The goal of such a statute "is to make the consumer whole, and to restore the consumer to a position he or she occupied before acquiring the lemon."²⁵⁶

cumulative total of thirty or more calendar days"). Compare with FLA. STAT. ANN. § 681.104(4) (2000) (fifteen working day and three repair attempt criteria); N.Y. GEN. BUS. LAW § 198-a(d) (fourth attempt and thirty day limit within two years of purchase or 18,000 miles, whichever comes first).

253. *E.g.*, FLA. STAT. ANN. § 681.1095(10) (1990) (providing that appeal of decision of Florida Motor Vehicle Arbitration Board must be filed within "30 days after receipt of the decision"). A consumer "who pursues a case in front of the arbitration panel must file a damage action within one year after the final action of the [B]oard." *Ford Motor Co. v. Fowler*, 705 So. 2d 662, 663 (Fla. 1998).

254. *E.g.*, *Fowler*, 705 So. 2d at 663.

255. *Ledoux v. Ford Motor Co.*, No. 96-6981, 1998 WL 107112, at *1 (E.D. Pa. 1998) ("In determining appropriate attorney's fees, the court must first determine the lodestar. The lodestar is a computation of a reasonable hourly rate multiplied by the number of hours the court determines the attorney reasonably worked. The court may then adjust the lodestar as the court deems appropriate.") (citations omitted). *E.g.*, *Pugliese v. Chrysler Corp.*, 1998 WL 34857, at *2 (E.D. Pa. 1998) (reasonable rates in jurisdiction ranging from \$100 to \$150 per hour); Ohio Rev. Code § 1345.75(A), discussed in *Fortner v. Ford Motor Co.*, 1998 WL 172862, at *1-*2 (Ohio Ct. App. 1998) (unpublished opinion).

256. *Fortner*, 1998 WL 172862, at *1.