

► PRODUCTS LIABILITY

# Failure to Warn

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product liability claims in state and federal courts throughout the United States.

This article provides a general overview of Kansas product liability failure to warn claims and highlights issues often encountered by practitioners prosecuting and defending these claims.

As with any summary of the law, it is an oversimplification of a complex subject. For every general rule or principle discussed, practitioners should evaluate exceptions that may be relevant to a particular product or fact pattern.

## I. Kansas Product Liability Law

All Kansas product liability claims are governed by the Kansas Products Liability Act (“KPLA”), codified at K.S.A. § 60-3301 *et seq.* Pursuant to K.S.A. § 60-3302(c), all legal theories of recovery, *e.g.*, negligence, strict liability and failure to warn are merged into one legal theory called a “product liability claim.”<sup>1</sup>

The KPLA’s provisions apply to actions based on strict liability in tort as well as negligence, breach of express or implied warranty, and breach of or failure to discharge a duty to warn or instruct.<sup>2</sup>

In general terms, there are three ways in which a product may be defective:

1. A manufacturing defect;
2. A warning defect; and
3. A design defect.<sup>3</sup>

A product manufacturer has a duty to use reasonable care in designing, manufacturing and providing warnings and instructions for its products. A

product is considered defective if it leaves the seller’s hands in a condition unreasonably dangerous to the ordinary user.<sup>4</sup>

Regardless of the legal theory advanced, to prevail on a product liability claim, the plaintiff must prove that:

1. The injury at issue was caused by a condition of the product;
2. The condition was unreasonably dangerous; and
3. The condition existed at the time it left the defendant’s control.<sup>5</sup>

With regard to the second element, Kansas requires “that a product be *both* defective and unreasonably dangerous.”<sup>6</sup>

The KPLA does not govern claims for property damage only. Kansas has adopted the “economic loss rule” which states that a buyer of defective goods cannot sue in tort (either negligence or strict liability) when the only injury consists of damage to the goods themselves. Claims for damage to a product must be brought in contract actions.<sup>7</sup>

## II. The Duty to Warn

A product that the manufacturer knows, or by the exercise of ordinary care should know, is potentially dangerous to users has a duty to give adequate warnings of the danger where an injury to a user can be reasonably anticipated if an adequate warning is not given. A product may be defective if

there is either a complete failure to warn about a particular risk or if the warnings given are insufficient.<sup>8</sup> The duty to warn encompasses two separate duties:

1. The duty to provide a warning about dangers inherent in using the product; and
2. The duty to provide adequate instructions for safe use of the product.<sup>9</sup>

Whether a failure to warn claim is based on negligence or strict liability, a manufacturer's liability is measured by whether the warning in question was reasonable under all of the circumstances— a negligence standard.<sup>10</sup>

### III. Exceptions to the Duty to Warn

The KPLA carves three exceptions to the general duty to warn. K.S.A. § 60-3305 provides, in pertinent part:

In any product liability claim any duty on the part of the manufacturer or seller of the product to warn or protect against a danger or hazard which could or did arise in the use or misuse of such product, and any duty to have properly instructed in the use of such product shall not extend:

- (a) to warnings, protecting against or instructing with regard to those safeguards, precautions and actions which a reasonable user or consumer of the product, with the training, experience, education and any special knowledge the user or consumer did, should or was required to possess, could and should have taken for such user or consumer or others, under all the facts and circumstances;
- (b) to situations where the safeguards, precautions and actions would or should have been taken by a reasonable user or consumer of the product similarly situated

exercising reasonable care, caution and procedure; or

- (c) to warnings, protecting against or instructing with regard to dangers, hazards or risks which are patent, open or obvious and which should have been realized by a reasonable user or consumer of the product.

The Kansas Supreme Court has held that Section (a) excuses a product manufacturer from warning members of a profession about dangers generally known to that trade or profession. This is sometimes referred to as the sophisticated user doctrine.<sup>11</sup>


Section (b) requires product users to use reasonable care and take reasonable precautions when using a product. Examples would seem to include wearing safety glasses while operating a weed eater or using an oven mitt to pick up a hot frying pan.

Section (c) addresses what are often called “open and obvious” dangers. For example, there is no duty to “warn the purchaser that a knife or an axe will cut, a match will take fire, dynamite will explode, or hammer may mash a finger. Because the dangers associated with a knife, axe, match and dynamite are obvious, there is no reason to think a warning would make the products any safer.”<sup>12</sup>

By way of example, in *McCroy v. Coastal Mart*, the plaintiffs sued a convenience store and the manufacturer of a vending machine after an 11-year-old boy was severely burned when he spilled hot chocolate in his lap.<sup>13</sup>

Plaintiffs claimed the defendants were liable for designing the vending machine so as to produce an excessively hot product and for failing to warn consumers of the severity of burns that could result.

The jury returned a verdict in the plaintiffs' favor and the defendants filed




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motions for judgment notwithstanding the verdict.<sup>14</sup>

Addressing the plaintiffs' failure to warn claim, the federal district court cited K.S.A. § 60-3305(c) and held that the defendants had no duty to warn the plaintiffs that hot chocolate could cause burns.

[H]ere, the fact that hot liquids will burn if spilled on skin is a matter of common knowledge. That plaintiffs did not appreciate the degree of potential injury is unfortunate, but does not translate into a duty to warn when the basic danger is already known.<sup>15</sup>

The fact that a danger is obvious may also be an important factor in determining whether a plaintiff's fault contributed to his or her injury, but it does not provide blanket immunity to a product manufacturer.

In *Siruta v. Hesston Corp.*,<sup>16</sup> the plaintiff was injured by a hay baler and sued the manufacturer under a strict liability design defect theory. The defendant contended that the baler was not defective as a matter of law because the danger at issue was open and obvious.

Noting advances in technology that could have eliminated the hazard altogether, the Kansas Supreme Court disagreed, holding that simply because the hazard on a piece of equipment is

open and obvious does not prevent it from being dangerous to the operator.<sup>17</sup>

The manufacturer may still be liable under a design defect theory for failing to design out or guard against the open and obvious danger it warned about.<sup>18</sup>

#### IV. The Learned Intermediary Doctrine

Another exception to the general duty of a product manufacturer to provide warnings directly to the consumer is the "learned intermediary doctrine." The learned intermediary doctrine allows a prescription drug manufacturer to fulfill its duty to warn a patient of the risks associated with using a prescription drug if it adequately warns the patient's physician of the risks.<sup>19</sup>

Although the duty of a prescription drug manufacturer is to warn the doctor rather than the patient, the manufacturer is directly liable to the patient for a breach of the duty.<sup>20</sup>

Where a product is available only on prescription or through the services of a physician, the physician acts as a 'learned intermediary' between the manufacturer or seller and the patient. It is his duty to inform himself of the qualities and characteristics of those products which he prescribes for or administers to or uses on his patients, and to exercise an

independent judgment, taking into account his knowledge of the patient as well as the product. The patient is expected to and, it can be presumed, does place primary reliance upon that judgment. The physician decides what facts should be told to the patient. Thus, if the product is properly labeled and carries the necessary instructions and warnings to fully apprise the physician of the proper procedures for use and the dangers involved, the manufacturer may reasonably assume that the physician will exercise the informed judgment thereby gained in conjunction with his own independent learning, in the best interest of the patient. It has also been suggested that the rule is made necessary by the fact that it is ordinarily difficult for the manufacturer to communicate directly with the consumer.<sup>21</sup>

The duty to warn is a continuous one and requires prescription drug manufacturers to keep abreast of the current state of knowledge relevant to their products gained through research, adverse reaction reports, scientific literature and other available data.<sup>22</sup>

In prescription drug cases, if the plaintiff proves that the drug manufacturer failed to provide a proper warning, Kansas law presumes that a doctor would have heeded a proper warning.<sup>23</sup>

The law presumes that, but for the inadequate warning, the patient would not have been harmed because the doctor would have given the patient an adequate warning if he or she had received it, and the inadequate warning is therefore the cause of the patient's injury.<sup>24</sup> What a doctor might or might not have done had he or she been adequately warned is not an element a plaintiff must prove as a part of his or her case.<sup>25</sup>

The defendant may rebut this presumption by establishing that even if

the prescribing physician had read and heeded a proper warning, this would not have changed his or her course of treatment.<sup>26</sup> If the manufacturer provides credible evidence to rebut the presumption, the presumption disappears and the burden shifts back to the plaintiff to affirmatively prove causation.<sup>27</sup>

## V. Post-Sale Duty to Warn

A product manufacturer has a post-sale duty to warn purchasers who can be readily identified or traced when a defect that existed at the time the product was sold was unforeseeable at the time of sale but is later discovered to present a “life threatening hazard.”<sup>28</sup> In these situations, a manufacturer has a duty to take reasonable steps to warn consumers who purchased the product.<sup>29</sup> Kansas law allows a manufacturer a reasonable period of time after discovery of the hazard to issue a post-sale warning.<sup>30</sup>

As is the case with other failure to warn claims, the essential inquiry in a post-sale duty to warn case is whether the manufacturer’s post-sale conduct was reasonable. The reasonableness standard is flexible and is typically a jury question that involves a case-by-case analysis.<sup>31</sup>

## VI. Compliance with Government Regulations

K.S.A. § 60-3304 governs situations where there is some legislative or administrative regulatory safety standard relating to the design, performance, warning or instructions of a particular product. If the warning at issue was, at the time of manufacture, in compliance with federal or state standards relating to warnings or instructions, Kansas law states that the product is not defective by reason of the warning or instructions, unless the plaintiff proves that a reasonably prudent manufacturer “could and would have taken additional precautions.”<sup>32</sup>

Conversely, if the warning was not in compliance with regulatory safety

standards, the product is deemed defective as a matter of law unless the manufacturer proves that its failure to comply was a reasonably prudent course of conduct under the circumstances.<sup>33</sup>

In the context of mandatory government contract specifications relating to warnings and instructions, if the warning on the product was in compliance with a mandatory government contract specification, the product is deemed not defective for that reason.<sup>34</sup>

On the other hand, if the warning was not in compliance with mandatory government contract specifications relating to warnings or instructions, the product is deemed defective for that reason.<sup>35</sup>

## VII. Conclusion

Issues abound in failure to warn claims. While a product manufacturer has a general duty to warn consumers about dangers associated with its products, there are exceptions to the general duty, many of which are product dependent. Evaluate these claims carefully. You have been warned. ▲

### ENDNOTES

- 1 *Savina v. Sterling Drug, Inc.*, 247 Kan. 105, 114, 795 P.2d 915, 923 (1990).
- 2 *Id.* at 126, 795 P.2d at 931.
- 3 *Id.*
- 4 *Id.*
- 5 *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 630, 886 P.2d 869, 886 (1994).
- 6 *Samarah v. Danek Medical, Inc.*, 70 F.Supp.2d 1196, 1202 (D. Kan. 1999).
- 7 *Koss Construction v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 960 P.2d 255, rev. denied 265 Kan. 885 (1998).
- 8 *Samarah v. Danek Med., Inc.*, 70 F.Supp.2d 1196, 1204 (1999).
- 9 *Delaney v. Deere and Co.*, 268 Kan. 769, 778, 999 P.2d 930, 937 (2000).
- 10 *Richter v. Limax Intern., Inc.*, 822 F.Supp. 1519, 1521 (D. Kan. 1993).
- 11 *Mays v. Ciba-Geigy Corp.*, 233 Kan. 38, 60, 661 P.2d 348 (1983); *Kearney v. Kansas Public Service Co.*, 233 Kan. 492, 496-497, 665 P.2d 757 (1983).

- 12 *McCroy v. Coastal Mart, Inc.*, 207 F.Supp.2d 1265, 1276 (D. Kan. 2002) (citations omitted).
- 13 *Id.*
- 14 *Id.* at 1268.
- 15 *Id.* at 1275.
- 16 232 Kan. 654, 664, 659 P.2d 799, 806 (1983).
- 17 *Id.*
- 18 *Id.*; *Delaney v. Deere and Co.*, 268 Kan. 769, 772-73, 999 P.2d 930, 935 (2000).
- 19 *Wooderson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 409, 681 P.2d 1038, cert.denied 469 U.S. 965 (1984).
- 20 *Id.*
- 21 *Id.* (citations omitted).
- 22 *See id.* at 405, 681 P.2d at 1053 (citation omitted).
- 23 *Id.*
- 24 *Id.* at 409, 681 P.2d at 1057.
- 25 *Id.*
- 26 *Miller v. Pfizer Inc.*, 196 F.Supp.2d 1095, 1126 (D. Kan. 2002).
- 27 *Id.*
- 28 *Patton v. Hutchinson-Wil Rich Mfg. Co.*, 253 Kan. 741, Syl. ¶ 2, 861 P.2d 1299 (1993).
- 29 *Id.*
- 30 *Id.* at Syl. ¶ 3.
- 31 *Id.* at Syl. ¶ 8.
- 32 K.S.A. § 60-3304(a) (Supp. 2010); *see Miller v. Lee Apparel Co.*, 19 Kan.App.2d 1015, 881 P.2d, rev denied, 256 Kan. 995 (1994).
- 33 K.S.A. § 60-3304(b) (Supp. 2010)
- 34 K.S.A. § 60-3304(c) (Supp. 2010)
- 35 K.S.A. § 60-3304(d) (Supp. 2010)

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