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OUT OF THE BOX

Legal guidance for the consumer product + retail industry

A Guide to Practical Problem-solving and Compliance. See page 3.

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PROCEED WITH CAUTION WHEN WARNING PRODUCT USERS

For most consumer product companies, in-house counsel and risk managers can never be too careful when it comes to providing warnings or other disclosures that describe (and qualify) the potential risks and benefits associated with their products. Warning and misrepresentation litigation has become the predominant form of consumer product litigation in the United States. While most manufacturers and suppliers understand that they have some duty to warn about their products' potential dangers, crafting "adequate" warnings that will be understood and followed by product users may feel like reading tea leaves. Similarly, with the recent wave of false-advertising class actions, companies are often left wondering what inadvertent omission or implied claim could be the subject of the next lawsuit.

The Duty to Warn. The origin of a manufacturer's duty to warn is derived from a fundamental principle of American tort law: a supplier of a product is liable to foreseeable users for harm that results from foreseeable product uses—or even misuses—if the supplier has reason to know of the danger, yet fails to exercise reasonable care to inform the user. Restatement (Second) of Torts, section 388.

The duty to warn exists at the time of sale, and continues after a product has been manufactured and sold if the manufacturer becomes aware of product risks thereafter revealed by user operation. A manufacturer must provide adequate instructions for safe use, and warnings as to dangers inherent in proper (and even foreseeable improper) product use. But instructions are not an appropriate substitute for adequate warnings of dangers that may be encountered if the instructions given are not followed.

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Typical failure-to-warn cases involve the discrete, factual question—which often goes to the jury—of whether the warning given was adequate and whether a defendant exercised reasonable care in the issuance of the warning under the circumstances presented. A wide range of factors go into assessing the reasonableness or adequacy of a warning concerning a particular danger—including whether the danger is such that a redesign of the product is more appropriate and thus no feasible warning is adequate.

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After internally identifying potential hazards associated with a product (or seeking the assistance of a risk assessment expert), the prudent manufacturer or supplier will consider the following issues in formulating product warnings:

1. the likelihood that the product would cause an injury;
2. the degree or severity of the potential injury;
3. the product user's likely independent knowledge of the hazard and/or injury potential;
4. warning language and/or instructions for use that may minimize or prevent the hazard potential;
5. whether the warning adequately conveys the nature and extent of the injury (and how to avoid the injury, if possible) to the average user;
6. whether the warning is adequately conspicuous in location, position, color and size; and
7. whether the warning will stay affixed to the product, or, if contained in a manual or slipsheet, whether the warning will be read, understood, followed and remembered by a user.

Of course, the process of converting these general considerations into a specific, concise warning message is not easily reduced to a simple formula. It requires a careful effort to include important safety warnings, while not "diluting" those warnings in a sea of other disclosures and remote possibilities. Above all, the warnings must be "reasonable" and "adequate" for the average user.

Warnings Gone Awry – Consumer Class Actions Adopt Tort Standards

In the normal course, the duty to warn is tested in the context of a traditional product liability case alleging personal injury or property damage. But in the past 10 years, creative plaintiffs have repeatedly tried to export that legal duty to warn into "fraudulent omission" class action cases claiming that a products' inadequate warnings misled a class of consumers who never would have purchased the product had they been exposed to a proper warning, or known of the actual risk potential presented by the product. These consumers claim that they are entitled to a refund of their purchase price. These "no injury" failure-to-warn theories are particularly common in class actions that often follow product recalls.

While courts have not always been receptive to these arguments, the threat of class actions has altered the framework of how companies communicate health and safety risks, especially those risks that could reasonably be claimed to be material to a consumer's decision to purchase a product. In some instances, safety and risk information is now making its way out of the instruction manuals and into prominent places on product labels and advertising.

Creating product warnings that protect consumers and minimize litigation risk is a challenge, especially when warnings and disclosures are becoming more frequent targets of litigation. Morrison & Foerster Consumer Product Group lawyers have helped product companies of all sizes develop effective warnings and instructions for use, and have defended our clients' warnings in court. We have seen what works, and are prepared to bring our expertise to you.

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MOFO KNOW HOW

The vast majority of consumer products have no specific warning regulations or requirements. Manufacturers and suppliers of these products should employ the American National Standard Institute ("ANSI") hazard communication system to help ensure that product warnings are effectively communicated. ANSI establishes U.S. performance standards for the design, application, use and placement of safety signs and labels.

Under ANSI Z535.4, the signal word and color components of a warning combine with the text message to inform the user of the seriousness of the hazard.

Pictorials and symbols, in combination with word messages, can help convey the type of hazard, consequence of the hazard and way to avoid the hazard. The triangle with an exclamation point inside is the ANSI-approved, universally recognized warning symbol. Warnings with an explanatory graphic stand out and communicate the safety message more efficiently. Text-only warnings may not convey the hazard information as quickly or precisely, and may be ineffective for low-literacy or non–English speaking users.

⚠DANGER **DANGER** indicates an immediately hazardous situation which, if not avoided, *will* result in death or serious injury. This signal word is to be limited to the most extreme situations.

⚠CAUTION **CAUTION** indicates a potentially hazardous situation which, if not avoided, *may* result in minor or moderate injury. It may also be used to alert against unsafe practices.

⚠WARNING **WARNING** indicates a potentially hazardous situation which, if not avoided, could result in death or serious injury.

NOTICE **NOTICE** is the preferred signal word to address practices that may result in property damage.

For other consumer product + retail-related legal updates, click here.

ABOUT MORRISON & FOERSTER

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