Alabama

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This article will examine the scope of the duty to warn in Alabama, including who owes a duty, when a duty arises, exceptions to the duty, and presumptions. The article will address these duty issues within the context of cases arising under negligence and wantonness theories or under the Alabama Extended Manufacturers Liability Doctrine (hereinafter "AEMLD"). Specifically this article will answer the following questions:

Pre-sale duties

1. What is the general scope of the duty to warn and instruct in this state?
2. Were the warnings or instructions adequate?
3. Who do you have to warn?
4. Law regarding drugs and devices
5. Is it always necessary to warn?
6. Is there a heeding presumption in this state?
7. What defenses are available to those within the chain of distribution?
8. Is an expert required on warning issues?
9. Has the duty to warn been preempted with respect to any product in this state?

Post-sale duties

1. Generally

PRE-SALE DUTIES

What is the General Scope of the Duty to Warn and Instruct in This State?

To establish a failure to warn claim under Alabama law, a plaintiff must demonstrate that:

> (1) the defendant was under a duty to warn the plaintiff regarding the product-in-question's danger when used in its intended or customary manner, (2) the warning the defendant provided breached that duty because it was inadequate, and (3) the breach proximately caused plaintiff's injuries.

Campbell v. Robert Bosch Power Tool Corp., 795 F. Supp. 1093, 1096-97 (M.D. Ala. 1992); *see also Chase v. Kawasaki Motors Corp.*, 140 F. Supp. 2d 1280, 1287 (M.D. Ala. 2001).

Elements of the Duty

The existence of a legal duty is a question of law for the court. *See Rose v. Miller & Co.*, 432 So. 2d 1237, 1238-39 (Ala. 1983). To establish a defendant's duty to warn under the AEMLD, a plaintiff must prove that:

> (1) the defendant placed the product in question on the market, (2) the product was substantially unaltered when the plaintiff used it, (3) the product was imminently dangerous when put to its intended or customary purpose, and (4) the defendant knew or should have known that the product could create a danger when used in its intended or customary manner.

Campbell, 795 F. Supp. at 1097. *See also Caudle v. Patridge*, 566 So. 2d 244, 247 (Ala. 1990) (citing *Cazalas v. Johns–Manville Sales Corp.*, 435 So.2d 55, 58 (Ala.1983)). *Cf. Stone v. Smith, Kline & French Labs.*, 447 So. 2d 1301 (Ala. 1984) (noting that duty to warn is unique in prescription drug cases where "the manufacturer's duty to warn is limited to an obligation to advise the prescribing physician of any potential dangers that may result from the drug's use" (quoting *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1274 (5th Cir. 1974))).

To establish the duty to warn in a pure negligence context, the Supreme Court of Alabama has expressly adopted Section 388 of the Restatement (Second) of Torts. *See Ex parte Chevron Chem. Co.*, 720 So. 2d 922, 924 (Ala. 1998). To establish a defendant's duty to warn under a negligence cause of action, a plaintiff must prove that defendant:

> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Abney v. Crosman Corp., 919 So. 2d 289, 293 (Ala. 2005) (quoting *Restatement (Second) of Torts* §388 (1965)). In duty to warn negligence cases, a plaintiff must prove the duty to warn as part of his prima facie case. *See id.* In AEMLD cases, the duty issue may arise as part of plaintiff's prima facie case establishing liability or as an affirmative defense. *See*, *e.g.*, *Caudle*, 566 So. 2d at 247-48.

Relationship between Duty to Warn and Duty of Safe Design

The Supreme Court of Alabama laid out the legal criteria for a duty of safe design under the AEMLD in *Townsend v. General Motors Corp.*, 642 So. 2d 411 (Ala. 1994):

> Under the AEMLD, a manufacturer has the duty to design and manufacture a product that is reasonably safe for its intended purpose and use. However, the manufacturer of a product is not an insurer against all harm that may be caused by use of the product, and the manufacturer or designer is not obligated to produce an accident-proof or injury-proof product. Likewise, the failure of a product does not presuppose the existence of a defect. Proof of an accident and injury is not in itself sufficient to establish liability under the AEMLD; a defect in the product must be affirmatively shown.

Id. at 415. Therefore, manufacturers have a duty to make a product that is reasonably safe for its intended purpose and use and in some instances to warn users of any potential danger that the product could create when used in its intended or customary manner.

Theories of Liability (Including Restatement)

A defendant's liability for failure to warn in Alabama product liability cases generally arises under theories of negligence, wantonness, the AEMLD, or a combination of these actions. *See Turner v. Westhampton Court, LLC*, 903 So. 2d 82, 90 (Ala. 2004).

Section 2 of the *Restatement (Third) of Torts: Products Liability* addresses the "failure to warn" in products liability, and divides all product defects into three categories: defect in manufacturing, defect in design, and failure to warn. The Restatement also merges all factually identical failure to warn cases into one cause of action. In other words, under the *Restatement (Third)*, a plaintiff could not submit to the trier of fact two factually identical failure to warn claims, one under a negligence doctrine and one under strict liability (AEMLD). *See id.* §2 cmt. n.

The Supreme Court of Alabama has expressly refused to adopt the merger doctrine. *See Spain v. Brown & Williamson Tobacco Corp.*, 872 So. 2d 101, 106 (Ala. 2003); *Tillman v. Reynolds Tobacco Co.*, 871 So. 2d 28, 30 (Ala. 2003). In *Tillman*, the Court emphasized that Alabama is a common law state, and as such the "common-law tort action 'so far as [it is] not inconsistent with the Constitution, laws and institutions of this state…shall continue in force, except as from time to time…may be altered or repealed by the Legislature.'" 871 So. 2d at 35-36 (quoting Ala. Code §1-3-1 (1975)). Accordingly, the AEMLD does not subsume negligent or wanton failure to warn claims under Alabama law.

Who Has the Duty to Warn

Component Part Supplier

Whether a component part supplier has a duty to warn depends upon multiple factors such as the nature of the component parts, the sophistication of the purchaser, and whether the component parts will be substantially changed during a subsequent manufacturing process.

The "raw materials supplier doctrine," set out by the District Court for the Northern District of Alabama, generally declines to impose a duty to warn when the component parts are raw materials that have many safe uses; when they are not, in and of themselves, inherently defective; and when those components undergo substantial changes before they reach the consumer. *See In re Silicone Gel Breast Implants Prod. Liab. Lit.*, 996 F. Supp. 1110 (N.D. Ala. 1997) (citing *In re Silicone Gel Breast Implants Prod. Liab. Lit.*, 887 F. Supp. 1463, 1467 (N.D. Ala. 1995); Restatement (Second) of Torts §402A (1965); and Proposed Final Draft of Restatement (Third) of Torts: Products Liability §5 cmt. c (1998)). Courts have declined "to require the seller to develop expertise regarding a multitude of different end-products and to investigate the actual use of raw materials by manufacturers over whom the suppliers have no control." Restatement (Third) of Torts: Products Liability §5 cmt. c (1998).

The "bulk sales/sophisticated purchaser rule," discussed *infra*, provides that the component seller owes no duty to warn sophisticated purchasers or the ultimate consumers of dangers caused when the "component is unsuited for the special purpose to which the buyer puts it." It would be onerous "to require that component sellers monitor the development of products and systems into which their components are to be integrated." Restatement (Third) of Torts: Products Liability §5 cmt. b (1998).

When both the "raw materials supplier doctrine" and the "sophisticated purchaser rule" are present, courts are particularly loathe to impose a duty to warn. Where a defendant component supplier can prove that he "sells to a knowledgeable manufacturer raw materials in bulk, which are not themselves inherently dangerous and which are substantially changed during the manufacturing process before resale to consumers, and when the supplier has little or no role in the design of the end product," it cannot be liable under a duty to warn theory as a matter of law. *In re Silicone Gel Breast Implants Prod. Liab. Lit.*, 996 F. Supp. at 1114-17.

Manufacturer

"Alabama law imposes a duty to warn on a manufacturer who 'places goods on the market which are imminently dangerous.'" *Spain v. Brown & Williamson Tobacco Corp.*, 872 So. 2d 101, 136 (Ala. 2003) (quoting *King v. S.R. Smith, Inc.*, 578 So. 2d 1285, 1287 (Ala. 1991)). "A manufacturer is under a duty to warn users of the dangerous propensities of a product only when such products are dangerous when put to their intended use." *Ex rel. Gurley v. Am. Honda Motor Co.*, 505 So. 2d 358, 361 (Ala. 1987). "The objective of placing a duty to warn on the manufacturer of a product is to acquaint the user with a danger of which he is not aware…." *Id.*

Whether a manufacturer can be held liable for problematic components used in connection with or incorporated into its products downstream presents a unique question. An Alabama federal district court had occasion to wrangle with this issue in an asbestos case, where the defense is known as the "bare metal defense"—that is, when a manufacturer seeks to avoid liability from asbestos exposure occasioned by others' incorporation of asbestos into its "bare metal" products. The federal district court predicted that the Supreme Court of Alabama would recognize the "bare metal" defense:

> The clear thrust of the bare metal defense is that a manufacturer cannot be held liable for asbestos-containing products used in conjunction with its bare metal pumps, absent evidence that the manufacturer was part of the chain of distribution for those products. Accordingly, to the extent that plaintiff would predicate liability on a theory that [the manufacturer] "fail[ed] to warn of the dangers presented by these component parts" despite knowledge that some packing supplied with its pumps "would foreseeably be replaced by comparable asbestos-containing components", those claims fail as a matter of law. Under the bare metal defense, [the manufacturer] is not liable for harm caused by, and owed no duty to warn [the plaintiff] or anyone else concerning the hazards of, asbestos-containing packing and gaskets that users of [the] pumps might install, where [the manufacturer] did not manufacture, sell or distribute such asbestos-containing components.

Morgan v. Bill Vann Co., 969 F. Supp. 2d 1358, 1369 (S.D. Ala. 2013). *See also Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 472 (11th Cir. 1993) (quoting and adopting district court's reasoning that "'[t]he manufacturer of a non-defective component tire, cannot be held liable for injuries caused by a product it did not manufacture, sell, or otherwise place in the stream of commerce'"); *Sanders v. Ingram Equip., Inc.*, 531 So. 2d 879, 880 (Ala. 1988) (noting that, under Alabama law, "a distributor or manufacturer of a nondefective component is not liable for defects in a product that it did not manufacture, sell, or otherwise place in the stream of commerce"). *But see Hannah v. Gregg, Bland & Berry, Inc.*, 840 So. 2d 839, 855 (Ala. 2002) ("*Sanders* is inapplicable when the plaintiff seeks to recover based upon the theory that the product supplied by the defendant is itself defective.").

Distributor

It is possible for a manufacturer to "rely upon downstream distributors and suppliers" to effectively convey product information or warnings to the end-user of a product, thereby delegating the duty to warn. An example of such a delegation would be a manufacturer's bulk sale to a distributor who subsequently packages, labels, and markets the product. *See Purvis v. PPG Ind., Inc.*, 502 So. 2d 714, 722 (Ala. 1987) (holding that manufacturer of dry cleaning solvent properly delegated duty); *McGhee v. Oryx Energy Co.*, 657 So. 2d 853, 855-56 (Ala. 1995) (holding that propane gas manufacturer properly delegated duty). To expect "the manufacturer to inspect the subsequent labeling of the packaged product" would be "an onerous burden," and there is often no other effective way of conveying warnings to the consumer or even knowing the identity

of the consumer. *Purvis*, 502 So. 2d at 722. Consequently, the law permits the manufacturer in such cases to discharge its duty to warn by providing adequate warnings to the distributor "so long as the manufacturer has a reasonable basis to believe that the distributor will pass along the product information and warnings." *Id*; *see also Restatement (Second) of Torts* §388(c) and cmt. l. Under these circumstances, even if the ultimate consumer does not actually receive the warning, the manufacturer will not be held liable. *See Purvis*, 502 So. 2d at 722.

Retailer

Traditionally, a seller is also under a duty to warn "[w]hen the seller knows or should know that its product is imminently or inherently dangerous when used in its customary manner." *Rivers v. Stihl, Inc.*, 434 So. 2d 766, 773 (Ala. 1983). This duty can be far-reaching, as long as the seller is in the business of selling the subject product. For instance, the seller of a four-wheel drive conversion kit had the duty to warn future truck passengers, including one who was injured three years after the kit was installed and the truck was re-sold, of the dangers posed by the kit. *See Caudle v. Patridge*, 566 So. 2d 244, 247 (Ala. 1990). However, the re-seller of the truck in which the kit was installed did not have such a duty to warn, since, as an isolated or occasional seller, the re-seller was not in the business of selling kits. *See id.*; *see also infra*, "What Defenses are Available to Those Within the Chain of Distribution?"

2011 Amendments to Ala. Code §§6-5-501 and 6-5-521

As discussed *supra*, Alabama law has traditionally enforced a duty to warn against the distributor or retailer of imminently dangerous products, and this liability has in certain circumstances been very far reaching. However, in 2011, the Alabama Legislature amended Ala. Code §§6-5-501 and 6-5-521 (1975) with the stated intent of protecting distributors "who are merely conduits of a product" from liability in product liability actions. *Id.* §§6-5-501(2)(a)(4) and 6-5-521(b)(4) (referred to hereafter as the "Innocent Seller" statute). Under these sections, as amended, distributors, wholesalers, dealers, retailers, and sellers are insulated from suit unless (1) the distributor is also the manufacturer or assembler of the final product and such act is casually related to the product's defective condition; (2) the distributor exercised substantial control over the design, testing, manufacture, packing, or labeling of the product and such act is causally related to the product's condition; or (3) the distributor altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought. Ala. Code §§6-5-501(2)(a)(1)-(3) and 6-5-521(b)(1)-(3) (1975). However, if the plaintiff is unable, despite a good faith exercise of due diligence, to identify the manufacturer in a product liability action, the suit may still be brought against the distributor, wholesaler, dealer, retailer, or seller. *Id.* at §§6-5-501(2)(b) and 6-5-521(c). In such circumstances, the distributor or other third party sued has the opportunity to file an affidavit with its answer or responsive pleading that certifies the correct identity of the manufacturer of the subject product. *Id.* at §§6-5-501(2)(c) and 6-5-521(d). The plaintiff then has the obligation to exercise due diligence in filing an action and obtaining jurisdiction over the manufacturer; once the plaintiff has succeeded in doing so, it must voluntarily dismiss all claims against the distributor or other third party sued. *Id.*

At the time of this writing, these amendments have not yet been interpreted or applied in a published Alabama decision, save a dissent regarding whether the amendments apply retroactively (and arguing that they should not). *See Reyes v. Better Living, Inc.*, 174 So. 3d 342 (Ala. 2015) (Moore, C. J., dissenting). Federal district courts applying Alabama law have interpreted these amendments, however. The majority of these decisions to date relate to whether a non-diverse distributor or seller has been fraudulently joined, and the

federal courts have been hesitant to accept fraudulent joinder in the absence of Alabama state court decisions articulating the scope of the Innocent Seller statute. *See*, *e.g.*, *Davis v. Hillman Grp.*, 2017 WL 3313999, at *4 (S.D. Ala. Aug. 2, 2017) (rejecting defendant's argument that seller of wood screws had been fraudulently joined to defeat diversity in product liability action where fraudulent misrepresentation claim against seller "focus[ed] on alleged conduct" against the seller and other defendants "that is arguably separate and apart from the design, manufacture and marketing of the wood screws"); *Dalraida Props., Inc. v. ElastiKote, LLC*, 2015 WL 4393158, at *9-*11 (M.D. Ala. July 15, 2015) (misrepresentation claim contained allegations against defendant about "independent actions that remove him from the prohibition stated in §6–5–521"); *Lazenby v. ExMark Mfg. Co.*, 2012 WL 3231331 (M.D. Ala. Aug. 6, 2012) (rejecting defendant's argument that seller of riding lawnmower had been fraudulently joined given "the debatable nature" of whether the plaintiff's wantonness claim could exist apart from the Innocent Seller statute based on the allegation that "the decision to stock and sell a product that was known to be likely or probable to cause injury could constitute an independent act of wantonness that is separate from any act related to the design or manufacture of the product itself"). *See also Barnes v. Gen. Motors, LLC*, 2014 WL 2999188, at *5 (N.D. Ala. July 1, 2014) ("[W]hile §6-5-521 is clearly meant to protect sellers who unknowingly sell products that later prove to be defective…it is plausible that the drafters of [the] legislation…did not intend for it to immunize sellers who deliberately choose to sell dangerous products to unwary consumers."); *Robinson v. Invacare Corp.*, 2013 WL 5567084, at *2 (S.D. Ala. Oct. 9, 2013) ("The Alabama courts have not construed these new statutes and, until they do so, their meaning remains uncertain. Because the Court must "resolve any uncertainties about the applicable law in the plaintiff's favor…that uncertainty is fatal to removal.") (internal citations omitted). *But see Cooper v. Nissan Motor Co.*, 2018 WL 3109612, at *3 (N.D. Ala. June 25, 2018) (car dealership fraudulently joined in product liability action when manufacturer showed that it was "a mere conduit of [the] vehicle, and [plaintiff]…provided no argument or evidence to the contrary"); *Sewell v. Smith & Wesson Holding Corp.*, 2012 WL 2046830, at *2 (N.D. Ala. June 1, 2012) (seller of rifle fraudulently joined when plaintiff "presented no evidence to support any cognizable claim…that is unrelated to the product design or manufacture" and "proffered no Alabama law showing that…seller[ ] had a post-sale duty to notify the plaintiff when the manufacturer recalled the rifle three days after the purchase").

Federal district courts have also analyzed arguments under the Innocent Seller statute on summary judgment. In *McCuistian v. LG Electronics U.S.A., Inc.*, 2016 WL 8729835 (M.D. Ala. Dec. 2, 2016), the court granted summary judgment in favor of the distributor (LGE US) and seller (Sears) of a refrigerator on claims of manufacturing defect under the AEMLD; failure to warn or instruct; negligence and wantonness; and breach of warranty of merchantability based on a fire that plaintiffs attributed to a faulty wiring harness in the refrigerator. First, the court rejected the plaintiff's argument that Sears qualified as a "manufacturer" of the product under Ala. Code §6-5-501(2)a.1 because it had added its own brand (Kenmore) to the product; the Court reasoned that the 2011 amendments to the Innocent Seller statute had legislatively abrogated "this so-called 'apparent manufacturer doctrine.'" *Id.* at *4. The court then held that the plaintiff had failed to present evidence creating an issue of fact over whether LGE US manufactured the product and also rejected the plaintiff's agency and joint venture arguments. *See id.* at *4-*5. Next, the court considered and rejected the plaintiff's arguments that Sears and LGE US had exercised substantial control over the manufacture of the product under Ala. Code §6-5-501 (2)a.2, with a particular emphasis on the fact that the plaintiff had failed to show that any indices of control were causally related to the alleged product condition (manufacturing defect). *See id.* at *6. Finally, the court held that there was no evidence of "independent acts" on the part of Sears or LGE US to impose liability under subsection 6-5-501(2)a.4 "even assuming that this provision is a

basis for liability rather than a mere statement of legislative intention." *Id.* at *7. *See also Gardner v. Aloha Ins. Servs.*, 2013 WL 839884, at *8 (N.D. Ala. Mar. 4, 2013) (granting summary judgment in favor of Wal-Mart under Innocent Seller statute when plaintiff "admitted that Wal-Mart did not manufacture or assemble the [product], did not have any role in designing, testing, packaging, or labeling the [product], and did not make any modifications to the [product]"), *aff'd*, 566 F. App'x 903 (11th Cir. 2014). *But see Ruiz v. Wintzell's Huntsville, LLC*, 2017 WL 4305004, at *8, *15 (N.D. Ala. Sept. 28, 2017) (denying summary judgment to oyster distributor under Innocent Seller statute because it did "more than simply distribute a raw product"; it "processe[d] harvested oysters to ready them for retail sale" and, thus, was "not a mere distributor or conduit within the meaning of Ala. Code §6-5-521(b)(4)" and denying summary judgment to restaurant that served oysters because plaintiffs alleged that it "committed acts of negligence unrelated to the product's design or manufacture and that these were causes of [the plaintiff's] injury"); *Wilson v. Recreational Water Prods., Inc.*, 2013 WL 6490590, at *4 (N.D. Ala. Dec. 10, 2013) (denying defendant's motion for summary judgment based on evidence produced by plaintiff that included product label stating that products at issue (chlorine tablets) were manufactured for defendant; information provided to EPA listing defendant as manufacturer; and evidence that defendant held Federal Insecticide, Fungicide and Rodenticide Act registration).

Employer

A seller or manufacturer can also delegate the duty to warn to third parties, such as employers, when that third party has an independent duty, by law or otherwise, to relay the warning. *McGhee v. Oryx Energy Co.*, 657 So. 2d 853, 855 (Ala. 1995); *see also Restatement (Second) of Torts* §388 cmt. n (1965) (noting that when a third party has a duty to inform user of danger, manufacturer can delegate the duty to warn to that third party). Alabama law requires employers, for example, to warn employees of known workplace dangers. *See* Ala. Code §25-1-1 (1975) (requiring employers to provide employees with a safe workplace); *Hill v. Metal Reclamation, Inc.*, 348 So. 2d 493, 494 (Ala. 1977) (noting that an employer has duty to warn employees of risk of harm and workplace dangers). Consequently, when a seller or manufacturer warns the Alabama employer of a danger, it has given that warning to a third party who has an obligation by law to pass it along to the employee. The act of warning an employer relieves a seller or manufacturer of liability. *See Ex parte Chevron Chem. Corp.*, 720 So. 2d 922, 926 nn.2 & 3 (Ala. 1998); *Vines v. Beloit Corp.*, 631 So. 2d 1003, 1005-06 (Ala. 1994) (affirming summary judgment for manufacturer on failure-to-warn claims based on violation of AEMLD and negligence when manufacturer provided warnings to plaintiff's employer, a sophisticated user of equipment, regarding risk plaintiff incurred). But, a seller or manufacturer can still be liable if the warning to the employer is not deemed to be *adequate*, and while the duty to warn is a legal issue, the adequacy of the warning is a fact issue. *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 471 (11th Cir. 1993) (citing *Deere & Co. v. Grose*, 586 So. 2d 196, 199 (Ala. 1991)).

Voluntary Assumption of Duty to Warn

The Supreme Court of Alabama has recognized that when a defendant "was not the supplier or manufacturer" of the product at issue, it "initially owed no duty to warn the expected users of the [product] of the safety issues relative to its use." *Yanmar Am. Corp. v. Nichols*, 166 So. 3d 70, 82 (Ala. 2014). However, that same decision later recognized that a defendant that did not initially owe a duty to warn could voluntarily assume one by undertaking efforts to warn, and would then be subject to a duty to warn to "foreseeable owners or operators" of the product at issue. *Id.* at 83. The Court held that such a defendant could only be held liable, however, if its actions exposed the injured person to a greater risk of harm, as compared to the risk

present if the defendant had not engaged in the undertaking at all. *Id.* at 84. The Court ultimately rejected a plaintiff's argument that the defendant's issuance of inadequate safety warnings was sufficient to establish liability under the theory that defendant had voluntarily assumed a duty to warn and then negligently performed it because the evidence showed that the warnings had never reached the injured party and, thus, could not have exposed him to greater risk of harm than if the defendant had taken no action. *Id.* at 85. The Court also rejected a theory of liability based on the defendant's alleged failure to ensure that the warnings were disseminated adequately such that potential purchasers and users of the product would be reached. *See id.*

Was the Warning or Instruction Adequate?

An adequate warning is "one that is reasonable under the circumstances and it need not be the best possible warning." *Gurley v. Am. Honda Motor Co.*, 505 So. 2d 358, 361 (Ala. 1987). "There is no duty to warn of every potential danger or to explain the scientific rationale for each warning, but only a duty to warn of those dangers which the owner or user would not be aware of under the particular circumstances of his use of the product in question." *Id.* (citations omitted). The adequacy of the warning is usually measured by its effect on the ultimate user or consumer. An additional exception exists in the "learned intermediary" cases, where the adequacy is measured by its effect on the learned intermediary, usually the physician. *Walls v. Alpharma*, 887 So. 2d 881, 883 (Ala. 2004); *see infra.* Note, too, that where evidence shows that the plaintiff did not actually read an allegedly inadequate warning, no claim for failure to adequately warn can be established as a matter of law, unless its inadequacy is such that it in fact prevented the plaintiff from reading the warning. *Squibb & Sons, Inc. v. Cox*, 477 So. 2d 963, 971 (Ala. 1985).

Factors to Consider

63A American Jurisprudence 2d Products Liability §1078 provides a potentially helpful list of factors that go into deciding whether a warning is adequate, but no Alabama case has directly adopted or cited this list of factors:

> The adequacy of a warning depends upon a number of factors including the burden involved in disseminating the warning and the seriousness of the consequences of failing to warn.
>
> The clarity of any warning that was provided is also important. The warning must render the product reasonably safe for its intended use, and its forcefulness must be commensurate with the danger involved.
>
> A court must balance the following factors to determine what precautions the manufacturer or supplier of a product must take to satisfy its duty to give adequate warning:
>
> - The dangerous condition of the product
> - The purpose for which the product is used
> - The form of any warnings given
> - The reliability of any third party who is to act as a conduit of necessary information about the product
> - The magnitude of the risk involved
> - The burdens imposed upon the supplier by requiring that it directly warn all users.

Warnings Found to be Adequate as a Matter of Law

- Warning of specific danger in bulletin from manufacturer to employer was adequate where employer had the duty under Alabama law to warn employees of known workplace dangers. *Ex parte Chevron Chem. Corp.*, 720 So. 2d 922, 926 nn.2 & 3 (Ala. 1998).
- "Federally mandated warning on packages of cigarettes…has adequately warned the public of the dangers of tobacco smoking." *Toole v. Brown & Williamson Tobacco Corp.*, 980 F. Supp. 419, 425 (N.D. Ala. 1997).
- Warnings given by manufacturer of vent tubing to physicians and perfusionists that "cautioned against the exact acts and errors committed" by perfusionists were adequate under learned intermediary doctrine, and no separate warning needed to be given to the patient. *Morguson v. 3M Co.*, 857 So. 2d 796, 801-02 (Ala. 2003).
- Warning labels on motorcycle gas tank stating "WARNING-OPERATOR ONLY-NO PASSENGER" and "Read Owner's Manual Carefully Before Riding" in addition to notices on the inside front cover of the owner's manual stating that the motorcycle was designed for the operator-only without a passenger were adequate warnings as a matter of law. *Gurley v. Am. Honda Motor Co.*, 505 So. 2d 358, 360-61 (Ala. 1987).
- Warnings given by manufacturer to reputable distributor of dry cleaning solvent such as "Vapor Harmful" and "Do Not Take Internally" were adequate even though warnings did not reach ultimate consumer. *Purvis v. PPG Indus., Inc.*, 502 So. 2d 714, 717, 720-22 (Ala. 1987).

Warnings in Which the Adequacy of the Warning was a Jury Issue

- Manufacturer providing instruction booklet to employer stating general warning that pipe stoppers were dangerous and people should not stand in front of them during pressure testing raised jury issue about adequacy. *Hicks v. Commercial Union Ins. Co.*, 652 So. 2d 211, 217 (Ala. 1994).
- Adequacy of warnings on butane lighters that stated only, "Keep away from/out of reach of children," and did not mention attractiveness of lighters to small children or how easily small children could operate was jury question. *Bean v. Bic*, 597 So. 2d 1350, 1353 (Ala. 1992).
- Adequacy of warning on aerosol spray paint can that failed to indicate how the product is to be properly disposed of was jury question. *Brownlee v. Louisville Varnish Co.*, 641 F.2d 397, 401 (5th Cir. Unit B Apr. 1981) (applying Alabama law).
- Adequacy of warnings about multi-piece rim assemblies was jury question when the rim assemblies were not imprinted with a warning or color-coding to prevent mismatching. *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 471 (11th Cir. 1993).

Location of Warning (on Product or in Instructions)

The warning does not have to be both in an instruction manual and on the product itself as long as its placement is "reasonable under the circumstances." *Gurley v. Am. Honda Motor Co.*, 505 So. 2d 358, 361 (Ala. 1987). The Court found the warnings to be adequate in *Gurley* when there was both a label reading "Warning—Operator Only—No Passengers" on top of the motorcycle's fuel tank, visible at the time of the accident, and the owner's manual also prominently displayed the warning "Operator Only. No passengers." *Id.* In contrast, however, a user's choice not to read the warning in the gas company's manual about the dangers of

installing plastic pipe does not impose a legal duty on the manufacturer of the pipe to place a warning on the pipe itself. *Ex parte Chevron Chem. Co.*, 720 So. 2d 922, 925-26 & n.3 (Ala. 1998).

Content of Message—Conspicuousness

The *Gurley* "reasonable under the circumstances" standard also applies to the adequacy of the content and conspicuousness of the warning. A warning about a product can be legally inadequate if it is not read by the user of the product because the conveyance of the warning was "not calculated to attract the user's attention given its position, size, and coloring." *Caruth v. Pittway Corp.*, 643 So. 2d 1340, 1345 (Ala. 1994) (internal quotations omitted). However, the Supreme Court of Alabama has affirmed summary judgment in favor of the manufacturer and seller of a kerosene heater after it found they had adequately warned the buyer of the potential dangers of using gasoline in the heater through nine warnings accompanying the heater and those warnings were "specific, comprehensive, and detailed." *Yarbrough v. Sears, Roebuck & Co.*, 628 So. 2d 478, 481-82 (Ala. 1993).

Obvious Hazards

See infra, "Is It Always Necessary to Warn?"

Reasonably Foreseeable Misuse

Under the AEMLD, a plaintiff must prove that the product is defective, *i.e.*, that "it is marketed without a warning and is unreasonably dangerous when used as intended." *Gean v. Cling Surface Co.*, 971 F.2d 642, 645 (11th Cir. 1992). The defendant therefore has no duty to warn against dangers accompanying product misuse, as long as the defendant can "'establish that the plaintiff used the product in a manner different from that intended by the manufacturer.'" *Halsey v. A.B. Chance Co.*, 695 So. 2d 607, 609 (Ala. 1997) (quoting *Sears, Roebuck, & Co. v. Harris*, 630 So. 2d 1018, 1028 (Ala. 1993)); *see also infra*, "What Defenses are Available to Those Within the Chain of Command?" The plaintiff's misuse of the product also must not have been "reasonably foreseeable" by the defendant. *Halsey*, 695 So. 2d at 609. Accordingly, to establish product misuse, the court must look at whether the actions taken by the person using the product were "both unintended and unforeseeable." *Hicks v. Commercial Union Ins. Co.*, 652 So. 2d 211, 223 (Ala. 1994).

Who Do You Have To Warn?

Bystanders

Third parties generally have standing to complain of failure to warn. In a negligence action, a person who is not the user or purchaser has standing to complain of the failure to warn even though, traditionally, the plaintiff is the purchaser or the user of the product. In *Abney v. Crosman Corp.*, 919 So. 2d 289 (Ala. 2005), the person injured and killed by the product—a BB gun—was not the purchaser or the user. Noting that the plaintiff was traveling under a "novel legal theory," the court nevertheless relied on the *Restatement (Second) of Torts* §388 for the statement that the supplier owes a duty "not only to those whom the supplier 'should expect to use' but also *to those who are 'endangered by its probable use*.'" *Abney*, 919 So. 2d at 293 (emphasis added). The court concluded that the *Restatement* language allows a plaintiff other than the user of the product to bring a negligence action for breach of duty to warn. *Id*. at 293-94.

Allergic Persons

The Eleventh Circuit certified to the Supreme Court of Alabama the question whether a manufacturer is liable under a duty to warn theory when the injury to the plaintiff resulted from an uncommon allergic reaction. *Griggs v. Combe, Inc.*, 456 So. 2d 790 (Ala. 1984). The Supreme Court of Alabama held that manufacturers are not to be held liable for the injuries of "ultrasensitive [persons], who suffered from an allergic reaction which would be suffered by a very small or insignificant number of people," and of which the manufacturer was not aware, nor could have been made aware through reasonable diligence, that its product might cause such a reaction. *Id.* at 792; *see also id.* ("If Combe could have no foreknowledge of this type of injury, it was not negligent in marketing the product, nor did it have a duty to warn of such an unforeseeable risk."). However, this principle may not apply if the manufacturer knew that its product caused an allergic reaction in a number of other people. *See Allen v. Delchamps*, 624 So. 2d 1065, 1069 (Ala. 1993) (distinguishing *Griggs* in adjudicating implied warranty of merchantability claim where allergic reaction was sufficiently common that FDA had imposed regulations banning use of product).

Sophisticated Buyers

It is not necessary to warn a sophisticated buyer if the buyer falls under the "sophisticated buyer doctrine," which is based on comment b to *Restatement of the Law of Torts: Products Liability (Third)* §5:

> [W]hen a sophisticated buyer integrates a component into another product, the component seller owes no duty to warn either the immediate buyer or ultimate consumers of dangers arising because the component is unsuited for the special purpose to which the buyer puts it. To impose a duty to warn in such circumstances would require that component sellers monitor the development of products and systems into which their components are to be integrated.

A federal court sitting in Alabama quoted this section in support of its grant of summary judgment. *See In re Silicone Gel Breast Implants Prod. Liability Litig.*, 996 F. Supp. 1110, 1114-15 (N.D. Ala. 1997) (finding that raw materials supplier had no duty to warn purchasers who were sophisticated breast implant manufacturers). The court noted that the sophisticated buyer is generally aware of the product danger and is in a position to test products and evaluate the risks associated with them. *Id.* at 1115. Some buyers even have independent duties to provide warnings to the ultimate consumers. *Id.* This doctrine is limited to component part and raw materials suppliers selling to sophisticated manufacturers.

It should be noted that if the sophisticated buyer doctrine does not apply because the manufacturer is not selling component parts, a defendant could nevertheless escape liability for failing to warn by proving that the sophisticated buyer is aware of the danger. The defendant has no duty to warn of a danger of which the sophisticated buyer was already aware, which was common knowledge or practice in the industry, or where the plaintiff assumed the risk under the AEMLD. *See, e.g.*, *Tanksley v. ProSoft Automation, Inc.*, 982 So. 2d 1046, 1057 n.8 (Ala. 2007) (noting that summary judgment on failure to warn issue was supported by substantial evidence because plaintiff's employer was a sophisticated user and both employer and plaintiff already knew of danger of energized lines during pickle line repair).

Bulk Supplier

The raw materials supplier doctrine, discussed *supra*, and the bulk supplier doctrine, though "conceptually distinct," often "overlap and tend to merge." *In re Silicone Breast Implants Prod. Liability Litig.*, 996 F. Supp. 1110, 1113 (N.D. Ala. 1997). Both doctrines fundamentally state that the supplier of bulk raw materials has no

duty to warn the ultimate users when the materials it provides are not inherently defective or unreasonably dangerous when sold in bulk; the manufacturers buying the materials are "sophisticated" buyers, *see supra*; and the materials underwent substantial changes during the manufacturing process. *Id.* at 1114-17; *Restatement (Second) of Torts* §§388, 402A (1965).

Law Regarding Drugs and Devices

Applying the *Restatement (Second) of Torts* §402A comment k (1965), the Supreme Court of Alabama has found that prescription drugs may be "unavoidably unsafe," but has also ruled that "the adequacy of [a drug's] accompanying warning determines whether the drug, as marketed, is defective, or unreasonably dangerous." *Stone v. Smith, Kline & French Labs.*, 447 So. 2d 1301, 1304 (Ala. 1984). Therefore, the plaintiff must prove that inadequacy of the warning as part of his prima facie case. *Bodie v. Purdue Pharma Co.*, 236 F. App'x 511, 518 (11th Cir. 2007) (quoting *Stone*, 447 So. 2d at 1304); *see also Reyes v. Wyeth Labs.,* 498 F.2d 1264, 1274 (5th Cir. 1974) *(*quoting *Restatement (Second) of Torts* §402A cmt. k (1965)); *Rudd v. Gen. Motors Corp.*, 127 F. Supp. 2d 1330, 1346 (M.D. Ala. 2001).

A federal court in Alabama has extended this same rationale to over-the-counter drugs and dietary supplement pills, noting that "the pill itself is nondescript" and that the advice and warnings from the manufacturer should be treated as "part of the product itself" when the Court is addressing the issue of whether the product is defective or unreasonably dangerous. *Lowe v. Metabolife Int'l, Inc.*, 206 F. Supp. 2d 1195, 1201 (S.D. Ala. 2002).

Learned Intermediary

The "learned intermediary doctrine" provides that the drug manufacturer has the initial duty to warn the prescribing physician of side effects and to give dosing guidelines, and the physician then acts as the "learned intermediary" between the drug manufacturer and the patient. *Nail v. Publix Super Markets, Inc.*, 72 So. 3d 608, 614 (Ala. 2011). This doctrine is generally used in "duty to warn" cases involving medical products "where the medical product and its related warning are too complex to be fully appreciated by the patient." *Morguson v. 3M Co.*, 857 So.2d 796, 801 n.1 (Ala. 2003). Courts require, therefore, the manufacturer to warn only the patient's medical care provider—the learned intermediary—about the product risks. *Id*. at 801-02. The medical provider would presumably then use that information to evaluate if and how the patient should use the product. *See id*. Many "learned intermediary" cases involve prescription drugs, *see Bodie v. Purdue Pharma Co.*, 236 F. App'x 511, 519 (11th Cir. 2007), *and Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1313 (11th Cir. 2000), and the doctrine "imposes on a pharmaceutical company a duty to provide warnings about drug products solely to the prescribing physician, rather than to the patient directly." *Bodie,* 236 F. App'x at 516 (citing *Stone v. Smith, Kline & French Labs*, 447 So. 2d 1301, 1304-05 (Ala. 1984)). This doctrine "creates an exception to the general rule that one who markets goods must warn foreseeable ultimate users about the inherent risks of his products." *Id.* (citing *Walls v. Alpharma USPD, Inc.*, 887 So. 2d 881, 883 (Ala. 2004)). The reasoning behind the exception is a recognition that the "prescribing physician is best suited to evaluate the characteristics of the medication vis-à-vis the needs and background of the patient." *Gordon v. Pfizer Inc.*, 2006 WL 2337002, at *9 (N.D. Ala. May 22, 2006) (summarizing the Supreme Court of Alabama's holding in *Stone*). The adequacy of the warning in "learned intermediary" cases is therefore gauged by its effect on the physician, not its effect on the consumer. *Toole*, 235 F.3d at 1313-14. The "learned intermediary" doctrine has not been limited to prescription drugs in Alabama. The court has also applied it in a case involving pump and vent tubing for heart by-pass surgery. *Morguson v. 3M Co.*, 857 So. 2d 796 (Ala. 2003).

"While the 'learned intermediary' doctrine does not create an automatic bar to recovery for a plaintiff alleging claims under the AEMLD or under negligent failure to warn, application of the doctrine will often temper the viability of these actions." *Bodie*, 236 F. App'x at 519. Because the physician often makes decisions about whether to prescribe a drug independent of the adequacy or inadequacy of the drug warnings, the intervention of the learned intermediary often destroys proximate cause in a failure to warn case. *See id.; Christopher v. Cutter Labs.*, 53 F.3d 1184, 1192 (11th Cir. 1995); *Garrison v. Novartis Pharm. Corp.*, 30 F. Supp. 3d 1325, 1333 (M.D. Ala. 2014) (prescribing physician's disregard of the risk of ailment caused by medication and plaintiff's unavoidable need for surgery disrupted plaintiff's theory that drug manufacturer's inadequate warnings were the proximate cause of her injuries); *Wyeth, Inc. v. Weeks*, 159 So. 3d 649, 673 (Ala. 2014), *abrogated on other grounds by* Ala. Code §6-5-530 (1975), ("The patient must show that the manufacturer failed to warn the physician of a risk not otherwise known to the physician and that the failure to warn was the actual and proximate cause of the patient's injury."). In other words, if the prescribing physician had "substantially the same knowledge" as the information which the plaintiff claims should have been in the warning, then the causal link is broken. *See Christopher*, 53 F.3d at 1193. "However, 'if the warning to the learned intermediary is inadequate or misrepresents the risk, the manufacturer remains liable for the injuries sustained by the patient.'" *Garrison*, 30 F. Supp. 3d at 1333 (quoting *Wyeth, Inc. v. Weeks*, No. 1101397, 2013 WL 135753 (Ala. Jan. 11, 2013), *opinion withdrawn and superseded*, 159 So. 3d 649 (Ala. 2014)). "'The patient must show that the manufacturer failed to warn the physician of a risk not otherwise known to the physician and that the failure to warn was the actual and proximate cause of the patient's injury.'" *Id.*

The doctrine also forecloses any action against pharmacists under a "duty to warn" theory in prescription drug cases. *See Walls*, 887 So. 2d at 886 ("To the extent that the learned-intermediary doctrine applies, the duty to determine whether the medication as prescribed is dangerously defective is owed by the prescribing physician and not by the pharmacist filling the prescription."). The pharmacist's duty is limited to accurately filling a doctor's prescription and being watchful for obvious mistakes on the face of prescriptions. *Id*. Unless a separate statute or regulation expressly requires it, pharmacists have no duty to warn customers of the dangers, risks, or potential side effects associated with the drug their doctors prescribe. *Id*. Any other policy would "interject the pharmacist into the physician-patient relationship and interfere with ongoing treatment." *Id.* (quoting *McKee v. Am. Home Prods. Corp.*, 782 P.2d 1045, 1051 (1989)).

In a landmark case, the Supreme Court of Alabama held that, "[u]nder Alabama law, a brand-name-drug company may be held liable for fraud or misrepresentation (by misstatement or omission), based on statements it made in connection with the manufacture of a brand-name prescription drug, by a plaintiff claiming physical injury caused by a generic drug manufactured by a different company." *Wyeth, Inc. v. Weeks*, 159 So. 3d 649, 676 (Ala. 2014). The Court based its holding largely on the learned intermediary doctrine and the "unique relationship between brand-name and generic drugs as a result of federal law and FDA regulations":

> This Court has adopted the learned-intermediary doctrine, which provides that a prescription-drug manufacturer fulfills its duty to warn users of the risk associated with its product by providing adequate warnings to the learned intermediaries who prescribe the drug and that, once that duty is fulfilled, the manufacturer owes no further duty to the ultimate consumer. When the warning to the prescribing health-care professional is inadequate, however, the manufacturer is directly liable to the patient for damage resulting from that failure. The substitution of a generic drug for its brand-name equivalent is not fatal to the [plaintiffs'] claim because the [plaintiffs] are not claiming that the drug… ingested was defective; instead, the [plaintiffs'] claim is that [] fraudulently misrepresented or suppressed information concerning the way the drug was to be taken and, as discussed, the FDA mandates

> that the warning on a generic-drug label be the same as the warning on the brand-name-drug label and only the brand-name manufacturer may make unilateral changes to the label.

Id. at 674, 677. The Court added that "it is not fundamentally unfair to hold the brand-name manufacturer liable for warnings on a product it did not produce because the manufacturing process is irrelevant to misrepresentation theories based, not on manufacturing defects in the product itself, but on information and warning deficiencies, when those alleged misrepresentations were drafted by the brand-name manufacturer and merely repeated, as allowed by the FDA, by the generic manufacturer." *Id.* at 677. *Compare Stephens v. Teva Pharm., U.S.A., Inc.*, 70 F. Supp. 3d 1246, 1254 (N.D. Ala. 2014) (granting motion to dismiss because plaintiffs failed to alleged prescribing physician was not adequately informed about risks of generic drug as a treatment for atrial fibrillation), *with Fields v. Eli Lilly & Co.*, 116 F. Supp. 3d 1295 (M.D. Ala. 2015) (denying motion for summary judgment on learned intermediary issue when plaintiff lacked testimony from deceased prescribing physician that he would not have prescribed medication if he had been provided adequate warnings by manufacturer but plaintiff offered "subjective evidence" from the prescribing physician's nurse about his customs and practices and how he would have responded to an adequate warning). *See also Tutwiler v. Sandoz, Inc.*, 2018 WL 1719024, at *3 (11th Cir. Apr. 9, 2018) (affirming dismissal of failure to warn claim when plaintiff failed to allege what effect allegedly omitted information would have had on doctor's decision to prescribe drug and, thus, plaintiff could not meet burden of pleading proximate causation).

In reaction to *Weeks*, the Alabama legislature enacted the following statute in 2015 to abrogate its holding:

> (a) In any civil action for personal injury, death, or property damage caused by a product, regardless of the type of claims alleged or the theory of liability asserted, the plaintiff must prove, among other elements, that the defendant designed, manufactured, sold, or leased the particular product the use of which is alleged to have caused the injury on which the claim is based, and not a similar or equivalent product. Designers, manufacturers, sellers, or lessors of products not identified as having been used, ingested, or encountered by an allegedly injured party may not be held liable for any alleged injury. A person, firm, corporation, association, partnership, or other legal or business entity whose design is copied or otherwise used by a manufacturer without the designer's express authorization is not subject to liability for personal injury, death, or property damage caused by the manufacturer's product, even if use of the design is foreseeable.
>
> (b) This section is not intended in any way to alter or affect any other principle of law, including those that apply under the Alabama Medical Liability Act, Section 6-5-540 et seq.; those that apply to successor entities, distributors, component manufacturers, or manufacturers who use component parts in assembling products for sale as complete units; or those that apply to the operation of a contract, including a licensing agreement.

Ala. Code §6-5-530 (1975). To date, only one reported decision from an Alabama court has cited the statute, and then only in passing to note that it was enacted to abrogate *Weeks*. *See West v. Janssen Pharm., Inc.*, 2018 WL 1977258, at *9 (M.D. Ala. Apr. 4, 2018) ("Janssen's pleadings note the limited theory of recovery established in *Weeks* subsequently was abrogated by the Alabama legislature."), *report and recommendation adopted*, 2018 WL 1973272 (M.D. Ala. Apr. 26, 2018). *See also In re Zofran (Ondansetron) Prod. Liab. Litig.*, 261 F. Supp. 3d 62, 74 (D. Mass. 2017) ("Three justices of the Alabama Supreme Court dissented in *Weeks*. Furthermore, the Alabama legislature reversed *Weeks* by statute within a year of the court's decision.").

Is It Always Necessary to Warn?

No Duty when Intended Use is Not Dangerous

There is no duty to warn "when a product is not shown to be dangerous when put to its intended use." *Donnelly v. Club Car, Inc.*, 724 So. 2d 25, 28 (Ala. Civ. App. 1998) (citing *Gurley v. Am. Honda Motor Co.*, 505 So. 2d 358, 361 (Ala. 1987)). For example, in *Donnelly*, the court held that in the absence of sufficient evidence that a golf cart windshield was defective, there could be no duty to warn of the danger that the windshield, when shattered, could cause injury. *Id.*; *see also Gurley*, 505 So. 2d at 361 ("A manufacturer is under a duty to warn users of the dangerous propensities of a product only when such products are dangerous when put to their intended use.").

Is It Necessary to Warn about Commonly Known Dangers?

No. A duty to warn "is triggered only when the supplier has 'no reason to believe' that the user will realize the 'dangerous condition' of the product." *Ex parte Chevron Chem. Co.*, 720 So. 2d 922, 925 (Ala. 1998). "Where the public possesses common knowledge about the risk of harm flowing from the use of a product, a manufacturer is not required to provide a 'redundant warning.'" *Robinson v. Anheuser-Busch, Inc.*, 2000 WL 35432556, at *3 (M.D. Ala. Aug. 1, 2000) (quoting *Ex Parte Chevron Chem. Co.*, 720 So. 2d at 924). The standard for common knowledge is objective in that "the overall knowledge common to the community that is a basis for determining a duty to warn, not what individuals may or may not know." *Robinson*, 2000 WL 35432556, at *2 (internal quotations omitted). Because of the objective nature of this standard, the age of the person using the product does not vitiate common knowledge of the danger nor does the foreseeability of an underage person using the product impose a duty to warn. *Id.* at *3. Similarly, when commercials show dangerous activity in a positive light they do not negate basic common knowledge of a danger. *Id.*

Common knowledge often refers to that possessed by the public at large, *see id.*, but where the product user is a member of an industry or special group, the common knowledge of the industry or group may control. *See Ex parte Chevron Chem. Co.*, 720 So. 2d at 923 (considering the common knowledge among pipe installers); *Ala. Power Co. v. Williams*, 570 So. 2d 589, 592 (Ala. 1990) (considering the common knowledge among engineers in the industry). Common knowledge of the danger precludes the existence of a duty to warn against it, so when there is common knowledge, a plaintiff cannot establish a prima facie case of negligent failure to warn. In AEMLD cases, common knowledge provides a complete affirmative defense. *Robinson*, 2000 WL 35432556, at *5. However, common knowledge of a general danger associated with a product does not necessarily relieve the manufacturer of a duty to warn of a specific danger. *See Hicks v. Commercial Union Ins. Co.,* 652 So. 2d 211 (Ala. 1994*)* (question of fact presented where common knowledge of general danger associated with pipe stoppers during pressure testing did not necessarily relieve manufacturer of duty to warn against dangers posed by a specific defect).

Examples of Dangers That May be Common Knowledge

- Irresponsible use of alcohol is dangerous. *Robinson v. Anheuser-Busch, Inc.*, 2000 WL 35432556, at *2 (M.D. Ala. August 1, 2000) (holding that there is no duty to warn about dangers of under-age drinking in beer commercials with characters appealing to children because dangers are common knowledge); *see also Krupp Oil Co. v. Yeargen*, 665 So. 2d 920, 925 (Ala. 1995) (holding that there is no duty to warn that alcohol impairs physical faculties because it is common knowledge); *Kingry v. McCardle*,

98 So. 2d 44, 47 (Ala. 1957) (determining that there is no duty to warn that alcohol affects motor vehicle operation).

- Failing to properly ground pipe during the purging process will increase the danger of static electricity and fire. *Ex parte Chevron Chem.*, 720 So. 2d 922, 925-26 (Ala. 1998) (holding that danger was common knowledge among plastic pipe installers).
- Low pressure impulse line pipes have the potential for interior corrosion. *Ala. Power Co. v. Williams*, 570 So. 2d 589, 592 (Ala. 1990) (holding interior corrosion of impulse line pipes is common knowledge among engineers in industry).
- Smoking tobacco products is harmful to health. *Toole v. Brown & Williamson Tobacco Corp.*, 980 F. Supp. 419, 425 (N.D. Ala. 1997) (noting that the danger associated with tobacco products has been "ordinary knowledge common to the community" since the late 1980s).
- It is dangerous to mount tires on multi-piece rims. *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 471 (11th Cir. 1993) (determining danger is common knowledge among experienced tire-changers).

Examples of Dangers that Are Not Common Knowledge as a Matter of Law

- Although dangers associated with standing near pipe stoppers during pressure testing may be common knowledge, it is not necessarily common knowledge that mismatching of the jaws of a pipe stopper will greatly increase likelihood of an accident. *Hicks v. Commercial Union Ins. Co.*, 652 So. 2d 211, 217 (Ala. 1994).
- An issue of fact exists as to whether a post hole digger should know that it is dangerous to apply force to a post hole machine. *Rodgers v. Shave Mfg. Co.*, 993 F. Supp. 1428, 1436 (M.D. Ala. 1998).

Is There a Duty to Warn Of Open and Obvious Dangers?

No, not in Alabama. As explained in *Abney v. Crosman Corp.*, 919 So. 2d 289 (Ala. 2005):

> The duty to warn expressed in §388(c) [of the Restatement (Second) of Torts] is "triggered only when the supplier has 'no reason to believe' that the user will realize the 'dangerous condition' of the product referred to in §388(b)." Ex parte Chevron Chem.[Corp.], 720 So. 2d [922, 925 (Ala. 1998)]. In other words, "[t]he objective of placing a duty to warn on the manufacturer [or supplier] of a product is to acquaint the user with a danger of which he is not aware, and there is no duty to warn when the danger is obvious." *Gurley v. American Honda Motor Co.*, 505 So. 2d 358, 361 (Ala. 1987) (citing *Ford Motor Co. v. Rodgers*, 337 So. 2d 736, 739 (Ala. 1976)).

Id. at 294.

"Open and obvious" is treated as an affirmative defense in AEMLD cases, but it is treated "as obviating the defendant's duty in a negligence case." *Abney*, 919 So. 2d at 295 (comparing *Atkins v. Am. Motors Corp.*, 335 So. 2d 134, 143 (Ala. 1976), with *Rodgers*, 337 So. 2d at 739). While that distinction may seem to be one of little difference, the Supreme Court of Alabama, in *Bean v. Bic*, used it to justify denying summary judgment. The Court indicated that in AEMLD cases, the "open and obvious" issue did not fall under the prima facie case of duty, which would be a legal issue, but instead, fell under the affirmative defense of assumption of risk, which would be a fact issue. *Bean*, 597 So. 2d at 1352-53. The Court, therefore, held that summary judgment on this fact issue was inappropriate. *Id*. at 1353; *see also King v. S.R. Smith, Inc.*, 578 So. 2d 1285, 1287 (1991) (reversing summary judgment on similar reasoning) ("Whether a danger [is] open and obvious

does not go to the issue of the duty of the defendant under the AEMLD. Instead, open and obvious danger relates to the affirmative defense of assumption of risk, the alleged defectiveness of the product, and the issue of causation." (internal quotations omitted)). The Court failed to address the fact, however, that plaintiff also sued under an independent negligence theory, *see Bean*, 597 So. 2d at 1352-53; in negligence, "open and obvious" *does* fall under the prima facie case of duty and is a legal issue. In the 2005 case of *Abney*, the Court noted the "logical inconsistency" between the treatment of the "open and obvious" issue depending upon which theory, AEMLD or negligence, is presented, but the court nevertheless granted summary judgment for failure to warn under both theories. 919 So. 2d at 295-96.

Examples of Open and Obvious Dangers as a Matter of Law

- Uncontested evidence that the plaintiff knew that a gun could kill a person is sufficient to preclude jury issue on whether the danger was open and obvious. *Abney v. Crosman Corp.*, 919 So. 2d 289, 295-96 (Ala. 2005).
- Lubricating exposed, moving gears on a crane is a known danger. *Entrekin v. Atl. Richfield Co.*, 519 So. 2d 447, 450 (Ala. 1987).

Examples of Dangers Not Open and Obvious as a Matter of Law

- It is not obvious that butane lighters pose hazards to young children. *Bean v. Bic Corp.*, 597 So. 2d 1350, 1353 (Ala. 1992) (holding that summary judgment is inappropriate because "open and obvious" was fact question as part of affirmative defense under AEMLD).
- It is not obvious that applying lubricant underneath a corn header attached to a combine while in a raised position is dangerous. *Ford Motor Co. v. Rodgers*, 337 So. 2d 736, 740 (Ala. 1976) (conflicting evidence about whether danger was open and obvious and case should go to jury).
- The danger of diving from pool diving boards is not open and obvious as a matter of law. *King v. S.R. Smith, Inc.*, 578 So. 2d 1285, 1288 (Ala. 1991).

Subjective or Objective Perspective?

When evaluating the "open and obvious" character of the danger, whose perspective do we evaluate: the objective perspective of a reasonable man or the subjective perspective of the plaintiff or user? The vast majority of cases have "focused upon the particular plaintiff's subjective knowledge of the danger." *Abney v. Crosman Corp.*, 919 So. 2d 289, 294-95 (Ala. 2005) (collecting cases). The following citation from *Abney* lists five other cases evaluating "open and obvious" from the plaintiff's subjective knowledge of the danger:

> *See Mathis v. Harrell Co.*, 828 So. 2d 248, 257 (Ala.2002) (concluding that "in this case, the facts do not establish that there was an open and obvious danger.…[T]here is testimony that [the plaintiff] was hurried and that he did not know, understand, and appreciate the danger"); *Rowden v. Tomlinson*, 538 So. 2d 15, 18 (Ala. 1988) (concluding that "[t]he evidence shows that the rotating auger blades were open and obvious to Rowden's view and that he knew, understood, and appreciated their danger"); *Hawkins v. Montgomery Indus. Int'l, Inc.*, 536 So. 2d 922, 926-27 (Ala. 1988) (concluding that a defendant had no duty to warn of a danger because the evidence indicated that all parties were aware of it); *Entrekin v. At. Richfield Co.*, 519 So.2d 447, 450 n. 5 (1987) (concluding that a defendant had no duty to warn because the plaintiff knew of the danger posed by a product); and *Gurley v. Am. Honda Motor Co.*, 505 So.2d at 360 (concluding that defendant had no duty to warn because the plaintiff "had read and

> understood the warnings" and had even informed a friend that the product-a motorcycle-was not built for two people).

Abney, 919 So. 2d at 294-95.

While *Abney* notes that the vast majority of cases have viewed this issue from the subjective point of view, it also provides examples of cases in which the Supreme Court of Alabama has considered a more objective perspective. In *Ford Motor Co. v. Rodgers*, 337 So. 2d 736, 740 (Ala. 1976), the Court listed the following as appropriate for jury consideration in a product liability action alleging negligent failure to warn:

> whether the injured person had any special experience involving the condition from which he was injured, whether it would be commonly known that such a condition was dangerous, whether the danger should have been obvious to the injured person, and finally, whether the user had knowledge of the danger and appreciated it.

The first and fourth considerations focus on subjective knowledge but the second and third seem to be more objective inquiries. *See also Ex parte Chevron Chem. Corp.*, 720 So. 2d 922, 926 (Ala. 1998) (holding that there was no duty to warn when plaintiffs already were, or had reason to be aware of the danger); *Halsey v. A.B. Chance Co.,* 695 So. 2d 607, 610-11 (Ala. 1997) (determining plaintiff's evidence that "someone" could have made the same mistake as plaintiff's decedent was substantial evidence that the danger was not open and obvious).

Interestingly, the *Abney* court chided the parties for not addressing the "critical issue [of]…whether the openness of a particular danger is to be evaluated from the objective perspective of a 'reasonable person' or from the subjective perspective of the particular plaintiff." *Abney*, 919 So. 2d at 294. While acknowledging that its current position was to view "open and obvious" subjectively, the Court seemed to be telegraphing that it would like to have re-considered that issue and regretted that neither party asked it to do so: "Yet because no party here has argued that we should reverse course, we need not reevaluate the wisdom of determining the openness and obviousness of a danger based on the subjective perspective of the user." *Id.* at 295.

Whose Perspective?

Because the majority of Alabama cases have embraced a subjective perspective, it therefore becomes crucial to determine *whose* subjective perspective? In other words, to whom does the danger need to be open and obvious: the purchaser, the plaintiff, or the person who ultimately used the product? The common answer is the *user of the product*: "negligent-failure-to-warn cases have also historically examined the openness and obviousness of a danger from the vantage point of the 'person for whose use [the product] is supplied.'" *Abney*, 919 So. 2d at 295 (quoting *Restatement (Second) of Torts* §388). The court in *Abney,* however, had an interesting twist on this issue. The user of the product in question, a BB gun, was a seven-year-old child, and the purchaser of the product was the child's mother. The plaintiff seemed to assume that the appropriate perspective to evaluate was that of the gun's purchaser, not the gun's user. The *Abney* court found that the danger was open and obvious from the user-child's perspective but also found that even if the purchaser's perspective were considered, the danger would still be open and obvious. *Id.* at 296.

Is It Necessary to Warn about Unavoidably Unsafe Products?

Perhaps so. The term "unavoidably unsafe" is found and described in Comment k to Section 402A of the *Restatement (Second) of Torts* (1965):

> k. Unavoidably unsafe products

> There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies…. Such a product, properly prepared, and *accompanied by proper directions and warning*, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician…. The seller of such products, again with the qualification that they are properly prepared and marketed, and *proper warning is given*, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk. (underlining added).
>
> Alabama state and federal courts have noted that this comment of the *Restatement* "retains its utility" under AEMLD. *Stone v. Smith, Kline & French Labs*., 731 F.2d 1575, 1578 (11th Cir. 1984); *Atkins v. Am. Motors, Corp*., 335 So. 2d 134, 143 n.5 (Ala. 1976).

Is There a Heeding Presumption in This State?

Under Alabama negligence law, there is no presumption that the warning would have been read and heeded: "A negligent-failure-to-adequately warn case cannot be submitted to a jury unless there is some evidence that the…warning would have been read and heeded and would have kept the accident from occurring." *Gurley v. Am. Honda Motor Co.*, 505 So. 2d 358, 361 (Ala. 1987); *see also Yarbrough v. Sears, Roebuck & Co.*, 628 So. 2d 478, 482-83 (Ala. 1993).

Under the AEMLD, however, "when a warning is given by the manufacturer, the manufacturer may reasonably assume that it will be heeded by the consumer." *Morguson v. 3M Co.*, 857 So. 2d 796, 802 (Ala. 2003) (citing *Ex parte Chevron Chem. Co.*, 720 So. 2d 922, 927 (Ala. 1998); *see also* Restatement (Second) of Torts §402 A cmt. j (1965) ("Where warning is given, the seller may reasonably assume that it will be read and heeded.").

What Defenses Are Available to Those Within the Chain of Distribution?

Types of Parties

Manufacturer

Alabama categorizes the available defenses as general denials and affirmative defenses. *Atkins v. Am. Motors, Corp.*, 335 So. 2d 134, 143 (Ala. 1976). To assert a general denial, the manufacturer must present evidence that the defect or harmful nature of the product occurred only after the product left its control or possession. *Id*. While there is only one type of general defense available, there are several affirmative defenses available, including causal relation, assumption of risk, contributory negligence, and, most importantly, prior knowledge of the harm. *Id*. at 143-44. "The defendant may establish that there is no causal relation in fact between his activities in connection with handling the product and its defective condition." *Id*. at 143. Assumption of risk requires proof that the defendant "sold a product which was unavoidably unsafe and the danger was either apparent to the consumer or the seller adequately warned the consumer of the danger." *Id*. In addition, contributory negligence applies in the context of the duty to warn. *Id*. Importantly, a party can avoid liability if there is proof that a user is aware of the dangerousness of a product. *Robinson v. Anheuser-Busch, Inc*., 2000 WL 35432556, at *5 (M.D. Ala. Aug. 1, 2000).

Bulk Suppliers, Distributors, and Retailers

Under the AEMLD, "the term 'manufacturer'[ ]…is applicable to every seller engaged in the business of selling products." *Huprich v. Bitto*, 667 So. 2d 685, 687 (Ala. 1995). Therefore, the same general and affirmative defenses will apply to bulk sellers, distributors, and retailers. Also see the discussion of Ala. Code §§6-5-501 and 6-5-521, *supra* (statutes protecting distributors who are "merely conduits of a product" in certain circumstances).

Isolated or Occasional Sellers

While the term "manufacturer" in an AEMLD action "excludes isolated or occasional sellers from liability." *McGraw*, 812 So. 2d at 275 (internal quotations omitted). The company that sold the rubber processor in *McGraw* was not the rubber processor's manufacturer or a company engaged in the business of selling such machines, but was a rubber processing company that sold a machine it no longer used. As an "occasional seller," the company was not liable under the AEMLD. *Id.* at 276. Similarly, a seller who is not in the business of selling the dangerous product is not liable for a failure to warn. *Caudle v. Patridge*, 566 So. 2d 244, 248 (Ala. 1990).

Pharmaceutical Representatives

Plaintiffs in many failure to warn cases have sued pharmaceutical representatives along with drug companies on various theories (fraud, AEMLD, breach of warranty), often in an attempt to add a non-diverse defendant and destroy federal diversity jurisdiction. The courts have generally dismissed the pharmaceutical representatives, finding that the AEMLD and warranty claims apply only to "sellers" and "manufacturers" and not to drug representatives. The fraud claims are similarly generally unsupportable where drug representatives are innocent "conduits" through whom information flows from company to third parties and who simply rely on information provided by the company without any knowledge of its falsity. *See*, *e.g.*, *Gordon v. Pfizer Inc.*, 2006 WL 2337002, at *6 (N.D. Ala. May 22, 2006) (collecting cases).

Pharmacists

The learned intermediary doctrine forecloses liability of pharmacists in prescription drug cases under a duty to warn theory. Their duty is limited to filling the prescription and being alert to mistakes obvious on the face of the prescription. *Walls v. Alpharma USPD, Inc.*, 887 So. 2d 881, 886 (Ala. 2004).

Proximate Cause: No Proximate Cause under Negligent Failure to Warn

One cannot submit to a jury the issue of inadequacy of written warning without evidence that the plaintiff would have read and heeded it. *Gurley v. Am. Honda Motor Co.*, 505 So. 2d 358, 361 (Ala. 1987) (holding that warnings on motorcycle fuel tank and owner's manual were sufficient as a matter of law); *E.R. Squibb & Sons, Inc. v. Cox,* 477 So.2d 963, 970-71 (Ala. 1985) (inadequacy of warnings did not cause injury when plaintiff admitted that he did not read instructions and warnings provided on and with insulin).

No Proximate Cause: Affirmative Defense under AEMLD

If users failed to read the warnings or the document containing warnings, their choice not to read breaks the causal chain and the alleged inadequate warning is not the proximate cause of their injury. *See Chase v. Kawasaki Motors Corp.*, 140 F. Supp. 2d 1280, 1287-88 (M.D. Ala. 2001) (involving ATV purchasers who

admitted that they did not read owner's manual containing warnings); *Ex parte Chevron Chem. Corp.*, 720 So. 2d 922, 926-27 n.3 (Ala. 1998) (determining that plaintiff's choice not to read manual with warning does not impose on defendant a duty to put warning on product itself); *Yarbrough v. Sears, Roebuck, & Co.*, 628 So. 2d 478, 482 (Ala. 1993). There is an exception to the "read and heed" rule where the alleged inadequacy prevents plaintiff from reading the warning. *See E.R. Squibb & Sons, Inc. v. Cox,* 477 So. 2d 963, 971 (Ala. 1985).

Intervening, Independent Cause

When a defect created by an alteration to a product after it left the seller's control is the factual and proximate cause of an injury, and the alteration was not foreseeable, the alteration amounts to an intervening or superseding cause of the injury and relieves the seller from liability under the AEMLD.

Kirk v. Garrett Ford Tractor, Inc., 650 So. 2d 865, 867 (Ala. 1994). *See also Easterling v. Ford Motor Co.*, 2018 WL 1535290, at *14 (N.D. Ala. Mar. 29, 2018) ("Because the [seat belt] buckle's 'imminently dangerous' condition resulted from an alteration of the product, [plaintiff] cannot establish that Ford had a duty to warn him about the danger."). Intervention of a "learned intermediary" will often "destroy[ ] the causal link between the allegedly defective product, and the plaintiff's claimed injury." *Bodie v. Purdue Pharma Co.*, 2007 WL 1577964, at *6 (11th Cir. June 1, 2007) (applying Alabama law in pharmaceutical product case); *Stone v. Smith, Kline & French Labs.*, 447 So. 2d 1301, 1304 (Ala. 1984) ("We cannot quarrel with the general proposition that where prescription drugs are concerned, the manufacturer's duty to warn is limited to an obligation to advise the prescribing physician of any potential dangers that may result from the drug's use." (quoting and adopting *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1274 (5th Cir. 1974))). Intervening and independent cause defenses are not, however, always successful, because it can be argued that the injury often would not have occurred but for the failure to warn, *i.e.*, the intervening party cannot foresee the dangerous consequences of its action. *See*, *e.g.*, *Gean v. Cling Surface Co.*, 971 F.2d 642, 646 (11th Cir. 1992) (holding that a reasonable jury could conclude that, but for the failure to warn, the plaintiff would not have been injured).

Assumption of Risk: Affirmative Defense under the AEMLD

Even if a plaintiff presents a prima facie case that a manufacturer failed to adequately warn about a defective or dangerous product, the manufacturer cannot be held liable when the defendant knew and appreciated the danger and used the product anyway. To establish assumption of the risk, defendant must prove: "(1) knowledge by the plaintiff of the dangerous condition, (2) appreciation of the danger under the surrounding conditions and circumstances, and (3) that the plaintiff acted unreasonably by placing himself in to the way of the known danger." *Campbell v. Robert Bosch Power Tool Corp.*, 795 F. Supp. 1093, 1099 (M.D. Ala. 1992); *see also Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 470 (11th Cir. 1993).

It is not enough for defendant to prove "[a] general awareness of danger." *Reynolds*, 989 F.2d at 470. For example, where a plaintiff testified to having no appreciation of the specific danger of a grinder disk shattering and flying into his eye, it is not enough to show a more generalized knowledge of the danger that can be caused to an eye by grit resulting from using power tools. *Campbell*, 795 F. Supp. at 1099. Instead, "the defendant must show that the plaintiff actually appreciated the specific danger which caused his injuries. 'The fact that the plaintiff is fully aware of one risk…does not mean that he assumes another of which he is unaware.'" *Id.* at 1100 (quoting *Davis v. Liberty Mut. Ins. Co.*, 525 F.2d 1204, 1206-07 (5th Cir. 1976) (applying Alabama law)). The "defendant must prove that the plaintiff understood the danger involved." *Gean v. Cling Surface Co.*, 971 F. 2d 642, 646 (11th Cir. 1992); *see*, *e.g.*, *Abney v. Crosman Corp.*, 919 So. 2d. 289, 291, 295-96 (Ala.

2005) (awareness of danger that gun could kill a person established where BB gun user testified that he knew that it could kill a person and that BB gun purchaser told her children that the gun could kill).

Contributory Negligence through Product Misuse

Another affirmative defense available to a defendant under AEMLD is product misuse. Ordinarily, the issue whether plaintiff misused the product is one for the trier of fact. *Beloit Corp. v. Harrell,* 339 So. 2d 992, 997 (Ala. 1976). When, however, there is no dispute that the plaintiff misused the product in question or did not put it to its intended use, the cause of action is appropriate for summary judgment. A defendant cannot assert a misuse defense if that defense is based on the same warning label that plaintiff alleges is "inadequate." *See Campbell v. Robert Bosh Power Tool Co.*, 795 F. Supp. 1093, 1098 (defense of misuse premised on plaintiff's failure to heed warning label raised question of fact where plaintiff alleged warning itself was inadequate).

Is an Expert Required on Warning Issues?

"'[O]rdinarily, expert testimony is required' in AEMLD cases…" *Rudd v. Gen. Motors*, 127 F. Supp. 2d 1330, 1338 (M.D. Ala. 2001) (alteration in original) (quoting *Sears, Roebuck & Co. v. Haven Hills Farm, Inc.*, 395 So. 2d 991, 995 (Ala.1981)). This testimony is typically needed because of the complexity of the product and the lack of competency of ordinary jurors to understand the defectiveness issue without expert help. *See Sears, Roebuck & Co.*, 395 So.2d at 995. There are limited instances, however, where lay jurors may be able to "reasonably infer that the defective condition of the product is the cause of the product's failure and plaintiff's resultant injury…absent expert testimony." *Id.*; *see Goree v. Winnebago Indus., Inc.*, 958 F.2d 1537, 1542 (11th Cir. 1992) (dismissal for failure to present expert testimony reversed in AEMLD case where evidence that temperatures generated within a Winnebago were 65 degrees higher than those which would normally cause burn injuries sufficient to present question of defect to jury). Such cases represent an exception, rather than the norm.

For example, the Supreme Court of Alabama has stated that an automobile braking system requires expert testimony:

> [A]n automobile brake system is composed of, among other parts, calibers, rotors, disks, rear wheel cylinders, brake shoes, and master cylinders; it is a system composed of parts that would not be familiar to the lay juror, and the lay juror could not reasonably be expected to understand that system and determine if it was defective, without the assistance of expert testimony. In essence, it is a system that appears to be precisely the type of complex and technical commodity that would require expert testimony to prove an alleged defect.

Brooks v. Colonial Chevrolet-Buick, Inc., 579, So. 2d 1328, 1333 (Ala. 1991).

In *Rudd*, an Alabama federal court touched on the issue of requiring expert testimony when it granted the defendant's motion for summary judgment on the duty to warn issue. While the warning issue is generally raised as an affirmative defense,

> when the AEMLD plaintiff is the party to raise [failure to warn] issues as distinct claims, he or she must at least satisfy the usual AEMLD standard, offering proof that the lack-of-adequate-warning or lack-of-a-protective-shield itself constitutes a defect, that is, a condition that was "unreasonably dangerous" for intended uses of the product.

Rudd, 127 F. Supp. 2d at 1346. In granting summary judgment for defendant under the failure to warn (AEMLD) cause of action, the court noted that the plaintiff did "not provide[] any testimony or evidence, much less expert testimony, to suggest that it was unreasonably dangerous for GM not to provide a protective shield or not to warn more adequately of the dangers of fan-blade separation." *Id.* at 1347. The Court's holding suggests that absent some other clear evidence of an inadequate warning or failure to warn, expert testimony would be required to establish a prima facie failure to warn under the AEMLD. *See also Jim Bishop Chevrolet-Buick-Pontiac-GMC, Inc. v. Burden*, 211 So. 3d 794, 803 (Ala. 2016) (reversing denial of judgment as a matter of law and rendering judgment in favor of defendant on plaintiff's claim for breach of duty to warn based on car dealership's handling of complaints related to burning odor emanating from truck due to lack of expert testimony demonstrating how [the dealership] breached its duty in failing to recognize that a hazardous condition existed within the truck and failed to warn [plaintiff] of the condition under the circumstances").

Has the Duty to Warn Been Preempted with Respect to Any Product in This State?

Railroads Warnings

State laws regarding railroad warnings are preempted by federal law when federal funds are used to the build railroad warnings at issue. *See Norfolk So. Ry. v. Shanklin*, 529 U. S. 344, 353-54 (2000); *Ala. Great S. R.R. Co. v. Johnson*, 874 So. 2d 517, 531 (Ala. 2003).

Cigarettes

A state's requirement to label and to warn is preempted by Congress's action regarding cigarette warnings. *Spain v. Brown & Williamson Tobacco Corp.,* 363 F.3d 1183, 1197 (11th Cir. 2004).

POST-SALE DUTIES

No common law post-sale duty to warn is expressed in Alabama case law, nor has a statutory duty been imposed by the Legislature. *See*, *e.g.*, *Sewell*, 2012 WL 2046830, at *2 (seller of rifle fraudulently joined when plaintiff "presented no evidence to support any cognizable claim…that is unrelated to the product design or manufacture" and "proffered no Alabama law showing that…seller[ ] had a post-sale duty to notify the plaintiff when the manufacturer recalled the rifle three days after the purchase").

Additionally, the Supreme Court of Alabama has not adopted the *Restatement (Third) of Torts: Products Liability* §§10-11, which would impose a post-sale duty to warn and to recall. The Court has rejected a duty to recall in at least one instance. In *Walls v. Alpharma*, 887 So. 2d 881, 882 (Ala. 2004), the court was asked to decide whether there can be a duty to warn or a duty to recall placed on a pharmacist. The court held that there are no duties to warn owed by a pharmacist provided the pharmacist complies with the prescription orders and state and regulatory requirements in filling the prescription. *See id*. at 886. Presumably, then, a pharmacist would have no post-sale duty to warn or to recall.

Note, however, that while there is no cause of action for "failure to recall" under Alabama law, "evidence of a failure to recall may have relevance to a failure to warn claim." *Lampley v. Bridgestone Firestone, Inc.*, 1992 WL 12666661, at *1 (M.D. Ala. Mar. 31, 1992). *See also Lowe v. Gen. Motors Corp.*, 624 F.2d 1373, 1378

(5th Cir. 1980) ("[E]vidence of negligence in the recall campaign is admissible on the issue of a manufacturer's design and manufacturing responsibilities including the duty to warn. The essence of the claim is negligence and failure to carry out the statutorily imposed duties is evidence of negligence.").

The AEMLD, in particular, does not apply to post-sale activities. In *Grimes v. Gen. Motors Corp.*, 205 F. Supp. 2d 1292, 1292 (M.D. Ala. 2002), the district court specifically noted that AEMLD claims address manufacturers' actions *before* sale. If the AEMLD applies only to a manufacturer's "construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, or labeling of the product," *id.* at 1296, then it cannot apply to the manufacturer's post-sale activities. The AEMLD could not, therefore, impose any post-sale duty to warn. *See also Weeks v. Wyeth, Inc.*, 2011 WL 1216501, at *4 (M.D. Ala. Mar. 31, 2011) (noting that "the AEMLD has not subsumed or merged with the common law torts of fraud and failure to warn").

Finally, when a party fails to initially warn but then later issues a post-sale warning, the delay to warn will not suffice to toll the statute of limitations. Specifically, the Supreme Court of Alabama has held: "We rule that a mere failure or refusal to warn, without more, while actionable, does not rise to the level of fraudulent concealment and, hence, does not toll the running of the statute." *Cazalas v. Johns-Manville Sales Corp.*, 435 So. 2d 55, 58 (Ala. 1983) *abrogated on other grounds by Jerkins v. Lincoln Elec. Co.*, 103 So. 3d 1, 7 (Ala. 2011). It should be noted, however, that when a defendant is under no duty to warn but voluntarily undertakes efforts to warn, it can then he held subject to a duty to warn to "foreseeable owners or operators" of the product at issue. *Yanmar*, 166 So. 3d at 83. Such a defendant can only be held liable, however, if its actions exposed the injured person to a greater risk of harm, as compared to the risk present if the defendant had not engaged in the undertaking at all. *Id.* at 84.

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