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DANGER! DANGER! WILL ROBINSON:

Are My Warnings Enough?

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CHALLENGES POSED IN JURISDICTIONS FOLLOWING THE "HEEDING PRESUMPTION" IN FAILURE TO WARN CASES

1. A. What is the "Heeding Presumption" in Products Liability Warnings Cases?

In a product liability case in which the plaintiff is asserting failure to warn claims, the plaintiff ultimately bears the burden of proving that a failure to warn actually caused the plaintiff's injuries. Meeting that burden of proof is easier in states which recognize or follow the "heeding presumption" doctrine.

Generally speaking, under the "heeding presumption," when a plaintiff introduces evidence that a particular warning was inadequate or unreasonable, a presumption arises that the plaintiff would have "heeded" an adequate or reasonable warning had one been provided. At that point, the burden shifts to the defendant to introduce evidence that the plaintiff would not have followed the purportedly adequate or reasonable warning.

Ironically, the heeding presumption was derived from language in Restatement (Second) of Torts §402A, comment J (1965) that dealt with the opposite situation. Comment J of the Restatement (Second) includes this language: "Where warning is given, the seller may reasonably assume that it will be read and heeded." The logical conclusion of this statement is that it is reasonable for a product manufacturer supplying a warning to presume that a warning, when given, will be read and heeded by a user of the product. Such a result is unquestionably "defendant friendly" in that, at some level, any presumption that a warning will be "heeded" or followed makes a plaintiff's burden of proof far more difficult. Put another way, if a jury must presume that a plaintiff will "heed" a warning (regardless of whether it was seen, read, and/or understood), it is far less likely that the jury tasked with analyzing whether an alleged "failure to warn" caused the plaintiff's injuries will find for that plaintiff.

Unfortunately, some courts have turned that presumption 180 degrees and created a doctrine that is nowhere to be found in the Restatement (Second) – commonly known as the "heeding presumption." Thus, instead of helping defendants as was reasonably contemplated by the drafters, the courts created a presumption that, where a warning is shown to be *inadequate* or *unreasonable*, plaintiff's proposed alternative warning would have been read, understood and followed by the plaintiff . . . and, of course, the plaintiff would not have suffered an injury. It is axiomatic that, in jurisdictions which adopted and follow the heeding presumption, plaintiff's burden of proof is lessened as it all but eliminates their burden to prove causation and, instead, shifts a burden to the defendant to demonstrate that the plaintiff would not have followed the proposed warning or instruction.

Notably, in 1998, when the Restatement (Second) of Torts was replaced by the Restatement (Third), the drafters eliminated any language regarding presumptions and shifting burdens of proof. Indeed, in the notes to comment I of the Restatement (Third), the drafters criticized comment J's presumption language as "unfortunate" and concluded that it shouldn't be followed. Consequently, if you find yourself defending a case in a jurisdiction which adopted/followed the heeding presumption based upon the language of the Restatement (Second), an argument can be made that the elimination of any reference to presumptions in the Restatement (Third) compels abandonment of the heeding presumption.

Accompanying this document is a table of jurisdictions and their respective approach to the heeding presumption. In the United States (including Puerto Rico and the District of Columbia), sixteen (16) states expressly recognize the heeding presumption, with some applying the doctrine in more limited circumstances than others. The remainder of the states have either expressly rejected it or they have not definitively addressed it.

2. Heeding Presumption – Difference Between "Use" Warnings and "Risk" Warnings

A "use warning" is one which addresses the risks if a user fails to use the product in a particular way. For example, if you use the product in a certain manner, you may suffer personal injury. (I.e. if you reach your hand into a meat grinder with the guard removed, you may suffer amputation injury to your hand).

On the other hand, "risk warnings" involve an inherent risk of a particular product (I.e. if you take a particular prescription medication, there is an inherent risk of a particular side effect). In such situations, the warning is provided so that a user can make an informed decision about whether that risk outweighs the benefits that might be gained from using the product.

The difference between the two types of warnings is discussed in *Thomas v. Hoffman-LaRoche, Inc.*, 949 F.2d 806, 814 (5th Cir. 1992).

If you are dealing with a case involving a product with an inherent risk and defending the "risk warning," the only way to avoid the risk is ***not to use the product***.

So . . . what happens if you are in a jurisdiction which follows the heeding presumption when a "risk warning" is involved? Because the only way to avoid an inherent risk is to not use/take the product, "heeding" that instruction essentially means that the product would not have been used/taken. Application of the "heeding presumption" in such situations opens the door to allowing plaintiff's counsel to essentially contend that the product should not have been sold or used. If a jury was to conclude that a plaintiff would have heeded the warning and not accepted the inherent risk, then the product should not have been sold/used or, alternatively, the manufacturers of such products are strictly liable for each and every injury caused by that product – regardless of the contents of the warning and regardless of the effort to allow a plaintiff to make an informed and educated decision. Following a "heeding presumption" in such cases defies logic and common sense. We know, for example, that people continue to use products that have an inherent risk – alcohol, prescription drugs, tobacco products, etc.

For that reason, some courts treat the heeding presumption in cases involving inherent risks and "risk warnings" differently than cases involving "use warnings." For an example, there are courts which interpret the "risk warnings" in prescription medicine cases as meaning only that the prescribing physician would have factored the "risk warning" as information in an "adequate" warning into his or her decision making when determining what to prescribe. *See Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1021 (10th Cir. 2001) (improper to view physician's 'heeding' as an adequate warning to mean [s/he] would have given the warning) (applying Oklahoma law); *In re Diet Drug Litigation*, 895 A.2d 480, 490-91 (N.J. Super. Law Div. 2005).

3. The Importance of Choice of Law

While preparing the summary of jurisdictions and their respective approach to the heeding presumption, we found that a few instances in which there is conflict between a state court approach and the approach employed by federal courts in that state. For example, in Colorado, there is authority from 1986 which holds that Colorado does not recognize the heeding presumption. *Uptain v. Huntington Lab, Inc.* , 723 P.2d 1322, 1326 (Colo. 1986). However, in 1997, a federal court concluded that Colorado does follow the heeding presumption. *Staley v. Bridgestone/Firestone, Inc.* , 106 F.3d 1504, 1509 (10th Cir. 1997). It appears that a subsequent decision clarifies the approach that Colorado does not follow the heeding presumption. *Farmland Mut. Ins. Co., v. Chief Industries, Inc.*, 170 P.3d 832, 839 (Colo. 2007). New York is another jurisdiction where there is state court authority denying

application of the heeding presumption and federal courts concluding that he heeding presumption should be applied. In other jurisdictions (such as Iowa), there is federal court authority which concludes that the heeding presumption applies without specific guidance from that state's highest court.

As a practice pointer, due to the variance in approaches to the heeding presumption in various jurisdictions, counsel should carefully take into consideration choice of law issues and whether arguments can be raised that the court should apply the law of a jurisdiction which refuses to apply the heeding presumption as opposed to a jurisdiction which lessens the plaintiff's burden of proof.

4. How to Defend Warnings Claims in Jurisdictions Following the Heeding Presumption

If you find yourself in jurisdiction which follows the heeding presumption, it is possible for a manufacturing defendant to rebut the presumption with evidence that the plaintiff would not have heeded the warning. Defendant's counsel is ultimately tasked with the responsibility of demonstrating that a plaintiff is not the type of person who typically reads and/or follows warnings or instructions. Eliciting testimony from the plaintiff and/or plaintiff's co-workers/supervisor regarding plaintiff's customs and practices with warnings is one way for defense counsel to rebut the presumption that an alternative warning would have prevented the injury. For example, if you can elicit admissions from the plaintiff that he/she never saw or read the allegedly deficient warning, a strong argument can be made that plaintiff's proposed alternative warning would not have been "heeded" or followed. Trying to elicit custom and practice testimony regarding a plaintiff's approach to warnings with products that he/she owns and uses on a daily basis is another approach (I.e. asking questions about whether the plaintiff has read his vehicle's owner's manual cover to cover or whether the plaintiff can identify all of the warning labels/safety tags in his/her vehicle). Also, eliciting testimony to support the conclusion that a plaintiff was aware of the specific risk but, regardless of that risk, proceeded voluntarily to encounter the risk and subjected himself/herself to harm. *Sharpe v. Bestop Inc*, 713 A.2d 1079, 1085 (N.J.Super. 1998), a New Jersey case, provides a discussion how a defendant can try to rebut the heeding presumption.

Death cases present a particularly difficult scenario. Where a plaintiff was killed in the incident, the heeding presumption essentially substitutes as evidence. As a practical matter, obtaining evidence regarding a plaintiff's custom and practice with warnings/labels or knowledge of a particular risk is far more difficult – if not impossible – if the plaintiff is no longer living. The defense is placed in the difficult position of trying to rebut the presumption that the decedent would have followed an alternative warning without having the ability to question the plaintiff regarding his/her knowledge of the danger or his/her attitude towards warnings or custom and practice of reviewing/following warnings.

POST-SALE DUTY TO WARN CLAIMS – RETAILER CLAIMS – WARNING BEYOND THE LABEL & POST-SALE DUTY TO WARN

Retailers receive inconsistent instructions within and across jurisdictions as to whether they have a duty to warn consumers, when such a duty arises, and what form the warning should take. In some industries, the practical response to this predicament is to sway on the side of caution and issue direct warnings to consumers. Tracking industry trends, legal developments, and implementing changes accordingly does not guarantee protection against failure to warn claims, but it will likely reduce a retailer's exposure to liability.

1. Must Retailers Provide Warnings to Consumers or Warn Beyond What is Provided in the Warning Labels?

For manufacturers, the duty to issue adequate warnings of foreseeable dangers is well-established. In some

states, the retailer may be strictly liable for the manufacturer's failure to adequately warn simply by virtue of being in the line of distribution. See, e.g., *Bylsma v. Willey*, 2017 UT 85, 416 P.3d 595; *Durden v. Hydro Flame Corp.*, 1999 MT 186, 295 Mont. 318, 983 P.2d 943. Retailers may also have an independent duty to warn under a negligence theory. See, e.g., *Love v. Weecoo (TM),* 774 F. App'x 519, 521 (11th Cir. 2019) (Amazon, as seller of hoverboard, may have a duty to warn if it had actual or constructive knowledge of danger); *Topliff v. Wal-Mart Stores E. LP*, No. 6:04-CV-0297 (GHL), 2007 U.S. Dist. LEXIS 20533, at *123 (N.D.N.Y. Mar. 22, 2007) (citing Restatement (Second) of Torts, §§ 388, 401) (addressing Walmart's potential liability for failing to warn of flammable properties on grounds it knew of the danger); *Midgley v. S. S. Kresge Co.*, 55 Cal. App. 3d 67, 71, 127 Cal. Rptr. 217, 219 (1976) (noting telescope retailer's potential liability for failing to warn of dangers in looking at the sun is "coextensive with that of the manufacturer of the product"); *Hartzog v. United Corp.*, 59 V.I. 58, 88 (Super. Ct. 2011) (finding plant retailer could be held liable for failing to issue warning regarding the toxicity of a plant).

Likewise, rental companies may have a duty to warn customers beyond the warnings given by the manufacturer. See, e.g., *Palla v. L M Sports, Inc.*, 388 F. Supp. 3d 1191, 1207 (E.D. Cal. 2019) (boat rental company had duty to warn of particular dangers of using boat for tubing); *Erickson v. U-Haul Int'l, Inc.*, 274 Neb. 236, 246-47, 738 N.W.2d 453, 462-63 (2007) (lessor of truck may have duty to warn intended user depending on factual issues, including user's knowledge of danger); *Barsness v. Gen. Diesel & Equip. Co.*, 383 N.W.2d 840, 845-46 (N.D. 1986) (citing Restatement (Second) of Torts, § 388) (lessor of lift had duty to warn of dangers); *Strong v. U-Haul Co.*, No. 1:03-cv-00383, 2007 U.S. Dist. LEXIS 7818, at *9 (S.D. Ohio Feb. 2, 2007) (rental company had duty to warn of particular towing dangers).

Recently, however, certain jurisdictions have carved out exceptions for retailers when contact with the product, warning, or consumer is tangential.[1] See, e.g., Tex. Civ. Prac. & Rem. Code Ann. § 82.003 (a seller is liable only when it designed, installed, altered or modified the product, exercised substantial control of the product or its warnings, made a harmful representation, knew about the defect, or when the manufacturer is insolvent); *Groesbeck v. Bumbo Int'l Tr.*, 718 F. App'x 604, 612 (10th Cir. 2017) (Utah case law "speak[s] to one clear premise: a passive retailer cannot be held strictly liable for a product defect unless the record evidence discloses some basis to conclude that the retailer participated in the design, manufacture, engineering, testing, or assembly of the challenged product."); *Zamora v. Mobil Oil Corp.*, 104 Wash. 2d 199, 204, 704 P.2d 584, 588 (1985) ("The more the retailer [seller] is only a conduit for the product, the less likely [it] can be held in negligence. Conversely, the more the [seller] takes an active part in preparing the product for final use and takes the role of a manufacturer or assembler, the more likely [it] can be found liable in negligence"). While retailers that operate within these jurisdictions may escape liability, because the exceptions require intensive fact analysis, it is not a shoo-in.

Given the potential exposure to liability, retailers may want to consider issuing thorough warnings of foreseeable dangers to consumers directly, especially when the retailer has more than negligible contact with the consumer or product.

2. Must Retailers Give Warnings to Consumers Post-Sale?

In 1959, the Michigan Supreme Court found General Motors had a duty to issue a warning about a potential defect it discovered only after the vehicle in question was put on the market and sold to the plaintiff. *Comstock v.*

[1] Similarly, courts have dismissed defendants from product liability claims by focusing on the meaning of "retailer" or "seller." See, e.g., *Musser v. Vilsmeier Auction Co.*, 522 Pa. 367, 376, 562 A.2d 279, 283 (1989) (finding an auctioneer was not a seller); *Stiner v. Amazon.com Inc.*, 2019-Ohio-586, ¶ 34, 120 N.E.3d 885, 894 (Ct. App.) (affirming finding by trial court that a third-party vendor was not a seller).

General Motors Corp., 99 N.W.2d 627 (Mich. 1959). After that decision, several other courts applied a similar post-sale duty to manufacturers. *See Rodriguez v. Besser Co.*, 565 P.2d 1315 (Ariz. Ct. App. 1977); *Prokolkin v. General Motors Corp.*, 365 A.2d 1180 (Conn. 1976); *Downing v. Overhead Door Corp.*, 707 P.2d 1027 (Colo. App. 1985).

When the Restatement (Third) of Torts: Product Liability was introduced in 1997 and codified a post-sale duty to warn, it sparked considerable debate. The post-sale duty in the Restatement not only binds manufacturers to issue post-sale warnings, but any party "engaged in the business of selling or otherwise distributing products" when "a reasonable person in the seller's positions would provide such a warning." Third Restatement § 10. Notably, the duty does not require the danger to exist at the time the product is sold. Thus, under the Restatement, retailers and any party in the distribution line may have a timeless obligation to warn even if the product has long since left the store or market in general. And while the Restatement goes on to provide four factors for analyzing what a "reasonable person" might do, those factors are gauzy and generate more questions than answers.[2]

A few jurisdictions have rejected the post-sale duty outright. See *DeSantis v. Frick*, 745 A.2d 624, 632 n.7 (Pa. 1999); *Palmer v. Volkswagen of America*, 905 So. 2d 567 (Miss. Ct. App. 2003). A handful have adopted the Restatement's post-sale duty as written. See, e.g., *Lovick v. Wil-Rich*, 588 N.W.2d 688, 691 (Iowa 1999); *Jones v. Bowie Industries, Inc.*, 282 P.3d 316, 322-23. But most jurisdictions have either adapted the duty or have yet to address the issue. *See Brown v. Crown Equip. Corp.*, 960 A.2d 1188, 1190 (Me. 2008) (recognizing the post-sale duty but rejecting the Restatement); *Jablonski v. Ford Motor Co.*, 955 N.E.2d 1138, 1142 (Ill. 2011) (opening the door to a post-sale duty despite ample precedent rejecting it). A list of this breakdown follows:

Adopted Restatement 3d § 10

- Alaska
- Iowa
- Massachusetts
- Minnesota

Limited Post-Sale Duty to Warn (only for latent defects)

- Arizona
- Colorado
- Hawaii
- Illinois
- Kansas
- Michigan

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[2] A reasonable person in the seller's position would provide a warning after the time of sale if: (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and (4) the risk of harm is sufficiently great to justify the burden of providing a warning.

- New Mexico
- Pennsylvania
- South Carolina

Post-Sale Duty to Warn
(not expressly limited to latent defects)

- Connecticut
- Georgia
- Louisiana
- Maryland
- New Jersey
- New York
- North Carolina
- North Dakota
- Ohio
- South Dakota
- Washington
- Wisconsin

Split/Uncertain

- Kentucky
- Nevada
- Virginia

Adoption of Duty Predicted by Federal Court

- New Hampshire
- Utah
- Virginia

No Post-Sale Duty
(either expressly or no case law support for such duty)

- Alabama
- Arkansas
- California
- Delaware
- Florida
- Idaho
- Indiana
- Mississippi

- Missouri
- Montana
- Nebraska
- Oklahoma
- Oregon
- Rhode Island
- Tennessee
- Texas (exceptions)
- Vermont
- West Virginia
- Wyoming

FAILURE TO WARN – A SAMPLING OF SUMMARY JUDGMENT DECISIONS FOR DEFENDANTS BY CIRCUIT

	Case	Facts	Negligence or Strict	Grounds for Summary Judgment
1st Circuit (Puerto Rico)	*Santos-Rodríguez v. Seastar Sols.*, 858 F.3d 695, 696 (1st Cir. 2017)	Plaintiff was injured in a boating accident when a corroded rod end that was part of the boat's steering mechanism failed. The steering system's instruction manual informed owners that bi-annual inspection of the steering system is required and instructed them to check fittings, but did not include a specific warning about corrosion of the rod end. The boat's owner, acquired it second-hand and did not do maintenance or read the manual.	Strict	The district court granted summary judgment on grounds plaintiff could not show causation on his failure-to-warn claim because there was no evidence that Viera or any person maintaining the boat had ever looked at the manual or the steering system's warning labels. The First Circuit affirmed, noting even if the manual failed to provide an adequate warning, the claims fails absent evidence that someone read the manual.
1st Circuit (Massachusetts)	*Geshke v. Crocs, Inc.*, 740 F.3d 74, 75-76 (1st Cir. 2014)	Plaintiff's daughter was injured when her Croc shoe got stuck in an escalator. She brought a claim for failure to warn on grounds the shoes should've warned of the danger of escalator entrapment.	Negligence	Affirming, the appeals court held plaintiff had produced no evidence beyond conjecture, that Crocs posed a danger. Absent evidence of a particular danger, the manufacturer has no duty to warn.
1st Circuit (Puerto Rico)	*Prado Alvarez v. R.J. Reynolds Tobacco Co.*, 405 F.3d 36 (1st Cir. 2005)	The decedent smoked cigarettes for 42 years and died of lung cancer. The family brought an action against the tobacco company, alleging that smoking the company's cigarettes was a substantial factor in the decedent's illness and death. The district court dismissed the failure to warn claim and granted	Both	Affirming, the appeals court held that no reasonable jury could conclude that any member of the general public in Puerto Rico, including the decedent, lacked knowledge about the risks of smoking by the time the decedent started smoking in 1960. The family's failure to show a lack of common knowledge about the risks of smoking precluded the claims for either a

		summary judgment in favor of the company on the remaining claims.		failure-to-warn or design defect.
2nd Circuit (New York)	*Colon v. BIC USA, Inc.*, 199 F. Supp. 2d 53 (S.D.N.Y. 2001)	A 6-year-old boy was playing with a disposable lighter and lit his shirt on fire, burning his torso and neck. Defendants brought evidence of extensive testing showing that children were rarely able to override the child safety feature, and plaintiffs failed to rebut that evidence.	Both	The court analyzed three possible versions of failure to warn. Claims dismissed under all three because 1) open and obvious danger; 2) failure to warn was not the proximate cause of the accident; and 3) child's removal of safety feature was not a foreseeable intended or unintended use of the product of which manufacturer should have known.
2nd Circuit (New York)	*Hutton v. Globe Hoist Co.*, 158 F. Supp. 2d 371 (S.D.N.Y. 2001)	Plaintiffs sued for damages incurred when a car fell from a lift, crushing him. Defendants argued that 1) plaintiff's expert was unqualified and 2) dangers from a car falling off a lift are obvious and can't establish lack of warning was proximate cause.	Not specified	Court found: 1) expert's theory was conjecture, which does not suffice to defeat summary judgment; 2) New York has exceptions to finding of proximate cause of obviousness and knowledgeable user and plaintiffs failed to show genuine issue of material fact as to either, therefore summary judgment on failure to warn was appropriate.
2nd Circuit (New York)	*Mustafa v. Halkin Tool, Ltd.*, No. 00-CV-4851 (DGT), 2007 U.S. Dist. LEXIS 23096 (E.D.N.Y. Mar. 29, 2007)	Plaintiff was a recent immigrant who neither spoke nor read English. He severed both hands in an accident involving a press break, which had warnings written in English only. Plaintiff claimed the press brake was unreasonably dangerous because it did not have adequate safeguards at the point of operation and because the operator was not warned against using a foot pedal without safeguards to protect the operator's hands. Defendant argued plaintiff was aware of the danger and could have avoided it with reasonable care and it had no duty to warn of an open and obvious danger and the warnings were not the proximate cause of the accident.	Both	Plaintiff did not allege that the warning was inadequate because it was only in English. Court held that the fact that the warnings were in English, a language plaintiff didn't understand, "severs the causal connection between the alleged inadequacy of the warning and the accident." Court also rejected a third-party conveyance theory.
3rd Circuit (Pennsylvania)	*Igwe v. Skaggs*, 258 F. Supp. 3d 596 (W.D. Pa. 2017)	Case involved a transmitter system meant to send a signal to traffic controller device requesting a change in the color of approaching traffic lights for use by law enforcement. Police	Strict	Court found police policy warned officers device could be outrun, officer knew device could be outrun, other officers knew device could be outrun, and officer did not rely on device on the day of the incident. Court also found there was no

		officer drove his vehicle at a high rate of speed into an intersection and collided with another vehicle, killing the driver. Among other claims, plaintiff alleged manufacturer should have placed warning stickers or placards in emergency vehicles to warn of possibility of the device not changing lights in time.		requirement for a product seller to provide a myriad of similar worded warning when its issued warning, as understood by the buyer, addresses the alleged defect. The court "decline[d] to require redundant warnings when the undisputed evidence confirms the purchaser knew and adopted the warning in its policies."
3rd Circuit (New Jersey)	*Medley v. Freightliner LLC*, No. 07-1580 (DRD), 2009 U.S. Dist. LEXIS 46047 (D.N.J. June 1, 2009)	Experienced trucker uses unfamiliar vehicle, and falls as he gets down because he assumed the truck had a step in the same location as newer trucks. Plaintiffs claim both that truck is defective and there was a failure to warn.	Not specified	Court acknowledges that there were multiple ways to make the truck safer but found the risk of falling off the deck platform was open and obvious and the warning decal gave sufficient notice that the battery box was not to be used as a step.
3rd Circuit (Pennsylvania)	*Hittle v. Scripto-Tokai Corp.*, 166 F. Supp. 2d 142 (M.D. Pa. 2001)	Child start a fire with a lighter that kills his sister and injures his mother. Plaintiffs sue lighter corporation arguing it failed to warn them properly of the consequences of the lighter falling into the hands of an unsupervised child.	Negligence	Court held plaintiffs' failure-to-warn claim lacked merit "for both of the following independent reasons: (1) the risk that children who operate the lighter may cause injuries is open and obvious; and (2) the warning to keep the lighter away from children was adequate as a matter of law."
4th Circuit (Virginia)	*Jeong v. Honda Motor Co.*, Civil Action No. 95-0024-A/R, 1998 U.S. Dist. LEXIS 8124 (W.D. Va. Apr. 22, 1998)	Plaintiff was in a rollover event in a Honda Accord which caused the roof to collapse, resulting in permanent quadriplegia. Plaintiff asserted Honda is liable for failing to warn Accord users of the dangers of head and neck injury associated with a low speed rollover accident. Defendant argued the danger was open and obvious.	Strict	Court finds that plaintiff's support for his claim is based in part on inadmissible expert testimony and that the possible dangers associated with a rollover accident are "readily apparent." There is no duty to warn when a danger is open and obvious.
5th Circuit (Texas)	*Isaac v. C. R. Bard*, No. A-19-CV-895-LY, 2021 U.S. Dist. LEXIS 59224 (W.D. Tex. Mar. 29, 2021)	Plaintiff was surgically implanted with inferior vena cava filter following a serious automobile accident. After the filter was implanted, plaintiff alleges she suffered a cascade of "filter failures." Plaintiff alleges the manufacturer failed to warn patients and physicians about this danger.	Both	Court finds plaintiff failed to provide any evidence that her implanting physician "would have read or encountered the adequate warning, and that the adequate warning would have altered her physician's treatment decision." Therefore, inadequacy in the product's warning cannot be the producing cause of the injuries.

5th Circuit (Louisiana)	*Perez v. Brown Mfg.*, CIVIL ACTION NO. 98-478 SECTION "K", 1999 U.S. Dist. LEXIS 11479 (E.D. La. July 21, 1999)	Plaintiff was an employee at a tree cutting company that use a tree cutting machine, provided minimal training, and never provided a full copy of the machine manual to plaintiff or his supervisor. The machine's sticker's recommended people stay several hundred feet away from the cutter. Plaintiff was hit in the head by a piece of wood thrown from the machine and suffered severe closed head injuries.	Negligence	Court found manufacturer's warnings "more than adequate." The warnings were provided to both the purchaser of the product and to the potential users of the product. There was no feasible method by which the manufacturer could have warned bystanders such as the plaintiff of the dangerous nature of its product. Once the manufacturer warned the employer of the dangers of using the tree cutter and provided a detailed manual and decals for the machine, the duty to warn employees shifted to the employer.
6th Circuit (Ohio)	*In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 45 F. Supp. 3d 706 (N.D. Ohio 2014)	Plaintiffs alleged defendant had a duty to warn potential purchasers that the washing machines carried with them greater risks of foul odors and health hazards than an ordinary consumer would expect when using the machines in their intended or reasonably-foreseeable manner.	Negligence	Court concludes that the alleged defect (propensity for mold growth) is not a safety defect and that a failure-to-warn claim is cognizable in Ohio only if the allegedly inadequate warning addresses a safety defect.
6th Circuit (Ohio)	*Mohney v. USA Hockey, Inc.*, 300 F. Supp. 2d 556 (N.D. Ohio 2004)	17-year-old fractured his neck when he crashed into a wall while playing hockey, causing him to become a quadriplegic. Helmet manufacturer argued there were adequate warnings and no proximate cause.	Both	Plaintiff admitted he'd never read the warning, despite it being in plain view to read. He further testified he would not have read the instructions or the warnings for the face mask before putting it onto the helmet. Court notes that presumption is that adequate warning will be heeded, but even assuming that warnings were inadequate, the plaintiff admitted he did not read the warnings. As such, warnings were not proximate cause of injury.
7th Circuit (Indiana)	*Clark v. Oshkosh Truck Corp.*, No. 1:07-cv-0131-LJM-JMS, 2008 U.S. Dist. LEXIS 52829 (S.D. Ind. July 10, 2008)	Plaintiff slipped on the bed of a rollback truck and caught his leg as he fell off. Plaintiff sued for failure to warn of the dangers associated with walking on the rollback bed. He alleged that open and obvious defense didn't apply because although he knew the bed was slick, he didn't		The court concluded defendant did not have a duty to warn of dangers associated with rollback bed's open and obvious conditions, and plaintiff was aware of the slick nature of the bed. Court further concluded that the specific

		expect to get his foot caught.		mechanics of the fall (caught foot) are irrelevant because of the plainly visible characteristics of the bed, which plaintiff recognized. Summary judgment is denied on plaintiff's failure to instruct theory as there are genuine material facts as to the adequacy of defendant's instructions for operation of the truck.
7th Circuit (Illinois)	*Walker v. Macy's Merch. Grp., Inc.*, 288 F. Supp. 3d 840 (N.D. Ill. 2017)	Plaintiff's jacket caught fire while cooking and fire spread to pajamas she was wearing under jacket. Plaintiff sued manufacturers and sellers of clothing, arguing they failed to warn as to the garments' flammability.	Strict	Defendants argue no duty to warn of obvious danger such as fire, and court agrees summary judgment should be granted. Plaintiff argues "heeding presumption" for failure-to-warn claims, in other words, because defendant provided no warnings on its product, the court must presume that Plaintiff would have heeded any warning. However, court notes this presumption in Illinois is limited to defective pharmaceuticals, comprising the learned intermediary exception, and thus does not exist here. Even if "heeding presumption" been applicable, plaintiff didn't provide evidence of specific additional or alternative warnings.
8th Circuit (Missouri)	*Menz v. New Holland N. Am., Inc.*, 460 F. Supp. 2d 1050 (E.D. Mo. 2006)	Plaintiff was injured in tractor rollover accident. Plaintiff's expert testified no warnings would have altered plaintiff's conduct.	Both	Court held that in cases involving technical and complex machinery whose properties are outside the common knowledge or experience of a jury, a failure to warn claim requires expert testimony that additional or other warning might have altered the behavior of the plaintiff. Plaintiff did not offer such evidence; therefore, summary judgment was proper.
8th Circuit (North Dakota)	*Tosseth v. Remington Arms Co., LLC*, 483 F. Supp. 3d 659	While attempting to remove a cartridge from a gun at a shooting range, gun father is holding discharges and kills 14-year-old	Both	Plaintiff admits he never read the instruction manual other than disassembling sections. Plaintiff failed to offer proof of what made the warnings

	(D.N.D. 2020)	daughter. Plaintiff asserts failure to warn/instruct. Father demonstrates knowledge of mishandling firearms, danger of pointing muzzle at people, and general gun expertise. Defendant argues they provide a wide array of warning and instructions.		inadequate so that the firearm was unreasonably dangerous to the ordinary user or that the warnings provided fell below the standard of reasonable care. Plaintiff's expert did not offer support for contention that warnings were inadequate. Court held that without that evidence, summary judgment for defendant is appropriate.
8th Circuit (Iowa)	*Rowson v. Kawasaki Heavy Indus.*, 866 F. Supp. 1221 (N.D. Iowa 1994)	Plaintiff is injured in ATV rollover accident. He admits he did not read any of the warnings printed on the ATV prior to riding. After defendant moves for summary judgment, plaintiff submits an affidavit stating he did partially read some of them or didn't read the warnings because they were not clearly visible.		Court find affidavit is admissible and denies summary judgment on grounds failure to read the warning would not bar the claim as a matter of law because plaintiffs pleaded a case that falls withing a recognized exception by alleging the warnings are inadequate in presentation and location.
9th Circuit (California)	*Rodman v. Otsuka Am. Pharm., Inc.*, No. 18-cv-03732-WHO, 2020 U.S. Dist. LEXIS 129644 (N.D. Cal. July 22, 2020)	Plaintiff alleges antipsychotic medication caused Tardive Dyskinesia.		Court excluded Plaintiff's opinion on label inadequacy. Plaintiff's lack of expert testimony, her doctor's testimony that he was aware of the risks and a different warning label would not have impacted his prescribing decision, and the doctor's testimony that he knew to monitor for TD were fatal to her failure to warn claim.
9th Circuit (California)	*M.G. v. Bodum USA, Inc.*, No. 19-cv-01069-JCS, 2021 U.S. Dist. LEXIS 34774 (N.D. Cal. Feb. 24, 2021)	10-year-old child was injured when the glass beaker for a French press coffee maker fractured. Manufacturer included a warning to keep children away and not allow them to use the coffee maker in the instructions.	Strict	Court found that plaintiffs admitted to throwing away the instructions without reading them, so no matter what the warnings were, plaintiffs wouldn't have seen them, and plaintiffs admitted to not reading the warnings printed on the glass beaker; therefore, they could not establish causation on failure to warn and summary judgment was appropriate.
10th Circuit (Oklahoma)	*Britton v. Electrolux Home Prods.*, No. CIV-05-1322-F, 2006 U.S. Dist. LEXIS 74945 (W.D. Okla. Oct. 13, 2006)	Plaintiff's 4-year-old son was backed over with a lawn mower resulting in the amputation below the knee of one leg. Oklahoma recognizes the heeding presumption; however, defendants argued that operator's failure to read any of the warnings rebutted that presumption.	Strict	Court found that defendants successfully rebutted the heeding presumption with undisputed evidence that the mower's operator did not read any of the warnings or safety instruction in the owner's manual or any of the warnings on the tractor itself. With the presumption gone, the court found that plaintiffs failed to present evidence for the jury to conclude that the alleged inadequate warnings caused the injuries. Failing to establish causation is fatal to the failure to warn

				claim.
11th Circuit (Alabama)	*Borum v. Werner Co.*, No. 5:11-cv-997-AKK, 2012 U.S. Dist. LEXIS 78545 (N.D. Ala. June 6, 2012)	Plaintiff fell off a ladder and suffered serious bodily injury. Defendant argued there were extensive warnings on the ladder, providing sufficient notice.	Negligence	Court found plaintiff failed to offer sufficient evidence that defendant breached a duty. The ladder's safety instructions provided adequate warning regarding the plaintiff's alleged dangerous propensities.
11th Circuit (Court of Appeals) (originally Wisconsin)	*Stupak v. Hoffman-La Roche, Inc.*, 326 F. App'x 553 (11th Cir. 2009)	Mother alleged 17-year-old son committed suicide without having any premonitory symptoms while taking Accutane. Although defendants both knew of and warned of the risk of suicide, plaintiff claims that they had knowledge of patients without premonitory signs of depression preceding the deaths.	Both	Defendant was only negligent or strictly liable for failure to warn if it had a duty to warn, and only had a duty to warn of dangers of which is knew or should have known. Plaintiff only makes conclusory allegations that defendant should have know without specific supporting facts. Without that evidence, plaintiff cannot maintain a claim that defendant had a duty to provide a separate warning of the danger of suicide without premonitory symptoms. Because duty is a necessary element of both negligence and strict liability, summary judgment for defendant is upheld.

50 STATE CHART ON HEEDING PRESUMPTION

States	Recognizes Heeding Presumption?	Case Law	Notes
Alabama	No	Alabama does not recognize the heeding presumption. *Deere & Co. v. Grose* , 586 So. 2d 196, 198 (Ala. 1991) ("a negligent-failure-to-warn-adequately case should not be submitted to the jury unless there is substantial evidence that an adequate warning would have been read and heeded and would have prevented the accident.").	
Alaska	No	Alaska does not recognize the heeding presumption. *Ross Laboratories, Div. of Abbot Laboratories v. Thies* , 725 P.2d 1076, 1079 (Alaska 1986) (requiring parties to prove they "were incapable of understanding an adequate warning or that such a warning would not have been heeded by them").	
Arizona	Yes	Arizona recognizes the heeding presumption. *Golonka v. Gen. Motors Corp.* , 65 P.3d 956, 968-69 (Ariz. Ct. App. 2003) ("the heeding presumption is viable in Arizona").	The Arizona Supreme Court has not ruled on the heeding presumption yet.
Arkansas	Yes	Arkansas recognizes the heeding presumption. *Bushong v. Garman Co.* , 843 S.W.2d 807, 811 (Ark. 1992) ("Once a plaintiff proves [a] lack of an adequate warning or instruction, a presumption arises that the user would have read and heeded adequate warnings or instructions. This presumption may be rebutted by evidence.")	
California	No	California does not recognize the heeding presumption. *Huitt v. S. California Gas Co.* , 188 Cal. App. 4th 1586, 1603 (Cal. Ct. App. 2010) (holding the plaintiffs must present evidence they would have read and heeded a warning to recover for a failure to warn cause of action).	
Colorado	No	Colorado does not recognize the heeding presumption. *Uptain v. Huntington Lab, Inc.* , 723 P.2d 1322, 1326 (Colo. 1986); *see also Farmland Mut. Ins. Co., v. Chief Industries, Inc.* , 170 P.3d 832, 839 (Colo. 2007) (finding the court in *Uptain* adopted the Restatement (Second) of Torts section 402(a) comment j, but whether a warning would be heeded is a question of fact for the jury).	Federal courts applying Colorado state law have found that Colorado does recognize the heeding presumption. *Staley v. Bridgestone/Firestone, Inc.* , 106 F.3d 1504, 1509 (10th Cir. 1997).
Connecticut	No	Connecticut does not recognize the heeding presumption. Conn. Gen. Stat. Ann. § 52-572q(c) ("the claimant shall prove by a fair preponderance of the evidence that if adequate warnings or instructions had been provided, the claimant would not have suffered the harm.")	
Delaware	Undetermined	Delaware has not expressly recognized the heeding presumption.	
District of Columbia	Yes	The District of Columbia recognizes the heeding presumption. *East Penn Mfg. Co. v. Pineda* , 578 A.2d 1113, 1124 (D.C. 1990) ("we [have] adopted a "rebuttable presumption that the user would have read an adequate warning, and in the absence of evidence rebutting the presumption, a jury may find that the defendant's product was the producing cause of the plaintiff's injury"(quoting *Payne v. Soft Sheen Products, Inc.* , 486 A.2d 712, 725 (D.C. 1985)).	
Florida	Undetermined	Florida has not expressly recognized the heeding presumption.	In *West v. Caterpillar Tractor Co., Inc.* , Florida adopted the Restatement (Second) of Torts section 402A. This section includes comment j which is often used to support the heeding presumption in courts. 336 So.2d 80, 90 (Fla. 1976).
Georgia	No	Georgia does not recognize the heeding presumption. *Dozier Crane & Mach., Inc. v. Gibson* , 644 S.E.2d 333, 336 (Ga. 2007) ("where there is no evidence that a plaintiff read the allegedly inadequate warning, causation cannot be shown.")	
Hawaii	Undetermined	Hawaii has not expressly recognized the heeding presumption.	

Idaho	Undetermined	Idaho has not expressly recognized the heeding presumption.	
Illinois	Undetermined	Illinois has not expressly recognized the heeding presumption.	Federal courts have applied Illinois law to recognize the heeding presumption in cases with learned intermediaries. *Erickson v. Baxter Healthcare, Inc.* , 151 F.Supp.2d 952, 970 (N.D. Ill. 2001) (applying Illinois law) ("the plaintiffs are entitled at this stage to a presumption that a learned intermediary would have heeded the warnings given.")
Indiana	Yes	Indiana recognizes the heeding presumption. *Kovach v. Caligor Midwest* , 913 N.E.2d 193, 199 (Ind. 2009) (holding the presumption applies but "the plaintiff invoking the presumption must still show that the danger that would have been prevented by an appropriate warning was the danger that materialized in the plaintiff's case.")	
Iowa	Undetermined	Iowa has not expressly recognized the heeding presumption but has adopted Restatement (Second) of Torts section 402A, including comment 'j' which is often used to support the presumption in courts. *Cooley v. Quick Supply Co.* , 221 N.W.2d 763, 768 (Iowa 1974).	Federal courts in Iowa (applying Iowa law) have recognized a limited heeding presumption depending on the circumstances. *Petty v. United States* , 740 F.2d 1428, 1438 (8th Cir. 1984) (affirming "the district court's application of a rebuttable presumption to the proximate cause issue.").
Kansas	Yes	Kansas recognizes the heeding presumption. *Wooderson v. Ortho Pharm. Corp.* , 681 P.2d 1038, 1042 (Kan. 1984) ("There is a presumption that an adequate warning would be heeded. This operates to the benefit of a manufacturer where adequate warnings are in fact given. Where warnings are inadequate, however, the presumption is in essence a presumption of causation.")	
Kentucky	Undetermined	Kentucky has not expressly adopted the heeding presumption.	Federal courts have interpreted Kentucky law to recognize the presumption. *Snawder v. Cohen* , 749 F.Supp. 1473, 1480-81. ("Although this Court can find no Kentucky case which affirmatively applies this presumption, Kentucky has adopted § 402A of the Restatement of Torts 2d. The presumption is formulated in comment j of that section and presumably would be followed by the Kentucky courts.")
Louisiana	Yes	Louisiana recognizes the heeding presumption. *Bloxom v. Bloxom* , 512 So.2d 839, 850 (La. 1987) (superceded on other grounds) ("Once a plaintiff proves that the lack of an adequate warning or instruction rendered the product unreasonably dangerous, his cause in fact burden is assisted by a presumption: when a manufacturer fails to give adequate warnings or instructions, a presumption arises that the user would have read and heeded such admonitions.")	
Maine	Undetermined	Maine has not expressly recognized the heeding presumption.	Federal courts have interpreted Maine law to find the heeding presumption would not be applied. *Novak v. Mentor Worldwide LLC* , 287 F. Supp. 3d 85, 96 (D. Me. 2018) (applying Maine law) (holding the plaintiff must produce proof a warning would have changed their behavior).
Maryland	Yes	Maryland recognizes the heeding presumption. *United States Gypsum Co. v. Mayor of Baltimore* , 647 A.2d 405, 413 (Md. 1994) ("this Court has long recognized a presumption that plaintiffs would have heeded a legally adequate warning had one been given").	
Massachusetts	Yes	Massachusetts recognizes the heeding presumption. *Evans v. Lorillard Tobacco Co.* , 990 N.E. 2d 997, 1023-24 (Mass. 2013) ("Once a plaintiff establishes that a warning should have been given, the burden is on "the defendants to come forward with evidence tending to rebut such an inference." (quoting Wolfe v. Ford Motor Co., 6 Mass.App.Ct. 346, 352, 376 N.E.2d 143 (1978)).	

Michigan	Limited	Michigan generally does not recognize the heeding presumption. *Allen v. Owens-Corning Fiberglass Corp.* , 571 N.W.2d 530, 535 (Mich. App. 1997) ("In most failure-to-warn cases, proximate cause is not established absent a showing that the plaintiff would have altered his behavior in response to a warning").	The presumption may be applied in situtations where the person who should have been exposed to the warning is dead. *Allen v. Owens-Corning Fiberglass Corp.* , 571 N.W.2d 530, 535 (Mich. App. 1997) ("When the consequences of the exposure are severe, the lack of warning is undisputed, and the person exposed is dead, the jury may be permitted to infer that a warning would have been heeded and that the failure to warn was a proximate cause of the injury").
Minnesota	No	Minnesota does not recognize the heeding presumption. *Yennie v. Dickey Consumer Prod., Inc.* , 2000 WL 1052175, at *1 (Minn. Ct. App. 2000) ("Under Minnesota law, to prevail on a failure-to-warn claim, a plaintiff must establish that the lack of an adequate warning caused plaintiff's injuries").	
Mississippi	No	Mississippi does not recognize the heeding presumption. *Harris v. Intn'l Truck & Engine Corp.* , 912 So.2d 1101, 1109 (Miss. App. 2005) (declining to adopt a heeding presumption in Mississippi).	The Mississippi Supreme Court has not ruled on the heeding presumption yet. *Harris v. Intn'l Truck & Engine Corp.* , 912 So.2d 1101, 1109 (Miss. App. 2005) ("The fact that our supreme court has ruled on cases where a heeding presumption could easily have been applied to aid the plaintiff in a products liability case and declined to do so indicates to us that the Mississippi Supreme Court has no intention or desire to adopt or create a heeding presumption as a part of our jurisprudence with respect to product liability cases. Therefore, we decline to create one as well").
Missouri	Yes	Missouri recognizes the heeding presumption. *Moore v. Ford Motor Co.* , 332 S.W.3d 749, 762 (Mo. 2011) (""Missouri, like several other states, aids plaintiffs in proving this second part of causation by presuming that a warning will be heeded."" (quoting *Arnold v. Ingersoll–Rand Co.* , 834 S.W.2d 192, 194 (Mo. 1992)).	
Montana	No	Montana does not recognize the heeding presumption. *Riley v. Am. Honda Motor Co* ., 856 P.2d 196, 200 (Mont. 1993) ("we have not adopted the specific language in Comment j that—in the view of many courts—gives rise to a rebuttable presumption regarding causation.")	
Nebraska	Undetermined	Nebraska has not expressly recognized the heeding presumption.	In *Haag v. Bongers* , the state supreme court concluded the trial court did not abuse its discretion by refusing to allow counsel to declare the evidence showed warnings would not have been heeded. The court agreed the record did not establish warnings could not be expected to be heeded and affirmed the judgment in favor of the plaintiff, suggesting the court may recognize a heeding presumption. 589 N.W.2d 318, 330 (Neb. 1999).
Nevada	No	Nevada does not recognize the heeding presumption. *Rivera v. Philip Morris, Inc.* , 209 P.3d 271, 276 (Nev. 2009) ("we conclude that the manner in which we have previously cited to comment j indicates that we will not stray from the principle that the plaintiff carries the burden of production of the element of causation.")	
New Hampshire	No	New Hampshire has not expressly recognized the heeding presumption.	Federal courts have not applied a heeding presumption under New Hampshire law. *Barlett v. Mut. Pharm. Co., Inc.* , 731 F. Supp. 2d 135, 147 (D.N.H. 2010) (applying New Hampshire law) (reversed on other grounds) ("whether that so-called "heeding presumption" applies under New Hampshire law is questionable").

New Jersey	Yes	New Jersey recognizes the heeding presumption. *Coffman v. Keene Corp.*, 628 A.2d 710, 720 (N.J. 1993) ("we now hold that with respect to the issue of product-defect causation in a product-liability case based on a failure to warn, the plaintiff should be afforded the use of the presumption that he or she would have followed an adequate warning had one been provided, and that the defendant in order to rebut that presumption must produce evidence that such a warning would not have been heeded").	
New Mexico	Undetermined	New Mexico has not expressly recognized the heeding presumption.	
New York	No	New York courts have reached conflicting decisions about whether the state recognizes the heeding presumption and without clear authority, the recent trend for judges is to deny applying the presumption. *See e.g.*, *Castorina v. A.C. & S.*, 49 N.Y.S.3d 238, 243 (N.Y. Sup. Ct. 2017); *In re New York City Asbestos Litigation*, 59 N.E.3d 458, 483 (N.Y. 2016) (refusing to address the heeding instructions on their merits but noting "trial courts must continue to ensure jury instructions honor the principle that the burden of proving proximate causation . . . falls squarely on plaintiffs.").	
North Carolina	No	North Carolina does not recognize the heeding presumption. N.C. G.S.A. §99B-5(a) ("No manufacturer or seller of a product shall be held liable in any product liability action for a claim based upon inadequate warning or instruction unless the claimant proves that. . . the failure to provide adquate warning or instruction was a proximate cause of the harm").	
North Dakota	Yes	North Dakota recognizes the heeding presumption. *Crowston v. Goodyear Tire & Rubber Co.*, 521 N.W.2d 401, 410 (N.D. 1994) ("this court held that "when no warning is given the plaintiff is entitled to the benefit of a presumption that an adequate warning, if given, would have been read and heeded" (quoting *Butz v. Werner*, 438 N.W.2d 509, 517 (N.D. 1989)).	
Ohio	Yes	Ohio recognizes the heeding presumption. *Seley v. G.D. Searle Co.*, 423 N.E.2d 831, 838 (Ohio 1981) ("[h]owever, where no warning is given, or where an inadequate warning is given, a rebuttable presumption arises, beneficial to the plaintiff, that the failure to adequately warn was a proximate cause of the plaintiff's ingestion of the drug").	
Oklahoma	Yes	Oklahoma recognizes the heeding presumption. *Cunningham v. Charles Pfizer & Co.*, 532 P.2d 1377, 1382 (Okla. 1974) ("we conclude plaintiff was . . . entitled to a rebuttable presumption he would have heeded any warning which might have been given").	
Oregon	Undetermined	Oregon has not expressly recognized the heeding presumption.	Federal courts have not applied a heeding presumption under Oregon law. *Parkinson v. Novaritis Pharm. Corp.*, 5 F. Supp. 3d 1265, 1272 (D. Or. 2014) (applying Oregon law) ("In any event, Plaintiff does not cite and the Court could not find a case in which a court applied any such presumption under Oregon law. The Court, therefore, concludes there is not a presumption under Oregon law that an adequate warning "would have been read and prevented the harm").
Pennsylvania	Limited	Pennsylvania recognizes the heeding presumption in limited situations where the plaintiff is forced by employment to be exposed to the product causing the harm. *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534 (Pa. Super. 2004), aff'd, 881 A.2d 1262 (Pa. 2005).	The heeding presumption also does not apply in prescription medical product cases because Pennsylvania does not apply strict liability to such cases. *Fecho v. Eli Lilly & Co.*, 914 F. Supp. 2d 130, 145-47 (D. Mass. 2012) (applying Pennsylvania law).
Puerto Rico	Undetermined	Puerto Rico has not expressly recognized the heeding presumption.	
Rhode Island	Undetermined	Rhode Island has not expressly recognized the heeding presumption.	

South Carolina	Undetermined	South Carolina has not expressly recognized the heeding presumption.	Federal courts have not applied a heeding presumption under South Carolina law. *Odom v. G.D. Searle & Co.* , 979 F.2d 1001, 1003 (4th Cir. 1992) (applying South Carolina law) ("[plaintiff] argues that we should simply presume causation in the event she is able to prove that Searle's warning was inadequate. There is no such presumption under South Carolina law, and we are unwilling to create one here").
South Dakota	No	South Dakota does not recognize the heeding presumption. *Karst v. Shur-Co* , 878 N.W.2d 604, 613 (S.D. 2016) ("In order to prove causation in a failure-to-warn claim, "[a] plaintiff must show that adequate warnings would have made a difference in the outcome, that is, that they would have been followed."" (quoting *Gen. Motors Corp. v. Saenz ex rel. Saenz* , 873 S.W.2d 353, 357 (Tex. 1993)).	
Tennessee	Undetermined	Tennessee has not expressly recognized the heeding presumption.	Federal courts have not applied a heeding presumption under Tennessee law. *Payne v. Novartis Pharm. Corp.* , 767 F.3d 526, 533 (6th Cir. 2014) (appying Tennessee law) (discussing various causation doctrines adopted by states and concluding that "Tennessee has not adopted any of these presumptions").
Texas	Limited	Texas recognizes the heeding presumption. *Magro v. Ragsdale Bros., Inc.* , 721 S.W.2d 832, 834 (Tex. 1986). However, Texas has also expressly rejected the Restatement (Second) of Torts section 402A comment 'j' for public policy reasons after the restatment was superceeded by the Third edition. *Uniroyal Goodrich Tire Co. v. Martinez* , 977 S.W.2d 328, 336-37 (Tex. 1998).	Federal courts have applied the heeding presumption in a limited capacity under Texas law, does not apply in cases involving prescription medical products. *Ackermann v. Wyeth Pharm.* , 526 F.3d 203, 212-13 (5th Cir. 2008) (applying Texas law) (holding the heeding presumption does not apply in cases involving prescription medical products because it would not serve Texas's policy concerns).
Utah	Yes	Utah recognizes the heeding presumption. *House v. Armour of Am., Inc.* , 929 P.2d 340, 347 (Utah 1996) (affirming the court of appeals recognition of the heeding presumption in Utah).	
Vermont	Yes	Vermont recognizes the heeding presumption. *Needham v. Coordinated Apparel Group, Inc.* , 811 A.2d 124, 129 (Vt. 2002) ("we recognize a presumption that, if a manufacturer has a duty to warn and fails to discharge the duty, the user would have heeded an adequate warning if it had been given").	
Virginia	No	Virginia does not recognize the heeding presumption. *Ford Motor Co. v. Boomer* , 736 S.E.2d 724, 734 (Va. 2013) (holding whether a plaintiff would have heeded a warning is a question of fact for a jury).	
Washington	Undetermined	Washington has not expressly recognized the heeding presumption.	Federal courts have not applied a heeding presumption under Washington law. *Luttrell v. Novartis Pharm. Corp.* , 894 F. Supp. 2d 1324, 1345 n.16 (E.D. Wash. 2012), aff'd, 555 F. App'x 710 (9th Cir. 2014) (applying Washington law) ("encourages the Court to adopt the "read and heed" presumption accepted by "other brethren states" . . . This presumption is not currently recognized in Washington law, which law the Court must apply in this case")
West Virginia	Undetermined	West Virginia has not expressly recognized the heeding presumption.	At least one federal court has also found that West Virginia does not recognize the heeding presumption. *In re NuvaRing Litig.* , 2013 WL 1874321, at *36 (N.J. Super. Law Div. Apr. 18, 2013) (applying West Virginia Law).
Wisconsin	No	Wisconsin does not recognize the heeding presumption. *Kurer v. Parke, Davis & Co.* , 679 N.W.2d 867, 876 (Wis. Ct. App. 2004) ("[a] plaintiff who has established both a duty and a failure to warn must also establish causation by showing that, if properly warned, he or she would have altered behavior and avoided injury").	
Wyoming	Undetermined	Wyoming has not expressly recognized the heeding presumption.	