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The Newsletter of the Product Liability Committee

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Product Liability Prevention

Multilingual Warnings and Instructions: An Update

by Kenneth Ross



The duty to warn and instruct is a significant duty in the United States. Under U.S. product liability law, liability can result if a manufacturer or product seller fails to adequately communicate appropriate safety information to purchasers and users of its products.

Given the significant number of languages spoken and read in the United States and the significant number of people who are illiterate in English or in all languages, developing a method to effectively communicate safety information to readers of product labels and instruction manuals is an important consideration. Adequate safety communications that are not effectively communicated to foreseeable users may arguably be considered defective.

This article will describe the relevant law, including new case law from June of this year, and the 2011 version of the voluntary U.S. technical standards concerning the use of Spanish in safety information. It will not discuss in detail the use of pictorials or symbols which I will discuss in a future article. It will also provide recommendations to manufacturers about using multilingual labels and instructions including the use of new technology to better transmit such information.

The Number of Non-English Reading Residents in the U.S.

According to the Census Bureau's 2010 census, the Hispanic population in the United States is close to 50 million and is estimated that it will number well over 100 million by 2050.

In addition, the Census Bureau estimated that 35 million U.S. residents 5 and older spoke Spanish at home in 2009, up from 17 million in 1990. And, of the 35 million who spoke Spanish, the Census Bureau estimated that 17.9% spoke English "not well" and 9.8% "not at all." For all foreign languages, the total number is over 55 million with 24 million who speak English less than "very well." U.S. Census Bureau's American Community Survey.




While these numbers are somewhat shocking, they should be considered in the context of the fact that Hispanics and

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others continue to increase their proficiency in English as they make progress in school and society. While older Hispanics who have not lived here very long may still mostly speak and understand Spanish, I believe that younger Hispanics who live in the U.S. understand some amount of English and by 2020, there hopefully will be very few Hispanics who only speak or read Spanish. This seems to make sense given the proliferation of courses in English as a second language for children and adults as well as the requirements to understand English in order to get a decent job and to drive a car.

In the meantime, however, companies selling products in the U.S. must consider whether multilingual instructions and warnings should be provided with some products.

U.S. Case Law

With this as a backdrop, let us first examine what the courts are saying in this area. The two main ways to effectively communicate to illiterate or non-English reading product users is by use of their mother tongue or by use of commonly understood pictorials. However, U.S. common law provides little guidance on when foreign languages or safety pictorials or symbols are appropriate or required. Court rulings on this issue show the difficulty the courts have had in rendering clear decisions and providing guidance on this issue. \

In 1992, the U.S. District Court for the Southern District of Florida issued a significant ruling in *Stanley Industries, Inc. v. W.M. Barr & Co., Inc.*, 784 F.Supp 1570 (S.D. Fla. 1992). In that case, plaintiff alleged that a fire, which occurred in plaintiff's facility, was caused by the spontaneous combustion of rags soaked in defendant's linseed oil. The linseed oil was being used by two employees who were brothers from Nicaragua and whose primary language was Spanish.

Plaintiff sued the manufacturer of the linseed oil and the retailer, Home Depot, Inc., for negligent failure to warn, strict liability and breach of warranty of fitness for a particular purpose. The defendant manufacturer filed a motion for summary judgment on the negligent failure to warn count.

The plaintiff's response to defendant's motion for summary judgment argued that because the language on the back of the product label was in English only and contained no pictorials, it was inadequate. It further alleged that the label did not fairly, appropriately and comprehensively warn Spanish speaking, monolingual product users of the dangers likely to be encountered with the product's use.

The key fact in this case was that both defendants arranged to jointly and cooperatively advertise, promote and market products in the Miami area. Home Depot regularly and actively advertised in the Miami market on Hispanic television and radio and in Hispanic newspapers. Home Depot also marketed a number of its products with bilingual instructions.

After reviewing the few prior cases discussing the subject of multilingual warnings or universally accepted pictorials or symbols, the court denied the motion for summary judgment and held that it was for the jury to decide whether the defendants could have reasonably foreseen that the linseed

New Orleans, Louisiana

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oil would be used by persons such as the plaintiffs.

The court also held that the jury must decide whether a warning should at least contain universally accepted precautionary pictorials. Lastly, the court held that it was for the jury to decide whether a warning, to be adequate, must contain words in a language other than English or must contain pictorials.

In addition to denying defendant's motion for summary judgment, the court added that it did not intend to advance any position on the merits of the case nor did its decision foreclose affirmative defenses such as comparative negligence or intervening cause.

In a subsequent trial in November 1993, the jury returned a verdict in favor of Home Depot. Since the only defect claimed by the plaintiff was an inadequate warning, it can be assumed that the jury felt that it was unnecessary for the defendants to warn the plaintiff's employees in Spanish or by use of pictorials even if the defendant retailer advertised in Spanish.

Interestingly, many people have interpreted the judge's ruling in *Stanley* to mean that pictorials and Spanish were necessary in this situation. That is not the holding of the court and the fact that the jury subsequently ruled in favor of Home Depot supports the view that communications in Spanish were not considered necessary in this case.

Interestingly, three days before the jury verdict in 1993, Home Depot sent a letter to many of its suppliers asking that Spanish be included on all warning labels and instructions accompanying some products sold to Home Depot. Presumably, Home Depot, as a preventive measure, decided that its suppliers should warn and instruct in Spanish regardless of the outcome of this case.

In the second major opinion on this issue, the California Supreme Court ruled in 1993 that a manufacturer might not be held liable in tort for labeling a non-prescription drug solely in English. In *Ramirez v. Plough, Inc.*, 25 Cal. Rptr. 2d 97 (1993), the court ruled on the adequacy of English-only warnings regarding Reye's syndrome on aspirin purchased by the plaintiff's mother who could not read English but was literate in Spanish.

The California Court of Appeals had held that the adequacy of warnings was normally one of fact and an issue for the jury. The pertinent facts this court considered were that the aspirin was advertised to and used by non-English-literate Hispanics and that the manufacturer presented no evidence as to the cost of Spanish-language labeling and the reasonableness of the manufacturer's conduct in not labeling in Spanish. The manufacturer appealed the case to the California Supreme Court.

The California Supreme Court reversed, affirming summary judgment for the manufacturer. The court held that the plaintiff's cause of action for inadequate warnings was preempted by federal and state regulations regarding warning requirements. Thus, the court held that, as a matter of law, a manufacturer could not be held liable for failure to

include foreign language warnings when the product's warnings and labels complied with federal and state regulations.

The court relied on the lack of statutory authority from the California State Legislature requiring anything other than English labels on non-prescription drugs. It inferred that the Legislature had ". . . deliberately chosen not to require that manufacturers also include warnings in foreign languages." And, they believed that requiring a language other than English "...is a matter of public policy for consideration by the appropriate legislative bodies and not by the Courts."

More recently, the federal district court in Orlando considered the efficacy of the 1992 *Stanley Industries* decision. Plaintiff argued in *Medina v. Louisville Ladder and Home Depot, U.S.A., Inc.*, 496 F.Supp.2d 1324 (2007), that the ladder was defective because it lacked warnings and instructions in Spanish and that defendants were negligent in failing to include them. They relied on the *Stanley Industries* case to support their allegations. Defendants filed a motion for summary judgment.

In June 2007, the court considered the *Stanley Industries* opinion and declined to follow it. The court stated that *Stanley Industries* is "isolated precedent" and that in 15 years from the date of the opinion, no Florida case, state or federal, has concluded that bilingual warnings and instructions may be necessary under Florida law. The court said that there is no indication that Florida law imposes a duty to provide bilingual labels on consumer products and the court was unwilling to extend the law that far. On that basis, the court granted defendant's motion for summary judgment.

Lastly, in June of this year, the 11th Circuit Court of Appeals considered the *Stanley Industries* facts and issued a clear opinion on its applicability. In *Farias v. Mr. Heater, Inc.*, --- F.3d ----, 2012 WL 2354369 (11th Cir. (Fla.) June 21, 2012) (NO. 11-10405), plaintiff appealed from an adverse ruling on summary judgment against Mr. Heater, Enerco Group and Home Depot on her claim of negligent failure to warn. The appellate court found no error in the district court's conclusion that the warnings provided with the manufacturer's heater were adequate as a matter of law and therefore affirmed the granting of summary judgment.

The appellate court stated that a trial court can rule on warning adequacy as a matter of law if the warnings are objectively accurate, clear and unambiguous. While plaintiff did not challenge the trial court's ruling that Florida law does not automatically impose a duty to provide bilingual warnings on consumer products, she did argue, in part, that the question of the adequacy of the English-only warnings should be a jury question, citing the *Stanley Industries* case.

The appellate court held that *Stanley Industries* did not apply because there was no evidence that Enerco or Home Depot specifically marketed to Spanish-speaking customers through Hispanic media. And, the fact that Home Depot requested its vendors to use bilingual packaging was not sufficient evidence of a targeted marketing campaign.

These recent cases are significant rulings since no defendant

wants to have a jury decide such an issue but would prefer to have it decided in their favor as a matter of law.

Therefore, as of today, the common law in general does not require a label to include a foreign language or even pictorials in order for it to meet the duty to warn and instruct. And, if there is a directed marketing campaign to Spanish-speaking consumers, then it seems like the court would hold that the jury can decide.

U.S. Labeling Standards

In 1991, the American National Standards Institute published voluntary consensus standards, referred to as ANSI Z535, concerning product safety labeling. ANSI Z535.4 (2011) provides guidelines for developing safety labels. This subpart provides, in an unofficial annex, acceptable formats for multilingual labels but does not provide any guidance on when to include foreign languages. On that issue, the standard says: "The selection of additional languages for product safety signs is an extremely complex issue. Experts suggest that nearly 150 languages are spoken in the United States and millions of Americans speak a language other than English in their homes. If it is determined that additional languages are desired on a safety sign, the following formats should be considered. In all examples, the use of symbols is strongly encouraged in order to better communicate the sign's hazard information across language barriers."

And, lastly, a new subpart, ANSI Z535.6, which provides guidelines on instructions, was issued in 2006 and reissued in 2011. This part of the standard does not contain any discussion of multilingual manuals.

Therefore, the main U.S. safety label standards do not require multilingual labels and provide no guidance on when or where they may be appropriate.

Retailer and Government Actions

Despite the fact that the common law and voluntary standards do not require foreign language safety labels or instructions, some manufacturers are including bilingual or even trilingual (English, Spanish and French) labels and instructions with their products. This may arise out of safety or liability concerns or merely is a reaction to sales patterns in North America or from customer demands such as Home Depot's.

Trilingual labels and other identification information would allow a manufacturer to sell anywhere in North America without changing its labeling. To the extent that this trend grows, the "state of the art" may be raised despite the lack of clear judicial, legislative or voluntary standard guidance or requirements.

In addition, some government agencies have required manufacturers who fall under their jurisdiction to attach bilingual or pictorial labels to some of their products. One example of government action is the California legislature's adoption of a law requiring 5-gallon buckets sold in California to have a bilingual label with a pictorial.

There may be other specific examples of government agencies or even standards groups requiring or recommending foreign language labels, but it is limited and has not resulted in a broad legal or practical requirement. Therefore, manufacturers and product sellers still have great flexibility as to how to meet their duty to warn and instruct.

Preventive Techniques

As discussed above, with a few narrow exceptions, neither U.S. law nor voluntary consensus technical standards specifically require that Spanish or any other foreign language be used on safety labels or instructions even when those products are clearly being sold in non-English speaking or reading areas in the United States.

Based on that, one could argue that there appears to be no duty to warn in any language other than English. However, having a good defense to a lawsuit may not be the best result when preventing accidents is the primary goal. In order to provide a safer product for foreseeable non-English reading product users, a manufacturer or retailer may decide to exceed any enunciated or anticipated legal or technical requirements.

Before including foreign languages in labels on their products and in their instructions, however, manufacturers should think about this carefully. A manufacturer may run some risk of liability if it voluntarily chooses to include foreign language labels on its products and these labels contain inadequate information or are not effectively communicated. This is particularly true in the case of illiterates.

Likewise, a manufacturer who voluntarily chooses to include one foreign language on its label or in its instructions may be criticized for its failure to include other languages. If one foreign language is selected, another significant part of the user population that reads one of the over 150 other languages used in the United States may be neglected.

Another reason to be careful is that there is no assurance that product users in the U.S. will be able to read the foreign language. In fact, they may be illiterate in all languages. Also, including other languages on a safety label tends to clutter the label and could diminish the effectiveness of the entire label, especially the English message. And, lastly, if the label is in a foreign language, the manufacturer should also provide an instruction manual in the same foreign language.

If the manufacturer decides to add some Spanish but doesn't want to make it fully bilingual, one option is to have two signal words (e.g. WARNING in English and Spanish) and a pictorial on the label that at least clearly shows the hazard. The remainder of the label would be in English. Another option is to include one sentence in the foreign language describing the hazard and telling the reader to consult with their supervisor to find out how to avoid it.

In either case, the non-English reading or illiterate users could at least understand the type of hazard and possibly the consequences of not avoiding it. Then, if they are unable to read the English message on the label, they could ask

someone who reads English to translate. Also, in this situation, the label could include a reference to the company website that includes safety information in a variety of foreign languages. Presumably, this safety information will already be translated for manuals shipped with products sold in foreign countries.

New technology might also be useful in easily offering Spanish or other languages without having a full translation. There could be a label on the product with a sentence in English and Spanish about getting further information on their smartphone using QR codes (they look like a bar code in a square) which, when scanned, can portray a warning message on the screen or send the user to the company's website. This website can contain a link to the full English version of the instructions and to Spanish warnings or a Spanish instruction manual.

In addition, there are companies that will be offering verbal or video warnings that can be attached to products. For example, see <http://www.vesstech.com/>. These could be programmed to offer information in English, Spanish and other languages.

When the manufacturer does not know what foreign language may be appropriate for a given situation, it could provide English labels, including pictorials, with the product and offer to provide labels in other languages to product sellers or employers. The practical burden (although probably not the legal burden) could be shifted to the product sellers or employers to decide if another language is required for safe use of this product. These entities could then specifically request foreign language labels and manuals from the manufacturer. While this approach might be appropriate for some industrial equipment and other products used by workers, it isn't practical for most consumer products.

One alternative is that manufacturers could offer to provide to retailers in areas with a significant number of non-English speaking customers, a pamphlet or leaflet providing the safety information in the foreign language of the customers. Another alternative is to include a toll-free customer information number on the label of the product informing the consumer that they can call the toll-free number to receive safety information in a foreign language.

Since the retailer or employer knows its customers or product users better than the manufacturer, maybe the decision as to the appropriate course of action properly resides with them. While it may not be possible as a legal matter to delegate the duty to warn to others, it may be appropriate to allow those more familiar with product users' language skills to assist in more effectively communicating the safety message to enhance safe product use.

Conclusion

The legal and technical requirements for providing adequate safety communications to those who do not read or speak English are evolving. Manufacturers who are creating safety communications for sales in the United States must keep track of these requirements and trends and try to comply with or exceed them as they exist today or might exist in the

foreseeable future.

If the plaintiff is illiterate or only reads a foreign language and the safety information does not fully transmit the necessary information to that product user, there are risks no matter what course of action a manufacturer takes. Therefore, a manufacturer should make a risk assessment concerning which strategy to take and try to predict whether it will be defensible if challenged.

A manufacturer's goal in this area is to adequately communicate safety information to foreseeable users, no matter where they are located. It is not too difficult to anticipate that people may not read or speak the English language. It is much more difficult, if not impossible, to adequately communicate all necessary safety information to all foreseeable product users. Nevertheless, attention to this issue can help minimize future liability in the United States as well as provide a better quality product that is safer and easier to use.

Kenneth Ross is a former partner and now Of Counsel in the Minneapolis, Minnesota office of Bowman and Brooke LLP where he provides legal advice to manufacturers and other product sellers in the area of warnings, instructions, safety communications and all areas of product safety and product liability prevention. Mr. Ross can be reached at 952-933-1195 or kenrossesq@comcast.net. Other articles can be accessed on www.productliabilityprevention.com. This article includes portions of an article written by Mr. Ross entitled "The Duty to Warn Illiterate or Non-English-Reading Product Users" that appeared in the Winter 2008 edition of DRI's In-House Defense Quarterly.

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