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Post-Sale Duty to Warn: Michigan

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Michigan imposes a limited post-sale duty to warn: the manufacturer must warn promptly about a defect that is “hazardous to life” if it becomes known “shortly after” sale. *Comstock v. General Motors Corp.*, 358 Mich. 163, 177-78, 99 N.W.2d 627, 634-35 (1959). The post-sale duty is restricted to situations involving a latent defect existing at the time of sale which the manufacturer did not know or could not have known about at that time. *Gregory v. Cincinnati, Inc.*, 450 Mich. 1, 17, 538 N.W.2d 325, 331 (1995). A manufacturer does not have a duty to update purchasers regarding advances in technology when the product itself was not defective. *Reeves v. Cincinnati, Inc.*, 208 Mich. App. 556, 561, 528 N.W.2d 785, 790 (Mich. App. 1995). Nor is there a post-sale duty to recall or retrofit defective products. *Gregory*, 450 Mich. at 19-25, 538 N.W. 2d at 332-34. To date, the Michigan legislature has not passed legislation addressing a manufacturer’s post-sale duties.

In 1959, the Michigan Supreme Court decided *Comstock*, 358 Mich. at 177-78, 99 N.W.2d at 634-35, a decision that many view as the seminal United States case on post-sale duties. In *Comstock*, a car manufacturer learned of power brake problems in several 1953 models a few weeks after releasing them for sale, but took no steps to warn buyers of the defect. After reaffirming that Michigan requires manufacturers to

warn of defects known at the time of sale, the court extended this rule by holding that “a like duty to give prompt warning exists when a latent defect which makes the product hazardous to life becomes known to the manufacturer shortly after the product has been put on the market.” *Id.* at 177-78, 99 N.W.2d at 634-35. Subsequent decisions have not given much definition to the time frame for the “shortly after” rule.

In 1995, the *Gregory* court held the line on post-sale duties by refusing to impose a post-sale duty to recall or retrofit a defective product, for several reasons. 450 Mich. at 19-29, 538 N.W.2d at 332-337. *First*, a required element of a post-sale duty to warn is that the product must contain a latent defect. *Id.* at 19-20, 538 N.W.2d at 332-33. The *Gregory* plaintiff had brought a design defect case, asserting that the manufacturer knew or should have known at the time of sale of the dangerous condition of a brake press that lacked certain safety devices. The court concluded: “If the manufacturer should have known of the problem, liability attaches at that point, not post manufacture.” *Id.* at 20, 538 N.W.2d at 333. *Second*, imposing a duty to recall or retrofit is the province of administrative agencies or the legislature, which are “better able to weigh the benefits and costs involved in locating, recalling, and retrofitting products, as well as other economic factors affecting business and consumers.” *Id.* at

22-23, 538 N.W.2d at 334. *Third*, the court reasoned that imposing a duty to retrofit as technology advanced would place an unreasonable burden on manufacturers. *Id.* at 29, 538 N.W.2d at 337. Imposing a post-sale duty to recall or retrofit a product “would discourage manufacturers from developing new designs if this could form the basis for suits or result in costly repair and recall campaigns.” *Id.* The court left open the possibility of expanding the rule, in special circumstances, such as where the potential danger is “severe and widespread,” *id.* at 25, 538 N.W.2d at 335, or where there is a “continuing relationship” with the buyer, *id.* at 25-28, 538 N.W.2d at 335-36: “We emphasize that we are not presented with and do not decide whether manufacturers of distinct products have a continuing duty to warn

consumers or learned intermediaries of dangers discovered after the product enters the market.” *Id.* at 17-18, 538 N.W.2d at 331-32, n.18.

Federal courts applying Michigan law are in accord. *See, e.g., Estate of Raap v. Clark Equip. Co.*, No. G88-614-CA7, 1989 WL 382091 (W.D. Mich. June 20, 1989) (knowledge acquired five to ten years after the time of sale did not fall within *Comstock's* “shortly after” rule); *Eschenburg v. Navistar Int'l Trans. Corp.*, 829 F. Supp. 210, 214-15 (E.D. Mich. 1993) (rejecting duty to recall or retrofit); *Zettle v. Handy Mfg. Co.*, 837 F. Supp. 222, 224, (E.D. Mich. 1992) (rejecting a duty to notify consumers of post-sale safety advances when there was no allegation or proof of a defect existing at the time of sale).