

Arkansas

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Scope of the “Duty to Warn” in Arkansas

Arkansas’ product liability and consumer protection statutes are few in number; however, Arkansas’ courts have issued clear opinions regarding the duty to warn. As a general rule, a manufacturer has a duty to warn the ultimate user of the risk of its product.¹ This duty arises under three distinct theories of liability: (1) strict liability, (2) negligence and (3) breach of warranty.² A plaintiff may advance multiple theories of liability against a single defendant.³

Theories of Liability

Strict Liability

The Arkansas Product Liability Act applies to “all actions brought for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging, or labeling of any product.”⁴ The Act provides that a manufacturer or supplier of a product is strictly liable if:

- (1) the supplier is engaged in the business of manufacturing, assembling, selling, leasing, or otherwise distributing the product;
- (2) the product was supplied by him in a defective condition which rendered it unreasonably dangerous; and
- (3) the defective condition was a proximate cause of the harm to person or to property.⁵

An “unreasonably dangerous” product is one that “is dangerous to an extent beyond that which would be contemplated by the ordinary and reasonable buyer, consumer, or user who acquires or uses the product.”⁶

Negligence

To establish a *prima facie* case for negligence, a plaintiff must prove breach of duty, proximate cause, and damage.⁷

¹ *West v. Searle & Co.*, 305 Ark. 33, 806 S.W.2d 608 (1991).

² *Hill v. Searle Laboratories, Div. of Searle Pharmaceuticals, Inc.*, 884 F.2d 1064 (1989).

³ *Purina Mills, Inc. v. Askins*, 317 Ark. 58, 875 S.W.2d 843 (1994).

⁴ Ark. Code Ann. §16-116-202(5).

⁵ Ark. Code Ann. §16-116-101.

⁶ Ark. Code Ann. §16-116-202(7)(A).

⁷ *Mason v. Jackson*, 323 Ark. 252, 914 S.W.2d 728 (1996).

Breach of Warranty

An actual sale or a similar transaction is required to maintain a breach of warranty claim. The injured party must be a person whom the manufacturer or seller might reasonably have expected to use, consume or be affected by the goods, but privity is not required.⁸

Causation

The mere fact that an injury occurred is not evidence of causation.⁹ Instead, under Arkansas law, proximate cause is defined as that which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred.¹⁰ Proximate cause may be proven by either circumstantial or direct evidence.¹¹ If the facts are of such a nature and so connected and related to each other, the conclusion of proximate cause may be inferred.¹² However, there must be evidence that would tend to eliminate other causes that may fairly arise from the evidence and the jury must not be left to speculation and conjecture in deciding between two equally probable possibilities.¹³ For example, where plaintiffs offered several “possible sources” of a fire allegedly caused by a defective product, their products liability claim was subject to dismissal for failure to prove causation.¹⁴

Statutes of Limitations

Product liability actions are subject to a three-year statute of limitations, generally measured from the date on which the death, injury or damage complained of occurs.¹⁵ However, the statute of limitations does not commence running until the plaintiff knew, or by the exercise of reasonable diligence, should have discovered the causal connection between the production and the injuries suffered.¹⁶ The three-year statute of limitations period has been determined to govern a breach-of-warranty suit when damages for personal injury are sought.¹⁷

Factors for Testing the Adequacy of a Warning

Whether or not a given warning is deemed adequate depends upon the language used and the impression made upon the mind of an average user of the product.¹⁸ Questions of display, syntax and emphasis are

⁸ *Sawyer v. Pioneer Leasing Corp.*, 244 Ark. 943, 428 S.W.2d 46 (1968).

⁹ *Williams v. Smart Chevrolet Co.*, 292 Ark. 376, 730 S.W.2d 479 (1987).

¹⁰ *Anselmo v. Tuck*, 325 Ark. 211, 924 S.W.2d 798 (1996).

¹¹ *Cockman v. Welder's Supply Co.*, 265 Ark. 612, 580 S.W.2d 455 (1979).

¹² *White River Rural Water Dist. v. Moon*, 310 Ark. 624, 839 S.W.2d 211 (1992).

¹³ *McAway v. Holland*, 266 Ark. 878, 599 S.W.2d 387 (Ark. App. 1979).

¹⁴ *Chandler v. Wal-Mart Stores Inc.*, 2016 Ark. App. 372, 498 S.W.3d 766, 772.

¹⁵ Ark. Code Ann. §16-116-203.

¹⁶ *Martin v. Arthur*, 339 Ark. 149, 3 S.W.3d 684 (1999).

¹⁷ *Follette v. Wal-Mart Stores*, 41 F.3d 1234 (8th Cir. 1994), *supp. opinion on reh'g*, 47 F.3d 884 (8th Cir. 2002).

¹⁸ *Robertson v. Norton Co.*, 148 F.3d 905 (8th Cir. 1998).

analyzed in the evaluation of a warning.¹⁹ If a label is at issue, the test as to whether it adequately conveys a warning is if an ordinary prudent person can understand the label, assuming it does not contain false information.²⁰ With regard to prescription drugs, the warning must be “meaningful and complete” so as to be understood by the recipient, or there must be an individualized medical judgment that this treatment or medication is necessary and desirable for the particular patient.²¹ The adequacy of a warning is generally a question of fact for the jury to determine.²²

Experts and Warning Issues

The adequacy of a given warning is an interpretation of the meaning of words in the English language and is within the capabilities of the jury.²³ Experts are not required, though not precluded, on issues regarding the adequacy of a warning as it is not a scientific matter.²⁴

Heeding Presumption

The doctrine of heeding presumption is recognized in Arkansas.²⁵ If a plaintiff meets his burden of proving that a warning on a product is inadequate, a presumption arises that he would have read and heeded an adequate warning; however, the presumption may be rebutted by evidence that an adequate warning would have been futile under the circumstances.²⁶

To Warn or Not To Warn

Arkansas law imposes a duty upon a manufacturer or seller to warn an ultimate user of the risks of its products.²⁷ That duty, however, is not absolute.

Commonly Known Dangers

There is no duty to warn a product’s user of dangers which are known to him.²⁸ As an example of this theory, an Arkansas state court held, in a matter involving the criminal misuse of a gun, that the manufacturer of the gun had no duty to warn regarding potential misuse as this danger is generally known.²⁹

¹⁹ *Id.* at 907.

²⁰ *Walton*, 191 F.2d at 285.

²¹ *Hill*, 884 F.2d at 1070.

²² *Bushong v. Garman Co.*, 311 Ark. 228, 843 S.W.2d 807 (1992).

²³ *Walton*, 191 F.2d at 285-86.

²⁴ *Id.* at 286.

²⁵ *Lee v. Martin*, 74 Ark. App. 193, 45 S.W.3d 860 (2001).

²⁶ *Boerner v. Brown & Williamson Tobacco Corp.*, 260 F.3d 837 (8th Cir. 2001).

²⁷ *Apex Oil Co., Inc. v. Jones Stephens Corp.*, 881 F.3d 658 (8th Cir. 2018).

²⁸ *Hergeth, Inc. v. Green*, 293 Ark. 119, 733 S.W.2d 409 (1987); *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983).

²⁹ *First Commercial Trust Co. v. Lorcin Eng’g*, 321 Ark. 210, 900 S.W.2d 202 (1995).

Open and Obvious Dangers

Arkansas has many cases regarding open and obvious dangers. There is no duty to warn a product's user of a danger when the defect is open and obvious or the danger is one which the user should reasonably discover for himself.³⁰ However, a manufacturer is not relieved of the duty to exercise due care in the design and manufacture of a product merely because the dangerous feature is clearly exposed.³¹

Unavoidably Unsafe Products

There is no case law in Arkansas obviating the duty to warn based upon a product being unavoidably unsafe. Arkansas has, however, adopted the unavoidably unsafe product defense.³² The unavoidably unsafe product defense stands for the proposition that some products, such as certain prescription drugs, are so beneficial to society that their manufacturer should not be held strictly liable if the products are properly prepared and are accompanied by adequate warnings.³³

Sophisticated Users

Arkansas does not create a specific exception from the duty to warn when sophisticated users are involved. Arkansas does state there is no duty of a manufacturer or supplier to warn a user who knows of the danger or by whom the danger is reasonably discoverable.³⁴

Duty within the Distribution and Manufacturing Chain

Warnings given to a purchaser do not necessarily insulate the manufacturer or supplier from liability to an injured user of the product.³⁵ Arkansas defines a manufacturer as the designer, fabricator, producer, compounder, processor or assembler of any product or its component parts.³⁶ Furthermore, a supplier who sells a product which he knows or has reason to know is likely to be dangerous when used in the manner or for the purpose for which it was designed has a duty to give a reasonable and adequate warning of that danger.³⁷ Arkansas defines a supplier as any individual or entity engaged in the business of selling a product, whether the sale is for resale, or for use or consumption.³⁸ A supplier includes a retailer, wholesaler, or distributor and, also, includes a lessor or bailor engaged in the business of leasing or bailment of a product.³⁹

³⁰ *Hergeth*, 293 Ark. at 122.

³¹ *Forrest City Machine Works, Inc. v. Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981).

³² *West*, 305 Ark. at 39, 806 S.W.3d at 612.

³³ *Id.*

³⁴ *Hopkins v. Chip-In-Saw, Inc.*, 630 F.2d 616 (W.D. Ark. 1980).

³⁵ *Id.* at 620.

³⁶ Ark. Code Ann. §16-116-202(3).

³⁷ *Lilly v. J.A. Riggs Tractor Co.*, 238 Ark. 1027, 386 S.W.2d 488 (1965).

³⁸ Ark. Code Ann. §16-116-202(6)(A).

³⁹ Ark. Code Ann. §16-116-202(6)(B).

Defenses Available to the Manufacturer or Supplier of a Product

- (a) Compliance by a manufacturer or supplier with any federal or state statute or administrative regulation existing at the time a product was manufactured and prescribing standards of design, inspection, testing, manufacture, labeling, warning or instructions for use of a product shall be considered as evidence that the product is not in an unreasonably dangerous condition in regard to matters covered by these standards.⁴⁰
- (b) Supplying of a product after its anticipated life may be considered as a defense by the manufacturer as between the manufacturer and supplier if the product is supplied after the expiration date placed on the product.⁴¹
- (c) Use of a product beyond its anticipated life by a consumer where the consumer knew or should have known the anticipated life of the product may be considered as evidence of fault on the part of the consumer.⁴²
- (d) Arkansas, also, recognizes the unsafe product defense.⁴³

Indemnity of the Supplier

A supplier of a defective product, who is not the manufacturer, shall have a cause of action for indemnity from the manufacturer of a defective product arising from the supplying of the defective product.⁴⁴ Arkansas does not separately define bulk suppliers.

Liability of Component Part Manufacturers

Component part manufacturers are clearly included in the Arkansas Products Liability Act of 1979 under the definition of manufacturer.⁴⁵ Arkansas has not yet adopted the component-parts doctrine which provides that suppliers of inherently safe component parts are not responsible for accidents which result when the parts are integrated into a larger system the component part supplier did not design or build.⁴⁶ However, in 2006, an Arkansas court, applying reasoning analogous to the component-parts doctrine, held a gun powder manufacturer was not liable for a plaintiff's claim that the manufacturer had a duty to warn regarding the use of its gun powder in a particular type of rifle.⁴⁷ The court reasoned the gun powder manufacturer did not have any control over the design, testing or manufacturing of the rifle in question and that the gun powder was a non-defective product.⁴⁸

⁴⁰ Ark. Code Ann. §16-116-205(a).

⁴¹ Ark. Code Ann. §16-116-205(b).

⁴² Ark. Code Ann. §16-116-205(c).

⁴³ *West*, 305 Ark. at 39, 806 S.W.3d at 612.

⁴⁴ Ark. Code Ann. §16-116-207.

⁴⁵ Ark. Code Ann. §16-116-202(3).

⁴⁶ *Wagner v. GMC*, 370 Ark. 268, 258 S.W.3d 749 (2007).

⁴⁷ *Ford v. Traditional Sporting Goods, Inc.*, No. CIV. 05-2086, 2006 WL 3075547 (W.D. Ark. Oct. 30, 2006).

⁴⁸ *Id.*

The Learned Intermediary Doctrine

A manufacturer's duty to warn generally extends to the ultimate user of a product; however, the learned intermediary doctrine serves as an exception to this rule.⁴⁹ The learned intermediary doctrine provides that a drug manufacturer may rely on the prescribing physician to warn the ultimate consumer of the risks of a prescription drug because the physician acts as the learned intermediary between the manufacturer and the ultimate consumer.⁵⁰ In applying the doctrine to pharmaceuticals, the Arkansas Supreme Court explained that (1) the patient relies on her physician's independent medical judgment that the drug is appropriate—not on the manufacturer, (2) “it is virtually impossible in many cases for a manufacturer to directly warn each patient,” and (3) imposing “a duty to warn the user directly would interfere with the relationship between the doctor and the patient.”⁵¹

The learned intermediary doctrine does have limitations in Arkansas. It must be shown that the warning given by the physician is part of an individualized medical judgment and the treatment or medication is desirable for the individual patient.⁵² In *West v. Searle*, the Arkansas Supreme Court determined that the public policy reasons for the learned intermediary doctrine are present as to oral contraceptives.⁵³ The Court reasoned that although the patient would make the initial choice about birth control, the physician would exercise medical judgment as to the best method of contraception. However, the Eighth Circuit in *Hill v. Searle*, which pre-dates *West*, held a drug manufacturer does have a duty to warn the patient of risks associated with an IUD device. The Eighth Circuit reasoned that IUD devices, like other forms of birth control, are atypical from most prescription drug products because the patient makes an independent decision as to whether to use birth control and the method she prefers with only limited input from the physician.⁵⁴ A more recent Eighth Circuit decision found that, under Arkansas law, the learned intermediary doctrine defeated a failure-to-warn claim where the prescribing physical had independent knowledge of the risks an adequate warning would have communicated.⁵⁵

Delegating the Duty to Warn to Third Parties

The delegation of the duty to warn to third parties is an area of law which has had little discussion in Arkansas. Arkansas has adopted the learned intermediary doctrine which allows the manufacturer to rely upon a prescribing physician to warn the ultimate user of the risks associated with a prescription drug.⁵⁶ In a case involving the death of an employee while operating a piece of lumber equipment, the court held when a manufacturer can reasonably foresee that the warnings it gives to a purchaser of its product will not be adequately conveyed to a probable user of the product, then its duty to warn may extend beyond the purchaser to any per-

⁴⁹ *In re Prempro Prod. Liab. Litig.*, No. 4:03CV1507-WRW, 2006 WL 1897267 (E.D. Ark. July 11, 2006).

⁵⁰ *Id.*; *Hill*, 884 F.2d at 1070.

⁵¹ *Kowalski v. Rose Drugs of Dardanelle, Inc.*, 2011 Ark. 44, 378 S.W.3d 109, 120.

⁵² *Hill*, 884 F.2d at 1070.

⁵³ *West*, 305 Ark. at 43, 806 S.W.3d at 613-14.

⁵⁴ *Hill*, 884 F.2d at 1070-71.

⁵⁵ *Bell v. Pfizer, Inc.*, 716 F.3d 1087 (8th Cir. 2013).

⁵⁶ *In re Prempro Prods. Liab. Litig.*, 2006 WL 1897267, at *2.

son foreseeably endangered by the product's use.⁵⁷ While the court did not go so far as to say that the manufacturer could not depend on the purchaser of the product, here an employer, to convey warnings to the ultimate user, the court still held the manufacturer to the duty of insuring the ultimate user was adequately warned.⁵⁸

Post-Sale Duty to Warn

The post-sale duty to warn is another area that has not been widely addressed in Arkansas. Arkansas has held there can be no manufacturer negligence relating to a product design that did not exist as a defect when the manufacturer parted with possession; however, it recognized an exception might arise where there exists a subsequent duty to warn or to recall.⁵⁹ In a combined products liability and medical malpractice action involving a piece of equipment utilized to administer anesthesia, an Arkansas federal court found the plaintiffs had no cause of action under Arkansas law regarding any post sale duty to warn as Arkansas imposes liability as of the time of sale.⁶⁰ The Court further noted there was no government recall which would place a subsequent duty upon the manufacturer in this case.⁶¹ Pursuant to the Arkansas Product Liability Act, in determining the liability of the manufacturer, the state of scientific and technological knowledge available to the manufacturer or supplier at the time the product was placed on the market, rather than at the time of injury, may be considered as evidence.⁶²

Preemption

The duty to warn has been preempted with regard to some specific products in Arkansas. Arkansas has ruled in cases involving insecticide that a plaintiff's claims involving failure to warn were preempted by the Federal Insecticide, Fungicide and Rodenticide Act.⁶³ Likewise, in a case involving the duty to warn of toxic shock syndrome associated with the use of tampons, the court found the Medical Devices Amendments Act of 1976 preempted the failure to warn claim.⁶⁴ The court went further to say that a plaintiff could still recover under state tort law when a defendant fails to comply with the federal requirements imposed.⁶⁵

Restatement Third (Torts)

Arkansas has not formally adopted the *Restatement (Third) of Torts*; however, the Arkansas Supreme Court has looked to the *Restatement (Third)* for guidance recent decisions.⁶⁶ Therefore, the *Restatement (Third) of Torts* cannot be completely discounted as an analytical tool where there is little or no case law on a particular issue.

⁵⁷ *Hopkins*, 630 F.2d at 619.

⁵⁸ *Id.*

⁵⁹ *W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982).

⁶⁰ *Boatman's Trust Co. v. St. Paul Fire & Marine Ins. Co.*, 995 F. Supp. 956 (E.D. Ark. 1998).

⁶¹ *Id.* at 962.

⁶² Ark. Code Ann. §16-116-204(a)(1).

⁶³ *DerGarzarian v. Dow Chemical Co.*, 836 F. Supp. 1429 (W.D. Ark. 1993).

⁶⁴ *National Bank of Commerce v. Kimberly-Clark Corp.*, 38 F.3d 988 (8th Cir. 1994).

⁶⁵ *Id.* at 993.

⁶⁶ *United Sys. of Arkansas, Inc. v. Beason & Nalley, Inc.*, 2014 Ark. App. 650, 448 S.W.3d 731; *Royal Overhead Door, Inc. v. Jernigan*, 2013 Ark. App. 588 (unpublished).

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