Is There a Risk to Overwarning?

A Good Idea or Not?

In most product liability cases, manufacturers are alleged to have sold a product with inadequate or no warnings or instructions about a particular hazard that allegedly caused injury. One of the defenses to such allegations is that the warning was unnecessary because the hazard was obvious. In addition to that defense, many manufacturers have argued that warnings not given on the product or in the manual were too remote, or that the potential injury would be minor and that they didn't want to “overwarn.”

This article will discuss whether there is a risk to overwarning or if it provides better protection than underwarning? And, in light of these risks, what should a manufacturer do?

Basic Legal Duty to Warn and Instruct

Product sellers must provide “reasonable warnings and instructions” about their products’ risks. The law differentiates warnings and instructions as follows: warnings “alert users and consumers to the existence and nature of product risks so that they can prevent harm either by appropriate conduct during use or consumption or by choosing not to use or consume,” while instructions “inform persons how to use and consume products safely.”

Therefore, when the law talks about the “duty to warn,” it includes warnings on products in the form of warning labels, safety information in instructions that are separate from the product, instructions that affirmatively describe how to use a product safely, and safety information in other means of communication such as videos, advertising, catalogs, blogs and websites.
The law says that a manufacturer has a duty to warn when: 1) the product is dangerous; 2) the danger is or should be known by the manufacturer; 3) the danger is present when the product is used in the usual and expected manner; and 4) the danger is not obvious or well known to the user.

Once the decision has been made to warn, the manufacturer then needs to determine whether the warning is adequate. Generally, the adequacy of a warning is a question of fact to be decided by a jury. However, one court (Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 85 (4th Cir. 1962)) provided a useful description of an adequate label as follows:

“If warning of the danger is given and this warning is of a character reasonably calculated to bring home to the reasonably prudent person the nature and extent of the danger, it is sufficient to shift the risk of harm from the manufacturer to the user. To be of such character the warning must embody two characteristics: first, it must be in such form that it could reasonably be expected to catch the attention of the reasonably prudent man in the circumstances of its use; secondly, the content of the warning must be of such a nature as to be comprehensible to the average user and to convey a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person.”

A court must focus on a warning’s “content and comprehensibility, intensity of expression and the characteristics of expected user groups” to determine its adequacy. And the court said that “[i]t is impossible to identify anything approaching a perfect level of detail that should be communicated in product disclosures.”

Case law concerning the adequacy of warnings and instructions is not particularly illuminating. Most of the cases talk about the adequacy of warnings either on the product or in the instruction manual. In discussing the adequacy of instructions, the cases only say that manuals should be “adequate, accurate and effective” and “clear, complete and adequately communicated.”

Despite the lack of guidance from U.S. courts, there are voluntary consensus standards that do provide some help. The ANSI Z535 standards, which will be discussed below, provide some guidelines on creating warning labels and how to incorporate safety information into instructions. Unfortunately, these voluntary standards mostly provide only format and general content guidelines and not specific content guidelines. As a result, it is possible to comply with these standards and still have inadequate content, thereby resulting in potentially legally inadequate warnings and instructions.

Exceptions to Duty to Warn
The first general exception to the duty to warn is that there is no need for a manufacturer to warn of an open or obvious danger. This exception has been narrowed in recent years so that in many cases, a jury will be allowed at trial to decide if a danger is open and obvious to the user.

Manufacturers should consider warning about most open and obvious dangers that are specific to that product, particularly when the risk of injury or damage is high. This is an area where an experienced U.S. product liability attorney can help analyze whether the hazard has been held by a court to be so open and obvious that a warning may not be necessary.

Second, a manufacturer need not warn about dangers that are commonly known to the general public. For example, there is no need to warn that knives cut, flames burn, or hammers smash. However, a jury may be allowed to decide if a danger or hazard is commonly known and was known to the injured party.

The third general exception to a manufacturer's duty to warn is when users of a product have special expertise using the product. For example, it is possible that an experienced electrician need not be warned about the dangers of coming into contact with live electrical parts. Also, an experienced machinery operator may not need to be warned about the hazards of pinch points. This exception is also somewhat limited in that, in the United States, it is very possible that inexperienced and untrained users and operators will be allowed to operate potentially hazardous products.

The last general exception to the duty to warn is that a manufacturer need only warn of dangers that are known to, or reasonably foreseeable by the manufacturer. Dangers which are not reasonably foreseeable, or which arise out of unforeseeable misuses of a product, need not be considered by a manufacturer in determining which warnings are necessary. For example, a manufacturer need not warn a user about the hazard of using a lawn mower to trim hedges.

A manufacturer should broadly analyze reasonably foreseeable dangers and misuses of a product. While it is not necessary to foresee bizarre uses of the product (once referred to as the “far reaches of pessimistic imagination”), the manufacturer should not assume that what it thinks is reasonable is what some potential user will think is a reasonable use or misuse of that product. As with open and obvious dangers, a jury will many times be allowed to decide if a use or misuse is reasonably foreseeable.

**Law on Overwarning**

There is much discussion in the cases about the proposition that “overwarning” may detract from the more important warnings and cause the reader to ignore all of the warnings or to miss the
important warnings embedded in the long list of warning messages.

In this regard, a legal treatise says: “In some cases, excessive detail may detract from the ability of typical users and consumers to focus on the important aspects of the warnings, whereas in others reasonably full disclosure will be necessary to enable informed, efficient choices by product users.” The treatise goes on to caution courts to look at warnings carefully “before imposing a duty to provide overly numerous or too detailed warnings” or “trivial or far-fetched risks.”

The case law considers “overwarning” in the context of justifying leaving a warning statement off a product or just putting it in the instructions. Courts talk about the problem of information costs and the lack of proof that a few more warnings on the label attached to a product would have prevented an accident. So, the courts consider all places where safety information could have been placed in determining adequacy.

One court said:

“If a manufacturer had to list all sources of friction, or all sources of sparks, as a means of warning of a flammability hazard, its warning label would have to be of epic or encyclopedic proportions. Even then, the manufacturer could not be certain that it had covered every possibility. The combinations of circumstances or materials that could create a spark or friction would be almost limitless. This Court has previously recognized that excessive warnings on product labels may be counterproductive, causing “sensory overload” that literally drowns crucial information in a sea of mind-numbing detail.”

Another court said:

“(a)s a practical matter, the effect of putting at least ten warnings on the drill would decrease the effectiveness of all of the warnings. A consumer would have a tendency to read none of the warnings if the surface of the drill became cluttered with the warnings. Unless we should elevate the one hazard of sparking to premier importance above all others, we fear that an effort to tell all about each hazard is not practical either from the point of view of availability of space or of effectiveness. We decline to say that one risk is more worthy of warning than another.”

And, to make it more confusing, unlike an on-product warning label, an instruction manual has unlimited space. So, is it acceptable to overwarn in the instructions but not in the warning label?

The problem with this caselaw is that there is no guidance on when a label or manual has “overwarned,” thus making the warning defective. In virtually all warnings cases that go to verdict, a jury decides whether or not a warning was adequate. Of course, the jury’s ruling can be overturned on appeal, but when
manufacturers are designing warnings and instructions, they need to decide how much is necessary, how much might be too much, and where to put the information.

In looking at the caselaw, I found no cases that held a warning to be defective because it was too long or too detailed. All of the warning adequacy cases that I read contained an allegation that the warning was inadequate because the pertinent warning was not present, and the defendant argued that adding all of those warnings would constitute overwarning and would diminish the effectiveness of the remaining warnings.

This result should support having more warnings rather than fewer warnings, especially when in doubt about whether it is an obvious hazard or a remote risk, or whether you have some other possible exception to the duty to warn.

The ANSI Standards on Warnings and Instructions

The ANSI standards don't address the issue of overwarning specifically. But ANSI Z535.4 does say that warnings should be “concise” and “readily understood.” And it does say, “When detailed instructions, precautions, or consequences require a longer word message, or when space is limited, a sign may refer the user to the proper instruction manual or other relevant information.” *Id.*

And ANSI Z535.6 says:

“Section safety messages should identify the hazard, indicate how to avoid the hazard, and advise of the probable consequences of not avoiding the hazard. Information regarding hazard, consequences, or avoidance behavior may be omitted from the safety message if it can be readily inferred. This information may also be omitted or abridged in situations where provision of the information would produce unnecessary repetition.”

However, these ANSI standards are mostly design standards meant to achieve some consistency from label to label and instructions to instructions. There is very little guidance on content and on where the safety information should be located, either on the product or in the instructions.

What to Do

It is interesting to learn about what the law says, but it doesn't help a manufacturer decide what information to include in its safety documentation as it is developing a product for sale in the United States and internationally. Manufacturers would prefer to develop warnings and instructions that are likely to be read, understood, and followed so that no accident occurs. However, in the event that an accident does occur, a manufacturer would want to have provided warnings and instructions that will be
defensible or, more importantly, will convince the plaintiff's attorney that the manufacturer supplied enough information and that the injured party was culpable because he or she ignored this information and suffered injury as a result.

My practical advice for the last 40 years of advising on warnings has been to tell manufacturers that, to my knowledge, no company has been held liable for having too many warnings or warnings that are too long. So, despite the language on “overwarning,” as discussed above, I haven't found cases holding that the warnings or instructions were defective because they were too voluminous.

While we do want to write warnings as succinctly as possible and not include clearly obvious hazards or remote risks, I tend to include all residual risks on the label, or at least in the manual where we have unlimited space. A law professor I know confirmed the legal correctness of this advice, when he said: “Firms may potentially incur tort liability penalties for underwarning. Yet there are no penalties levied for overwarning. The uncertainty of whether warnings meet the liability test consequently provides incentives for firms to overwarn, thus potentially diluting the efficacy of warning in other contexts as well.”

In other words, I think it is better to provide more warnings and risk overwarning than to provide fewer warnings and have to explain why a warning was left out. The best way to deal with this approach is to organize warnings and instructions so that the hazards are clearly classified by level of risk through the use of ANSI Z535.4 signal words, “Danger, Warning, and Caution,” to organize the warnings so that it is easy for the user to find information that he or she needs to assemble, operate and maintain a product safely, and to add visual markers such as bullets so that the different messages can easily be distinguished from each other.

This can be done by grouping safety messages either by phase of usage—assembly, installation, use, maintenance, troubleshooting—or by the type of hazard that exists—electrical shock, burn, explosion, or dust, among others. In addition, you need to decide whether a warning goes on a product and in the manual or just in the manual. My operating principle is to determine whether the safety message should be available to be seen by a user each time he or she uses the product, in which case it goes on the product, or if it can simply be read in the manual before first using the product, and referred to as necessary in the future.

Lastly, when some safety information is contained only in the instruction manual and not on the label, the product should have one label telling the user to read the warnings and instruction manual before using the product and, if the instructions are missing, how to get a copy of the instruction manual on the company's website or by calling customer service.
Conclusion

It is difficult to defend against an injury case when the plaintiff is sympathetic, has suffered a significant injury, and a jury could believe that the plaintiff would not have been injured or killed if a manufacturer had added a warning or added a few more words to an existing warning. The relative ease of proof for such claims should encourage manufacturers to think carefully about how to adequately transmit an entire warning message, even for users who should know better, and provide it in a way that a plaintiff’s attorney or jury would believe, after seeing it, that the injured party should have seen it and that there was nothing more that the manufacturer could do.

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