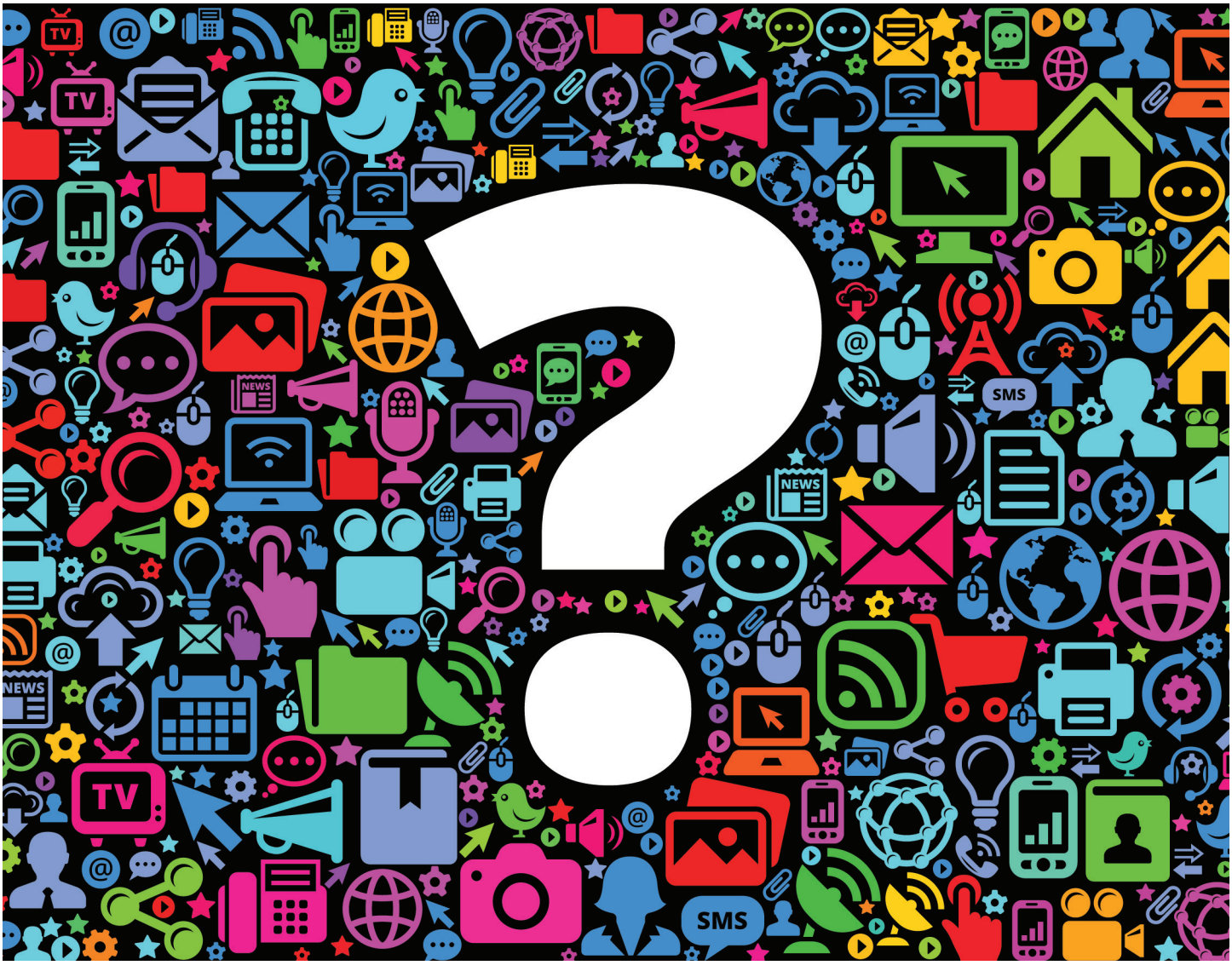
Ostrich, Tiger, or Gazelle

By Joshua B. Fleming and Vanessa A. Davis

Which Approach Should a Manufacturer Take in Monitoring and Responding to Online Content?



■ Joshua B. Fleming is a partner in the Indianapolis, Indiana, office of Quarles & Brady LLP where he concentrates his practice in product liability defense and commercial litigation. He has defended clients in litigation involving product liability, premises liability claims, and complex and mass tort claims, as well as commercial claims involving restrictive covenant enforcement and other business disputes. Vanessa A. Davis is a senior associate in the Indianapolis, Indiana, office of Quarles & Brady LLP where she concentrates her practice on product liability defense and mass tort litigation. She has defended manufacturers throughout the United States and in Canada and also serves as national discovery counsel for a major orthopedic device manufacturer.

An emerging issue for product manufacturers, distributors, and retailers is what to do about the plethora of information about their products and brands available online. Consumers and users are now posting about their every emotion, experience, and thought, which often involves Tweets, complaints on blogs, videos of their experiences with products, and other communications about a product's performance, alleged defects, or unforeseen uses of the product. This information, while arguably advantageous for consumers, is also helping would-be plaintiffs create and gather information. "Mommy" blogs, plaintiffs' firm-driven blogs and websites, and other negative content are littered throughout cyberspace.

This is becoming the standard method of communication. While manufacturers may expect that their products will be discussed on their own (controllable) sites such as Facebook, Twitter, and Instagram, the truth is that these discussions, including complaints about performance, are popping up everywhere. For example, one study suggests that patients are more likely to post drug-related adverse events on Twitter than report them to the FDA. Thomas Sullivan, *Mining Social Media for Adverse Events*, Policy Med (Oct. 22, 2014), available at http://www.policymed.com/2014/10/mining-social-media-for-adverse-events.html. YouTube is saturated with videos of accidents, people misusing products, and pranks involving products, none of which could have ever been contemplated by the manufacturer. And Reddit, an online bulletin board system, is ripe with potential for shared stories and conversation.

Some companies engage and monitor these bloggers in an effort to actively defend their products and brand. The question is whether to do so and how to do so effectively. This article considers the potential effect Internet content may have on product manufacturers and other downstream suppliers and, ultimately, recommends that all companies with an affected interest develop a comprehensive social media plan, and provides some tips and best practices for doing so.

What You Don't Know Can Hurt You

Online content can adversely affect defenses and may spawn increased risk. Though not exhaustive, a few areas of concern caused by online content are (1) plaintiff's argument that online content amounts to notice/knowledge of defect; (2) triggering duties to warn; (3) the erosion of defenses; and (4) potential evidence of punitive damages.

Notice/Knowledge of Defect

Manufacturers are not required to make accident-proof products or to act as insurers for their customers' safety. Generally, manufacturers are required to make products that are reasonably safe for their intended uses; that conform to the manufacturer's specifications; and to warn against any reasonably foreseeable dangers. For all such claims, a manufacturer's knowledge of any potential defect is important evidence. Plaintiffs are already starting to try to use online content to prove that knowledge. For example, in *Crandall v. Seagate Technology, Best Buy Co.*, No. 1:10-CV_128-MHW, 2011 WL 280990 (D. Idaho Jan. 25, 2011), the plaintiff merchant sued Best Buy and Seagate for negligence, strict liability, and breach of warranty, alleging computer hard drives purchased for the plaintiff's business prematurely failed. To attempt to defeat summary judgment, the plaintiff offered evidence of the alleged defect in the form of blog posts (one from Best Buy's Gee Squad's own blog) and Internet articles that it contended were "voluminous and omnipresent in the public domain" such that Best Buy should have known of the defect before it sold the product. *Id.* at *3. The court allowed and considered the evidence to determine if the existence of online complaints satisfied the elements of Idaho's applicable product liability statute to overcome summary judgment. *Id.* The court ultimately concluded that the mere existence of complaints on the Internet did not provide sufficient evidence that Best Buy was aware of or had knowledge of the alleged defect. *Id.*

Crandall demonstrates that plaintiffs and their lawyers are creatively scouring the Internet for evidence. What would have happened if the plaintiff could prove that Best Buy had monitored social media, blogs, and Internet articles that mentioned the product at issue and actively responded like many companies are doing today? What if the number of complaints were significant enough for the court to consider whether Best Buy had notice of the alleged defect or should have known of it? How many complaints would that take? Worse, what if during discovery the plaintiff was able to prove that Best Buy not only had knowledge of the blog allegations, it investigated them and determined there was a problem? In other words, such evidence may only be the tip of the iceberg, enticing plaintiffs to engage in extensive and costly discovery targeted at the company's knowledge of and response to allegations.

This is but one example. In product liability cases, this evidence, if properly authenticated and admitted, could be detrimental.

> The majority of [s]tates, either by case law or by statute, follow the principle expressed in Restatement (Second) of Torts §402A comment j (1965), which states that "the seller is required to give warning against [a danger], if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the… danger."

Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909, 922 (Mass. Ct. App. 2001). Certainly, evidence that users posted content on a seller's social media site about alleged dangers could constitute evidence of "knowledge" on behalf of the seller. While this may not be enough to carry the day for a plaintiff, this evidence could certainly register with a jury if admitted.

Post-Sale Duties to Warn

A related issue is the potential effect on post-sale duties. While the Restatement (Second) of Torts did not directly address post-sale duties, the Restatement (Third) of Torts, §10 states:

> §10. Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Warn

(a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning.
(b) A reasonable person in the seller's position would provide a warning after the time of sale if:
    (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
    (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
    (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
    (4) the risk of harm is sufficiently great to justify the burden of providing a warning.

Essentially, under section 10, once a product misuse becomes known to the manufacturer, the manufacturer should take steps to combat the misuse or to add additional warnings. Joseph W. Glannon, *The Law of Torts*, 288–296 (3rd Ed. 2005). While the Restatement (Third) was released in 1997, it has not been adopted by a significant number of courts. However, more than thirty states have adopted some version of a post-sale duty to warn. Bryant Walker Smith, *Proximity Driven Liability,*102 Geo.L.J. 1777, 1803 (2014). These post-sale duties are premised on the informational disparity between the manufacturer and/or seller and the consumer. *Id.* Manufacturers have long been held to have knowledge of information readily available in trade journals and other popular literature in their fields. William A. Drier and Haekyoung Suh, *Post-Sale Duties to Warn*, Norris, McLaughlin & Marcus, PA, available at http:www.nmmlaw.com/articles/post-sale-duties-to-warn/ (last visited December 16, 2015). It is not a far stretch to thus hold that a manufacturer will be deemed to have knowledge of Internet content, especially if it is directed at the manufacturer or posted to a site the manufacturer should or does access, or in some instances, controls. While no case addresses this at this time, these authors anticipate that this will be an emerging issue in the near future.

In most jurisdictions, manufacturers can be insulated from liability if a plaintiff has misused the product either by statute.

The Erosion of Defenses

Not only does this potential evidence impact liability from a duty and notice standpoint, it very likely could impact standard product liability defenses. Consider the issue of reasonable foreseeability for defenses of misuse and modification. In most jurisdictions, manufacturers can be insulated from liability if a plaintiff has misused the product either by statute (e.g. *Colo. Rev. Stat.* §13-21-402.5; Ind. Code §34-20-6-4; Michigan Compiled Laws §600.2947(2); Tennessee Code §29-29-108) or by case law (e.g. *McCurter v. Norton Co.*, 263 Cal.App.2d 402 (2d. Dist. 1968; *Busch v. Busch Const. Inc.*, 262 N.W.2d 377 (Minn. 1997); *Sheppard v. Charles A. Smith Well Drilling and Water Systems*, 93 A.D.2d 474, 463 N.Y.S.2d 546 (3d Dep't 1983). Likewise, in most jurisdictions a manufacturer will not be liable if there is evidence that the product has been modified or altered from the condition in which it left the manufacturer. Am. L. Prod. Liab. 3d §39:5 (2015).

These defenses however turn on the foreseeability of the misuse and/or modification. Both defenses require that the defendant demonstrate that the misuse or modification were not "reasonably expectable" to the seller. 2 Owen & Davis on Prod. Liab. §13:24 (4th ed. 2015). As the Indiana Court of Appeals has explained,

> If a manufacturer could not foresee a particular use, they would not know to warn against it. Thus, we believe the term "reasonably expected use" must include the manufacturer's reasonably expected permitted use. If not, the moment a seller or manufacturer provided a warning against a particular use, they would have admitted to foreseeing use of the product in that proscribed manner.

Barnard v. Saturn, 790 N.E.2d 1023, 1031, n.3 (Ind. Ct. App. 2003). Of course, this also means that, if the manufacturer knows that his product is being widely misused, it may have a duty to make reasonable efforts to warn against the consequences of the misuse. *Traylor v. Husqvarna Motor*, 988 F.2d 729, 735 (7th Cir. 1993) (applying Indiana law).

Logically, then, the more Internet and social media content develops and the more companies monitor and engage against such content, the argument that a misuse or modification is unforeseeable will erode, particularly when there exist YouTube videos or other online content depicting the very misuse and/or step-by-step videos on how to modify the particular product. As of the date of this article, no case has specifically addressed this argument. However, it is a growing concern for the reasons discussed herein. It seems that if the plaintiff can demonstrate that the evidence is reliable and admissible and that an alleged misuse or modification should have been reasonably expected by a seller, these defenses will not be available to the defendant.

The Potential Impact on Damages

Defenses are not the only area of concern. This developing evidence could also affect damages. The more evidence of notice or knowledge of this content, the more the risk that a plaintiff will attempt to use it to sustain a claim for punitive damages. In many states, punitive damages may be awarded if there is clear and convincing evidence that the defendant acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error of judgment, overzealousness, mere negligence, or other human failing (*e.g. Wohl-*

wend v. Edwards, 796 N.E.2d 781 (Ind. Ct. App. 2003)).

The possible impact social media or other online content could have on a plaintiff's ability to demonstrate gross negligence or wanton disregard is great. If a company ignores online content and does nothing to investigate allegations of problems with its product, all the while actively engaging in social media content, a jury could construe that as reprehensible conduct and seek to punish a defendant via punitive damages. And the opposite is true as well. In *Marte v. Limited Brands,* a candle exploded, severely injuring a woman. No. 13-139(FSH), 2014 WL 1092503 (D. New Jersey Mar. 18, 2014). The defendant manufacturer sought dismissal of the punitive damages claim for failure to state a claim. *Id.* at *1. The plaintiff opposed, relying on printouts from a consumer complaint Internet database about several of the manufacturer's candles. *Id.* The court ultimately granted the motion to dismiss based on the pleadings but noted that the defendant manufacturer's conduct in responding to the Internet complaints and asking for more information demonstrated evidence that the defendant did not engage in the kind of egregious disregard for the safety of others, as required to impose punitive damages in New Jersey. *Id.* at *5. This case demonstrates that not only are plaintiffs using this content to seek punitive damages, but that a manufacturer's conduct may be important evidence as manufacturers seek to eliminate these claims through dispositive motions.

Should You Monitor

One fundamental question manufacturers face is whether or not to monitor social media and Internet content. Today there exist tens of thousands of content venues that are not controlled by manufacturers where misinformation is housed. Companies and in-house legal departments are faced with the desire of senior management to defend the "shield" while not taking on or creating duties to act. It is therefore essential that you ask whether and to what extent you want to engage in a never-ending battle. For some the answer will be no. The authors believe for many the answer should be yes and that the company needs to engage and develop a responsible social media plan to address not only proactive social media content, but monitoring misinformation and responding to such information.

Before discussing social media plans, we will first address the extent to which a manufacturer has a *duty* to monitor, either through common law liability duty or through statutory and regulatory duty. There are surprisingly still no cases specifically dealing with this issue. There are analogous cases dealing with notice and knowledge that suggest taking action is generally the best practice. However, a full recitation of that line of cases is outside the scope of these materials. What is clear at present is that monitoring may well be required by regulation, if applicable. For example, a number of government agencies require some level of action with respect to social media.

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Consumer Product Safety Act

The Consumer Product Safety Commission ("CPSC") is an independent agency of the United States government created to protect against unreasonable risks of injuries associated with consumer products. U.S. Consumer Product Safety Commission, Frequently Asked Questions, www.cpsc.gov/about/faq.html. The CPSC has jurisdiction over more than 15,000 consumer products. The only products not under its jurisdiction are those specifically named by law that fall under the jurisdiction of other federal agencies (e.g., drugs and medical devices are regulated by the Food and Drug Administration ("FDA")). *Id.*

The CPSC carries out its duties by enacting and enforcing several rules. One particularly relevant to this topic is the Consumer Product Safety Act ("CPSA") reporting requirements. Section 15(b)(2) of the CPSA requires every manufacturer, distributor, and retailer of a consumer product who obtains information "which reasonably supports the conclusion that the product contains a defect" to inform the CPSC of the defect. CPSC Product Safety Act Regulations, 16 C.F.R. §1115.4 (2013). The Consumer Product Safety Improvement Act of 2008 ("CPSIA") expands the scope of product safety violations that trigger reporting requirements and grants the CPSC additional corrective action authority. For example, the CPSIA requires an automatic report when a product fails to comply with any rule, regulation, standard, or ban promulgated under any CPSC-administered statute. CPSC Product Safety Act Regulations, 16 C.F.R. §1115.5 (2013).

Again, these authors are not aware of any authority specifically requiring manufacturers, distributors, and retailers of consumer products to monitor social media to comply with this regulation. However, two regulations suggest such monitoring may be required. First, in evaluating whether or when a company should have reported, the Commission will deem a company to know what a reasonable person acting in the circumstances in which the company finds itself would know. CPSC Product Safety Act Regulations, 16 CFR §1115.11(b) (2013). Thus, a company shall be deemed to know what it would have known if it had exercised due care to ascertain the truth of complaints or other representations. *Id.* This includes the knowledge a company would have if it conducted a reasonably expeditious investigation in order to eval-

uate the reportability of a death or grievous bodily injury or other information. *Id.*

So if, for instance, a company fails to monitor or investigate social media content, particularly when the content exists on its own company site, and continues to sell an allegedly defective product, the Commission may find that the company "knowingly" violated the regulations. The penalties for a knowing violation are steep. Under the CPSA, civil and criminal penalties up to $15 million can be sought against any person who "knowingly violates" the relevant portions of the rules the CPSC enforces. Commerce and Trade, Consumer Product Safety, 15 U.S.C. §2069 (2013). "Knowingly" has been defined to mean "(1) the having of actual knowledge; or (2) the presumed having of knowledge deemed to be possessed by a reasonable person who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations." *Id.*

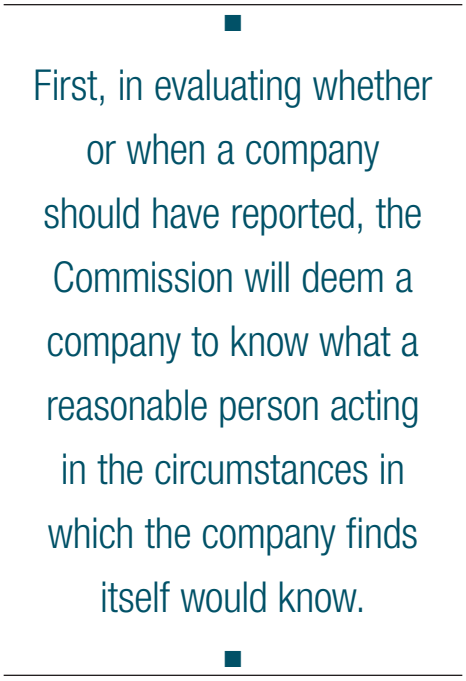
Second, one of the additional factors the Commission may consider when assessing a penalty is a company's safety/compliance program or system for collecting and analyzing information relating to safety issues. CPSC Product Safety Act Regulations, 16 C.F.R. 1119.4(b)(1) (2013). The Commission may consider "whether a person had at the time of the violation, a reasonable program/or system for collecting and analyzing information related to safety issues." *Id.* All of these factors suggest that companies regulated by the CPSC may have a duty to monitor social media.

FDA Medical Device Requirements

Since 1984, the FDA Medical Device Reporting regulations have required medical device companies who have received complaints of device malfunctions, serious injuries, or deaths associated with medical devices to notify the FDA of the incident. As one might imagine, this has created some ambiguity as to what, if anything, manufacturers of medical devices must do to monitor for complaints. And social media only adds to that confusion.

In recent years, the FDA has been working to address that ambiguity:

- December 2011: Draft Guidance on Responding to Unsolicited Requests for Off-Label Information About Prescription Drugs and Medical Devices, December 27, 2011, *available at* http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM285145.pdf.
- January 2014: Draft Guidance on Fulfilling Pos-Marketing Filings Involving Interactive Media



- June 2014: Draft Guidance on Correcting Third-Party Misinformation
- June 2014: Draft Guidance on Internet/Social Media Character Space Limitations

A full review of the scope of this guidance is beyond the scope of these materials. Pertinent to this topic, in these guidance documents, the FDA has stated that it will not hold responsible companies that choose to correct (or not to correct) third-party misinformation. However, the FDA specifically warns that companies should consider the product liability implications of whether or not to correct the information. Further, corrective messaging must not be promotional in tone or content and the author of any such content must clearly identify the relationship with the manufacturer.

Finally, these guidance documents did not directly address (beyond the character concerns for Tweets) whether pharmaceutical or medical device manufacturer's duty to report Adverse Events to the FDA are impacted by social media posts. Thus, if Internet content is monitored and Adverse Events are noted, then the manufacturer must report and investigate just as it would with any other notification of an Adverse Event so long as there is knowledge of the four key "data elements":

1. An identifiable patient;
2. An identifiable reporter;
3. A suspect drug or biological product; and
4. An adverse experience or fatal outcome suspected to be due to the suspect drug or biological product.

Draft Guidance, Postmarketing Safety Reporting for Human Drug and Biological Products Including Vaccines, 2001, *available at* http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Vaccines/ucm092257.pdf.

Until the FDA provides further guidance, companies should err on the side of reporting whenever these data points are known. As the FDA has stated:

> [t]he principals of adverse event reporting apply regardless of the forum in which industry learns about it. We recognize that there are certain aspects of social media that are different from telephone calls, letters and traditional emails. We are working to see exactly how those differences may require more refined guidance on our part.

Drug safety—past, present and the future, FDA.gov (July 9, 2015) (interview with Dr. Gerald Dal Pan, director, Office of Surveillance and Epidemiology in FDA's Center for Drug Evaluation and Research), *available at* http://www.fda.gov/Drugs/NewsEvents/ucm343275.htm.

Tread Act

The National Highway Traffic Safety Administration ("NHTSA") and the Department of Transportation implemented early warning reporting provisions as part of the Transportation Recall Enhancement, Accountability, and Documentation Act ("Tread Act"). Under this rule, motor vehicle and motor vehicle equipment manufacturers are required to report information and submit documents about consumer satisfaction campaigns and other activities and events

that may assist NHTSA to promptly identify defects related to motor vehicle safety. National Highway Traffic Safety Administration, Department of Transportation, Defect and Noncompliance Responsibility and Reports, 49 C.F.R. §573.1 (2013). For example, every reporting period, manufacturers of over five thousand or more light duty vehicles per year are required to report for the last ten model years, all incidents involving one or more deaths or injuries identified in a claim against and received by the manufacturer which alleges the death or injury was due to a possible defect in the manufacturer's vehicle. These manufacturers are also required to provide copies of all field reports, other than a dealer report or a product evaluation report. National Highway Traffic Safety Administration, Department of Transportation, Reporting Requirements for Manufacturers of 5,000 or More Light Vehicles Annually, 49 C.F.R. §579.21(b)(1) (2013).

Whether an incident leading to injury or a field report of product defect or performance problems, the issue becomes when and if a social media post constitutes a claim received by the manufacturer. These authors are not aware of any authority on this topic. And a distinction could logically be made between social media communications with the manufacturer and those made to the public at large or to third-parties. However, authority continues to develop on related issues, which suggests a trend toward finding any communication to be reportable.

In 2008, NHTSA was asked to issue an advisory opinion as to whether an electronic form "help request" from a dealer is a "field report" for purposes of the Tread Act reporting requirements. The advisory opinion notes that the definition of "field report" includes:

> a communication in writing, including communications in electronic form, from…a dealer or authorized service facility of such manufacturer…to the manufacturer regarding the failure, malfunction, lack of durability or other performance problem of a motor vehicle or motor vehicle equipment, or any part thereof, produced for sale by that manufacturer and transported beyond the direct control of the manufacturer, regardless of whether verified or assessed to be lacking in merit…

Legal Interpretation, May 8, 2008, available at www-odi.nhtsa.dot.gov/ewr/interpretations/Lamborghini.pdf. Based on that definition, NHTSA defined these electronic communications from a dealer as a field report for the purposes of early warning reporting. Legal Interpretation, May 8, 2008, available at www-odi.nhtsa.dot.gov/ewr/interpretations/Lamborghini.pdf. It does not seem a far stretch to extend this to posts on a manufacturer's social media sites.

> Second, one of the additional factors the Commission may consider when assessing a penalty is a company's safety/compliance program or system for collecting and analyzing information relating to safety issues.

These are just three examples of possible regulatory duties that could expand to include and impose a duty on companies to monitor and investigate online content. The problem will be how companies assess the reliability of the reports and what efforts must be taken to verify the content before a reporting obligation exists.

Practical Tips and Best Practices

When deciding how to develop any social media plan, you must consider a number of risk factors. Does monitoring and correcting misinformation in one place, but not another, imply confirmation, notice, or acceptance? If you correct misinformation and the posting party responds with additional misinformation, are you now duty bound to further engage? Who within the company has the responsibility for responding? Finally, how do you respond—publicly or privately?

A company that wants the commercial benefits of social media must also recognize that it assumes potential regulatory and liability risks by participating. Any social media planning therefore requires the input of different groups within the organization, including but not limited to, commercial, marketing, medical/regulatory, legal, and potentially quality and compliance, depending on the specific content or postings. Companies should also consider revisiting or updating existing standard operating procedures to reflect the plan and evaluate whether revisions are needed. Any good social media plan must take into account the following guidelines:

- Digital content lasts forever;
- Be respectful;
- Be honest and accurate;
- Act with understanding that this is brand-specific and makes an impact;
- Use applicable and legitimate terms.

Any good internal social media or Internet content plan will address permissible content development as well as how to handle negative content or misinformation. Rules regarding content should focus on and include direction on how to handle usage of intellectual property, what the company allows its employees or content developers to say or not say (and a reminder to not use what does not belong to the company); how to handle and use photos or videos; how to respect and manage private information and the company's confidential information. Any plan should also detail posting frequency and monitoring of the company's own content. The company's control of its own site or Facebook page can have a real impact on the duty that applies to the company, so it is essential the company develop a plan that details its expectations. Any plan must require compliance with all laws and regulations applicable to the company and its products, but also consumer and marketing guidelines and regulations. For instance, it is important to consider advertising regulations, FTC guidelines, or state regulations on things like contests, giveaways, promotions, price incentives and other offers, that may have legal ramifications later.

If a company intends to develop and control its social media presence, it must develop a plan on how to use the medium. The company must designate who is permitted to speak and post for the company on the medium and control it. More importantly, the company must develop a plan and method for monitoring any sites it controls—which includes sites like Facebook and LinkedIn—as well as how to troubleshoot and respond to negative content and misinformation. It will come whether you want it or not and whether your product is safe or not.

While how best to actually respond to negative information is circumstance-specific and any company should address every instance separately, we offer a few advisory comments. First, do not panic. Assess the comment or post to understand whether it has merit or not. If the complaint or post is legitimate, use it as an opportunity to acknowledge the comment (consider publicly versus privately) and be sure to thank the poster for the comment and feedback. Do not address the substance of the comment publicly, and if it requires a substantive response, provide a contact mechanism for the poster (*e.g.*, an email address or phone number). Another important piece of advice is that there will always be people who are beyond satisfaction and who will not act reasonably regardless the efforts. In that instance, the best move is to simply move on and not argue, create a negative record, or add more fuel to the fire.

Generally, it is a good strategy to develop a list of do's and don'ts. Examples include:

DO'S	DON'TS
Post relevant and valuable information about your business and the industry;	Cast the brand in a negative light;
Create posts with positive language;	Make false, inflammatory or derogatory remarks;
Engage with your audience in a respectful and business-like manner;	Engage in negative, disparaging, inappropriate, or unprofessional behavior;
Interact with consumers in a friendly way;	Be deceiving or misleading;
Listen and understand feedback from your audience;	Give judgmental opinions;
Consider making social media a medium for your company.	Talk about religion or politics;
	Respond to a post or message negatively or with an argument;
	Post something you are uncomfortable with the public seeing;
	Post anything that belongs to someone else;
	Use social media or the Internet as a vehicle to complain or vent.