

# ***Research on Tort Liability for Breach of Product Follow-up Observation Obligation***

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**Abstract:** The tort liability for breach of the product follow-up observation obligation should be different from the traditional product liability, and should be positioned as a relatively independent liability, so as to strengthen the producer's initiative to take measures to prevent damage, and realize the dual remedy path of paying equal attention to damage compensation and damage prevention with product liability. In the principle of imputation, in view of the drawbacks of the principle of no fault and the adverse risk of the victim's proof under the principle of fault, the principle of presumption of fault should be adopted. The general defense is applicable to the tort liability for breach of the obligation to observe the follow-up of the product, while the bulk seller theory and development risk defense in the special defense are not applicable. The product follow-up observation obligation only reasonably limits the scope of application of the development risk defense to the product liability exemption.

## **1. Introduction**

In the traditional sense, product liability comes from the producers' violation of their duty of care before putting their products into market circulation, that is to say, the products have defects in the design, manufacturing process or safety warning links controlled by the producers, which leads to damage to consumers, and the producer should bear the liability for damages.[1] With the deepening of product liability theory and practice, people's expectation of duty of care for production and sales subjects has broken through the traditional time limit, extending from before the product is provided to after the product is provided, and this obligation is no longer lifted with the delivery of the product.[2] Producers and sellers should always pay attention to the follow-up use of their products, and intervene in time when they find that the products are dangerous or have been dangerous, and take necessary measures to prevent or reduce the potential dangers of products to consumers. This duty of care is the duty of follow-up observation of products. The obligation of product follow-up observation in China first appeared in Article 46 of Tort Liability Law, and then was extended by Article 1206 of Civil Code. The obligation of product follow-up observation has the function of damage prevention, which has changed the deficiency of the original product damage relief in China, established a dual relief model that pays equal attention to damage compensation and damage prevention, and put forward stricter requirements for producers and sellers compared with traditional product liability. It is of great practical significance in protecting consumers' transaction safety and

improving product liability.

However, this system has not been fully implemented and valued in China. In judicial practice, it is not uncommon for producers to violate the obligation of follow-up observation of products, but most of them are absorbed by the liability for compensation for product defects, which can not play the independent value of the system; Most domestic scholars take the specific remedial measures in the obligation as the research object, such as the warning and recall of specific products such as automobiles and medicines, while there is a lack of general research on the tort liability for violating the obligation of follow-up observation of products. Is the responsibility for violating the obligation of product follow-up observation a product responsibility? What kind of imputation principle should be adopted and how should the burden of proof be distributed? Are there any special reasons for the defense under this system? All these problems are controversial and have not been solved for a long time. In view of this, this paper intends to start with the attribution of tort liability for violating product follow-up observation obligation, explore its relationship with product liability, study the imputation principle of this special tort liability, and analyze the defense reasons of this tort liability, focusing on trying to clarify the conflict between it and the development risk defense system, with a view to promoting the improvement of China's product follow-up observation obligation system.

## **2. Disputes over tort liability for violation of product follow-up observation obligation**

The obligation of product follow-up observation is now stipulated in Chapter 4 "Product Liability" of Tort Liability of Civil Code. According to Article 1206 of this law, if the product producers and sellers find that the product has design, manufacturing or warning defects, they should take remedial measures such as recall and warning instructions in time according to law. If the consequences of the damage are enlarged due to the delay in performing the remedial obligation or ineffective remedy, the above-mentioned subject shall also bear tort liability for the enlarged damage. In the article, "failure to remedy in time or ineffective remedy" is an act of violating the obligation of follow-up observation, and it is necessary to bear tort liability for damage caused by violation of this act.

### **2.1. Dispute over the attribution of tort liability in violation of the obligation of follow-up observation**

Is the responsibility for violating the obligation of follow-up observation a product responsibility or an independent responsibility? China's legislation has not responded to this issue, and there are roughly the following ways to deal with this issue in practice. Some courts think that the producer violates the obligation of follow-up observation of products at this time, and it also belongs to the damage caused by defective products. For example, in the case of product liability dispute between Huang and Volkswagen (China) Sales Co., Ltd., the court found that the recall notice issued by Volkswagen was not complete and sufficient, which was a case of poor remedy in violation of the obligation of follow-up. At the same time, it pointed out that the design defect of the car involved led to the engine damage of Huang's vehicle, and finally the court sentenced Volkswagen to compensate Huang for 680,000 yuan for the damage caused by the design defect. Some courts think that the product tracking defect is a type of product defect, and the damage caused by violating the tracking obligation should still be the defective product liability, such as: Inner Mongolia Zhaohua Construction Engineering (Group) Co., Ltd. v. Tengfeng Construction Equipment Sales Department of Huimin District and other product liability disputes. The court of second instance thinks that the material hoist is a professional equipment, and strict attention should be paid to the tracking service after it is put into market use. In this case, the after-sales maintenance personnel did not effectively eliminate the hidden dangers during the maintenance process, which belongs to the tracking defect in the category of product defects and needs to bear the liability for compensation. Or take the remedial

measures such as violation of warning or recall as the reason for determining the producer's liability for damages, and judge the liability for damages of defective products in the final judgment, such as the product liability dispute case between Wu Mou Qin and FAW Company, and the property damage compensation dispute case between Shandong Shouguang Shenghe Agricultural Technology Co., Ltd. and Cangnan Dazheng Agricultural Resources Management Department. It can be seen that most of the courts in our country regard it as a part of general defect liability or can be included in product liability when dealing with the attribution of tort liability for violating the obligation of follow-up observation. There are different voices in the theoretical circle. Wang Zhu scholars believe that the liability arising from the violation of the obligation of follow-up observation is still the liability of defective products in essence, and the basis of this article is the current article 1203 of the Civil Code;[3] Dong Chunhua scholars believe that the liability for compensation caused by violation of after-sales obligations is not general product liability.[4] Zhang Yun, a scholar, put forward that the traditional product liability theory regards the after-sales warning obligation as an extension of the risk warning obligation when selling, which is an over-interpretation of the "pre-sales warning obligation" and violates the product follow-up observation obligation as the development trend of the new system. The tort liability that violates this obligation should have an independent tort liability status.[5] Generally speaking, it is inconclusive whether it is necessary to bear independent responsibility for violating this obligation.

## **2.2. Dispute over the imputation principle of tort liability in violation of the obligation of follow-up observation**

According to the provisions of China's "Product Quality Law" and "Civil Code," the principle of no-fault liability is applicable to the producer's product liability, and the seller bears fault liability. Then, what kind of imputation principle should be adopted for tort liability in violation of the obligation of follow-up observation? Article 10 of the "Restatement of Tort Law (Third): Product Liability" in the United States stipulates such tort liability as an after-sales obligation and believes that it belongs to the category of negligence theory. The European Community supports the principle of fault liability for breach of follow-up observation obligations. Although the United States, Germany, Britain and other countries have adopted the principle of fault liability in comparative law, China has not yet clearly defined the principle of liability for breach of this obligation in legislation. Chinese scholars have different opinions on this issue. There are mainly the following views. The first view is that the principle of fault liability should be applied. Unrestricted after-sales obligations will unduly increase the burden on producers. The principle of fault liability is more in line with risk control theory and can achieve a balance between justice and efficiency between producers and consumers; [6] The second view is that it should be unified with the producer's product liability and apply no-fault liability. The reason is that the legislative purpose of the product follow-up observation obligation is to protect the interests of the consumer group. If the fault liability is applied, the consumer is required to bear the difficult burden of proof. On the contrary, it hinders the maintenance of consumer interests. In the face of public safety, any reason for producers to safeguard their own self-interest is negligible;[1]the third view is that the principle of presumption of fault should be applied to the tort liability for breach of the product's follow-up observation obligation. The reason is that the breach of obligation belongs to the category of negligence. At the same time, in order to protect consumers, in the consideration of 'who advocates who gives evidence' and 'proof convenience', fault inversion should be adopted.[7]

## **2.3. The dispute of tort liability defense in violation of follow-up observation obligation**

The defense or exemption of the violation of the follow-up observation obligation refers to the

basis for the subject of liability to invoke the legally recognized reasons to fully or partially waive its tort liability to consumers when it fails to perform the follow-up observation obligation of the product. The defense of tort liability is mainly divided into general defense and special defense. The general defense includes the fault of the victim and the fault of the third party. It is a defense based on the fault of the victim or the fault of the third party to reduce or exempt the producer's liability. This traditional defense is applicable to the field of tort liability for breach of follow-up observation obligations. It is not controversial.

Special defenses include pre-sale warning exemption defense and development risk defense. Pre-sale Warning Disclaimer is a rule established in American tort law and is mainly applied in the field of pre-sale warning obligations. There are four kinds of pre-sale warning obligation defenses in American law, namely, open danger rules, sophisticated user theory, bulk seller theory and erudite intermediary theory. At present, these pre-sale warning exemption defenses have been tried to apply to the after-sales field. It is worth noting whether these defenses can be applied to China's after-sales field. Zhang Min's scholars support this; [8] Zhang Yun scholars believe that the theory of mass seller can not be applied to the field of follow-up observation obligation in China. [7] Different from the fact that the pre-sale warning exemption defense has not been established by China's legislation, the development risk defense system is stipulated in Article 41 of China's "Product Quality Law," which is one of the statutory exemptions for product liability in China. The defense refers to the fact that when the product is put into circulation, the product defect cannot be found based on the scientific and technological level at that time. The producer can use this as an excuse to claim exemption from liability for damage caused by subsequent product defects revealed by scientific and technological progress. The question is, can the tort liability arising from the violation of the product's follow-up observation obligation be exempted from the development risk defense? There is a great theoretical controversy on this issue. One opinion holds that the product follow-up observation obligation and the development risk defense can form a connection. Taking the time point when the product risk can be found as the boundary, the damage before the discovery is applicable to the development risk exemption, and the damage after the discovery needs to be responsible for violating the follow-up observation obligation. [9] Another view is that there is no defense, and there is a contradiction between the two systems in function. [10] In fact, the development risk defense system itself has a lot of controversy, which challenges the traditional fair value and consumer protection concept, has been questioned by many people, and the application situation is not optimistic. Then the establishment of the follow-up observation obligation of the product, the abolition of the development risk defense 'this sleeping clause' was once again proposed. However, with the development of science and technology, intelligent products have gradually penetrated into life, bringing convenience to the society while also implying risks. Many scholars have begun to seek the role of development risk defense in ensuring the safety of intelligent products and technological innovation, and the development risk defense system has begun to get more positive voices. However, how to deal with the relationship between the development risk defense and the follow-up observation obligation has not been effectively solved at present.

### **3. The clarity of tort liability for violation of product follow-up observation obligation**

#### **3.1. The tort liability for breach of the obligation of follow-up observation is relatively independent liability**

From the perspective of comparative law, Germany mainly adopts the "German Civil Code" and the "Product Quality Law" to shape the product system. It regards the product follow-up observation obligation as the transaction security obligation that manufacturers have to undertake, and stipulates it in the "German Civil Code", which separates this responsibility from the traditional product

responsibility framework and forms an independent responsibility form. Although this legislative model of completely stripping the follow-up observation obligation from the product liability system is theoretically self-consistent, it will face institutional adaptation obstacles when transplanted into China's current legal system.

Article 1206 of China's Civil Code has placed the obligation of follow-up observation in the chapter of product liability. Based on the consideration of the coordination of code system and the continuity of judicial practice, China's product follow-up observation obligation should adopt a "relatively independent" system positioning. "Relative" means that the obligation of product follow-up observation is still stipulated in the product liability system at the level of normative system; "Independence" refers to distinguishing the liability of static defective products during production and circulation from the liability of dynamic follow-up observation after circulation at the level of liability types, thus forming two relief paths of liability for defective products and liability for breach of follow-up observation obligations. The liability for damage caused by defective products adjusts the tort liability of consumers' personal and property damage caused by inherent defects at the beginning of the product's circulation; However, after the product circulation is regulated by the tort liability for violating the product follow-up observation obligation, the tort liability form caused by the failure of producers and sellers to fulfill the follow-up attention obligation; It should be emphasized that the obligation of product follow-up observation, as an institutional arrangement with the function of damage prevention, its core essence should include the obligation of producers and sellers to keep track and observe the safety of after-sales products, and to discover and eliminate potential risks in time.

In the case that producers and sellers only delay in fulfilling their obligations without causing actual damage to consumers, consumers are allowed to take their violation of this obligation as the basis of their right of claim, claiming that producers and sellers should bear the tort liability of stopping the infringement and eliminating the danger. Through a broad understanding of the "damage" in Article 1206 of the Civil Code, the risk of damage caused by product defects is included in the scope of damage, so as to solve the structural imbalance that the product damage prevention function is weaker than the damage compensation function in tort liability and strengthen the initiative of producers to take measures to prevent damage.[2] In the case that producers and sellers are negligent in fulfilling their obligations and lead to the expansion of actual damage to consumers, it is clear that the cause of compensation for the expansion of some damage is caused by the violation of the follow-up observation obligation, so as to promote the court's judgment to strictly distinguish between the two types of liability. By clarifying the dual obligation boundary of producers' "pre-sale quality assurance" and "after-sale risk prevention and control", the three-dimensional protection of consumers' rights and interests will be strengthened.

### **3.2. The tort liability that violates the follow-up observation obligation should be applied to the presumption of fault**

The principle of presumption of fault should be adopted in the tort liability of violating the obligation of follow-up observation of products in China. With the continuous exposure of the disadvantages under strict liability and the maturity of the application of foreign fault liability in product follow-up observation obligations. Non-traditional strict liability is adopted in the field of responsibility of China's product follow-up observation obligation, and the application of fault liability should be more appropriate.

Under the framework of strict liability, there is an obvious dilemma in the follow-up observation obligation of products. With the improvement of technology, producers need to improve the safety of their products in order to maintain their own market competitiveness. However, improving products

may make the products they originally sold defective, and producers need to bear strict responsibility for it. If we don't improve the products, it will lead to the outdated products and eventually lose the market. Product safety improvement should not be linked to the product follow-up observation obligation. Because of product improvement, producers have to bear the tort liability for violating the follow-up observation obligation, which will hinder the enthusiasm of producers to improve the product safety performance. This is not the original intention of the product liability law. At the same time, after the product is put into circulation, it is out of the control of producers and sellers, and has lost the reasonable basis for the application of strict liability under the absolute control factors. The absoluteness of strict liability and the continuity of follow-up observation obligations are naturally uncomfortable. The United States put forward the "rational person standard" with obvious negligence characteristics in determining whether producers should bear tort liability. Specifically, based on the judgment of a rational producer, when a rational person in the producer's position thinks that it is necessary to warn the product risk, the producer has the obligation to post-sales warning of its products, and failure to perform the behavior of warning the products after sale constitutes negligence and should bear tort liability. On the other hand, if a rational person judges that there is no need for after-sales warning, the producer does not have to perform and does not constitute negligence. This kind of judgment logic based on the prediction of "rational person" behavior reflects that the United States focuses more on the "performance of the subject of the obligation" rather than the "defect of the product itself" in determining the tort liability of the producer in violation of the follow-up observation obligation.[7] Although there is no mention of "fault" in the stipulation of this obligation in China, the expressions of "failure to remedy in time" and "ineffective remedy" in the provisions all reflect the consideration of whether there is fault in the performance of the obligation subject. Finally, considering that it is too difficult to ask consumers to prove that producers and sellers are at fault and to respond to the concerns of supporters of the no-fault principle, China's tort liability for breach of product follow-up observation obligations should adopt the principle of presumption of fault, that is, producers and sellers should bear the burden of proof that they are not at fault when they cannot prove that they are at fault. Therefore, different from the three elements required by the product liability certificate, namely, the product is defective, the damage fact and the causal relationship between the damage fact and the defect, the constitutive elements of tort liability for violating the follow-up observation obligation include fault factors. On the basis of the principle of imputation of fault presumption, the constituent elements that consumers or victims need to prove, we believe that should include: first, producers and sellers have violated the obligation of follow-up observation, that is, they do not fulfill the obligation of follow-up observation or do not properly fulfill the obligation of follow-up observation. Among them, improper performance of the obligation of follow-up observation includes two situations: failure to take timely remedial measures and ineffective remedial measures; second, consumers are subject to damage or risk of damage. Damage mainly includes damage to consumers' life, health, physical rights, property losses and mental pain. At the same time, according to Article 19 of the Interpretation of the Supreme People's Court on the Application of the "Tort Liability Part I," this damage also includes damage to the product itself; third, there is a causal relationship between the violation of the obligation of follow-up observation and the damage or danger of consumers.[6] The identification of causality draws on the theory of apparent proof, that is, through the highly probable rule of thumb, the existence of causality is presumed to reduce the burden of proof of consumers.[11] At present, the courts in China have adopted this kind of proof. In order to exempt producers and sellers from tort liability, they need to prove that they have reasonably fulfilled their obligations, and there is no fault or exemption.



### 3.3. Exceptions to exemption for violating the obligation of follow-up observation

Can the theory of bulk seller be used as a defense against tort liability for breach of follow-up observation obligation? We believe that it should not be applied in our country. The "Draft for Public Consultation on Product Quality Law" pointed out in Article 17 that "if there are widespread defects in the same batch, model or category of products due to design, manufacture, warning and other reasons, the producer should stop production and report to the market supervision and management department in accordance with the relevant provisions of the state, notify consumers and relevant operators, and take the initiative to implement the recall. Relevant operators should stop the business activities involving the defective products and assist producers to recall the defective products." This paragraph clarifies the main role of producers in undertaking the follow-up observation of products, and emphasizes that other operators have the obligation to assist producers in recalling products. Among them, the "related operator" does not explicitly exclude which subject, should include all the sellers, wholesalers and other subjects selling products to the society. The opinion draft reflects the tendency of legislators to a certain extent. After the producer supplies the product to the wholesaler under the theory of bulk seller, it is not in line with the current legislative spirit of our country to only bear the warning obligation to the intermediate wholesaler for its product risk without bearing the warning obligation to the consumer. Producers should actively fulfill their obligations such as warning and recall to consumers.

In today's era of artificial intelligence, the development risk defense should not be abolished, and its relationship with the follow-up observation obligation should also have a more reasonable coexistence model. Specifically, it should be clear that the development risk defense cannot exempt the tort liability for breach of the follow-up observation obligation. According to the defense of development risk, when a product defect is a defect that cannot be found by the scientific and technological level when the product is put into circulation, the producer can fight against the infringement lawsuit of consumers or users, but the producer and seller still have follow-up observation obligations for the products put into circulation market. The defects that cannot be found in circulation cannot be used as a defense that producers and sellers are exempted from obligations. The reason is that the basis of the two systems is not the same. When the development defect causes damage, the development risk defense is applied to the backtracking of the level of science and technology when it is put into market circulation, focusing on the consideration of the nature of the defect, and its exemption effect is against the consumer or other infringer's claims for infringement caused by product defects; However, in violation of the obligation of follow-up observation, it bears the responsibility of "failure to take remedial measures in time or ineffective remedial measures to cause damage"[12], considering the remedial behavior of the responsible subject. As mentioned above, the obligation of product follow-up observation is not a product responsibility centered on defect consideration, but a requirement for the subjective attitude of the responsible subject to fulfill the obligation. Based on the needs of social production innovation, producers don't have to take responsibility for defects that are not discoverable. However, with the development of science and technology, when defects are no longer undetectable. As producers who open up dangerous sources and profit from products, if they can be based on the development risk defense exemption and ignore the risks created, it is not only a distortion of the concept of consumer protection, but also a violation of social equity. Producers who have the advantage of preventing product dangers should have the obligation to discover defects and eliminate the dangers of defects. Therefore, the development risk defense cannot exempt the producer from the tort liability caused by the violation of the follow-up observation obligation.

Although producers have the obligation to warn and recall the defects found in the subsequent development of scientific level, and they cannot be exempted from liability by development risk

defense, this does not overhead the development risk defense system, making it useless. The obligation of follow-up observation of products only reasonably limits the scope of application of development risk defense. During the period from "the products begin to circulate" to "before the defects are found in the scientific and technological level", the development risk defense can still achieve the effect of exemption for producers. No matter whether the producer assumes the obligation of active observation or negative observation, during this period, the defect has not been discovered by the scientific and technological level. Without the defect, the producer will not have to take remedial measures such as stopping sales, warning and recalling, and there will be no tort liability of "failing to take remedial measures in time or causing damage due to ineffective remedial measures". If consumers later sue for damages caused by product defects during this period, producers may claim development risk defense exemption. When it comes to the "level of science and technology to find defects" after this point, the producer has the obligation to take remedial measures in time. If the producer fails to perform or fails to perform properly, he will be responsible for violating the follow-up observation obligation. What needs to be clear is that at this time, we still recognize that product defects are in line with development risk defects, but there is no exemption effect, because producers should bear the tort liability of violating the follow-up observation obligation.

#### 4. Conclusion

The follow-up observation obligation has a unique value position in China's product liability system, and its breakthrough has opened up the road of preventive relief for product infringement in China. However, at present, China's legislation on this obligation is still in a vague and imperfect stage, and there is no corresponding judicial interpretation as a guide. The research on the tort liability of the product follow-up observation obligation is of great significance to the application of the system. This paper takes the tort liability of product follow-up observation obligation as the research object, and makes a more in-depth study on its attribution, imputation principle and defense reasons. However, the writing of this paper is still relatively macro, and there is no in-depth discussion on the details. Therefore, many problems of tort liability for breach of product follow-up observation obligations need to be further explored and studied.

#### References

- [1] Zhang Yun. *Breakthrough and transcendence: Interpretation of the product follow-up observation obligation of Tort Liability Law* [J]. *Modern Law*, 2011,33(05):174-183.
- [2] Ma Yide. *On the producer's product follow-up security obligations* [J]. *Law*, 2015,(06):44-53.
- [3] Wang Zhu, Wang Yichun. *On the tort liability for violating the obligation to remedy the universal defects of products after circulation-centered on Article 46 of the Tort Liability Law* [J]. *Beihang Law Review*, 2011,(00):169-182.
- [4] Dong Chunhua. *After-sales obligations in American product liability law and its enlightenment to China* [J]. *Oriental Forum*, 2012,(02):39-45.
- [5] Zhang Yun. *Research on the obligation of follow-up observation of products in China* [M]. Beijing: Law Press, 2020.
- [6] Chen Chengtang. *After-sales warning obligation-strict liability or negligence liability? -On the imputation principle of Article 10 of the American Restatement of the Third Tort Law: Product Liability Law* [J]. *Jianghuai Forum*, 2003,(03):74-78.
- [7] Zhang Yun. *Composition and defense of tort liability for violating product follow-up observation obligations*[J]. *Research on the Rule of Law*, 2018, (05): 93-104. Doi: 10.16224/j.cnki.cn33-1343/d.2018.05.009.
- [8] Zhang Minan. *Research on the warning obligation of after-sale danger in American tort law* [J]. *Northern Law*, 2008, (06): 41-60. doi: 10.13893/j.cnki.bffx.2008.06.011.
- [9] He Chen. *Reflection and reconstruction of developing risk defense system in China's product liability law* [J]. *Legal Science (Journal of northwest university of politics and law)*, 2016,34 (03): 135-144.doi: 10.16290/j.cnki.1674-5205.2016.03.
- [10] Zhang Zaizhi, Amber Chia. *On the exclusion of development defects in product liability defense* [J]. *Politics and Law*, 2007,(02):75-80.



- [11] Zhou Youjun. *On the obligation of product tracking and observation in tort law* [J]. *Legal Science (Journal of northwest university of politics and law)*, 2014,32 (04): 127-132. DOI: 10.16290/j.cnki.1674-5205.2014.04.00.
- [12] Wei Yanwei. *Research on the defense rules of product liability "development risk" in the era of Civil Code* [J]. *Journal of China University of Political Science and Law*, 2023,(06):198-214.