

Relying on MSDS Information Not Always Enough for Defendants in “Failure to Warn” Cases

Attorney Advises Additional Steps to Bolster Defense

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Memphis – A well-prepared material safety data sheet (MSDS) may not always be sufficient to protect a company facing a “failure to warn” claim, writes Eric Hudson in *For The Defense*, the journal of the Defense Research Institute. Hudson advises that chemical manufacturers have all of their employees promote the MSDS in interactions with customers and take steps to ensure that end users are familiar with the information.

Hudson is an attorney with Butler, Snow, O’Mara, Stevens and Cannada, PLLC, (Butler Snow). DRI, with more than 22,000 members, is the nation’s leading professional organization for corporate counsels and defense attorneys specializing in tort defense.

“Defense counsel can always rely on the MSDS as a part of the defense in a failure to warn claim, but actions taken by the manufacturers before litigation is even contemplated can significantly bolster the defense,” he explains. The article cites cases in which the MSDS alone failed to provide protection to manufacturers.

Also cited is *York v. Union Carbide Corporation*, 586 N.E. 2d 861 (Ind. App. 1992), a case in which the trial court granted a summary judgment for the defense. Hudson writes that the appellate court noted that the adequacy of warnings is usually an inappropriate matter for summary judgment. “Nevertheless,” according to Hudson, “the court found that summary judgment was appropriate because of the adequacy of the warning and the means by which it was conveyed.”

Hudson says factors contributing to Union Carbide’s successful outcome included a directive on the MSDS requesting the users of the product notify its employees, agents and contractors of the information in the MSDS and the distribution on more than 100 occasions of a booklet containing detailed safety information. While noting that the standards in *York* set a high bar for the defense, he recommends that companies do the following:

- Where appropriate, provide pamphlets or other written information that reinforce the information contained in the MSDS.
- Train sales personnel on the information in the MSDS and other warning material.

- Train sales personnel to identify and watch for misuse of the product while on sales visits.

These actions, while not required, “can significantly improve the defense of common law failure to warn claims,” Hudson writes. He adds that even if they aren’t sufficient to gain a summary judgment, they will impress a jury and bolster a company’s defense.

Hudson focuses his practice on mass torts, chemical exposure, products liability, and commercial litigation, and is a frequent speaker on those topics. He is chair of the DRI Young Lawyers Civility and Professionalism Initiative and a member of the DRI Young Lawyers Steering Committee. He is also active on the Toxic Torts and Environmental Law Committee.

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