



THE GOLDHABER WARNINGS REPORT



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TO WARN OR NOT TO WARN: THAT IS THE QUESTION!

According to the American Bar Association, over 90% of Products Liability lawsuits have a failure to warn claim imbedded in the lawsuit. It would seem obvious, therefore, that the question of whether or not to warn has become as much a common legal question as the lawsuit itself! Fortunately, there are guidelines that should help product designers, manufacturers and their legal advisors answer this question. Basically, there are two questions that must be answered before one decides whether or not a warning is advised: Is there a hazard or hazardous condition that is most likely linked to the use of the product and, if so, is that hazardous condition likely to be "hidden" or not readily apparent to the product's user at the time of use. In short, we typically should warn for "hidden hazards." For example, a consumer purchasing bug spray may not be aware of the potential flammability hazard associated with such spray, or an installer of fiberglass wool insulation, over time, may be exposed to potential lung disorders or a user of soft drinks may not be aware that a pressurized bottle cap could blow off, injuring an eye or other body part. Or, an adult user of a children's water slide may not be aware of the risk of serious spinal injury from such use. In all of these cases, the hazard or hazardous condition was possible or probable, and the product's user, in all likelihood, wouldn't have been aware of the hazard without a warning.

Occasionally, a product will require a warning, based upon current Federal and/or State regulations and laws, whether or not the hazard is hidden or obvious to the user. For example, since 1965, all cigarettes sold in the U.S. have contained a federally mandated warning about the hazards of smoking...although some have argued that King James I of England, in the 1600's provided the first tobacco warnings when he declared that tobacco was "loathsome to the eye, hateful to the nose, harmful to the brain" and "dangerous to the lungs" In another example, the National Highway Traffic Safety Administration (NHTSA), currently mandates airbag warnings on all U.S. manufactured vehicles recommending that children be placed in the back seat of vehicles to avoid the potential for serious injury or death. While the Food and Drug Administration (FDA) has required that tampon manufacturers warn about the risk of Toxic Shock Syndrome (TSS), they have given the manufacturers some leeway as to where they place their warnings (on the outside of the box or inside the box).

The next issue of this newsletter will address the very serious question of when NOT to warn and what harm could result from over warning.

Please feel free to pass this newsletter on to any interested friends or colleagues.