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Three Questions Raised by Decision Expanding Failure to Warn Manufacturer Liability

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In *Taylor v. Intuitive Surgical, Inc.*, the Washington Supreme Court held that a patient-plaintiff may now recover for a medical device manufacturer's failure to provide adequate warning to a purchasing hospital—despite the manufacturer's provision of adequate warning to the patient-plaintiff's treating physician. This post addresses three key questions:

1. How did the court come to this decision?

Taylor relies on three unobjectionable steps to justify its bold holding. First, under the Washington Product Liability Act (WPLA), manufacturers have a statutory duty to provide adequate warnings to purchasers and patients who use their product. Second, the learned intermediary doctrine is an exception to this statutory duty, which allows a manufacturer to satisfy its duty to adequately warn patients by providing proper warnings to the treating physician. Third, the learned intermediary doctrine does not excuse manufacturers from their duty to provide adequate warnings to purchasers, even where the product is a medical device.

2. How will this decision operate in practice?

Patients can recover for a manufacturer's failure to provide adequate warnings to the purchaser, even if the manufacturer provided adequate warnings to the patient's treating physician. Thus, *Taylor* empowers plaintiffs to recover damages for breach of a duty owed to another. It also leaves an important question unanswered: what happens when both the plaintiff and purchaser bring an action for the same breach of duty?

And that is not the only situation where unjust outcomes are likely to result. Consider the following scenario: A surgeon performs the same surgery on Patient A and Patient B. Patient A's surgery is performed at Hospital A, while Patient B's surgery is performed at Hospital B. Both hospitals purchased identical surgical devices from the manufacturer, but somehow the manufacturer only provides proper warnings with its surgical device to Hospital A. The manufacturer does, however, provide proper warnings to the surgeon, who promptly disregards them. As a result, Patient A and Patient B are both gravely injured. Under the law as stated in *Taylor*, Patient A cannot recover from

the manufacturer but Patient B can. Even worse, *Taylor* penalizes the manufacturer for an act that did not cause Patient B's injury.

3. What immediate steps should be considered?

Outside of leaving or avoiding Washington, a medical device manufacturer should think about incorporating *Taylor* into its risk management policies. First, manufacturers may consider assessing their exposure given the new state of law: determine how many products are being sold into or used in Washington, which hospitals and other facilities are using the products and which doctors are using their products. After determining the extent of potential liabilities, manufacturers should think about whether additional legal advice is required. And of course, until the law in this area crystalizes—tread carefully.

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