OREGON STATE BAR
SECTION
Products Liability

Products Liability NEWSLETTER

A section newsletter of the Oregon State Bar

Summer 2006 Volume XV, Number 2

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Post-Sale Duty To Warn: A Plaintiff's Perspective

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A. COMMON LAW RIGHT TO POST-SALE WARNINGS.

Oregon recognizes a common law post-sale duty to warn in product liability claims. Most clearly, this duty exists where subsequent to the original sale of the product the manufacturer either provides inaccurate information to the consumer or learns of a defect and fails to warn.

In *Erickson Air-Crane Co. v. United Tech. Corp.*, 303 Or 281, 289, 735 P2d 614, on recons, 303 Or 452, 736 P2d 1023 (1987), the Court considered a claim of the first sort—that is, where a manufacturer provides inaccurate information subsequent to the original sale of the product. There, a helicopter manufactured in 1971 crashed in 1981. According to evidence at trial, the helicopter crashed because of a failed compressor disk. When the helicopter was first sold, the defendant told the plaintiff the disc had a useful life of up to 4,000 miles. However, in 1977, the manufacturer gave the plaintiff a chart showing the useful life to be 6,000 miles. In 1978, a manufacturer's technical representative assigned to work with the plaintiff stated again that the useful life was 6,000 miles. As it turned out, the information originally provided was correct and the subsequent information incorrect. The plaintiff's case was predicated on the post-sale erroneous information provided by the chart and technician and was pleaded in negligence. The defendant responded by claiming that the case, in fact, was a product liability action, controlled by ORS 30.905(1). According to the defendant the action was barred because the product at issue was more than eight years old. The Court disagreed.

After reviewing the legislative history of ORS 30.905, the Court stated:

> "In sum, the assumption throughout legislative consideration of and the rationale behind HB 3039 was that manufacturers, distributors, sellers and lessors should have the benefit of a limited and predictable time period during which they would be exposed to liability for defects that existed when the product left a respective party's hands. That time period, codified in ORS 30.905(1), was the result of a compromise by business and insurance organizations in that the act or omission of the manufacturer covered by ORS 30.900 to 30.925 occurs when the manufacturer makes the product, but the time limitation does not begin to run until the time of purchase. Minutes, House Committee on the Judiciary 9, 12 (May 16, 1977).
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> "We conclude from the foregoing legislative history that the legislature, in enacting ORS 30.905, contemplated placing limits only on a defendant's exposure to liability for acts or omissions taking place before or at the time that the defendant places a product in the stream of commerce. Nothing in ORS 30.905 or its legislative history indicates that the legislative intent was to allow a manufacturer to retreat to the date of 'first purchase for use or consumption' and raise the defense of ORS 30.905 for

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> negligent acts committed after the date of the first purchase for use or consumption. Indeed, in the final meeting of the House committee on this matter, Representative Richards asked whether 'some service department failure that resulted in an accident * * * would be excluded because service isn't mentioned in [the definition section now codified in ORS 30.900].' Representative Gardner answered that 'that would be a classic negligence situation and it wouldn't fall under * * * products liability.' Minutes, House Committee on the Judiciary 2 (May 27, 1977).
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> "The difference between the present case and the type of case that the legislature meant to cover under ORS 30.905(1) is that, in this negligence case, the reasonableness of certain of defendant's actions after plaintiff's purchase are in question while, in a product liability case governed by ORS 30.905, it is the condition of the article at the date of purchase that is in question. *See Johnson v. Star Machiner, supra*, 270 Or at 707, 530 P2d 53. We conclude that ORS 30.905 is not applicable and that ORS 12.110(1) and 12.115(1) are applicable. There is no dispute that plaintiff brought its action within the time limitations of these latter statutes." 303 Or at 288-289 (Footnote omitted.)

Following *Erickson*, a trilogy of cases further flushed out the post-sale duty to warn. The first two seemed to rule out that a manufacturer had a simple "continuing" duty to warn based on information within its possession at the time of the original sale. However, the third clearly noted that a claim could be predicated on knowledge acquired by the manufacturer after the product was in the stream of commerce.

The first case was *Sealey v. Hicks*, 309 Or 387, 788 P2d 435, cert den, 498 US 819, 111 SCt 65, 112 LEd2d 39 (1990), overruled in part on other grounds by *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 123, 23 P3d 333 (2001). There, the Court considered whether or not a manufacturer had a "continuing' duty to warn. In it, the plaintiff sued Toyota Motor Company, alleging a defect because of a propensity of a 1975 Toyota Landcruiser to roll over. The plaintiff was injured when the vehicle rolled over in 1986—eleven years after the vehicle was manufactured. Suit was filed in the same year as the accident--1986. To avoid application of the eight year statute of repose, as found in ORS 30.905, the plaintiff argued that Toyota was negligent because of a continuing duty to warn of the propensity of the vehicle to roll over. However, the Court noted that the Plaintiff's complaint failed to plead such a claim. Rather, it pled only that there was a failure "to give adequate warning of he vehicle's dangerous propensity to roll over at low speeds." The Court stated, "The only reasonable reading of these allegations is that they refer to an initial failure to warn prior to the first sale of the vehicle; they cannot also be read to include a failure to warn at some later date after the product's defect was discovered." *Id.* at 399. In a footnote, the Court stated:

> "We express no opinion as to whether a properly pleaded continuing failure to warn would actually state a cause of action independent of the statutory product liability claim." *Id.* at 399, n14.

The second case was *Kambury v. DaimlerChrysler*, 185 Or App 635, 639, 60 P3d 1103 (2003). In it, the Plaintiff attempted to plug the hole left open by *Sealey*. That is to say, the plaintiff explicitly pled a product manufacturer was negligent because of a violation of a "continuing" duty to warn. However, the Court felt that the pleading was no better stated than the pleading in *Sealey*.

More specifically, *Kambury* was a wrongful death claim, in which the deceased was allegedly killed by an air bag in her Jeep vehicle. However, the complaint was filed more than two years after the date of the incident, and the defendant, DaimlerChrysler, contended that it was untimely. DaimlerChrysler contended that the two year statute of limitations for product liability claims in ORS 30.905 controlled. The plaintiff responded that he had filed the claim within three years of the incident. He contended, *inter alia*, that he pled a regular negligence action and that the three year statute of limitations in the wrongful death statute, ORS 30.020(1), controlled. Specifically, the plaintiff pled that there was a failure to warn and that "This failure occurred both at the time [decedent] purchased the subject vehicle and thereafter on a continuing basis up to and including the date of [decedent's] death." 185 Or App at 640.

In its analysis, the *Kambury* Court reviewed both the *Sealey* and *Erickson* opinions, stating:

> "Reading *Sealey* and *Erickson* together, we hold that "[a]n initial failure to warn prior to the first sale of the [product]" that merely continues after the date of the sale is not sufficient to state a claim independently of ORS 30.900. *See Sealey*, 309 Or at 399. At a minimum, the complaint must allege 'a failure to warn at some later date after the product's defect was discovered,' *id.*, or some other negligent act that occurs after the date of purchase, *Erickson*, 303 Or at 289, 735 P2d 614. In this case, the amended complaint does not allege that defendants

> discovered a defect after the decedent purchased the car but failed to warn her of that defect, nor does it allege, as the complaint did in *Erickson*, that some other negligent act occurred after the product was sold. Rather, the complaint alleges only that defendants failed to warn decedent before she bought the car and that that initial failure continued until the date of her death. Following *Sealey*, we hold that that allegation is insufficient to avoid ORS 30.905 and accordingly affirm the trial court's judgment." 185 Or App at 642-43 (footnotes omitted).

As it had in Sealey, the Court in Kambury expressed "no opinion as to whether 'a properly pleaded failure to warn would actually state a cause of action independent of the statutory product liability claim." 185 Or App at 642 n4.

Finally, there is the case of *Simonsen v Ford Motor Co.*, 196 Or App 460, 462, 102 P3d 710 (2004), rev den, 338 Or 681, 115 P3d 246 (2005), in which the court did acknowledge the viability of a post-sale failure to warn, based on information acquired by the defendant after the product left the manufacturer's hands. There, the plaintiff filed a claim against Ford Motor Company for injuries allegedly related to a twelve year old vehicle. According to the complaint, the plaintiff was injured when a defective control arm in steering wheel in a 1989 Fiesta caused a loss of control of the vehicle, contributing to a collision with another vehicle. Although the incident occurred in 1994, the action was not brought until 2001. Ford Motor Company responded to the suit, claiming it was barred by the statute of repose in ORS 30.905. The plaintiff disagreed, stating that his claim sounded in negligence. He also stated that he was entitled to an extension of the statute of limitations for negligence actions because he was rendered legally insane by the collision.

Significantly, the Court noted that not all negligence claims against a manufacturer are governed by ORS 30.905:

> "Plaintiff contends, correctly, that not all allegations of negligence against a product manufacturer or supplier are subject to ORS 30.905(1). Rather, some post-sale conduct by a manufacturer or supplier can give rise to a negligence claim governed by ORS 12.110(1) and ORS 12.115. *See, e.g., Erickson Air-Crane Co.*, 303 Or 281, 735 P2d 614; *Kambury*, 185 Or App 635, 60 P3d 1103." 196 Or App at 468-469.

According to the court, "The threshold question here is the proper characterization or categorization of plaintiff's three specifications of negligence." 196 Or App at 196.

Ultimately, the Court refused to dismiss the plaintiff's claims. It noted that two negligence claims pertained to information available to Ford at the time of the original sale. However, it could not say the same with respect to the third allegation, which was that Ford was negligent because it failed to "test to discover the latent defect once Defendant Ford began receiving reports of serious injury and fatality attributed to loss of control by the driver." In relevant part, the Court said:

> "That allegation neither identifies specific reports received by defendant nor describes the content of the alleged reports. Nor do the pleadings disclose whether the alleged reports that defendant received were obtained before or after the date that the Festiva was sold. That ambiguity is critical: If defendant received the reports before the date of first purchase and thereafter failed to act on them by warning, testing, or otherwise, then specification "C," like specifications "A" and "B," would merely allege the continuation of presale action or inaction. In that event, specification "C," like specifications "A" and "B," would be governed by ORS 30.905. *See Kambury*, 185 Or App at 642-43, 60 P3d 1103. Conversely, if defendant received the reports after the date of first sale, its alleged negligence in failing to act on those reports would be subject to ORS 12.110(1) and ORS 12.115, and not to ORS 30.905(1) and (2). *Id.*; *see also Erickson Air-Crane Co.*, 303 Or at 289, 735 P2d 614.
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> "Given that ambiguity, specification "C" was not susceptible to dismissal under ORCP 21 A(9). Under that rule, dismissal is proper only if "the pleading shows that the action has not been commenced within the time limited by statute." That is, it must be apparent from the face of the pleadings that the allegation is time-barred. Further, in reviewing a dismissal pursuant to Rule 21 A, we must liberally construe the pleadings and draw all inferences in plaintiff's favor. *Hinkley* [*v. Eugene Water Electric Board*, 189 Or App 181, 183, 74 P3d 1146 (2003)]. So viewed, specification "C" does allege a negligent act (the failure to test to discover the latent defect) that would have occurred after the date of purchase (once defendant began receiving reports of injury). Consequently, as pleaded, specification "C" is not subject to ORS 30.905 but is, instead, governed by the generic limitations and ultimate repose provisions for negligence actions, ORS 12.110(1) and ORS 12.115." 196 Or App at 473-474.

B. STATUTORY BASES FOR POST-SALE WARNING CLAIMS

In addition to a common law basis for a post-sale warnings claim, there also may be statutory bases for such a claim. For example, in automobile defect cases, it may well be possible to predicate a negligence per se claim on violation of 49 USC §§ 30118 and 30119. See, for example, *Lowe v. General Motors Corp.*, 624 F2d 1373 (5th Cir 1980). Those sections place responsibility on auto manufacturers to warn consumers and the National Highway Traffic Safety Administration of automobile defects of which they have learned. They also may impose an obligation to recall and remedy the defect. In product claims, a plaintiff's counsel would be well advised to research and consider whether a statutory basis for such a claim exists.

C. RESPONSE TO THE DEFENSE PERSPECTIVE

The defense perspective on *Erickson* will generally emphasize the "active and continuous relationship," between the defendant and the plaintiff in that case, highlighting the chart provided to the plaintiff in 1977 and the role of the technician, which was to provide "continuing assistance."

The defense perspective also tends to emphasize that the defendant in *Erickson* made an "affirmative misrepresentation." Undoubtedly, these facts were part of the background of the case. However, nowhere does the *Erickson* court rely on them for its decision. Rather, the crucial fact simply was that the act of negligence occurred after the sale. *Erickson*, 303 Or at 288-289 ("The difference between the present case and the type of case that the legislature meant to cover under ORS 30.905(1) is that, in this negligence case, the reasonableness of certain of defendant's actions after plaintiff's purchase are in question while, in a product liability case governed by ORS 30.905, it is the condition of the article at the date of purchase that is in question.")

The defense perspective also tends to take a narrow view of the *Simonsen* holding. But the Court, there, unquestionably emphasized that it is enough for the plaintiff to plead "some other negligent act that occurs after the date of purchase." 196 Or App at 472 (quoting *Kambury*, 185 Or App at 642-43). From the plaintiff's perspective, this may be all that matters for purposes of a post-sale duty to warn claim. It certainly was in Simonsen, as the defendant there contended that any claim regarding an eight year old product was time-barred.

In reading *Erickson*, *Sealey*, *Kambury*, and *Simonsen* together, one cannot help but conclude that a manufacturer may, indeed, have a post-sale duty to warn. There are at least two lessons to be learned from these cases. The first is that a manufacturer may not give inaccurate information about its product subsequent to the original sale (*Erickson*) and that a manufacturer may have a duty to warn if it learns subsequent to the original sale that its product is defective (*Simonsen*). The second lesson is to plead the case properly. Do not simply claim a "continuing" duty to warn; rather make it clear that the conduct at issue occurred after the original sale (*Sealey* and *Kambury*). And remember to consider the possibility that there may be a statutory basis for a post-sale warnings claim.

Finally, although plaintiffs may confront the argument that other jurisdictions do not recognize a post-sale duty to warn, there is, in fact, no consistency on this issue. See cases collected in *Expanding Products Liability: Manufacturers' Post-Sale Duties To Warn, Retrofit And Recall*, 36 Idaho Law Review 7 (1999).