

**LJN**LAW JOURNAL  
NEWSLETTERS

LJN'S

# Product Liability

*Law & Strategy*<sup>®</sup>An **ALM** Publication

Volume 30, Number 1 • July 2011

## Graphic Health Warnings for Alcohol

### *Legal Impediments and International Trade Law Implications*

By **Philip Pfeffer**  
and **Ashley Pappin**

In 2010, Thailand proposed mandating the use of highly emotive graphic warnings on all domestic and imported wine, beer and liquor bottles with the aim of deterring consumers from drinking alcohol. These proposed labels would cover 30%-50% of the bottles' surface or packaging area. It is expected that other countries will follow Thailand's lead. The Thai proposal raises important questions about the role of warning labels. It also widens the debate over the appropriate balance between regulators' efforts to protect public health, and consumers' individual choice. Requiring graphic warnings on alcohol bottles also raises a plethora of constitutional, intellectual property and international trade law issues. This is particularly so, given that empirical evidence indicates that graphic warnings, while more emotive than text-only warnings, do not change consumer behavior. In light of the World Health Organization's international strategy to reduce the use of alcohol, these issues are becoming increasingly important and the implications need to be understood.

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**Philip Pfeffer** is a partner at Chadbourne & Parke LLP, London, UK, focusing on product liability litigation and regulation. **Ashley Pappin** is an associate in the firm's product liability department.

### **COMMON LAW DUTY TO WARN**

At the heart of the common law duty to warn is the obligation of manufacturers to communicate risks inherent in ordinary usage of consumer products. The object of this requirement is to enable consumers to make informed choices about whether — and if so, how — they use such products. At common law, the manufacturer's duty to warn arises where: 1) the product supplied poses a risk; 2) the risk is or should be known by the manufacturer; 3) the risk is present when the product is used in the expected manner; and 4) the risk is not obvious or well known to the user. Once this duty to warn has arisen, the overriding requirement for the manufacturer is that it provide a warning that is adequate.

Adequacy of warning labels at common law is measured by how well warning labels communicate the risk of dangerous products to consumers. For example, to be adequate, a warning should: 1) catch the attention of a reasonably prudent person in the circumstances of its use; 2) be understandable; and 3) convey a fair indication of the nature of the potential danger to the individual.

Warning labels tend to be inadequate where they fail to make consumers cognizant of risk, for example where labels: 1) fail to report accurately the risk associated with using the product; 2) fail to give sufficient information about how to avoid the

risk; and 3) include statements that neutralize the warning's impact. Notably, a manufacturer is not required to warn with respect to products when the risk is well known and recognized. For example, leading commentators have noted that the risks associated with alcohol consumption are well-known risks for which there is no duty to warn (Restatement (Second) of Torts § 402A, Comment (j)).

In short, the common law of tort ascribes value to self determination by requiring manufacturers to communicate accurate risk information to consumers which facilitates informed decision making. Dissuading consumers from consuming legal products that could, under certain circumstances, be risky, *e.g.*, wine, beer or alcohol, has never been part of the duty to warn at common law.

### **REGULATORY INTERVENTION**

Over and above the common law duty to warn, there is an increasing trend toward regulation mandating the introduction of warning labels that are designed to deter consumers from using risky products. Regulators are increasingly imposing warning requirements that are not formulated with reference to the accurate communication of risk and informed decisions by consumers. Rather, regulatory warning requirements for risky consumer products have typically taken the form of graphic, emotive and oversized health warnings that

are designed to change the consumer's behavior through shock tactics and maximization of emotional impact. Such warning labels mandated by regulation are often predicated on, and assessed with reference to, changes in consumer behavior and, in particular, whether they result in fewer consumers using the risky products at issue.

However, empirical evidence indicates that graphic health warnings do not alter consumer behavior or reduce the prevalence of risky consumer product usage. For example, Gospodinov and Irvine (2004) examined data from the Canadian Tobacco Use Monitoring Surveys before and after the introduction of graphic health warnings on cigarette packs in Canada. They concluded that "our findings indicate that the warnings have not had a discernable impact on smoking prevalence." (Gospodinov, N., "Global Health Warnings on Tobacco Packaging: Evidence from the Canadian Experiment," *Topics in Economic Analysis & Policy*, 4(1) Issue 1 Article 30 (2004)). Similarly, the World Health Organization has recognized that graphic warnings on risky products will "... not lead to changes in drinking behavior ..." (WHO, "Global Strategy to Reduce The Harmful Use of Alcohol" (2010) at 32).

The implementation of labeling proposals like that proposed by Thailand underscores the paradigm shift from informing consumers of risks to attempts at deterring consumption through shock and fear. By shocking, rather than informing consumers, regulators are seeking to denormalize legitimate, taxed products. While public health goals and advocacy are very important, government-sponsored denormalization of a legal product is not a legitimate government objective and raises a variety of legal concerns discussed below.

### CASE STUDY: THAILAND

As noted above, regulators in Thailand are planning to set an international precedent by mandating graphic health warning labels on all domestic and imported beer, wine and liquor bottles. The proposed label would cover 30%-50% of a bottle's packaging surface area and would include intentionally emotive graphic warnings. For example, one picture shows a shirtless man grabbing a woman by the hair and raising his fist to hit her, accompanied by the words, "Alcohol consumption could harm yourself, children and family." Another picture shows a pair of bare feet hanging in the air after an apparent suicide and the words, "Alcohol consumption could alter consciousness and lead to mortality."

Based on these examples, it appears as if Thailand's proposed graphic health warnings are not designed to provide consumers with accurate information regarding the risks associated with consuming alcohol. Rather, the proposed graphic health warnings seem to be specifically designed to elicit emotive responses and stigmatize alcohol consumption — perhaps with the intention of convincing consumers that there is no safe level of alcohol consumption.

### International Reaction

After Thailand alerted other governments to the proposal, Argentina, Australia, Chile, Mexico, the EU, New Zealand, Switzerland and the U.S. raised objections to Thailand's proposed graphic warnings on alcohol before the World Trade Organization (WTO). These WTO members invited Thailand to clarify the evidence base for the proposed graphic health warnings on alcoholic beverages and consider other less trade-restrictive measures.

The key concerns expressed by member states to the WTO related

to the scientific and technical bases used to justify the proposed warning labels. As noted above, empirical evidence indicates that graphic health warnings do not change consumer behavior. Additionally, the United States expressed concern that the labeling requirement could interfere with use of legitimate trademarks on the bottles, and present significant and unnecessary operational costs for manufacturers.

### U.S. LEGAL OBSTACLES

Thai-style graphic health warnings would be vulnerable to robust legal challenge if proposed in the U.S. Arguably, they would represent an unconstitutional taking in violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution, which states that private property may not "be taken for public use, without just compensation." Use of a trademark on goods sold in the U.S. market is a requirement for obtaining and maintaining trademark rights. By imposing a regulation that mandates the expropriation of large areas of labeling space, manufacturers are severely restricted in their use of legitimate trademarks to distinguish their product from others on the market and would face the potential risk of losing their intellectual property through non-use.

The value of trademarks to their owners' businesses is considerable. Indeed, brand owners have made significant and often long-term investments in developing and growing their brands. Preventing or diminishing these trademark owners' ability to use their marks by encroaching significant portions of labeling space would adversely affect the goodwill these trademark owners have developed. Even if governments were inclined to provide compensation for expropriation of the alcohol indus-

try's intellectual property, just compensation could necessitate multi-billion-dollar payments to brand owners within the alcohol industry.

Likewise, a compulsory labeling regime such as that proposed in Thailand would violate fundamental principles of freedom of commercial speech protected by the U.S. Constitution. Under the First Amendment, the government may mandate commercial disclosures that are "purely factual and uncontroversial," but not if they impose an "unjustified or unduly burdensome" restriction on the speaker. (*Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). The Thai warning labels for alcohol would compel commercial speech by requiring manufacturers to disseminate controversial and exaggerated messages like consumption of alcohol causes domestic violence and suicide.

Conversely, the proposed Thai labeling regime effectively restricts the commercial speech of alcohol manufacturers by significantly reducing the label space available for legitimate communication with the consumer. As a point of reference, a label covering approximately 5% of the packaging of a video game was considered "a substantial portion" of space in *Entertainment Software Association v. Blagojevich* 469 F.3d 641, 652 (7th Cir. 2006) in relation to labeling of video games with adult content. The imposition of a 30%-50% encroachment of labeling space could well constitute a significant restriction on manufacturers' freedom of commercial speech.

## INTERNATIONAL TRADE LAW IMPEDIMENTS

Regulatory initiatives that mandate the encroachment of significant portions of a product's labeling area may breach international trade agree-

ments if they are more trade restrictive than necessary. For example, the warning labels proposed by Thailand are likely to be considered "technical regulations" for purposes of the WTO Agreement on Technical Barriers to Trade ("TBT") because they deal with packaging and labeling and mandate compliance by manufacturers (Annex 1.1 to the TBT). Accordingly, the measures must be no more trade-restrictive than necessary to fulfill the legitimate objective of protecting human health (Article 2.2 TBT). However, graphic health warnings on alcohol are arguably an unnecessary trade restriction because the empirical evidence indicates that such warnings are ineffective in reducing consumption.

Graphic health warnings may also violate national governments' obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS") and the Paris Convention. Notably, Article 20 of TRIPS provides that "the use of a trademark ... shall not be unjustifiably encumbered by special requirements, such as ... use in [a] manner detrimental to its capability to distinguish goods and services." Article 15(4) of TRIPS provides that "[t]he nature of the goods or services to which the trademark is applied shall in no case form an obstacle to registration of the trademark." Article 7 of the Paris Convention contains identical language to that of Article 15(4) of TRIPS. By encumbering trademark owners' rights to use their trademarks and expropriating large portions of label space, national governments may run afoul

of the requirements of TRIPS and the Paris Convention. This is particularly so when, as mentioned above, empirical evidence indicates that, while more emotive, graphic warnings do not change consumer behavior.

## CONCLUSION

Governments and regulators are becoming increasingly paternalistic. As a result, the world market is experiencing a paradigm shift. One of the outputs of this shift is that governments and regulators are, in the name of public health, migrating away from the common law's intended purpose for warnings on consumer products — to provide consumers with accurate information about risk. Regulators are moving toward warnings that are intended to denormalize legitimate, albeit risky, products in the eyes of consumers in an effort to get consumers to stop using them. These regulatory initiatives are not evidence-based and often amount to an unjustified interference in consumer decision-making, not to mention an unduly burdensome encumbrance on valuable intellectual property and commercial speech rights. Empirical evidence and common sense suggest that graphic health warnings on alcohol products are likely to be ineffective and result in significant legal battles and international trade disputes.

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