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WARNING: A POST-SALE DUTY TO WARN TARGETS SMALL MANUFACTURERS

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The majority of states now obligate manufacturers to warn about dangers of their products that are discoverable after the sale. Commentators and courts have been hesitant about this obligation because of the potential burden it puts on manufacturers—the costs of identifying users and warning them of the danger. The consensus is that only a factually dependent post-sale duty to warn should exist, obligating manufacturers to warn only if a reasonable manufacturer would do so. A reasonable manufacturer, of course, would warn only if the danger to be warned of justifies the costs of the warning.

This Article is the first to identify a problem with a factually dependent post-sale duty to warn—it will most likely result in liability for small manufacturers, but not large manufacturers. This is because the costs of issuing the warning for a small manufacturer will always be smaller than for a large manufacturer. This Article is also the first to argue that a factually dependent post-sale duty to warn is inconsistent with the underlying purposes of products liability law and general public policy. Although the factually dependent post-sale duty to warn seems like a perfect solution to the overburdening problem, courts should not adopt it.

I. INTRODUCTION

> *If you want to see people squirm, we recommend that you gather representatives from industry in a room and then flash the words "post-sale warnings" on a screen. The reaction is guaranteed. The reason is simple. It is one thing to tell a manufacturer that it has the duty to provide an initial warning with the product.*[1]

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[1] JAMES A. HENDERSON, JR. & AARON D. TWERSKI, TEACHER'S MANUAL—PRODUCTS LIABILITY: PROBLEMS AND PROCESS 162 (7th ed. 2011).

But it is another thing to tell manufacturers that they could owe a duty to warn after they have sold the product—practically, a duty to identify users and warn them of a newly materialized danger. As explained by the authors of the *Third Restatement of Torts: Products Liability* ("*Third Restatement*"), it is a "monster duty," a "seemingly . . . timeless duty to warn."[2]

More than half of the states and the *Third Restatement* have adopted a post-sale duty to warn. But this is not a reason for manufacturers to hide in fear—at least not all of them. Most of these states have adopted a post-sale duty that is factually dependent. The duty will exist only if a reasonable manufacturer would have warned, which is true only if the costs of issuing the warning were reasonable. The *Third Restatement* explains, and commentators agree, this factually dependent inquiry is necessary to ensure a post-sale duty to warn does not "impose unacceptable burdens on product" manufacturers.[3] Because the costs are relevant, large manufacturers that distribute their products widely to a large number of customers need not be worried. If issuing a warning would necessitate identifying and contacting three million customers all spread across a region, no duty would likely exist.

This Article is the first to explore a problem with the well-intentioned factually dependent post-sale duty to warn—a problem that should make small manufacturers squirm. Unlike a large manufacturer, a small manufacturer is likely to have fewer customers located in a geographically distinct area. The small manufacturer may even have continuing contact with those customers, and it would not be very expensive for a small manufacturer to warn its customers. Thus, a small manufacturer would owe a post-sale duty to warn and face liability for failing to warn.

This type of factually dependent duty to warn—likely owed by small manufacturers but not large manufacturers—is inconsistent with the underlying theories of products liability. Those underlying theories support a broad post-sale duty to warn, obligating all manufacturers, not just the small manufacturers. A factually dependent post-sale duty to warn is also inconsistent with general public policy. Small manufacturers are already especially vulnerable to the effects of products liability law and have difficulty obtaining products liability insurance. This difficulty will increase now that only small manufacturers face a new form of liability for post-sale conduct.

Ultimately, a broad post-sale duty to warn could be very burdensome on manufacturers because of the costs of warning. A factually dependent version of the duty, however, likely protects only larger manufacturers from those costs. If those costs are real and valid, the solution is to reject any post-sale duty to warn, ensuring that all manufacturers are treated the same.

Part II of this Article explores the differences between the point-of-sale warning obligation and a possible post-sale warning obligation. Part III uses case

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[2] *Id.*

[3] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 cmt. a (1998) [hereinafter THIRD RESTATEMENT].

law and the *Third Restatement* factors to explain how a factually dependent post-sale duty to warn is more likely to create a post-sale warning obligation for small manufacturers than for large manufacturers. Part IV argues that because of the effect on small manufacturers, a factually dependent post-sale duty is inconsistent with the theories underlying products liability law and with general public policy. Part V concludes by arguing the courts should reject any post-sale duty to warn that creates different obligations for different manufacturers. That likely means that courts should reject any post-sale duty to warn.

II. WHAT IS A POST-SALE DUTY TO WARN?

The best way to understand a post-sale duty to warn is to compare it to the well-accepted manufacturer's point-of-sale duty to warn.[4]

A. The Basics of a Point-of-Sale Warning

Manufacturers "have a duty to provide consumers with warnings of hidden product dangers and instructions on how products may be safely used."[5] The duty is not to warn of all hidden dangers, however. Instead, the manufacturer is obligated to warn of the foreseeable dangers—the dangers about which the manufacturer knew or should have known at the time of sale.[6]

Liability for failure to warn is based in negligence.[7] If a reasonable manufacturer would have warned about the foreseeable dangers, a defendant is

[4] This Article refers to the "manufacturer" instead of "seller." The common law obligates both manufacturers and sellers to warn. *See id.* § 1 cmt. e. At the same time, "[l]egislation has been enacted in many jurisdictions that, to some extent, immunizes nonmanufacturing sellers or distributors from strict liability." *Id.* A seller would not likely be liable for either a point-of-sale failure to warn or a post-sale failure to warn if it had no involvement in the creation of the warning. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 82.003 (West 2011). Thus, I will refer only to the manufacturer as possibly owing a post-sale duty to warn.

[5] DAVID G. OWEN, PRODUCTS LIABILITY LAW § 9.1 (2d ed. 2008).

[6] Richter v. Limax Int'l, Inc., 45 F.3d 1464, 1471 (10th Cir. 1995) (explaining that manufacturers have a duty to warn of harms "reasonably foreseeable to the manufacturer of the product" and that "a manufacturer cannot be held liable for harm that no reasonable person could anticipate").

[7] Some courts still pretend the standard is based in strict liability, but others admit a "strict liability" failure to warn claim is no different than a negligent failure to warn claim. *See, e.g.*, Anguiano v. E.I. Du Pont De Nemours & Co., 44 F.3d 806, 811–12 (9th Cir. 1995) (stating that "the question whether a manufacturer has a duty to warn under strict liability depends on the standards for determining a duty to warn under a negligence action"); Klem v. E.I. DuPont De Nemours Co., 19 F.3d 997, 1001–03 (5th Cir. 1994) (holding that failure-to-warn claims in strict liability and in negligence duplicate one another); Werner v. Upjohn Co., 628 F.2d 848, 858 (4th Cir. 1980) (stating that although the negligence and strict liability theories may be phrased differently, the issue is generally the same: "was the warning adequate?"); Sell v. Bertsch & Co., 577 F. Supp. 1393, 1397

liable if it failed to act similarly. A defendant cannot be liable for failing to warn of dangers that were unforeseeable at the time of the sale. Instead, a defendant can be liable only if it was at fault. That is, it failed to warn about the foreseeable dangers, the same dangers about which a reasonable manufacturer would warn.

It is still possible for liability for a failure to warn to be strict. That is how the New Jersey Supreme Court defined the warning obligation in *Beshada v. Johns-Manville Products Corp*.[8] There, the court affirmed liability for a manufacturer's failure to warn about the dangers of asbestos—dangers that, according to the defendant's allegations, were unknown to even the scientific community at the time the product was sold.[9] The court defined a strict liability warning obligation, and any argument that the defendant "could not have known the product was dangerous" was irrelevant to a theory of strict liability.[10]

But "American courts and commentators have widely (if not quite universally) rejected this kind of 'super-strict' liability on grounds of fairness, logic, and practicality."[11] The main reason for the criticism of *Beshada* and the rejection of strict liability for failure to warn is that strict liability would be too harsh and unfair. Requiring warnings of unknowable risks is essentially requiring the impossible. "A manufacturer cannot fairly be required to issue warnings at the point of sale of dangers about which it did not know and could not have

(D. Kan. 1984) ("Under either theory, the duty to warn is one of ordinary care."); Leesley v. West, 518 N.E.2d 758, 761 (Ill. App. Ct. 1988) (holding that where the issue regards a manufacturer's failure to warn, "the manufacturer's duty is essentially the same under either a negligence or [a] strict liability theory"); Olson v. Prosoco, Inc., 522 N.W.2d 284, 289 (Iowa 1994) ("After reviewing the authorities and comments on the failure to warn question, we believe any posited distinction between strict liability and negligence principles is illusory."); Crislip v. TCH Liquidating Co., 556 N.E.2d 1177, 1183 (Ohio 1990) ("[T]he standard imposed upon the defendant in a strict liability claim grounded upon an inadequate warning is the same as that imposed in a negligence claim based upon inadequate warning.").

[8] 447 A.2d 539, 545 (N.J. 1982).

[9] *Id.* at 546. There was a "substantial factual dispute about what defendants knew and when they knew it." *Id.* at 542. For purposes of resolving the defendants' motion to dismiss, though, the court assumed the defendants had a lack of knowledge. *Id.* at 543.

[10] *Id.* at 546.

[11] OWEN, *supra* note 5, § 9.2, at 592; THIRD RESTATEMENT, *supra* note 3, § 2 cmt. a (explaining that the rationale for imposing strict liability does not apply to defects based on inadequate instruction or warning). Even the New Jersey Supreme Court found differently a few years later in *Feldman v. Lederle Laboratories*, 479 A.2d 374 (N.J. 1984). In *Feldman*, the potentially defective products at issue were prescription drugs. *Id.* at 376–77. And when prescription drugs were at issue, the court held that drug manufacturers were obligated to warn only of "dangers of which they know or should have known on the basis of reasonably obtainable or available knowledge" at the time of sale. *Id.* at 376. The New Jersey Supreme Court also noted in *Feldman* that its decision in *Beshada* had been heavily criticized. *Id.* at 387–88.

known . . . ."[12] Thus, manufacturers are obligated to warn only of dangers about which they knew or should have known at the time of sale.

Notably, the fault analysis for the point-of-sale warning obligation considers what the defendant knew and what it should have known. The fault analysis does not consider the costs of issuing a point-of-sale warning. That is because the costs are negligible: "the cost of giving an adequate warning is usually so minimal, amounting only to the expense of adding some more printing to a label."[13] Obviously, the costs of the injury that result from the inadequate warning outweigh "a few pennies for a bit more paper and a little more ink."[14] Thus, a reasonable manufacturer would always warn of the foreseeable dangers.

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[12] Victor Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. REV. 892, 896–97 (1983).

[13] Moran v. Faberge, Inc., 332 A.2d 11, 15 (Md. 1975); *see also* Johnston v. United States, 568 F. Supp. 351, 359–60 (D. Kan. 1983) (explaining that point-of-sale warnings would be "trivial in cost"); *Moran*, 332 A.2d at 15 (discussing that balancing the costs of adding a warning against the benefits resulting from that warning "will almost always weigh in favor of an obligation to warn of latent dangers"); Wheeler v. Gen. Tire & Rubber Co., 419 N.W.2d 331, 339 (Wis. Ct. App. 1987) (explaining that the cost of added point-of-sale warnings would have been "very small"); Paul D. Rheingold & Susan B. Feinglass, *Risk-Utility Analysis in the Failure to Warn Context*, 30 U. MICH. J.L. REFORM 353, 357 (1997) (explaining that the "suppliers' costs of providing a warning" are "always . . . negligible").

Arguably, there are costs associated with issuing the point-of-sale warning. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 297 (1990) (arguing that "judges and juries . . . assume erroneously that warnings are virtually costless"); *see also* Karin L. Bohmholdt, Note, *The Heeding Presumption and Its Application: Distinguishing No Warning from Inadequate Warning*, 37 LOY. L.A. L. REV. 461, 477 (2003) (explaining that "there are collateral costs associated with providing warnings" including the "costs associated with lost profits from a product containing too many warnings or the costs associated with 'lost effect' of an important warning among multiple, less necessary ones"). If a product contains too many warnings, consumers may disregard them. Henderson & Twerski, *supra*, at 296; *see also* Cotton v. Buckeye Gas Prod. Co., 840 F.2d 935, 938 (D.C. Cir. 1988) ("The inclusion of each extra item dilutes the punch of every other item. Given short attention spans, items crowd each other out; they get lost in fine print."). Plus, there is a limit to how much information each warning can include. *Id.* ("If every foreseeable possibility must be covered, '[t]he list of foolish practices warned against would be so long, it would fill a volume.'" (quoting Kerr v. Koemm, 557 F. Supp. 283, 288 n.2 (S.D.N.Y. 1983)). "Even a court which knows, in the abstract, that a limit will ultimately be reached, has no immediate sense of whether the case before it pushes the warning package beyond the appropriate constraints." Henderson & Twerski, *supra*, at 301. It is difficult to argue these costs, however, because there is "no available body of hard science from which to draw the data." *Id.* at 298.

[14] Henderson & Twerski, *supra* note 13, at 297; *see also* Ross Labs. v. Thies, 725 P.2d 1076, 1079 (Alaska 1986) ("The cost of giving an adequate warning is usually so minimal, i.e., the expense of adding more printing to a label, that the balance must always be struck in favor of the obligation to warn where there is a substantial danger which will

B. The Basics of a Post-Sale Duty to Warn

A post-sale warning is a warning issued *after* the sale of the product. It addresses dangers that the seller discovered, or should have discovered, after the sale. These are most likely dangers that were unknowable at the time of sale—the type of danger for which the defendant could not be liable for failing to warn at the point-of-sale. But if the manufacturer discovers or should have discovered a danger after the sale, a post-sale duty would obligate the manufacture to warn users, possibly years after that sale, of that newly materialized danger.

To illustrate the difference, consider an illustration from the *Third Restatement*:

> ABC has manufactured and distributed vacuum cleaners commercially to millions of consumers over the course of many years. . . . Five years after the first commercial distribution of Model 14, ABC discovers a risk when the Model 14 is used to vacuum dust from a chemical carpet cleaner newly introduced to the market. No reasonable person in ABC's position would have foreseen the risk previously, and thus the Model 14 was not defective at time of original sale.[15]

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not be recognized by the ordinary user."); OWEN, *supra* note 5, § 9.2, at 591 (explaining that "the safety benefits of adding a sufficient warning virtually always exceed its monetary costs").

[15] THIRD RESTATEMENT, *supra* note 3, § 10 cmt. e, illus. 2. Courts that have adopted a post-sale duty to warn differ regarding whether the later-discoverable danger (triggering the need for a warning) must be related to a defect existing at the time of sale. Under the *Third Restatement* version, a post-sale duty to warn exists "whether or not the product is defective at the time of original sale." *Id.* § 10 cmt. a. Many states, however, have required that a latent and undetectable design defect exist at the time of sale for a manufacturer to owe a duty to warn of the later revealed danger. Kenneth Ross, *Post-Sale Duty to Warn: A Critical Cause of Action*, 27 WM. MITCHELL L. REV. 339, 347 (2000); *see also* DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 11.2, at 688 (3d. ed. 2000); *see, e.g.*, Romero v. Int'l Harvester Co., 979 F.2d 1444, 1450 (10th Cir. 1992) (limiting the post-sale duty to warn to "defects in design, existing but unknown or unappreciated at the time of the original sale, which are subsequently discovered by the manufacturer"); Patton v. Hutchinson Wil-Rich Mfg. Co., 861 P.2d 1299, 1313 (Kan. 1993) (recognizing a post-sale duty to warn "when a defect, which originated at the time the product was manufactured" is later discovered).

There is no obvious need for liability for a post-sale failure to warn if a design defect also exists. Seemingly, the manufacturer would lack an incentive to issue a warning if the product is defectively designed; later issuance of a warning would not negate liability for the defective design. THIRD RESTATEMENT, *supra* note 3, § 10 cmt. j. Still, issuing the warning could be practically beneficial. If the user is warned, the user may be able to avoid injury. Using the example in the accompanying text, the user may not use the vacuum cleaner along with the chemical carpet cleaner. If the user is not injured, the manufacturer cannot be liable despite the existence of a design defect. Alternatively, if the user operates the vacuum cleaner with the chemical carpet cleaner despite being warned, the

If a post-sale duty to warn existed, ABC would be obligated to warn its users of the newly discovered risk. How exactly would ABC warn its users? Obviously, the manufacturer cannot just "change the warning on the product,"[16] because the product has already left the manufacturer's control.[17]

In order for ABC to warn its users of the newly materialized danger, it will have to contact those users. "The manufacturer must try to locate the product, identify its users, and advise them about the newly discovered product hazard."[18] This will be difficult. The more customers, the more arduous this will be. It will be even more difficult if the product has changed hands over time—if the original purchaser has sold it or given it away.[19]

"Even if the effort to identify and contact current product users is successful, the cost of such an effort might be intolerable."[20] The writers of the *Third Restatement* agreed. They concluded that "an unbounded post-sale duty to warn would impose unacceptable burdens on product sellers," including undertaking the "daunting" "costs of identifying and communicating with product users years after sale."[21] The serious potential for overburdening sellers is the reason Illinois courts rejected a post-sale duty to warn: "the law does not contemplate placing the

manufacturer would have a basis for a comparative fault defense, reducing the plaintiff's recoverable damages.

Moreover, if the state requires a plaintiff to establish a point-of-sale design defect in order to show a post-sale failure to warn, it will be impossible for a plaintiff to base a post-sale duty to warn on a failure to disclose a danger not knowable until after sale. A design defect exists under the risk-utility test only if "the foreseeable risks of harm posed by the product could have been reduced" with an alternative design. *Id.* § 2(b). If the danger was unknowable (and obviously unforeseeable) at the time of sale, no design defect exists. Thus, if the danger was unknowable at the time of sale—and only later becomes knowable—there can also be no liability for a post-sale failure to warn if the state also requires a design defect.

Regardless of whether the defect must have existed at the time of manufacture, a post-sale duty to warn is not owed simply because the manufacturer develops a safety advancement. OWEN ET AL., *supra*, § 11.2, at 691.

[16] Lovick v. Wil-Rich, 588 N.W.2d 688, 694 (Iowa 1999) ("[O]nce the product is sold, a variety of circumstances can impede, if not make impossible, the ability of a manufacturer to warn users."); Schwartz, *supra* note 12, at 895 ("The warning cannot be attached to the product because the product already has been sold.").

[17] Douglas R. Richmond, *Expanding Products Liability: Manufacturers' Post-Sale Duties to Warn, Retrofit and Recall*, 36 IDAHO L. REV. 7, 18 (1999) ("Post-sale failure-to-warn claims are differentiated from point-of-sale failure-to-warn claims by a lack of manufacturer control.").

[18] Schwartz, *supra* note 12, at 895–96; Richmond, *supra* note 17, at 19.

[19] Schwartz, *supra* note 12, at 896; Richmond, *supra* note 17, at 19.

[20] Schwartz, *supra* note 12, at 896.

[21] THIRD RESTATEMENT, *supra* note 3, § 10 cmt. a.

onerous duty on manufacturers to subsequently warn all foreseeable users of products"[22] of "defects first discovered after a product has left its control."[23]

Despite the potential for overburdening manufacturers, over half the states have adopted a post-sale duty to warn and more are likely to follow given the *Third Restatement* also includes a post-sale duty to warn.[24] Those states that have

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[22] Modelski v. Navistar Int'l Transp. Corp., 707 N.E.2d 239, 246 (Ill. App. Ct. 1999) (quoting Collins v. Hyster Co., 529 N.E.2d 303, 306 (Ill. App. Ct. 1988)) (internal quotation marks omitted).

[23] Jablonski v. Ford Motor Co., 955 N.E.2d 1138, 1160 (Ill. 2011) (quoting *Modelski*, 707 N.E.2d at 247). Numerous other states have rejected the imposition of a post-sale duty to warn including the following: Boatmen's Trust Co., v. St. Paul Fire & Marine Ins. Co., 995 F. Supp. 956, 962 (E.D. Ark. 1998) (Arkansas); Smith v. DaimlerChrysler Corp., No. Civ.A 94C-12-002JEB, 2002 WL 31814534, at *5 (Del. Super. Ct. Nov. 20, 2002) (Delaware); Tober v. Graco Children's Prods., Inc., 431 F.3d 572, 578 (7th Cir. 2005) (Indiana); Wicker *ex rel.* Estate of Wicker v. Ford Motor Co., 393 F. Supp. 2d 1229, 1235–36 (W.D. Okla. 2005) (Oklahoma); Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 600–01 (Miss. Ct. App. 2003) (Mississippi); Anderson v. Nissan Motor Co., 139 F.3d 599, 602 (8th Cir. 1998) (Nebraska); Campbell v. Gala Indus., Inc., No. Civ.A.6:04-2036-RBH, 2006 WL 1073796, at *4–5 (D.S.C. Apr. 20, 2006) (South Carolina); McLennan v. Am. Eurocopter Corp., 245 F.3d 403, 430 (5th Cir. 2001) (Texas). Several other states and the District of Columbia have not yet addressed whether to impose a general post-sale duty to warn, including Alabama, California, D.C., Montana, Nevada, Rhode Island, Vermont, West Virginia, and Wyoming. *See* KENNETH ROSS, AM. BAR ASS'N, POST-SALE DUTY TO WARN: A REPORT OF THE PRODUCTS LIABILITY COMMITTEE 68, 72–73, 77, 106–07, 124–25, 129–30, 134–37 (2004); Jacob R. Swiss, *Delayed Discovery of Defect: Duty to Warn?*, USLAW, Spring/Summer 2014, at 10, 11.

[24] The following states have adopted some sort of post-sale duty to warn: Wilson v. U.S. Elevator Corp., 972 P.2d 235, 238 (Ariz. Ct. App. 1998) (Arizona); Downing v. Overhead Door Corp., 707 P.2d 1027, 1032–34 (Colo. App. 1985) (Colorado); Densberger v. United Techs. Corp., 297 F.3d 66, 70–71 (2d Cir. 2002) (Connecticut); Braniff Airways, Inc. v. Curtiss-Wright Corp., 411 F.2d 451, 453 (2d Cir. 1969) (Florida); GA. CODE ANN. § 51-1-11(c) (2000 & Supp. 2013) (Georgia); Tabieros v. Clark Equip. Co., 944 P.2d 1279, 1300 (Haw. 1997) (Hawaii); Patton v. Hutchinson Wil-Rich Mfg. Co., 861 P.2d 1299, 1313 (Kan. 1993) (Kansas); LA. REV. STAT. ANN. § 9:2800.57(C) (2009) (Louisiana); Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 643–46 (Md. 1992) (Maryland); Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909, 923–24 (Mass. 1998) (Massachusetts); Comstock v. Gen. Motors Corp., 99 N.W.2d 627, 634–35 (Mich. 1959) (Michigan); Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826, 833–34 (Minn. 1988) (Minnesota); Dixon v. Jacobsen Mfg. Co., 637 A.2d 915, 922 (N.J. Super. Ct. App. Div. 1994) (New Jersey); Cover v. Cohen, 461 N.E.2d 864, 871 (N.Y. 1984) (New York); Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401, 406–09 (N.D. 1994) (North Dakota); Temple v. Wean United, Inc., 364 N.E.2d 267, 272–73 (Ohio 1997) (Ohio); Walton v. Avco Corp., 610 A.2d 454, 459–60 (Pa. 1992) (Pennsylvania); Kozlowski v. John E. Smith's Sons Co., 275 N.W.2d 915, 923–25 (Wis. 1979) (Wisconsin).

The following states have adopted the *Third Restatement*'s post-sale duty or relied on it: Jones v. Bowie Indus., Inc., 282 P.3d 316, 335 (Alaska 2012) (Alaska); Lovick v. Wil-Rich, 588 N.W.2d 688, 693–96 (Iowa 1999) (Iowa); Jarrett v. Duro-Med Indus., No. 05-102-JBC, 2007 WL 628146, at *5 (E.D. Ky. Feb. 26, 2007) (Kentucky); Hanlan v.

adopted the duty have acknowledged the potential burden on manufacturers, as did the *Third Restatement*, which stresses that courts consider the "serious potential for overburdening sellers" when examining whether to impose the post-sale duty.[25]

In order to protect manufacturers, the states that have adopted a post-sale duty have adopted factually dependent versions—the duty will exist only when the facts show the manufacturer would not be overburdened if forced to issue the post-sale warning.[26] The *Third Restatement* similarly dictates that liability for a failure to warn is proper only if a reasonable manufacturer would have issued the post-sale warning.[27] Plainly, a reasonable manufacturer would have issued a warning only if the costs of issuing that warning were reasonable. If the costs are unreasonable, then liability is improper.

This is markedly different than the point-of-sale warning obligation. Certain exceptions exist,[28] but generally, all manufacturers owe a duty to issue the point-of-sale warning. The fact finder then decides whether the manufacturer breached that duty based on the factual circumstances. With the factually dependent post-sale duty to warn, however, courts frequently declare that a specific manufacturer

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Chandler, No. 4-0259B, 2008 WL 5608253, at *2–3 (Mass. Super. Ct. Nov. 13, 2008) (Massachusetts); *In re* Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig., No. 2004 4:08-MD-2004 (CDL), 2013 WL 2421007, at *3 (M.D. Ga. June 3, 2013) (Minnesota); Jenks v. Textron, Inc., No. 09-cv-205-JD, 2012 WL 2871686, at *2 (D.N.H. July 10, 2012) (New Hampshire); Robinson v. Brandtjen & Kluge, Inc., 500 F.3d 691, 697–98 (8th Cir. 2007) (South Dakota); Tabor v. Metal Ware Corp., No. 2:99-CV-00503DAK, 2008 WL 4250049, at *4–5 (D. Utah Sept. 9, 2008) (Utah); Rash v. Stryker Corp., 589 F. Supp. 2d 733, 735–36 (W.D. Va. 2008) (Virginia); Daniel v. Coleman Co., 599 F.3d 1045, 1049 (9th Cir. 2010) (Pregerson, J., dissenting) (Washington).

Additionally, "[b]y 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 advise health care professionals of new hazard related information." M. Stuart Madden, *Modern Post-Sale Warnings and Related Obligations*, 27 WM. MITCHELL L. REV. 33, 39–40 (2000). This is not controversial because drug manufacturers need only warn doctors, and it is not difficult to locate and contact doctors.

[25] THIRD RESTATEMENT, *supra* note 3, § 10 cmt. a.

[26] *See, e.g.*, Robinson, 500 F.3d at 697–98 (applying South Dakota law and finding no violation of the duty to warn where the long passage of time would make it unreasonable for the manufacturer to locate all owners of its product and the manufacturer had already conducted a reasonable "post-sale warning campaign").

[27] THIRD RESTATEMENT, *supra* note 3, § 10(a); *see also* Schwartz, *supra* note 12, at 896 (explaining that "cost should be considered in determining whether a manufacturer has made a reasonable effort to warn product users" and that the "facts of a particular case . . . should all be relevant in determining" liability for post-sale failure to warn).

[28] For instance, manufacturers do not have to warn of "risks that are either obvious, known to the affected party, or both." OWEN ET AL., *supra* note 15, § 9.1, at 519. Similarly, "there is no duty to give a warning to members of a trade or profession against dangers generally known to that group." *Id.* § 9.8, at 568. Exceptions to the duty to warn also exist for sellers of bulk materials and raw materials. *See generally id.* § 9.9.

does not even owe a duty to warn because of the factual circumstances. Similarly, the *Third Restatement*'s post-sale duty to warn can be read as a rule where the duty would not exist because of the factual circumstances.[29]

A factually dependent post-sale duty to warn also differs from a point-of-sale duty to warn in its consideration of costs. For the point-of-sale warning, the consideration of fault is limited to whether the danger was foreseeable. A

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[29] Professor Aaron Twerski was one of the co-reporters of the *Third Restatement of Torts: Products Liability*. In separate scholarship, Professor Twerski pointed to the post-sale duty rule as an example of a no-duty rule that is dependent on the individualized facts of the case as opposed to a categorical no-duty rule. *See* Aaron D. Twerski, *The Cleaver, the Violin, and the Scalpel: Duty and the* Restatement (Third) of Torts, 60 HASTINGS L.J. 1, 19–21 (2008). In addition, courts often rely on the facts to find that the defendant did not owe a post-sale duty to warn. *See, e.g.*, Lewis v. Ariens Co., 751 N.E.2d 862, 867 (Mass. 2001) (finding no duty where the facts showed the plaintiff "purchased the product at least second hand, sixteen years after it was originally sold, and did not own the product until years after a duty to provide additional warnings arguably arose"). Professor Twerski made his observation in criticizing the version of duty described in drafts of the *Third Restatement of Torts: Liability for Physical Harm*, written by Professors Michael Green and William Powers. *See* Twerski, *supra*, at 21–25. That version describes that "[n]o-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases." RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. a (2010).

The language of Professor Twerski's individualized facts no-duty rule in the *Third Restatement of Torts: Products Liability* could also be interpreted as being consistent with the brightline duty rules articulated in the *Third Restatement of Torts: Liability for Physical Harm*. It could be read as obligating all manufacturers to issue post-sale warnings, a brightline rule, but clarifying that no breach of that duty occurs if a reasonable manufacturer would not have issued the post-sale warning. This is more consistent with reasonableness's traditional relevance to breach (and not to duty). Under this interpretation, courts do not reject post-sale warning claims because the defendant did not owe a duty, but because the unreasonableness of issuing a warning meant the defendant did not breach as a matter of law. The *Third Restatement of Torts: Liability for Physical Harm* includes a description of this:

> Sometimes reasonable minds cannot differ about whether an actor exercised reasonable care under § 8(b). In such cases, courts take the question of negligence away from the jury and determine that the party was or was not negligent as a matter of law. Courts sometimes inaptly express this result in terms of duty. . . . In fact, these cases merely reflect the one-sidedness of the facts bearing on negligence, and they should not be misunderstood as cases involving exemption from or modification of the ordinary duty of reasonable care.

Id. § 7 cmt. i; *see also* W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 729 (2008) (explaining that when a judge dismisses a case because the plaintiff is unable to establish breach as a matter of law, it "requires judges to recognize and acknowledge that they are deciding a matter ordinarily left to the jury," which "imposes an appropriate psychological hurdle for a judge before so ruling").

manufacturer owes a duty to warn of foreseeable dangers regardless of the costs of that warning. For a post-sale warning, however, both the foreseeability of the danger and the costs of the warning are considered in the fault evaluation. A reasonable manufacturer would warn only of dangers about which it knows or should know and only if those dangers were substantial enough to justify the costs. Unlike a point-of-sale warning, a manufacturer may not owe a post-sale duty to warn because of the costs of issuing the warning.

III. UNEVENLY BURDENING SMALL MANUFACTURERS WITH THE FACTUALLY DEPENDENT DUTY

Although a factually dependent duty may be a way to ensure manufacturers are not overburdened, a factually dependent duty causes another problem. Courts have relied on particular facts in finding a post-sale duty to warn. The *Third Restatement* lists those same facts as factors that courts should consider in determining whether a post-sale duty to warn should exist. The facts courts have used and the *Third Restatement* factors are more likely to be present in cases where the defendant is a small manufacturer with fewer customers than if the defendant is a large manufacturer that widely distributes its product.[30]

A. Courts Imposing a Duty Based on the Facts

Facts that have motivated courts to impose a post-sale duty to warn include whether (1) the defendant sold the product to a small or otherwise limited market, (2) the defendant sold a small amount of products, and (3) the defendant maintained continuing contact with customers. As illustrated by the cases, these factors are more likely to be present if the defendant is a small manufacturer.

1. Limited or Specialized Market

Several courts have imposed a post-sale duty to warn on manufacturers that sold its product to a limited or specialized market. The Wisconsin Supreme Court, for example, imposed a post-sale duty to warn on a manufacturer of a sausage-stuffing machine in *Kozlowski v. John E. Smith's Sons Co.*[31] Years after the defendant first developed the product, an additional safety feature was invented

[30] A factually dependent duty does not de jure obligate only small manufacturers. On its face, a factually dependent duty applies neutrally to all manufacturers regardless of their size. Despite its neutrality, however, the application of a factually dependent duty will, de facto, create unequal obligations and liability for small and large manufacturers. Because of the factors used, a factually dependent duty will most likely obligate more small manufacturers than large manufacturers to issue a post-sale warning. Similarly, it will more likely create liability for small manufacturers than large manufacturers. My argument could be resolved as an empirical matter as more states adopt a post-sale duty and more plaintiffs pursue that theory of liability. At this point, however, my argument is predictive.

[31] 275 N.W.2d 915, 918, 923–25 (Wis. 1979).

that would minimize the possibility of an accident due to excessive pressure while cleaning the machine.[32] This feature was not on the machines purchased by the plaintiff's employer.[33] The court confronted the question of "whether there is a continuing duty to warn."[34] The court explained that, in determining whether that duty exists, the jury "must look to the nature of the industry" along with other factors.[35]

The nature of the industry helped convince the Wisconsin Supreme Court that the sausage-stuffer manufacturer owed a continuing duty to warn of dangers. "The sale of a sausage stuffer is to a limited market wherein the manufacturer should know of all companies that own its product."[36] Not only should the defendant have been able to identify all of its customers, it also had the easy ability to notify them through "trade publications that reached 100% of its customers."[37] In fact, the defendant had actually advertised the existence of a safety feature that would have prevented the plaintiff's injury in those trade publications,[38] and the defendant listed the safety feature in its repair parts brochure.[39] Because of the limited scope of the industry, the manufacturer owed a "continuing duty to warn of an alleged defective condition in light of the availability of a . . . safety device."[40] The jury would then decide whether the advertisements that the defendant sent out were adequate post-sale warnings.[41]

The Supreme Court of Pennsylvania similarly relied on the limited market in imposing a post-sale duty in *Walton v. Avco Corp*.[42] Like the sausage-stuffing machine in *Kozlowski*, the product in *Walton*, a helicopter, was sold to a small market.[43] The helicopter in question seized mid-flight due to a failure of an oil pump in the engine, killing the passengers in the ensuing crash.[44] The engine manufacturer had issued a Service Instruction advising of the defect and how to correct it.[45] The engine manufacturer had sent that Service Instruction to the helicopter manufacturer, but not to the helicopter's owners.[46] The court determined

[32] *Id.* at 916–17.
[33] *Id.* at 917.
[34] *Id.* at 923.
[35] *Id.* at 924. Those other factors included "warnings given, the intended life of the machine, safety improvements, the number of units sold and reasonable marketing practices, combined with the consumer expectations inherent therein." *Id.*
[36] *Id.* at 923.
[37] *Id*.
[38] *Id*. at 916, 923.
[39] *Id.* at 923.
[40] *Id*.
[41] *See id*.
[42] 610 A.2d 454, 459–60 (Pa. 1992).
[43] *Id.* at 459.
[44] *Id.* at 456.
[45] *Id*.
[46] *Id.* at 457.

the helicopter manufacturer was under a duty to warn its service centers and the purchasers of the affected helicopters.[47]

The intermediate court noted the similarities between the case and *Kozlowski*, including the limited market for the sale of the products. [48] Specifically, the court noted its "cognizan[ce] of the nature of the helicopter manufacturing industry. A helicopter is not a household good, commonly found in almost any home in this country. It is . . . a unique and costly product which is manufactured, marketed, and sold to a specialized group of consumers."[49] The Pennsylvania Supreme Court similarly relied on the market in affirming the post-sale duty: "[T]he peculiarities of the industry also go far to support this imposition of responsibility."[50] The court also explained that helicopters "are sold in a small and distinct market."[51]

Although it is possible that any sized manufacturer could sell to a limited market, it is generally true that a small manufacturer is more likely to sell to a limited market than a large manufacturer. A smaller manufacturer is more likely to distribute its products less widely, i.e., less than nationally. Applying this factor of selling to a limited market, it is more likely that a small manufacturer would owe a post-sale duty to warn.

Plainly, a court is much less likely to impose a factually dependent post-sale duty to warn on a larger manufacturer that widely distributes its products.[52] Both the Wisconsin Supreme Court in *Kozlowski* and the Pennsylvania courts in *Walton* make this clear. The Wisconsin Supreme Court specifically explained that it was not holding

> that there is an absolute continuing duty, year after year, for all manufacturers to warn of a new safety device which eliminates potential hazards. A sausage stuffer and the nature of that industry bears no similarity to the realities of manufacturing and marketing household goods such as fans, snow-blowers [sic] or lawn mowers which have become increasingly hazard proof with each succeeding model. It is beyond reason and good judgment to hold a manufacturer responsible for a duty of annually warning of safety hazards on household items, mass produced and used in every American home . . . . It would place an unreasonable duty upon these manufacturers if they were required to trace the ownership of each unit sold and warn annually of new safety improvements . . . .[53]

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[47] *Id.* at 459.

[48] Walton v. Avco Corp., 557 A.2d 372, 378 (Pa. Super. Ct. 1989), *aff'd*, 610 A.2d 454 (Pa. 1992).

[49] *Id.* at 379.

[50] *Walton*, 610 A.2d at 459.

[51] *Id*.

[52] *See* Richmond, *supra* note 17, at 43 (explaining that "courts are reluctant to find a post-sale duty to warn" if a product is "mass-marketed" and "could get swept away in the currents of commerce" (quoting *Walton*, 610 A.2d at 459) (internal quotations omitted)).

[53] Kozlowski v. John E. Smith's Sons Co., 275 N.W.2d 915, 923–24 (Wis. 1979).

By pointing out that "[a] helicopter is not a household good," the intermediate Pennsylvania court in *Walton* similarly implied that it would not find a post-sale duty to warn if the product at issue was a product found in every household.[54] The affirming Pennsylvania Supreme Court echoed that "[h]elicopters are not 'ordinary goods.' By their nature they are not the types of objects that could get swept away in the currents of commerce, becoming impossible to track or difficult to locate. Helicopters are not mass-produced or mass-marketed products . . . ."[55] Again, if helicopters were ordinary household goods widely distributed, a duty would likely not exist.[56] Accordingly, application of a factually dependent post-sale duty to warn is unlikely to result in a duty when the product is distributed widely, as is likely the case when the defendant is a large manufacturer.

2. *Number of Products Sold*

Related to the size of the market to which the manufacturer sells is the number of products the manufacturer sells. If the market is small or specialized, it is more likely the manufacturer has not mass-produced products and has instead sold a smaller amount. Not surprisingly, courts have looked to the number of products sold when determining whether to impose a post-sale duty to warn under a factually dependent test.

In addition to the limited market factual analysis in *Kozlowski* and *Walton*, the courts relied on the limited number of products sold as a factual basis for imposing the post-sale duty to warn. In *Kozlowski*, the Wisconsin Supreme Court mentioned "the number of units sold" as relevant to the determination of duty.[57] In fact, the number of units sold was so small the manufacturer should have known all of its customers because there were not that many of them.[58]

In *Walton*, the Pennsylvania Supreme Court noted helicopters are a unique good and are sold only to limited specialized consumers.[59] Again, the manufacturer should have known all of its customers because there were not that many of them.

Distinguishing *Walton*, a Pennsylvania federal court later refused to impose a post-sale duty to warn when the product was a forklift.[60] "[W]hile forklifts are not common household goods, they are certainly much more prevalent than helicopters. Nearly any business which has a loading dock or a warehouse has a

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[54] *Walton*, 557 A.2d at 379.

[55] *Walton*, 610 A.2d at 459.

[56] *See* Richmond, *supra* note 17, at 43 (explaining that courts have not imposed a post-sale duty to warn in cases involving products that are "ordinary or mass-marketed[,] includ[ing] heaters, forklifts, and multipiece tire-rim assemblies").

[57] *See Kozlowski*, 275 N.W.2d at 924.

[58] *Id.* at 923.

[59] *Walton*, 610 A.2d 459.

[60] Habecker v. Clark Equip. Co., 797 F. Supp. 381, 388 (M.D. Pa. 1992), *vacated*, 36 F.3d 278 (3d Cir. 1994).

forklift . . . ."[61] Because of the commonality and volume of the products sold, no post-sale duty to warn existed.[62]

Other courts have also mentioned the relevance of the number of products sold to the determination of whether a post-sale duty to warn should exist. In *Cover v. Cohen*,[63] New York's highest court identified "the kind of product involved and the number manufactured or sold" as relevant.[64] In *Crowston v. Goodyear Tire & Rubber Co.*,[65] the North Dakota Supreme Court explained that the number of products sold is not determinative of whether a duty exists, but it "militates against individualized notice to the original purchasers."[66] In *Patton v. Hutchinson Wil-Rich Manufacturing Co.*,[67] the Kansas Supreme Court similarly identified the "number of units manufactured or sold" as relevant.[68] The evaluation of this fact, among others, "may indicate that notice to all ultimate consumers who purchased the product prior to the time the manufacturer learned of a potential danger is unreasonable."[69]

Just as a smaller manufacturer is more likely to distribute its products to a smaller, more limited market, a smaller manufacturer is also more likely to sell fewer products, like helicopters or sausage stuffers. This reality means a factually dependent post-sale duty to warn is more likely to exist when a small manufacturer is before the court. Similarly, a factually dependent post-sale duty is less likely to impose a duty on a large manufacturer that distributes its products widely and sells a greater volume of products. In that case, the manufacturer is less able to identify the users needing to be warned and provide the actual warning.

3. Continuing Contact with Customers

Courts have been more likely to impose a post-sale duty to warn when the manufacturer is in contact with the user who needs to be warned. This was true in *Kozlowski*, *Patton*, and *Walton*. The sausage-stuffing machine manufacturer in *Kozlowski* was in an industry in which it should "know of all companies that own its product."[70] Plus, the defendant had access to its customers through trade journals that reached 100% of its customers.[71] The defendant even visited the

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[61] *Id.* at 388.
[62] *Id*.
[63] 461 N.E.2d 864 (N.Y. 1984).
[64] *Id.* at 872.
[65] 521 N.W.2d 401 (N.D. 1994).
[66] *Id.* at 409. The court further stated that a large volume of products sold also "suggests that manufacturers cannot totally ignore post-sale information which has the potential to prevent serious injury to so many people." *Id.*
[67] 861 P.2d 1299 (Kan. 1993).
[68] *Id.* at 1315.
[69] *Id*.
[70] Kozlowski v. John E. Smith's Sons Co., 275 N.W.2d 915, 923 (Wis. 1979); *see also id.* at 924 (describing the sausage-stuffer machine market as "limited in scope").
[71] *Id.* at 923.

plaintiff's employer's plant twice, but for an unknown reason, the defendant never disclosed the danger resulting from excessive pressure or the new safety feature that would have eliminated the danger.[72] This continuing contact helped convince the court a duty existed.

In *Patton*, the Kansas Supreme Court acknowledged that "[n]otification by a manufacturer to all prior purchasers of a product may be extremely burdensome, if not impossible," weighing against the imposition of a post-sale duty to warn.[73] But in that particular case, the manufacturer had a way to reach consumers—its retailer had "continuing contact with the consumers."[74] In *Walton*, the Pennsylvania Supreme Court described the fact the manufacturer had remained in contact with the plaintiff "for the very purpose of keeping [him] current on all pertinent information" as "[e]ven more important" than the limited market in determining that a post-sale duty to warn existed.[75]

Maine courts have also recognized the importance of this continuing contact. In *Brown v. Crown Equipment Corp.*,[76] the Supreme Judicial Court of Maine found liability for a failure to warn when the manufacturer knew of the risk, had created a kit to help reduce that risk, was in personal contact with the purchaser who was injured, and had even evaluated the specific forklift that injured the purchaser.[77] The court had "no difficulty concluding" the manufacturer owed a duty to the plaintiff "as a known user of that forklift."[78] The court also characterized the claim as a "straightforward negligence claim," meaning the duty existed because a reasonable manufacturer would have issued the post-sale warning under those circumstances.[79]

A New Jersey court held similarly in *Dixon v. Jacobsen Manufacturing Co.*[80] In *Dixon*, the court focused on the fact that the "manufacturer was aware of the identity of the current owner of the product."[81] The manufacturer was aware because the owner had contacted the manufacturer to request "any information" about the machine, covering the fact that an additional safeguard had been added to the machinery since the original manufacture.[82] The court acknowledged that numerous courts had been reluctant to impose a post-sale duty to warn because of

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[72] *See id*.

[73] *Patton*, 861 P.2d at 1314.

[74] *Id.*; *see also* Reiss v. Komatsu Am. Corp., 735 F. Supp. 2d 1125, 1150 (D.N.D. 2010) (refusing to grant summary judgment on the basis of a lack of a post-sale duty to warn partly because the defendant kept records of products sold).

[75] Walton v. Avco Corp., 610 A.2d 454, 459 (Pa. 1992).

[76] 960 A.2d 1188 (Me. 2008).

[77] *Id.* at 1193.

[78] *Id*.

[79] *Id.* The Maine court further declined to adopt section 10 of the *Third Restatement*, instead "recogniz[ing] a post-sale duty to warn indirect, known purchasers as it applies to the facts of this case." *Id.* at 1193–94.

[80] 637 A.2d 915 (N.J. Super. Ct. App. Div. 1994).

[81] *Id.* at 922.

[82] *Id.* at 923.

"the burden that such a duty places on manufacturers to ascertain the identity of current owners of the product, especially consumer products."[83] But "[n]o such policy consideration exists where the owner is known," as in this case.[84] The court thus had "no hesitation in holding that such a duty existed."[85]

It is possible for a manufacturer of any size to maintain some type of continuing contact with customers. This continuing contact is more likely to occur, however, if the manufacturer has a small number of customers, which a small manufacturer is likely to have. A small manufacturer may keep in contact with the customer for purposes of maintaining the machine, like in *Kozlowski*, or to ensure the customer is kept up to date. This type of continuing contact is more likely to occur if it is easy for the manufacturer, such as when there are a limited amount of customers. The reality that small manufacturers have a limited number of customers means a court will be more likely to impose a post-sale duty to warn on a small manufacturer.

A large manufacturer, on the other hand, is unlikely to have systematic continuing contact with its customers. When the number of customers is large, systematic continuing contact is more difficult. The lack of continuing contact with customers makes it less likely that a large manufacturer would owe a factually dependent post-sale duty to warn. It is possible that a large manufacturer may have some continuing contact; for example, a customer may contact the manufacturer, as was the case in *Dixon*. But that is likely the exception.

B. Third Restatement Factors

The *Third Restatement* states that the duty should exist only "if a reasonable person in the seller's position would provide such a warning."[86] The Third *Restatement* also dictates four factors to determine whether a reasonable person would have provided such a warning:

> 1. the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
> 2. those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
> 3. a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
> 4. the risk of harm is sufficiently great to justify the burden of providing a warning.[87]

[83] *Id*.
[84] *Id*.
[85] *Id.* at 924.
[86] THIRD RESTATEMENT, *supra* note 3, § 10(a).
[87] *Id.* § 10(b). For a duty to exist, the plaintiff must establish each of these elements. *See id.* § 10 reporters' note cmt. a; *see also* Twerski, *supra* note 29, at 20.

As was also true of the facts that courts evaluated to determine if a post-sale duty to warn should exist, application of the *Third Restatement*'s factors will often lead to a small manufacturer owing a post-sale duty to warn, but not a large manufacturer.

1. Knowledge of the Substantial Risk

The first *Third Restatement* factor clarifies that a warning will only potentially be legally required if "the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property."[88] This requirement ensures that a manufacturer can be liable only if it is at fault—if it knew or should have known about the danger.

This factor likely applies neutrally to manufacturers regardless of their size. Whether large or small, a manufacturer may become aware, or should have become aware, of a danger presented by its product. If anything, this factor may be present more often for large manufacturers than for small ones. Generally speaking, large manufacturers may have more resources for research and development, meaning they may be more likely to discover dangers. Large manufacturers are also likely to have more customers, increasing the chances that someone might be injured and complain to the manufacturer. At the same time, a customer may be more likely to complain of injury to a small manufacturer than to a large manufacturer because the small manufacturer may be more likely to respond.

Regardless, this factor, imposing a duty only if a manufacturer is aware or should be aware of a danger, likely applies neutrally to all manufacturers regardless of their size. It is, however, only one of four factors.

2. Ability to Identify Those Needing a Warning

The second factor requires a warning only if those needing a warning "can be identified."[89] Identifying those users can be difficult. As an example, if a vacuum manufacturer "manufactured and distributed vacuum cleaners commercially to millions of consumers over the course of many years"[90] and if the retailers that

[88] THIRD RESTATEMENT, *supra* note 3, § 10(b)(1).

[89] *Id.* § 10(b)(2). Federal agencies require some industries to track purchases to facilitate government-ordered recalls. The Consumer Protection Safety Commission requires manufacturers of "durable infant or toddler product[s]" to include a registration card with the product and then maintain a record of any returned cards. 16 C.F.R. §§ 1130.3, 1130.8(a) (2014). This enables communication with users to "improve the effectiveness of recalls of, and safety alerts regarding, such products." § 1130.1(a). The National Highway Traffic Safety Administration also requires that manufacturers of child car seats include a registration card. *See* 49 C.F.R. §§ 588.4–.5 (2013). Again, the express purpose of this requirement is "to aid manufacturers in contacting the owners of child restraints." § 588.2.

[90] THIRD RESTATEMENT, *supra* note 3, § 10 cmt. e, illus. 2.

sold the vacuum cleaners have "[o]nly scanty and incomplete sales records,"[91] the lack of records would weigh against imposing a post-sale duty to warn on the vacuum manufacturer. In fact, "when no such records are available, the seller's inability to identify those for whom warnings would be useful may properly prevent a post-sale duty to warn from arising."[92]

The inability to identify the user precluded the existence of a duty in *Lewis v. Ariens Co*.[93] There, the plaintiff had purchased a snow blower from a friend's sister about sixteen years after it was originally sold,[94] making the plaintiff difficult to identify. The court described the plaintiff as a "member of a universe too diffuse and too large for manufacturers or sellers of original equipment to identify," thereby negating a post-sale duty to warn.[95]

Russell v. Wright[96] illustrates the opposite situation. There, the manufacturer of a taser gun operated a certification program to be used in training police officers and regularly updated those training materials.[97] The manufacturer's relationship with the police department enabled it to inform purchasers of any new warnings or information.[98] The court explained that this manufacturer was "in a much better position than most manufacturers to ensure that users of its product are kept up to date on new warnings and instructions," weighing in favor of imposing a post-sale duty to warn.[99]

Small manufacturers can likely identify those needing a warning more easily than large manufacturers. Naturally, a small manufacturer is likely to sell fewer products and have fewer customers than a larger business.[100] The fewer the customers, the more likely it is the manufacturer will have some continuing contact with its customers, perhaps through continuing maintenance and support services like in *Russell*. Even if contact does not continue, the fewer the customers, the more likely it is the manufacturer might have maintained some purchasing records.

But even without records, the fewer the customers, the easier it will be for the manufacturer to identify the customers. In *Jones v. Bowie Industries, Inc*.,[101] the Supreme Court of Alaska found that sufficient evidence supported the jury's finding of liability for failing to warn after the sale partly because of the relative

[91] *Id*.
[92] *Id.* § 10 cmt. e.
[93] 751 N.E.2d 862 (Mass. 2001).
[94] *Id.* at 863.
[95] *Id.* at 867 (quoting Lewis v. Ariens Co., 729 N.E.2d 323, 327 (Mass. App. Ct. 2000)).
[96] 916 F. Supp. 2d 629 (W.D. Va. 2013).
[97] *Id.* at 651.
[98] *Id*.
[99] *Id*.
[100] *See* Ross, *supra* note 15, at 348 (explaining that the ability to identify those needing to be warned will depend on numerous factors, including "the number of units sold").
[101] 282 P.3d 316 (Alaska 2012).

ease of identifying customers.[102] The defendant had "produced relatively few hydromulchers like the one that injured [the plaintiff], making identification of the class of ultimate users less burdensome."[103]

Even if a small manufacturer does not have continuing contact, records, or other means of identifying customers, a small manufacturer is likely to have a more "geographically limited market."[104] The *Third Restatement* explains that "[i]ndividual names and addresses are not necessarily required," but identification of a class of product users or "geographically limited markets" may satisfy this factor.[105] This identification would enable some sort of public notice.[106] Thus, even when a small manufacturer cannot identify individual customers despite the limited amount of products sold, it will likely be able to identify a specific geographical area, which weighs in favor of imposing a post-sale duty to warn.

None of this is true for large manufacturers. Larger manufacturers are less likely to have any continuing contact with customers. A larger manufacturer is also unlikely to maintain customer records simply because of the cost.[107] Why incur what could be a very expensive cost when not legally obligated to do so? The larger the amount of customers, the more expensive the costs may be because of the greater volume of purchases to be tracked. A large manufacturer is also likely to sell to a non-limited market, meaning it would be unable to identify a

[102] *Id.* at 335–36.

[103] *Id.* at 336; *see also* Jarrett v. Duro-Med Indus., No. 05-102-JBC, 2007 WL 628146, at *5 (E.D. Ky. 2007) (finding that the customer needing a warning was easily identifiable because the defendant was aware that the plaintiff's specific wheelchair lacked a working right wheel brake, but it did not warn the plaintiff of the resulting danger).

Additionally, in *Lovick v. Wil-Rich*, the defendant had manufactured approximately 35,000 cultivators since it first introduced the cultivator into the market in 1971. 588 N.W.2d 688, 692 (Iowa 1999). Beginning in 1988, the defendant began including a more specific warning label of the dangers of operating the cultivator. *Id.* The Iowa Supreme Court adopted the factors enumerated in the *Third Restatement* to determine if a post-sale duty to warn existed for individuals who purchased the cultivator before 1988 and remanded the case, so the trial court could instruct the jury regarding those four factors. *Id.* at 695–96.

[104] THIRD RESTATEMENT, *supra* note 3, § 10 cmt. e.

[105] *Id*.

[106] Madden, *supra* note 24, at 47.

[107] Regardless of the size of the manufacturer, "in the case of consumer goods, it is unlikely that retailers will maintain detailed sales records allowing the identification of purchasers or users." Tom Stilwell, *Warning: You May Possess Continuing Duties After the Sale of Your Product!*, 26 REV. LITIG. 1035, 1055 (2007); *see also* Ross, *supra* note 15, at 348–49 ("Establishing a 'traceability' system before the product is sold is the most effective way to find customers. However, such systems take planning, considerable effort, and substantial cost."). Presumably, this is even truer when those detailed sales records would need to be extensive (and thus expensive) because of the volume of customers. Of course, more and more purchases of goods are made online. Because these purchases necessarily do not involve cash, some record of the purchase will exist. These records may make personal communication more feasible, even with a high volume of customers.

geographically limited market in which it sells. This inability to identify customers "may properly prevent a post-sale duty to warn from arising."[108]

3. *The Ability to Effectively Communicate a Warning*

The *Third Restatement*'s third factor asks whether "a warning can be effectively communicated to and acted on by those to whom a warning might be provided."[109] Comment *g* explains that if records exist identifying the consumers, "direct communication of a warning may be feasible."[110]

In *Jones*, the Alaska Supreme Court affirmed, allowing the jury to decide liability for a post-sale failure to warn partially because the manufacturer could have effectively communicated the warning.[111] Not only was identification of users not particularly burdensome because of the relatively few hydromulchers sold, but the hydromulcher was also a "specialized machine[] with a limited population of users, so that advertisements in trade publications were another viable method of . . . warning."[112] Similarly, in *Jarrett v. Duro-Med Industries*,[113] the defendant had direct contact with the plaintiff because the plaintiff brought her wheelchair to the defendant "to request a replacement right wheel brake."[114] This face-to-face contact provided an opportunity for an effectively communicated warning.[115]

Direct communication is only feasible if the users or consumers are identifiable,[116] which is more likely to be true for small manufacturers. This also means that small manufacturers will likely be able to warn in the most effective way—direct communication—meaning this factor will likely always weigh in favor of liability for a small manufacturer that failed to warn.

Large manufacturers are less likely to be able to warn directly because of the inability to identify their customers. They may have some records based on customer loyalty programs, but records of only customers' email addresses allows for communication only via email. Even though this is a form of direct communication, it is arguably ineffective given users likely ignore spam-like emails. It is more likely that large manufacturers will not have any ability to identify their many customers, precluding direct communication. In this case, the *Third Restatement* explains that "it may be necessary to utilize the public media to

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[108] THIRD RESTATEMENT, *supra* note 3, § 10 cmt. e; *see also* Madden, *supra* note 24, at 47 (explaining that for some 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").

[109] THIRD RESTATEMENT, *supra* note 3, § 10(b)(3).

[110] *Id.* § 10 cmt. g.

[111] *See* Jones v. Bowie Indus., Inc., 282 P.3d 316, 336 (Alaska 2012).

[112] *Id*.

[113] No. 05-102-JBC, 2007 WL 628146 (E.D. Ky. 2007).

[114] *Id.* at *1.

[115] *Id.* at *5.

[116] THIRD RESTATEMENT, *supra* note 3, § 10 cmt. g.

disseminate information regarding risks of substantial harm."[117] Thus, a large manufacturer may have to issue some sort of broad public notice through the public media.

The *Third Restatement* cautions, however, that it may not require this type of broad mass warning. Specifically, it notes that as the amount of those needing to be warned increases, the "costs of communicating warnings may increase and their effectiveness may decrease."[118] This language suggests a large manufacturer may not be required to issue a mass warning. Indeed, why should the law require a large manufacturer to incur the great expense of a mass warning when the warning is unlikely to be effective anyway? The *Third Restatement*'s highlighting of the cost and ineffectiveness of a mass notice—the only type of notice a large manufacturer could even do—indicates the large manufacturer would not be obligated to issue such a notice.

4. The Scale of the Harm and the Cost of the Warning

The last *Third Restatement* factor is whether the "risk of harm is sufficiently great to justify the burden of providing a warning."[119] This factor instructs courts to look to the burden of providing a warning, i.e., the costs of the warning. "In the post-sale context, identifying those who should receive a warning and communicating the warning to them can require large expenditures."[120] Because of the cost, even if a substantial risk exists, there may be no duty to warn.[121]

This factor seems neutral in application to small and large manufacturers. Regardless of the size of the business, a warning is legally required only if the risk of harm justifies the costs of that warning. But this factor does not apply neutrally because of the relevance of costs. The costs for small and large manufacturers will not be the same. The cost of a warning would be less expensive for the small manufacturer because of the amount and the geographical limitations of the small manufacturer's customers. The smaller expense to warn customers will always weigh in favor of a post-sale duty to warn existing for a small manufacturer.

The *Third Restatement*'s post-sale duty to warn is based in negligence, and "[w]hat is reasonably prudent post-sale conduct for one manufacturer and one type of product may not be reasonable for another manufacturer of an entirely different type of product."[122] Suppose the product danger is the same for two manufacturers. The first manufacturer's costs, however, may be so large (because of the number of customers to contact) that issuing a post-sale warning is unreasonable and thus not required. The second manufacturer's costs to warn may be reasonable simply because there are fewer customers to warn. If the costs are reasonable, then a warning is required. The hypothetical holds true even if the product and the

[117] *Id*.
[118] *Id*.
[119] *Id.* § 10(b)(4).
[120] *Id.* § 10 cmt. i.
[121] *Id*.
[122] Patton v. Hutchinson Wil-Rich Mfg. Co., 861 P.2d 1299, 1314 (Kan. 1993).

materialized danger are exactly the same. But because of the different costs of a post-sale warning, the small manufacturer with fewer customers would owe a duty and the large manufacturer would not.

There is some possibility that a large manufacturer may still owe a duty even when its costs of warning are high. That is because the size of the harm depends on both the frequency of the harm and its expected severity.[123] Because of the amount of customers, harm to the customers of a large manufacturer will occur more frequently. Three out of six customers of a small manufacturer may be hurt, whereas three million out of six million customers of a large manufacturer may be hurt. The level of harm for three million customers will likely be substantial. If the analysis were a simple benefits of warning (protecting three million consumers) versus costs of warning (again all six million consumers), the large manufacturer would likely owe a duty to warn despite the costs.

However, the *Third Restatement* does not create this simple weighing of the benefits versus costs analysis. Instead, it also mandates consideration of the effectiveness of the warning.[124] Practically, identifying all six million customers is likely impossible. The only way to warn those six million customers would be through some sort of mass warning. But a mass warning is unlikely to be effective.[125] Even if the harm is substantial because of its frequency, due to the volume of customers, both the costs and the likely ineffectiveness still weigh against the post-sale warning obligation. Thus, even though the frequency of injury is likely to be high for a large manufacturer because of the volume of its customers, this does not mean the large manufacturer will owe a duty to warn. To the contrary, the harm is only one factor that courts weigh against both the extensive costs and the likely ineffectiveness of communication, both of which will weigh against imposing a post-sale warning obligation on larger manufacturers. For the small manufacturer, though, the harm is a factor weighed against less extensive costs and the likely effectiveness of direct communication, all of which will weigh in favor of imposing a post-sale warning obligation.

Returning to the relevance of costs, the *Third Restatement* does not instruct courts to look at the costs of warning relative to the specific defendant's finances. If this were true, then even though a large manufacturer's costs to warn were large, they may not look so large in relation to the large manufacturer's overall financial situation. Similarly, a small manufacturer's costs to warn may be less expensive, but they still may be excessive when compared to the small manufacturer's overall

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[123] THIRD RESTATEMENT, *supra* note 3, § 10 cmt. d (explaining that there would be no duty to warn of dangers that "occur infrequently and are not likely to cause substantial harm"); *see also* Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401, 409 (N.D. 1994) (describing that a large volume of products sold also "suggests that manufacturers cannot totally ignore post-sale information which has the potential to prevent serious injury to so many people").

[124] *See supra* Part III.B.2.

[125] THIRD RESTATEMENT, *supra* note 3, § 10 cmt. g ("As the group to whom warnings might be provided increases in size, costs of communicating warnings may increase and their effectiveness may decrease.").

financial situation and capability. Despite this disparity, nothing in the *Third Restatement* suggests this type of particularized evaluation of the costs.[126]

In any case, such an evaluation of the specific defendant's finances would not be consistent with negligence law generally.[127] "Unreasonable conduct is merely the failure to take precautions that would generate greater benefits in avoiding accidents than the precautions would cost."[128] Accordingly, if the costs of injury outweigh the costs of the precaution,[129] then the reasonable actor would have undertaken that necessary precaution. But if the costs of the precaution outweigh the costs of injury, then the precaution is unnecessary and a reasonable actor would not take it,[130] even if he could personally afford it. Moreover, the law should not be that a manufacturer is obligated to undertake unnecessary precautions simply because it could afford it.[131] This would hurt society as it could cause manufacturers to "undesirably curtail their activities . . . [and] set prices above the proper level, chilling consumption of their products."[132] Such a law could also be potentially unfair as it would "effectively impose[] a tax on corporate size and success, thereby discouraging growth and development."[133] Lastly, if abundant financial resources were a reason to impose liability, would insufficient financial resources be a reason to negate liability? Surely, this is not a desirable result.

Thus, for valid reasons, the *Third Restatement* does not contemplate evaluation of the specific defendant's financial resources. Instead, the costs are evaluated without any context—meaning a large manufacturer's costs likely will be high, negating the likelihood of post-sale warning liability, and a small manufacturer's costs likely will be low, increasing the likelihood of post-sale warning liability.

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[126] The *Third Restatement* instead explains that identifying users and communicating the warning "can require large expenditures," and thus the obligation to warn after sale should exist "only if the risk of harm is sufficiently great." *Id.* § 10 cmt. i.

[127] *Id.* (explaining that the "test defining unreasonable conduct is that which governs negligence generally").

[128] McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1557 (7th Cir. 1987).

[129] *See, e.g.*, United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (introducing an analytical formula for determining reasonable conduct: weighing the probability and severity of injury versus the burden of adequate precaution).

[130] A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 879 (1998) (defining a "socially excessive precaution" as a precaution "that costs more than the reduction of harm produced by it").

[131] *Id.* at 911. This also raises questions of how the jury would determine whether a defendant could "afford" a post-sale warning. Is it that the defendant's business was profitable overall that year? Or is it that the defendant has excess cash at the time it should have warned?

[132] *Id.*

[133] *Id.*; *see also id.* at 912 (explaining that "retarding the natural growth of corporations can have adverse consequences, notably, that society forgoes economies of scale in production and in research and development").

IV. THEORETICAL AND PRACTICAL PROBLEMS WITH A RULE THAT (UNINTENTIONALLY) TARGETS SMALL MANUFACTURERS

A law that is more likely to create liability for small manufacturers than for large manufacturers is problematic. It is inconsistent with the theories underlying products liability law.[134] The factually dependent duty is also inconsistent with general public policy because of its potentially devastating consequences for small manufacturers, the same manufacturers already most vulnerable to the effects of products liability. Ironically, a factually dependent duty is also most likely to apply to this most vulnerable manufacturer.

A. Inconsistent with the Underlying Theories of Products Liability

Various theories underlie the imposition of liability on manufacturers when their products injure people. The theories include (1) fairness, (2) the manufacturer's superior position, (3) self-determination, (4) deterrence, and (5) risk spreading. None of these theories support a factually dependent post-sale duty because of its delineation between manufacturers that have to warn and those that do not. All of these theories, however, likely support the imposition of a broad post-sale duty to warn owed by all manufacturers regardless of the costs of the warning.

1. Fairness

"This idea of fairness embodies the maxim that those who design, market, and profit from a product should also pay for the injuries it causes."[135] The idea of

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[134] Technically, the theories of products liability explored in this section are the theories behind imposing strict liability for defective products that injure plaintiffs. There has been gradual movement away from strict liability for defective products. *See e.g.*, David A. Logan, *When the Restatement Is Not a Restatement: The Curious Case of the "Flagrant Trespasser,"* 37 WM. MITCHELL L. REV. 1448, 1459–60 (2011). If the product is defective because of a manufacturing defect, liability is still strict. If the product is defective because of its design and the jurisdiction uses the consumer expectations test, liability is also strict. But if the product is defective because of an inadequate warning, liability is based in negligence in all jurisdictions. *See supra* notes 7–10 and accompanying text. Similarly, if the product is defective in its design, liability is essentially based in negligence if the court follows the risk-utility test. *See supra* note 15. Any liability for a post-sale failure to warn is similarly based in negligence—a manufacturer failing to warn about a later-materialized danger about which it knew or should have known. These theories, although originally invoked to adopt strict liability, can still support negligence-based liability for injuries caused by defective products.

[135] Ellen Wertheimer, *The Third Restatement of Torts: An Unreasonably Dangerous Doctrine*, 28 SUFFOLK U. L. REV. 1235, 1235 (1994); *see also* Brooks v. Beech Aircraft Corp., 902 P.2d 54, 58 (N.M. 1995) ("The burden of illness from dangerous products . . . should be placed upon those who profit from its production . . . ." (quoting Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 549 (N.J. 1982)).

fairness also includes the evaluation of who should bear the costs of the injury, whether it is the manufacturer or the injured consumer. The manufacturer is responsible for the injury and should pay the resultant damages.[136] California Supreme Court Justice Traynor long ago pointed to fairness as a reason for making manufacturers liable: "The purpose of . . . liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[137]

The fairness theory supports the imposition of a broad post-sale duty to warn on all manufacturers. The manufacturer puts the product on the market and profits from doing so. So, the costs of injuries caused by later-materialized dangers of the product should be borne by the manufacturer who placed the dangerous product on the market. A New Jersey court recognized this fairness rationale when adopting a post-sale duty to warn in *Dixon v. Jacobsen Manufacturing Co*., explaining that the "imposition of a duty on the manufacturer to warn of dangers after a product is manufactured, and the extent of that duty, is essentially rooted in concepts of fairness."[138]

Between the manufacturer and the injured user, courts should force the manufacturer to cover the costs of the injury resulting from the manufacturer's failure to issue a post-sale warning. True, the risk was possibly unknowable at the time of manufacture. But by the time a manufacturer may need to issue a post-sale warning, the danger is known (or should have been known). If a manufacturer fails to warn of such a danger, the manufacturer is liable. This is liability based on fault; a reasonable manufacturer would have warned and this defendant is liable for a failure to act like that reasonable manufacturer. Fairness dictates that between a manufacturer who is at fault and an injured user, the manufacturer should be forced to cover the costs of the user's injury.

Even though fairness supports the imposition of a broad post-sale duty to warn, it does not support the factually dependent version developed in early case law and the *Third Restatement* because of its consideration of costs. At first glance, it would seem fair to consider the defendant's costs in determining liability for failing to issue a post-sale warning. But the fairness theory dictates "that the burden of accidental injuries caused by products intended for consumption be placed upon those who market" the product.[139] Thus, those who placed the product on the market should be liable regardless of the costs of warning.

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[136] Wertheimer, *supra* note 135, at 1238–39 ("[I]f neither the manufacturer nor the consumer is an appropriate cost-avoider, then the entity who placed the product on the market and profited from its sales should pay."); *see also* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) ("If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.").

[137] Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1963).

[138] 637 A.2d 915, 923 (N.J. Super. Ct. App. Div. 1994).

[139] RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965).

Similarly, the factually dependent post-sale duty is also inconsistent with the fairness theory because of how it distinguishes between manufacturers. If the costs of issuing a post-sale warning are too great, which will often be true for large manufacturers, that manufacturer will not be liable because a reasonable manufacturer would not have issued a warning. But if the costs are reasonable, which will often be true for small manufacturers, the manufacturer will be liable. The fairness theory, however, would not recognize distinctions based on what types of manufacturers should be liable and which should not, especially any distinction based on costs. Costly warnings or not, the manufacturer put the dangerous product on the market and should have to pay for the injuries the product caused.

Lastly, the factually dependent post-sale duty is inconsistent with the fairness theory because of how it distinguishes between consumers. The factually dependent duty distinguishes between consumers who are limited to a small geographic market (who would be entitled to a warning under a factually dependent post-sale duty to warn) and consumers who are dispersed nationwide (who would not be entitled to such a warning). The fairness theory, however, dictates that "the consumer of such products is entitled to the maximum of protection" from "those who market the products."[140] All consumers deserve this maximum protection, not just some. Thus, fairness supports the imposition of a broad post-sale duty to warn where all consumers would be warned regardless of the costs.

2. Manufacturer Is in a Superior Position to Discover Dangers

Another principle underlying products liability that is somewhat similar to fairness is the manufacturer's superior ability to discover dangers. Just as the manufacturer put the dangerous product on the market, the manufacturer is in the best position to eliminate those dangers. As Justice Traynor explained in *Escola v. Coca Cola Bottling Co.*,[141] "[i]t is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences."[142] The manufacturer has this superior position because of "the processes of design, testing, inspection and collection of data on product safety

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[140] *Id*.

[141] 150 P.2d 436 (Cal. 1944).

[142] *Id.* at 440–41 (Traynor, J., concurring); *see also id.* at 443 ("The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing such devices as trade-marks."). Justice Traynor used this language to advocate for strict liability. However, it also supports negligence-based liability.

performance in the field."[143] Imposing liability should motivate manufacturers "to use this information to help combat the massive problem of product accidents."[144]

This principle supports the imposition of a post-sale duty to warn for all manufacturers regardless of costs. In the post-sale scenario, the manufacturer is in a superior position to discover dangers from its product. People hurt by products will often complain to the manufacturer[145] and may even sue the manufacturer. Through either form of notification, the manufacturer could discover dangers in its product, including dangers about which it did not know pre-sale. Related to these complaints or not, the manufacturer may also continue to research and develop its products even after sale. Again, through this research, the manufacturer could discover dangers in its product.

An individual user does not have access to this type of information. He has no idea whether others have been harmed by the manufacturer's product. He also has no idea what additional research has shown regarding the dangers of the product. The discrepancy between the manufacturer's knowledge and the consumer's knowledge may even be greater post-sale than it is pre-sale.

Some courts have relied on the manufacturer's superior position in adopting a post-sale duty to warn. Specifically, the New York Court of Appeals stated:

> The justification for the post-sale duty to warn arises from a manufacturer's unique (and superior) position to follow the use and adaptation of its product by consumers. Compared to purchasers and users of a product, a manufacturer is best placed to learn about post-sale defects or dangers discovered in use.[146]

Alaska courts have cited this language,[147] and Iowa courts have also pointed to this justification as the reason for a post-sale duty.[148] These courts are correct. The manufacturer has superior knowledge of dangers accompanying its products that emerge only after sale. Imposing a post-sale duty to warn would force manufacturers to share this information and help combat product accidents.

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[143] David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1258 (1976).

[144] *Id.*; *see also* Voss v. Black & Decker Mfg. Co., 450 N.E.2d 204, 207–08 (N.Y. 1983) ("A manufacturer is held liable regardless of his lack of actual knowledge of the condition of the product because he is in the superior position to discover any design defects and alter the design before making the product available to the public.").

[145] THIRD RESTATEMENT, *supra* note 3, § 10 cmt. c ("As a practical matter, most post-sale duties to warn 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.").

[146] Liriano v. Hobart Corp., 700 N.E.2d 303, 307 (N.Y. 1998) (citation omitted).

[147] Jones v. Bowie Indus., Inc., 282 P.3d 316, 334–35 & n.65 (Alaska 2012).

[148] Lovick v. Wil-Rich, 588 N.W.2d 688, 694 (Iowa 1999) (explaining that warning obligations "reduce the chance of injury by equalizing the asymmetry of information between the parties").

Even though a manufacturer's superior position supports a post-sale duty to warn, it does not support the factually dependent version that courts have adopted and that is included in the *Third Restatement*. This is because the factually dependent version of the post-sale duty to warn will obligate some, but not others, to warn based on the costs of the warning. Regardless of those costs, the manufacturer is in a superior position, relative to the consumer, to discover dangers post sale. Also, the manufacturers most likely to have an obligation to warn will be small manufacturers, even though large manufacturers may be in an even more superior position to discover dangers.[149] Regardless of its size, the manufacturer is in a superior position, relative to the consumer, to discover dangers post sale. All manufacturers should thus be obligated to warn of dangers materializing after sale.

Plus, a distinction between manufacturers based on the costs of communicating the warning to consumers makes little sense in light of this purpose. Those that can communicate easily, most likely smaller manufacturers, are obligated; those who cannot communicate easily, most likely larger manufacturers, are not obligated despite their superior knowledge. Regardless of the ease of communicating, all manufacturers are in a superior position to discover dangers relative to consumers.

3. Individual Autonomy/Self-Determination

Liability for a point-of-sale failure to warn is also supported by another theoretical justification that is specific only to warning defects—educating users about the risks of the product enables the user to determine whether to purchase the product. This theory supports a broad post-sale duty to warn, but not a factually dependent one that would obligate some manufacturers but not others.

(a) Self-Determination Versus Minimizing Injury

Warnings can serve two purposes. "First, warnings may reduce the risk of product-related injury by allowing consumers to behave more carefully than if they remained ignorant of risks associated with product use."[150] The second purpose is different; it does not simply allow consumers to act more carefully. Instead, warnings provide consumers "the information necessary to choose whether or not they wish to encounter certain kinds of risks on a 'take it or leave it' basis."[151]

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[149] See *infra* Part IV.B.

[150] Henderson & Twerski, *supra* note 13, at 285.

[151] *Id.* The *Third Restatement* also recognizes these two purposes: "Warnings alert users and consumers to the existence and nature of product risks so that they can prevent harm either by appropriate conduct during use or consumption or by choosing not to use or consume." THIRD RESTATEMENT, *supra* note 3, § 2 cmt. i. Professors James A. Henderson, Jr. and Aaron D. Twerski label this purpose of warnings as the "social utility" purpose. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1318 (1991). This purpose requires warnings that will "reduce the risk of product-related injury by

This second purpose promotes individual autonomy.[152] By fully informing a user of the dangers of a product, the user is able to make a cost-benefit decision on whether to purchase the product. "[T]his kind of informed consent value focuses on protecting a user's individual rights—specifically, the user's right of self-determination, the right to 'determine his own fate.'"[153] An adequate warning is required because "the user or consumer is entitled to make his own choice as to whether the product's utility or benefits justify exposing himself to the risk of harm."[154]

This self-determination basis for imposing a duty to warn mirrors an informed consent medical malpractice case. This type of medical malpractice case does not question whether the doctor did the proper surgery or adequately performed that surgery. Instead, the focus is on whether the doctor properly disclosed the risks of that surgery to the patient. Proper disclosure is necessary to provide the patient with "adequate information" to enable him to decide "whether he wishes to encounter the risk[s]" associated with treatment.[155] Many states use a standard to determine the required contents of the disclosure based on what a reasonable patient would want to know.[156]

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allowing consumers to behave more carefully." Henderson & Twerski, *supra* note 13, at 285. The self-determination purpose, on the other hand, enables users to determine whether the utility of the product justifies encountering the risks. This purpose "reflects fairness concerns more clearly than the risk-reduction efforts." *Id.*

[152] OWEN, *supra* note 5, § 9.1, at 585; *see also* OWEN ET AL., *supra* note 15, § 9.1, at 513–14 ("The latter rationale—informed consent—reflects the societal judgment that a product user or consumer is entitled to make his own choice as to whether the product's utility or benefits justify exposing himself or others to the risk of harm."); Henderson & Twerski, *supra* note 13, at 285 (explaining that the self-determination purpose obligates warnings that "provide consumers with the information necessary to choose whether or not they wish to encounter certain kinds of risks on a 'take it or leave it' basis"); THIRD RESTATEMENT, *supra* note 3, § 2 cmt. i ("[W]arnings allow the user or consumer to avoid the risk warned against by making an informed decision not to purchase or use the product at all and hence not encounter the risk.").

[153] OWEN, *supra* note 5, § 9.1, at 585 (citing Pavlides v. Galveston Yacht Basin, Inc., 727 F.2d 330, 338 (5th Cir. 1984)). The Fifth Circuit describes self-determination as one of the principles underlying strict liability for failure to warn. *Pavlides*, 727 F.2d at 338. The other principle underlying strict liability for failure to warn is "social utility" in that "a warning that costs the manufacturer little can prevent severe losses by enabling users to avert harm." *Id.*

[154] Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1089 (5th Cir. 1973); *see also* Liriano v. Hobart Corp., 170 F.3d 264, 270 (2d Cir. 1999) ("[A] warning can do more than exhort its audience to be careful. It can also affect what activities the people warned choose to engage in.").

[155] Henderson & Twerski, *supra* note 13, at 286.

[156] *See, e.g.*, Canterbury v. Spence, 464 F.2d 772, 786–87 (D.C. Cir. 1972) (requiring disclosure of "all risks potentially affecting the [patient's] decision"); Largey v. Rothman, 540 A.2d 504, 508 (N.J. 1988) (requiring a physician to disclose risks that "a reasonable patient . . . would be likely to attach significance to" (quoting Cantebury v. Spence, 464 F.2d 772, 787 (D.C. Cir. 1972) (internal quotation marks omitted)).

(b) Supporting a Post-Sale Duty to Warn Owed by All Manufacturers

The self-determination purpose of warnings supports the imposition of a post-sale duty to warn, enabling the user to continue to make informed decisions regarding product use. When the user first uses a sausage-stuffing machine, a warning enables him to make the informed decision whether to use it. Every time the user uses the machine, he continually needs to make an informed decision. If a danger is discovered six months after he first uses it without being informed of that danger, the user is prevented from making an informed decision whether to continue to use the machine.

Granted, this possible later decision to cease use differs from the initial decision to use. At the initial decision, the user may decide not to purchase the product at all because of the foreseeable dangers. At the later decision, the user has already invested in the product, creating the natural tendency to want to continue use; a decision to cease use would create an additional loss based on the value of the machine at that point. The user needs to be able to balance the foreseeable dangers of continued use against this natural tendency to avoid the loss.[157]

Whether at the initial or later decision, however, the self-determination purpose aims to ensure the decision belongs to the user—the user can decide if the product's benefits outweigh its costs (the foreseeable dangers and out-of-pocket losses based on the then-existing value of the product). Without full disclosure of the substantial dangers, including the dangers that arise only years after purchase, this cost-benefit decision is transferred back from the user to the manufacturer.

The Eleventh Circuit alluded to the self-determination purpose in the context of post-sale warnings in *Watkins v. Ford Motor Co.*[158] There, the defendant's expert testified that once the consumer decided to drive the car at issue, "no warning could guard against the dangers of rollover."[159] The court explained, however, that the purpose of a warning, a point-of-sale or a post-sale warning, is not necessarily to prevent an accident.[160] Instead, warnings are required to allow the user "to make an informed decision whether to take on the risks warned of."[161] Once the defendant discovers the risk of a rollover, it must warn the user of that

[157] Even if some users choose to continue using the product to avoid the loss, it does not negate the need to warn under the self-determination purpose. *See* THIRD RESTATEMENT, *supra* note 3, § 2, cmt. i ("Whether or not many persons would, when warned, nonetheless decide to use or consume the product, warnings are required to protect the interests of those reasonably foreseeable users or consumers who would, based on their own reasonable assessments of the risks and benefits, decline product use or consumption.").

[158] 190 F.3d 1213 (11th Cir. 1999).

[159] *Id.* at 1219.

[160] *Id*.

[161] *Id*.

risk so that the user can make an informed decision whether to continue driving the automobile.[162]

The self-determination purpose requires warnings "whenever a reasonable man would want to be informed of the risk in order to decide whether to expose himself to it."[163] It would require disclosure of any risks that are great enough that a reasonable user would want to be informed of them, enabling that reasonable user to decide whether the utility of the product justifies exposure to the danger.[164] This purpose requires warnings both at the point of sale[165] and at whatever later time the manufacturer discovers, or should discover, a substantial danger about which a reasonable user would want to know.

(c) Lack of Support for a Factually Dependent Post-Sale Duty to Warn

The self-determination principle supports obligating manufacturers to warn of any post-sale dangers about which a reasonable person would want to know. It does not, however, support a factually dependent post-sale duty to warn, mainly

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[162] *See id.* at 1219–20. This analysis in *Watkins* is the closest a court has come to invoking self-determination in adopting a post-sale duty to warn. The Fifth Circuit invoked self-determination in explaining the reason for a point-of-sale duty to warn under Texas law. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1089 (5th Cir. 1973). In interpreting whether Texas law included a post-sale duty to warn, however, the Fifth Circuit rejected such a duty. *See, e.g.*, McLennan v. Am. Eurocopter Corp., 245 F.3d 403, 430 (5th Cir. 2001) (rejecting a post-sale duty to warn except in situations where (1) the manufacturer voluntarily, but negligently, attempts to provide a warning, or (2) the manufacturer regains control of the product after its initial sale and fails to remedy the known defect before the subsequent sale); Syrie v. Knoll Int'l, 748 F.2d 304, 311 (5th Cir. 1984) (describing that there is no cause of action in Texas "for a failure to warn about hazards discovered after a product has been manufactured and sold").

[163] *Borel*, 493 F.2d at 1089; *see also* OWEN ET AL., *supra* note 15, § 9.1, at 514 ("[A] 'true choice' situation arises, and a duty to warn attaches, whenever a reasonable man would want to be informed of the risk in order to decide whether to expose himself to it.").

[164] Davis v. Wyeth Labs., Inc., 399 F.2d 121, 129–30 (9th Cir. 1968) ("When, in a particular case, the risk qualitatively (e.g., of death or major disability) as well as quantitatively, on balance with the end sought to be achieved, is such as to call for a true choice judgment, medical or personal, the warning must be given.").

[165] THIRD RESTATEMENT, *supra* note 3, § 2 cmt. i ("[W]arnings must be provided for inherent risks that reasonably foreseeable product users and consumers would reasonably deem material or significant in deciding whether to use or consume the product."); *see also* Edwards v. Hop Sin, Inc., 140 S.W.3d 13, 16 (Ky. Ct. App. 2003) ("A reasonable consumer, moreover, expects warnings only against latent risks that are substantial, those risks sufficiently likely and sufficiently serious to demand attention. The graver the risk, of course, the less likely it need be to be substantial."). Substantiality is explicitly relevant to warnings of potential allergic reactions. THIRD RESTATEMENT, *supra* note 3, § 2 cmt. k (stating that "a warning is required when the harm-causing ingredient is one to which a substantial number of persons are allergic" and that "[t]he more severe the harm, the more justified is a conclusion that the number of persons at risk need not be large to be considered 'substantial'").

because of its consideration of the costs of warning. Regardless of the cost, the self-determination principle dictates that the user is entitled to be warned of the substantial risks. That is one reason why the costs of a point-of-sale warning are not relevant to whether a user is entitled to warning of the substantial risks.[166] Instead, consistent with the self-determination principle, the extent of the danger determines whether a warning is required at the point of sale. The factually dependent post-sale duty considers the costs, however, dictating that no duty is owed if the costs are burdensome. This consideration is inconsistent with the self-determination principle.

The consideration of costs also creates a consequence specifically inconsistent with the self-determination principle—it creates two categories of users. If the costs of warning are low, the manufacturer's customers are entitled to a warning and to determine their own fate. But if the costs of warning are high, the manufacturer's customers are not entitled to a warning or to determine their own fate. Applied to the reality of the differing costs for small and large manufacturers, the customers of smaller manufacturers will be entitled to decide their own fate, but customers of larger manufacturers will not be similarly entitled. The self-determination principle rejects any idea of some users being entitled to determine their own fates, but not others. A customer of a small manufacturer, "no less than any other product user, has a right to decide whether to expose himself to the risk."[167]

Moreover, the factors that decide who is entitled to notice under a factually dependent version of a post-sale duty to warn are irrational. The number of products sold and the size of the market bear no relationship to whether those customers are especially in need of information. A user of a sausage-stuffing machine should be informed about the newly-discovered danger of using the machine regardless of whether the manufacturer sells dozens or millions of the machines. The self-determination purpose of warnings would not draw any distinction based on the user's entitlement to information, much less a distinction based on the number of products sold.

4. Deterrence

Another principle behind imposing liability for defective products that injure plaintiffs is that possible liability should motivate manufacturers to make products as safe as practicable.[168] Because the product has left the manufacturer's control,

[166] Practically, this is also because the costs are assumed to be negligible. *See supra* notes 13–14 and accompanying text.

[167] *Borel*, 493 F.2d at 1106.

[168] This was a major motivation behind adopting strict liability as opposed to only imposing liability for fault (negligence). OWEN ET AL., *supra* note 15, § 5.4, at 287 (explaining that "raising the standard of liability for manufacturers from negligence to strict liability will improve product safety"); *see also* First Nat'l Bank v. Nor-Am Agric. Prods., Inc., 537 P.2d 682, 695 (N.M. Ct. App. 1975) (explaining that imposing strict liability "will

few ways exist to make a product safer after sale.[169] But the manufacturer could improve safety by issuing a post-sale warning.

It is difficult to evaluate a post-sale duty to warn under the deterrence rationale. Deterrence was a main motivation for imposing strict liability as opposed to a mere negligence standard, and imposing liability regardless of fault creates the strongest incentive to force manufacturers to make products as safe as practicable. The popularity of strict liability for product defects has diminished, however, and most do not advocate a post-sale duty to warn based in strict liability.[170]

Even negligence-based liability can create some deterrent effect. Both the point-of-sale and proposed post-sale warning obligations are based in negligence, meaning a manufacturer can only be liable if at fault. This creates some incentive to make products as safe as practicable. A negligence-based post-sale warning obligation creates an incentive to issue the warnings only when the costs of the warnings are reasonable. If the costs are reasonable, the manufacturers should be motivated to issue the warning. But a manufacturer has no incentive to issue the warning if the costs are great, regardless of how much safer the warning would make the product. If the costs are great, the manufacturer likely would not be found liable for not issuing a warning, negating any incentive to make its product safer by issuing the warning.

The point-of-sale warning obligation is also based in negligence, but it creates a greater incentive to improve the safety of products than the negligence-based post-sale warning obligation. If the manufacturer knows of a danger at the point of sale, there is no evaluation of whether to risk not issuing a warning. If a user is hurt based on that failure to warn, the manufacturer *will* be liable. But if the manufacturer learns of a danger after sale, the manufacturer can gamble. If a user is hurt based on that failure to warn, the manufacturer will not necessarily be liable because of the costs.[171] The costs of the warning are irrelevant to the point-of-sale

cause manufacturers to take cautionary steps to prevent the marketing of dangerously defective products").

[169] A manufacturer rarely owes a tort-based duty to recall or retrofit a defective product. Government agencies, however, may require a recall. Notably, the United States Consumer Safety Product Commission does not consider the costs of the recall when determining whether to order it. Instead, it considers the "pattern of defect, the number of defective products distributed in commerce, and the severity of risk to consumers." *See* Ross, *supra* note 15, at 354.

[170] *See, e.g.*, Richmond, *supra* note 17, at 30–40 (reviewing nine jurisdictions' approaches to a post-sale duty to warn).

[171] Plus, if the manufacturer did issue the warning, it would be voluntarily assuming the duty and could face liability if it acted unreasonably within that voluntary warning campaign. Many states recognize a duty based on its voluntary assumption. *See e.g.*, McLennan v. Am. Eurocopter Corp., 245 F.3d 403, 432 (5th Cir. 2001) (imposing post-sale warning liability when the manufacturer is negligent in its voluntary attempt to provide a post-sale warning); Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826, 833 (Minn. 1988) (explaining that the defendant learned that its products were exploding and voluntarily "undertook a duty to warn of K-rim dangers"). This is consistent with general tort law that imposes a duty to act reasonably when an actor voluntarily assumes a duty.

obligation, but almost control the post-sale obligation. The consideration of costs means a factually dependent post-sale duty does not create the incentive for product safety that the point-of-sale obligation does, much less the incentive the deterrence rationale envisions.

5. The Manufacturer's Ability to Spread the Risk

The basic idea of risk spreading is that a manufacturer is better able to cover the costs of injuries resulting from defective products because of its ability to integrate those costs into the price of the product.[172] A broad post-sale duty to warn would be consistent with this rationale, but a factually dependent post-sale duty to warn would not.

(a) Explained

California Supreme Court Justice Traynor pointed to this rationale in *Escola v. Coca Cola Bottling Co*., explaining "the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."[173] Manufacturers can distribute those costs by increasing the price of their goods.[174] The risk of injury is constant, and "[a]gainst such a risk there should be a general and constant protection and the manufacturer is best situated to afford such protection."[175]

Former Vanderbilt University Law School Dean John W. Wade also pointed to risk spreading in his contributions to the development of strict liability. He explained "the manufacturer can more easily obtain appropriate liability insurance coverage" to cover the costs of injuries and can "spread [the loss] among all the consumers" "by pricing his product."[176] In his influential work on defining a defect

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See, e.g., RESTATEMENT (SECOND) OF TORTS § 324 (1965) (imposing liability for a failure to exercise reasonable care by "[o]ne who, being under no duty to do so, takes charge of another who is helpless").

[172] Robert F. Cochran, Jr., *Dangerous Products and Injured Bystanders*, 81 KY. L.J. 687, 705–06 (1992–1993); *see also* Ramirez v. Amsted Indus., Inc., 431 A.2d 811, 823 (N.J. 1981) ("In time, the risk-spreading and cost avoidance measures adverted to above should become a normal part of business planning in connection with the corporate acquisition of the assets of a manufacturing enterprise.").

[173] 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

[174] *See id*.

[175] *Id.*; *see also* Note, *Economic Loss in Products Liability Jurisprudence,* 66 COLUM. L. REV. 917, 952 (1966) (explaining that under the risk-spreading principle, "[t]he manufacturer is expected to provide for such liability by either purchasing insurance, or by self-insuring through the creation of a reserve for anticipated losses. The insurance premium or costs of self-insuring become a manufacturing expense to be passed on to the ultimate purchaser by means of a rise in prices.").

[176] John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 826 (1973). "A different way of expressing essentially the same idea is to say that the

in strict liability, one of the factors Dean Wade delineated was "[t]he feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance."[177]

As the popularity of strict liability for defective products has diminished, the popularity of the risk-spreading idea underlying strict liability has also diminished. Practically, transaction costs preclude the theoretically simple transfer of money from the increased prices of products to payments to accident victims. "[F]or each dollar that an accident victim receives in a settlement or judgment, it is reasonable to assume that a dollar of legal and administrative expenses is incurred."[178] This is inefficient and "analogous to a person using an ATM at which a withdrawal of $100 results in a service fee of $100."[179] Regardless of this powerful criticism, courts still sometimes discuss risk spreading, making it appropriate to evaluate whether risk spreading would support the imposition of any post-sale duty to warn.

(b) Likely Support for a Post-Sale Duty to Warn for All Manufacturers

True, manufacturers generally control the prices of their products and could increase those prices to cover costs related to warning of later-knowable potential dangers. Thus, it seems that risk spreading supports the imposition of a post-sale duty to warn.

At the same time, the danger is unknowable when the manufacturer prices the product, which could make risk spreading difficult. This is another reason why the New Jersey Supreme Court's decision in *Beshada* was heavily criticized. *Beshada* held that a manufacturer could be liable for failing to warn of a danger unknowable at the time of sale.[180] Commentators questioned how a manufacturer could incorporate the costs of an unknowable injury into the price of a product:

> Even if one agrees that risk spreading is a valid goal, however, it is questionable whether the manufacturer or its insurer is capable of assessing product risks that are unknowable but nevertheless must be underwritten at the time the product is sold. The manufacturer's liability exposure, then, is potentially uninsurable. Since the cost and potential loss associated with product risks could not, except on an "open guess basis," be included in the price of the product, the likely result would be overpricing or underpricing the cost of insurance and of the product.[181]

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activity of making the particular product should pay its own way, that the enterprise should bear the liability." *Id.*

[177] *Id.* at 838.

[178] A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1470 (2010).

[179] *Id*.

[180] Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 549 (N.J. 1982).

[181] Schwartz, *supra* note 12, at 903–04; *see also* Henderson & Twerski, *supra* note 13, at 274–75 (explaining that "manufacturers cannot . . . insure against risks that even reasonably careful persons do not know exist" and "[l]iability for unknowable risks is a

The same consequence could occur with post-sale duty to warn liability. The dangers were unknowable when the product was priced. The cost and potential loss associated with that later discovered danger could not have been included in the price of the product.[182] The manufacturer can do little more than speculate, and "the likely result would be overpricing or underpricing the cost of insurance and of the product."[183]

There is one difference between liability for a post-sale duty to warn and strict liability under *Beshada*—a post-sale warning obligation applies only to dangers about which the manufacturer learns or should learn.[184] There is no practical way for a manufacturer to avoid liability under *Beshada*. A manufacturer could, however, avoid liability for a failure to issue a post-sale warning. Plainly, a manufacturer will not be liable for a post-sale failure to warn if it properly issues an adequate warning of the newly discovered danger.

Still, because of the possible need to issue a post-sale warning, a manufacturer may want to build into the price of the product something to cover the costs of issuing that post-sale warning.[185] Again, this could lead to overpricing the product.

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weed that should not be allowed to take root in the failure-to-warn garden"); Wertheimer, *supra* note 135, at 1239 ("[C]ost spreading will not be possible because the costs of the injuries are not known in advance, usually where the danger of the product was unknowable at the time of sale."); Ellen Wertheimer, *Unavoidably Unsafe Products: A Modest Proposal*, 72 CHI.-KENT L. REV. 189, 197 n.29 (1996) ("The cost-spreading rationale, which requires spreading the costs of injuries before those injuries occur, does not work particularly well in the context of dangers unknowable at the time of sale because it is difficult to insure against an unknowable risk, and impossible to spread the costs of an unknowable danger before that danger materializes.").

[182] *See* Joseph A. Page, *Generic Product Risks: The Case Against Comment k and for Strict Tort Liability*, 58 N.Y.U. L. REV. 853, 878 (1983) ("Since the offending products would already have been priced and sold, their liability costs could not be assigned to them.").

[183] Schwartz, *supra* note 12, at 904.

[184] Still, a post-sale duty to warn may have a similar effect as a *Beshada* strict liability failure to warn claim. A *Beshada* strict liability failure to warn claim is a way to hold manufacturers liable for failing to warn of dangers that were unknowable at the time of sale. *See Beshada*, 447 A.2d at 549. A post-sale duty to warn is also based on those unknowable dangers, except it arises at the time when the dangers become knowable (and the defendant fails to warn of them).

[185] Even if the manufacturer plans to continue to research its product and to issue any warnings that may become necessary, there is no guarantee that actually issuing a warning will mean the defendant is not liable—the plaintiff can still allege that the warning given was inadequate. *See* Smith v. Ontario Sewing Mach. Co., 548 S.E.2d 89, 96 (Ga. Ct. App. 2001) ("A post-sale warning must be adequate and specific to satisfy the manufacturer-seller's duty to the ultimate user to protect from harm; a vague or generalized warning that fails to warn of the specific defect, the danger from the defect, and remediation is not an adequate warning."), *vacated*, 576 S.E.2d 38 (Ga. Ct. App. 2002). In a recent case pending in Alaska, a manufacturer of a facial moisturizer issued a post-sale warning after it discovered that its moisturizer may have contained a "very low level of common bacteria." Blake v. Guthy-Renker, LLC, 965 F. Supp. 2d 1076, 1079 (D. Alaska 2013). The plaintiff

Because of the ability to avoid liability, the same impossibility of risk spreading in *Beshada* does not apply to a post-sale duty to warn. A broad post-sale duty to warn, then, is likely consistent with products liability's underlying risk-spreading rationale.

(c) Lack of Support for a Factually Dependent Post-Sale Duty

A factually dependent post-sale duty is, however, inconsistent with risk spreading because it obligates some manufacturers to warn but not others. The risk-spreading rationale does not recognize any distinctions among which manufacturers should be obligated and which should not.

Although Dean Wade listed the ability of the manufacturer to spread the risk as a factor relevant to whether a defect exists, he did not believe liability should depend on whether the particular defendant had the ability to spread the risk.[186] In fact, Dean Wade did not believe this factor should even be mentioned to the jury.[187] Courts agree. To imply "defendants should be held liable because they had the ability to spread the loss for injuries among all the users of the product by setting the price of the product or by carrying liability insurance" is "simply . . . not the law."[188] Just as a specific defendant's ability to spread the risk is not relevant, a defendant's specific inability to spread the risk is not relevant.

Instead, the risk-spreading rationale ignores the practical differences between manufacturers and assumes that all defendants can spread the risk and should be liable for injuries resulting from defective products.[189] Even small manufacturers that lack the practical ability to raise prices because it will hurt their ability to compete are assumed to be able to spread the risk.[190] Thus, even if the risk-spreading rationale would support a broad post-sale duty to warn, it would not

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alleges, however, that this warning was inadequate and thus the manufacturer breached its duty to issue a post-sale warning. *Id.* at 1079–80.

[186] *See* Wade, *supra* note 176, at 837–838, 840.

[187] *Id.* at 840.

[188] Fiorino v. Sears Roebuck & Co., 707 A.2d 1053, 1057 (N.J. Super. Ct. App. Div. 1998).

[189] *See* Note, *supra* note 175, at 952 (distinguishing risk spreading from "a loss-bearing or 'deep-pocket' justification which would make liability dependent upon whether the manufacturer or injured purchaser can better afford the loss").

[190] Courts have considered the inability to spread the risk when declining to adopt successor liability. *See* Malloy v. Doty Conveyor, 820 F. Supp. 217, 220 (E.D. Pa. 1993) (declining to find an installer company strictly liable because it was not within the chain of distribution and was thus unable to "control the defect and spread its costs through pricing"); Manh Hung Nguyen v. Johnson Mach. & Press Corp., 433 N.E.2d 1104, 1111 (Ill. App. Ct. 1982) (finding it problematic whether successors, especially small entrepreneurs, can spread the costs); Schmidt v. Boardman Co., 958 A.2d 498, 506 (Pa. Super. Ct. 2008) (finding that successors can be liable if it is shown that the successor had the "ability to assume the original manufacturer's risk-spreading role [sic]" (quoting Dawejko v. Jorgensen Steel Co., 434 A.2d 106, 109 (Pa. Super. Ct. 1981)) (internal quotation marks omitted)).

support a particularized factual version that would obligate some manufacturers but not others depending on their financial circumstances.

B. Inconsistent with Public Policy—Crippling Small Manufacturers

A factually dependent post-sale duty to warn is contrary to public policy because of its practical, economic consequences for small manufacturers—consequences that large manufacturers will not share. Small manufacturers are already disproportionately affected by products liability law. They are the least able to adjust prices to cover the costs of liability or products liability insurance. Imposing a factually dependent duty will only exacerbate these disproportionate effects. Small manufacturers will now face even higher products liability insurance costs, research costs, and actual warning costs.

Courts specifically reject another products liability law due to concern for its adverse effect on small manufacturers. That law is a product-line exception, which would make successor companies strictly liable for products sold by the predecessor company if the successor continued the product line. Because of the potential effects on small manufacturers, many courts reject this product-line exception. Courts should follow this reasoning and similarly reject a factually dependent post-sale duty to warn.

1. The Already Vulnerable State of Small Manufacturers

Commentators pointed out a possible disproportionate effect on small manufacturers when courts first adopted strict liability for injuries caused by defective products. Because of various "economic factors[,] it may often be a matter of pure chance as to whether a given manufacturer or industry can adjust its price structure to absorb a new cost thrust upon it."[191] Moreover, even if price adjustments are possible, "there will always be uninsured defendants, there will

[191] Marcus L. Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 947 (1957). Professor Plant also argued:

> Is it sound to assume that manufacturers in general are in a position to distribute the risk of all product injuries through the price mechanism? There is substantial reason to doubt that such a generalization is valid as to all industries or for all manufacturers in a specific industry. . . . For example, certain products are subject to what economists call an "elastic demand," *i.e.*, a slight increase in price will cause a sharp reduction in demand or will turn consumers to a substitute product. In such industries the product's price is by no means as adjustable as is assumed by the proponents of strict liability.

Id. at 946–47. *But see* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 504 (1985) (labeling Plant's criticisms as "hardly compelling and amount[ing] to little more than veneration of the status quo").

always be liability in excess of coverage, and there will be members of the group whose competitive situation does not permit them to pass on the cost of the insurance to their customers."[192]

For a small business, "an increase may mean pricing [itself] out of the market."[193] True, some manufacturers are easily able to pass on costs, "[b]ut many manufacturers are in a totally different situation. Their position in the industry is vulnerable and their competitive situation delicate. It is these comparatively small manufacturers who suffer when additional costs are added without regard to their situation."[194] The New Hampshire Supreme Court expressed a similar concern: "The 'Fortune 500' companies suffer less economically because they can develop adequate statistics, purchase insurance, and employ expensive experts and legal counsel. For thousands of small manufacturers, the high cost of self-protection or insurance can be prohibitive so as to force them out of business."[195]

Studies have shown that the increasing cost of products liability insurance has affected small manufacturers. In 1976, a Federal Interagency Task Force found the costs of product liability insurance had greatly increased, and the "increase appeared to have been greater for small, as compared to large, businesses."[196] Aside from simply being able to afford insurance or spread the costs by increasing the prices of products, "[s]mall businesses are less able to bargain effectively for favorable insurance rates."[197] A large manufacturer can adapt to retain coverage by

[192] William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1121 (1960).

[193] Plant, *supra* note 191, at 947.

[194] *Id*.

[195] Thibault v. Sears, Roebuck & Co., 395 A.2d 843, 846 (N.H. 1978).

[196] Victor E. Schwartz, *The Uniform Product Liability Act—A Brief Overview*, 33 VAND. L. REV. 579, 580 (1980); *see also* Robert A. Van Kirk, Note, *The Evolution of Useful Life Statutes in the Products Liability Reform Effort*, 1989 DUKE L.J. 1689, 1689–90 ("Insurance companies insisted that the drastic rise in both claims and awards necessitated increases in premiums that many small manufacturers found unaffordable."). The Interagency Task Force made the following "key conclusions about the nature and causes of the problem" of increasing costs of products liability insurance:

> 1. Although the cost of product liability insurance has increased substantially in most industries, the problem of increasing costs is severe in only a few industries, such as industrial machinery, industrial chemicals, automotive components, and pharmaceuticals.
>
> 2. The problem of availability and affordability of product liability insurance is concentrated in the small firms in those industries.

1 INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEP'T OF COMMERCE, PRODUCT LIABILITY: FINAL REPORT OF THE INSURANCE STUDY ES-7 (1977) [hereinafter Task Force].

[197] Glenn J. Waldrip, Jr., Comment, *Limiting Liability: Products Liability and a Statute of Repose*, 32 BAYLOR L. REV. 137, 139 (1980). The Comment also explains that

assuming a large deductible or accepting a differently rated plan. "For the smaller firm, particularly the single-product firm, these adaptations are not as feasible. The account is not large enough for its own experience to have credibility for the insurer, and it does not have the financial resources to share a significant proportion of the risk burden itself."[198]

Congress has addressed this problem numerous times. In a 1992 committee hearing, a Congressman explained that "[t]here is no doubt that the costs and perceived inefficiencies of our product liability system are of great concern to the small business community."[199] He further explained that "the cost and availability of liability insurance was one of the three chief concerns of small businesses in [his] home state of Virginia" and that reports demonstrating how the "costs of our product liability system fall disproportionately on small businesses are very troubling," particularly since "[m]any have concluded that the liability insurance crisis is especially severe for small businesses, in terms of both the cost and the availability of insurance."[200] At the same hearing, Professor Kip Viscusi also testified that the changes in liability insurance premiums "create particular problems for small firms."[201] Those small firms that are unable to self-insure tend to "have a less diversified product line so that any particular design defect case will tend to hit them harder," and they "lack some of the economies of scale with respect to litigation that larger firms have."[202]

Other committee hearings have focused on the effects of products liability law on small manufacturers. As examples, in 1999, a Congressman explained at a hearing that the burden of the tort system on "small business defendants is magnified. The smallest of businesses are more likely to be uninsured or underinsured, which means that one lawsuit puts their economic survival at

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the problems associated with obtaining liability insurance are amplified for small manufacturers selling machinery that will be used for many years:

> For small firms that manufacture nothing but long-life products such as industrial machinery, the problem is especially acute. Many of these firms have exposures that may amount to 10 to 20 times the current year's production—i.e. machines now in use that were sold over many years' time. Thus, in developing a rate to be applied to the current year's sales, the insurer must multiply the loss potential per machine 10 to 20 times.

Id. at 139–40 (quoting TASK FORCE, *supra* note 196, at ES-5).

[198] TASK FORCE, *supra* note 196, at ES-5.

[199] *Impact of the Product Liability System on Small Business: J. Hearing Before the Subcomm. on SBA, the Gen. Econ., & Minority Enter. Dev. & the Subcomm. on Exps., Tax Policy, & Spec. Problems of the H. Comm. on Small Bus.*, 102d Cong. 46 (1992) (statement of Hon. Norman Sisisky, Chairman, Subcomm. on Exports, Tax Policy, and Special Problems).

[200] *Id*.

[201] *Id.* at 119 (statement of Professor W. Kip Viscusi).

[202] *Id.* at 119–20.

risk . . . ."[203] A witness testified that "being sued is one of the most terrifying experiences a small business owner can have."[204] In a 2004 hearing, panelists described the costs of liability insurance for small manufacturers and the fact that some small manufacturers could not afford it and had to pay litigation costs out of pocket.[205] In 2007, a witness explained to a congressional committee that even small settlements can be damaging to a small business: "When you consider that many small businesses gross $350,000 or less a year, which does not include additional expenses of running the business, like payroll, rent, costs of goods sold, and regulatory costs, $5 to $10,000 can significantly impact a small business owner's bottom line."[206] Plus, any settlement, even if small, can drive up insurance premium rates.[207]

Congress has introduced numerous bills purporting to protect small manufacturers.[208] The most prominent was the Common Sense Product Liability

[203] *Small Business Liability Reform Act of 1999: Hearing Before the H. Comm. on the Judiciary*, 106th Cong. 7 (1999).

[204] *Id.* at 96–97 (statement by Roger R. Geiger, State Exec. Director, National Federation of Independent Business) ("It is even more frightening for the smallest of small businesses who fear being put out of business for good with one lawsuit. . . . More than half of Ohio's small businesses have had to raise the cost of products and services because of liability concerns—a cost we as consumers have to pay.").

[205] *See Small Business Liability Reform: Hearing on H.R. 2813 Before the Subcomm. on Regulatory Reform and Oversight of the H. Comm. on Small Bus.*, 108th Cong. 29–30 (2004) (statement of Lisa Rickard, President, U.S. Chamber Institute for Legal Reform) ("Very small businesses—those with less than $1 million in annual revenues—pay $33 billion of the $88 billion per year. That works out to about $17,000 each per year. What's even more astonishing is that these very small businesses pay 44%, or $15 billion, of their liability costs out-of-pocket—not through insurance coverage."); *see also id*. at 41 (statement of Jo Rae Wager, President, CTO, Inc.) ("[S]imply, many contracting firms can't afford triple-digit increases in their general liability premiums, that is, if they're lucky enough to find coverage. Often these increases come to companies that have not even had a claim; it's simply the nature of the industry.").

[206] *Full Committee Hearing on Liability Reform and Small Business: Hearing Before the H. Comm. on Small Bus.*, 110th Cong. 8 (2007) (statement of Karen R. Harned, Executive Director, National Federation of Independent Business Legal Foundation).

[207] *Id.* at 55.

[208] *See, e.g.*, Product Liability Reform Act of 1998, S. 2236, 105th Cong. § 2(a)(3) (1998) (proposing nationwide product liability standards and damage limitations, in part, because "product liability awards can jeopardize the financial well-being of individuals and industries, particularly the Nation's small businesses"); Product Liability Reform Act of 1997, S. 648, 105th Cong. § 2(a)(5) (1997) (proposing nationwide product liability standards and damage limitations, in part, because "excessive, unpredictable, and often arbitrary damage awards and unfair allocations of liability jeopardize the financial well-being of many individuals as well as entire industries, particularly the Nation's small businesses"); Product Liability Reform Act of 1997, S. 5, 105th Cong. § 2(a)(5) (1997) (proposing nationwide product liability standards and damage limitations, in part, because "excessive, unpredictable, and often arbitrary damage awards and unfair allocations of liability jeopardize the financial well-being of many individuals as well as entire industries,

Legal Reform Act of 1996, which contained tort reform measures benefitting both small and large manufacturers generally and had bipartisan support in both the United States House of Representatives and the United States Senate.[209] Despite ultimately passing both Houses, President Clinton vetoed it.[210]

2. Additional Costs to Small Manufacturers from the Post-Sale Duty

Because a factually dependent post-sale duty to warn is likely to apply to small manufacturers, small manufacturers will likely incur additional costs related to insurance, research, and issuing post-sale warnings.

(a) Products Liability Insurance

Generally speaking, "[t]he insurance mechanism . . . works best when losses for a class of risks over a period of time are reasonably predictable."[211] Premiums can then be set based on those expected risks; ideally, "premiums are set so as to exactly relate to the level of risk that the insured's own conduct occasions."[212]

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particularly the Nation's small businesses"); Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 104th Cong. § 2(a)(5) (1996) (explaining that "excessive, unpredictable, and often arbitrary damage awards and unfair allocations of liability jeopardize the financial well-being of many individuals as well as entire industries, particularly the Nation's small businesses"); Common Sense Product Liability Legal Reform Act of 1995, H.R. 1075, 104th Cong. §§ 101(a)(6) & (b) (1995) (proposing nationwide product liability standards, in part, because "product liability actions and punitive damage awards jeopardize the financial well-being of many industries and are a particular threat to the viability of the nation's small businesses"); *see also, e.g.*, Small Business Liability Reform Act of 2003, S. 1546, 108th Cong. (2003) (reintroduction of Senate Bill 865); Small Business Liability Reform Act of 2003, H.R. 2813, 108th Cong. (2003) (House Companion Bill to S. 1546); Small Business Liability Reform Act of 2001, S. 865, 107th Cong. (2001) (essentially a reintroduction of S. 1185); Small Business Liability Reform Act of 2001, H.R. 1805, 107th Cong. (2001) (House Companion Bill to S. 865); Small Manufacturer Liability Reform Act of 1999, S. 1185, 106th Cong. (1999); Small Business Liability Reform Act of 1999, H.R. 2366, 106th Cong. (1999). The House, but not the Senate, ultimately passed House Bill 2366 as the Small Business Liability Reform Act of 2000, H.R. 2366, 106th Cong. (2000).

[209] H.R. 956, 104th Cong. (1996).

[210] *See generally* H.R. DOC. NO. 104-207 (1996) (message from the President vetoing House Bill 956). President Clinton explained that he vetoed the bill because it "tilts the playing field against consumers" and "inappropriately intrudes on state authority." Neil A. Lewis, *President Vetoes Limits on Liability*, N.Y. TIMES, May 3, 1996, at A22.

[211] TASK FORCE, *supra* note 196, at 1-1.

[212] Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 320 (1990); *see also* Isaac Montal, Note, *The Consumer Expectations Test in New Jersey: What Can Consumers Expect Now?*, 54 BROOK. L. REV. 1381, 1394 (1989) (summarizing insurance industry representatives' testimony explaining the causes of a products liability "insurance crisis," including that "premiums are based on the probability of having to satisfy and defend future claims" but that probability is difficult

The level of risk that a manufacturer's own conduct occasions now includes possible liability for a failure to issue a post-sale warning. This is a new form of liability for manufacturers. When liability, a loss-producing factor, changes, "insurers must respond judgmentally by adjusting their rates to reflect these changing loss-producing factors."[213] Rationally then, insurers may need to increase premiums.

Insurers, however, do not need to increase premiums for large manufacturers. The level of risk that a large manufacturer's own conduct occasions would likely not include losses due to liability for a post-sale duty to warn. Because the duty is factually dependent on the costs of the warning, it is not likely that a large manufacturer will owe a duty to warn. It is also not likely that a large manufacturer would incur any losses related to a post-sale warning duty.

Small manufacturers, unlike large manufacturers, are likely to owe a post-sale warning duty. Thus, small manufacturers are also likely to incur losses related to a post-sale warning duty. Rationally then, insurers should increase the premiums for the policies of small manufacturers, but not large manufacturers, because of the post-sale obligation.

The question is how much insurers should increase the premiums for small manufacturers. Insurers already have difficulty setting premiums for products liability insurance policies because "it is difficult to estimate future losses with any degree of accuracy."[214] This is especially true because whether a loss is covered depends on whether it arose from an occurrence during the policy period.[215] "[I]t

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to determine); Waldrip, *supra* note 197, at 141 ("[D]ecisions concerning both the issuance and cost of policies are made by combining an actuarial analysis of loss experience with judgmental determinations . . . ."). Professor Schwartz explains that products liability insurers use both schedule rating and experience rating to set premiums. Schedule rating includes adjustments to premiums based on "information yielded by an inspection or survey of the insured's operations." Schwartz, *supra*, at 320. Premiums may thus be adjusted based on precautions the manufacturer takes in designing or manufacturing products. *Id*. Experience rating looks to the insured's history of claims as a proxy for future risk. *Id*.

Insurers also consider the number of products sold when determining premiums. *Id.* at 318 n.21 (explaining that the "premiums for products liability insurance are calculated as a predetermined percentage of dollars of sales," meaning the "premium [is] a direct function of the number of products sold"). Thus, the insurance premiums for small manufacturers with fewer customers should be smaller than the premiums for large manufacturers. Despite this, studies have shown that small manufacturers still have a more difficult time obtaining and affording liability insurance. *See supra* notes 196–198 and accompanying text.

[213] TASK FORCE, *supra* note 196, at 1-5. The Report explains that insurers must adjust their rates "when new legal precedents limit defenses." *Id.*

[214] Waldrip, *supra* note 197, at 141; *see also* TASK FORCE, *supra* note 196, at 1-2 (explaining that "[m]ost companies also require a survey by a loss control specialist before writing liability coverage for products they consider particularly risky").

[215] In the typical products liability policy, the insurer agrees to defend and pay "all sums that [the insured] will become legally obligated to pay as damages arising out of an

does not matter when the product was manufactured or sold, or whether it existed at the time the insurer underwrote the policy."[216] This aspect of coverage—that the insurance could cover injuries caused by products sold years before—"has been cited as the cause of severe problems."[217] The most difficult problem is that "[t]he underwriter is faced with the possibility that any one of the insured's existing products, including products manufactured over 20 years ago, could cause a loss under the current policy."[218]

This inability to predict the losses "is, according to most insurers, a major obstacle to underwriting decisions."[219] Simply because there is no other way to set rates, "[r]ates for product liability insurance are based largely or, for some products, entirely on nonstatistically derived, judgmental estimates of loss frequency and severity."[220]

The difficulty of setting fair premiums will only increase as insurers begin to contemplate losses due to post-sale warnings. A post-sale duty to warn arises when a manufacturer learns (or should learn) of a danger after selling the product. Whether that danger will materialize is, almost by definition, an uncertainty. The severity of that unknown danger, and the resulting loss, is also uncertain.

Plus, the danger could materialize two weeks after sale, or twenty years after sale.[221] The uncertainty of potential point-of-sale liability arising "from old

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occurrence or loss event causing bodily injury or property damage." TASK FORCE, *supra* note 196, at 1-14.

[216] *Id.*; *see also* Waldrip, *supra* note 197, at 141 (explaining that the insurer can become legally obligated to pay damages resulting from products sold before the policy was in place).

[217] TASK FORCE, *supra* note 196, at 1-14.

[218] *Id.* at 1-15; Waldrip, *supra* note 197, at 141–42 (explaining that difficulty of determining premiums increases because insurers are "forced to set their present premiums at a level sufficient to satisfy potential claims arising from old products that are or could be still in use").

[219] TASK FORCE, *supra* note 196, at 1-20.

[220] *Id.* at 1-40; *see also* Laurie L. Kratky, *Statutes of Repose in Products Liability: Death Before Conception?*, 37 SW. L.J. 665, 676 (1983) (explaining that the "increasing number and average dollar amount of products liability claims and awards" combined with the "highly subjective methods of insurance rate-making" have contributed to a dramatic increase in the premiums of products liability policies); Waldrip, *supra* note 197, at 141–42.

Two types of rates exist for the basic limits of a policy. Manual rates are derived from data that insurance companies have submitted to the Insurance Services Office regarding premiums, losses, and exposures. TASK FORCE, *supra* note 196, at 1-36. This data is then analyzed actuarially. *Id.* Even though this "basic rate is based on aggregate experience, some judgment may be involved in selecting the appropriate classification." *Id.* at 1-38. If insufficient data exists to calculate a rate through actuarial techniques, a "(a) rate" is determined based "primarily on judgment." *Id.* at 1-36. This judgment based (a) rate is also often used to determine premiums when insurance policy limits exceed $300,000 for bodily injury and $50,000 or $100,000 for property damage. *Id.* at 1-37.

[221] A statute of repose could cut off the possibility of liability at some point if the state legislature has adopted one. Madden, *supra* note 24, at 38–39 ("It would . . . seem to follow

products that are or could be still in use . . . contributed to liability premiums increases of over one thousand percent for some manufacturers."[222] Liability for the post-sale warning obligation is, almost by definition, based on old products that are or could still be in use that were, or should have been, discovered to be dangerous. True, the passage of time may make a factually dependent post-sale duty to warn less likely to exist, as even a small manufacturer may have difficulty identifying users after a long passage of time.[223] But the passage of time is not determinative, meaning liability is still possible, causing even more uncertainty in the estimation of future losses.

There is little doubt that post-sale warning liability will cause substantial uncertainty about a small manufacturer's potential losses. If any substantial uncertainty exists, the underwriter is forced "to be very cautious, which, in turn, affects the cost and availability of insurance."[224] Really, the insurer has only two options—either not issue the insurance policy, or set the "premiums high enough to prepare for the worst possibilities."[225] Either consequence is enough to drive the manufacturer needing the insurance out of business. Without insurance, the small manufacturer likely would be unable to survive even one judgment. With insurance, the small manufacturer would be unlikely to afford the premiums and yet continue in business.

Small manufacturers need to obtain products liability insurance to cover the risk of loss resulting from a post-sale warning because they (and not large

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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.").

[222] Waldrip, *supra* note 197, at 142; *see also* TASK FORCE, *supra* note 196, at ES-7 (explaining that one factor contributing to "increasing claim costs" is "a manufacturer's liability for products made years ago"); Kratky, *supra* note 220, at 676 ("[T]he uncertainty associated with products that have been in use for many years . . . caused many insurers to engage in 'panic-pricing.' Unknown liability for an equally unknown number of years has led to a worst-case type of analysis.").

[223] Hanlan v. Chandler, No. 4-0259B, 2008 WL 5608253, at *3 (Mass. Super. Ct. Nov. 13, 2008) (finding no post-sale duty to warn under the *Third Restatement* because "the crane accident occurred about thirty years after [the manufacturer] first sold the crane" and "[t]he crane changed hands at least three times in those thirty years," precluding the ability of the manufacturer to identify those needing to be warned).

[224] Waldrip, *supra* note 197, at 141.

[225] *Id.* at 142; *see also* Kratky, *supra* note 220, at 676 (explaining that as a result of the uncertainty of future losses, "many insurers have either refused to issue products liability policies altogether or have set premiums so high as to make them effectively unavailable"). True, small manufacturers can avoid liability by actually issuing the post-sale warning, reducing the chance that the insured manufacturer will incur losses. From the insurer's perspective, however, there is no guarantee that the small manufacturer will actually issue the warning. Plus, if the ability to avoid liability was a reason to not insure a risk, then an insurer would also not insure losses related to liability for point-of-sale warning obligations. Even though a manufacturer will not be liable if it warns of dangers it knows of or should know of, manufacturers still obtain and insurers still issue insurance for losses caused by liability for a point-of-sale warning.

manufacturers) are most likely to face liability related to a post-sale warning. Small manufacturers are also, however, the manufacturers already most likely unable to afford the costs of products liability insurance. And the cost of that insurance is only likely to increase as more jurisdictions adopt a post-sale warning obligation.

(b) Research

Other potentially expensive costs also exist. Mainly, this includes costs associated with ongoing research regarding possible dangers hidden in products. A factually dependent post-sale duty does not expressly obligate a manufacturer to research its products after sale. It does, however, make the manufacturer liable if it fails to warn of dangers about which it should have known. The dangers about which it should have known are the dangers that ongoing research would have revealed.[226] Thus, to avoid liability for a failure to issue a post-sale warning, a small manufacturer will need to continue to research the dangers of its products.[227] This research could be very expensive.[228] Small manufacturers will be forced to incur the costs of this continuing research, but large manufacturers will not.

(c) Costs of Actually Issuing the Post-Sale Warning

If the obligation to issue a post-sale warning exists under the factually dependent version of the duty, the costs of actually issuing that warning are reasonable. Even if reasonable though, there are still costs associated with issuing the warning. The costs include expenses related to the logistics of issuing the warning itself—producing the post-sale warning itself and communicating that warning to the manufacturer's customers.

If these costs are extensive and unreasonable, as they likely will be for a larger manufacturer, a manufacturer will not have to incur them because it will not be obligated to issue the post-sale warning. But if the costs are reasonable, as they likely will be for a smaller manufacturer, the small manufacturer will have to incur

[226] *See* Richter v. Limax Int'l, Inc., 45 F.3d 1464, 1470–71 (10th Cir. 1995) (affirming jury's verdict finding liability for a failure to warn that jogging on a trampoline could cause stress fractures because plaintiff's evidence showed that reasonable tests would have revealed that foreseeable danger).

[227] *See* Ross, *supra* note 15, at 345 (explaining how a post-sale duty to warn "may require manufacturers to investigate when reasonable grounds exist for the seller to suspect that a hitherto unknown risk exists"); *see also* Kenneth Ross & J. David Prince, *Post-Sale Duties: The Most Expansive Theory in Products Liability*, 74 BROOK. L. REV. 963, 969 (2009) ("The language in section 10 could be used to argue that the scope of other manufacturers' and suppliers' legal duties are extended by requiring reasonable affirmative actions to learn of post-sale product risks.").

[228] *See* Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517, 1528–29 (D. Minn. 1989) (discussing limiting a post-sale duty to situations where the manufacturer knows of the danger to alleviate the potentially "crushing burden on manufacturers to retest products").

them and issue the warning. Thus, a small manufacturer will likely have to spend money issuing post-sale warnings, but a larger manufacturer likely will not.

3. Courts' Concern for Small Manufacturers as the Main Reason to Reject the Product-Line Exception

Potentially devastating economic consequences for small manufacturers—the same consequences that could very well result from the imposition of a factually dependent post-sale duty to warn—are the very reason that numerous courts have rejected another specific products liability law. That law is a product-line exception to the general rule that a successor company cannot be strictly liable for products manufactured and sold by the predecessor corporation.[229] The product-line exception would impose strict liability on the successor if it "continues the output" of the line of products.[230]

The Florida Supreme Court rejected the product-line exception "due in part to the threat of economic annihilation that small businesses would face under such a rule of expanded liability. Because of their limited assets, small corporations would face financial destruction from imposition of liability for their predecessor's products."[231]

An Illinois court also rejected the exception because of small manufacturers' inability to obtain insurance:

> Recent studies indicate that many manufacturers, and in particular small manufacturers, have a difficult problem obtaining products liability insurance and find it impossible to cover the risks by raising prices because they have to compete with larger manufacturers who can keep the price down. . . . Additionally, it is one thing to assume that a manufacturer can acquire insurance against potential liability for its own products and another to assume it can acquire such insurance for the products made by a different manufacturer. We do not know whether insurance companies will readily provide such insurance. We cannot assume it as fact.[232]

Numerous other state courts have agreed.[233] Courts are concerned about how this rule, obligating all successor manufacturers, would affect small manufacturers.

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[229] *See* Bernard v. Kee Mfg. Co., 409 So. 2d 1047, 1049 (Fla. 1982).

[230] Ray v. Alad Corp., 560 P.2d 3, 11 (Cal. 1977).

[231] *Bernard*, 409 So. 2d at 1049.

[232] Manh Hung Nguyen v. Johnson Mach. & Press Corp., 433 N.E.2d 1104, 1111 (Ill. App. Ct. 1982).

[233] Johnston v. Amsted Indus., Inc., 830 P.2d 1141, 1144 (Colo. App. 1992) (expressly rejecting the product-line exception and citing concern for small manufacturer as a motivating rationale); Guzman v. MRM/Elgin, 567 N.E.2d 929, 932–33 (Mass. 1991) (same); Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 99–100 (Minn. 1989) (same); Simoneau v. S. Bend Lathe, Inc., 543 A.2d 407, 409 (N.H. 1988) (same); Semenetz v.

Courts should similarly be concerned with how a factually dependent post-sale duty, which possibly will apply only to small manufacturers, would affect those manufacturers.

V. CONCLUSION

One would not expect too many complaints about a law that imposes obligations only if those obligations are reasonable. How could a law be unfair or problematic if it imposes liability only if conduct is unreasonable?

Sherling & Walden, Inc., 851 N.E.2d 1170, 1173–75 (N.Y. 2006) (same); Downtowner, Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118, 122–25 (N.D. 1984) (same); Simmons v. Mark Lift Indus., Inc., 622 S.E.2d 213, 215 (S.C. 2005) (same); Griggs v. Capitol Mach. Works, Inc., 690 S.W.2d 287, 294 n.5 (Tex. App. 1985) (same); Ostrowski v. Hydra-Tool Corp., 479 A.2d 126, 127 (Vt. 1984) (same); Fish v. Amsted Indus., Inc., 376 N.W.2d 820, 825–29 (Wis. 1985) (same); *see also* Nissen Corp. v. Miller, 594 A.2d 564, 570 (Md. 1991) (rejecting the continuity of enterprise exception finding successor liability because "not only would liability be imposed upon 'a major corporation,' but it would also be imposed upon the small business operation which may not be in a position to spread the risk or insure against it"); Debra Ann Schiff, *Products Liability and Successor Corporations: Protecting the Product User and the Small Manufacturer Through Increased Availability of Products Liability Insurance*, 13 U.C. DAVIS L. REV. 1000, 1003–04 (1980) (noting that most small companies are unable to obtain policies covering liability for injuries caused by a predecessor's products). *But see* Ramirez v. Amsted Indus., Inc., 431 A.2d 811, 822–23 (N.J. 1981) (recognizing "legitimate concerns" for small manufacturers that arise as a consequence of adopting the product-line exception, but concluding that such "concerns, genuine as they may be, cannot be permitted to overshadow the basic social policy, now so well-entrenched in [New Jersey] jurisprudence, that favors imposition of the costs of injuries from defective products on the manufacturing enterprise and consuming public rather than on the innocent injured party"); Sullivan v. A.W. Flint Co., No. CV 920339263, 1996 WL 469716 (Conn. Super. Ct. Aug. 5, 1996) (same); Garcia v. Coe Mfg. Co., 933 P.2d 243, 249–50 (N.M. 1997) (same); Martin v. Abbott Labs., 689 P.2d 368, 604 (Wash. 1984) (same).

The Massachusetts Supreme Court described this "very real threat" to small manufacturers as an "issue[] of broad public policy involving balancing the interests of future plaintiffs and defendants, which the Legislature is better equipped to resolve." *Guzman*, 567 N.E.2d at 932–33. Two state courts that rejected a post-sale duty also noted that the issue should be resolved by the legislature instead of a court. Campbell v. Gala Indus., Inc., No. Civ.A.6:04-2036-RBH, 2006 WL 1073796, at *5 (D.S.C. Apr. 20, 2006) (refusing to "legislate from the bench"); Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 601 (Miss. Ct. App. 2003) (refusing to recognize a post-sale duty to warn "in the absence of legislative action"). Those courts did not cite the consequences to small manufacturers as a reason for the legislature being better equipped to resolve the existence of a post-sale duty to warn. But if the legislature is best equipped to evaluate the potential consequences to small manufacturers that will result from the product-line exception, it may similarly be best equipped to evaluate the consequences to small manufacturers that will result from a factually dependent post-sale duty to warn.

But what is reasonable for one manufacturer may not be reasonable for another depending on the manufacturer's circumstances. If a manufacturer has only a few customers, it is reasonable to obligate that manufacturer to contact those few customers to warn them. But if a manufacturer has thousands of customers, such an obligation would likely not be reasonable because of its expense. Because of the cost, it is reasonable for the large manufacturer to *not* warn.

Unintentionally, a factually dependent post-sale duty to warn creates a scenario where small manufacturers are more likely than large manufacturers to owe a duty to warn after the sale and be liable if they breach that duty. Further, it creates a scenario where customers of small manufacturers are more likely to receive and benefit from a post-sale warning, whereas customers of large manufacturers will be left without that safety benefit:

> Is it credible to have a body of law that permits a cause of action for a person who suffers serious burns when his custom-made suit, made of readily flammable material, catches fire, whereas the person who suffers identical injuries from a department-store suit made of the same material recovers nothing?[234]

The obvious answer is no. But that is exactly what a factually dependent post-sale duty does. It is also exactly why courts should not adopt a factually dependent post-sale duty to warn.

Essentially, courts are left with only two options in adopting or modifying a post-sale warning obligation: obligate all manufacturers regardless of the costs, or reject any post-sale duty to warn because the costs of warning are too burdensome. The first option is unlikely given the widespread belief that a post-sale duty to warn would be very burdensome on manufacturers. The solution to that burden is not to adopt a duty that would exist only if the costs are reasonable—that factually dependent duty is more likely to obligate small manufacturers than large manufacturers. Instead, the solution to that burden is to reject any post-sale duty to warn.

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[234] John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919, 1942 (2010). Professors Goldberg and Zipursky made this point in response to an argument made by Professors A. Mitchell Polinsky and Steven Shavell. Polinsky & Shavell, *supra* note 178, at 1452. Generally, Professors Polinsky and Shavell argued the costs of liability outweighed the benefits in improving product safety, especially when other mechanisms exist to improve product safety—mainly government regulation and the market. *See id.* at 1452. They admitted, however, that the conclusion applies better to widely sold products. *Id*. Professors Goldberg and Zipursky questioned the legitimacy of a products liability system that would apply to small manufacturers, but not large ones. *See* Goldberg & Zipursky, *supra*, at 1942. The point applies equally as well to a factually dependent post-sale duty to warn.