Revised Safety Label Standards Create Opportunity and Risk
By
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Introduction

Recently, there have been and will be revisions to the primary U.S. and European labeling standards in an attempt to harmonize them. The goal of these revisions is, in part, to make it easier for manufacturers to comply with both standards and use one kind of safety label in the U.S. and Europe. The result is that a U.S. manufacturer would be able to create labels that comply with the European standard and also use them in the U.S., thereby creating worldwide safety symbols.

Given the differences in labeling systems, legal systems, and approaches to safety, this is a significant change and one that has ramifications for potential liability in the U.S. and Europe. This article will discuss the U.S. and European labeling standards, how they will be revised, and some legal concerns.

Basic Duty

A manufacturer has a duty to warn where: (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. *See Billiar v. Minnesota Mining and Manufacturing Co.*, 623 F.2d 240, 243 (2d Cir. 1980).

Once the decision has been made to warn, the manufacturer needs to determine whether the warning is adequate. The law has said that a warning is legally adequate if:

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- it is in a form that could reasonably be expected to catch the attention of a reasonably prudent person in the circumstances of the product's use;
- the content is of such a nature as to be comprehensible to the average user; and
- it conveys a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person.

Bituminous Casualty Corp. v. Black and Decker Manufacturing Co., 518 S.W.2d 868 (Tex.App. 1974).

In *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1200 (Alaska 1992) the court similarly found that, for a warning to be adequate, it should: "1) clearly indicate the scope of the risk or danger posed; 2) reasonably communicate the extent or seriousness of harm that could result from the risk or danger; and 3) be conveyed in such a manner as to alert the reasonably prudent person."

A statute in Louisiana defines an adequate warning as follows:

> "Adequate warning means a warning or instruction that would lead an ordinary reasonable user or handler of a product to contemplate the danger in using or handling the product; and either to decline to use or handle the product or, if possible, to use or handle the product in such a manner as to avoid the damage for which the claim is made."

Despite these definitions, terms such as "reasonable user", "fair indication" and "reasonably be expected to catch the attention of the user" make it clear that, in the U.S., the jury gets to decide the adequacy of warnings. And, the cases have not been particularly helpful because there are so many variables in the hazards, the avoidance procedures, and the skills and backgrounds of the readers of the warnings. Is the reader educated, uneducated, skilled, unskilled, illiterate or semi-literate, etc?

Thankfully, labeling standards in the U.S. have provided some good guidelines on creating safety labels which do provide some amount of protection if there is an accident.

Current U.S. Labeling Standard

The most significant standard in the area of U.S. safety labels was developed by a committee of the American National Standards Institute. This standard, referred to as ANSI Z535, was initially published on June 6, 1991 with revisions in 1998 and 2002.

This ANSI standard provides the basis for developing a safety label system. Unlike some other labeling standards, ANSI Z535.4 sets forth performance requirements for the design, application, use and placement of safety labels. The purpose of this standard is "to establish a uniform and consistent visual layout for safety signs and labels applied to a wide variety of products." It is also designed to create a "national uniform system for the recognition of potential personal injury hazards for those persons using products."

ANSI Z535 .4 deals with on-product safety labels and provides for a specific format label containing a signal word panel, word message panel, and an optional pictorial or symbol panel. The message required by the standard to be transmitted, with words or symbols individually or in combination, is (1) nature of the hazard, (2) the seriousness of the hazard or probability that the user will encounter the hazard, (3) the consequences of encountering the hazard or the severity of the injury, and (4) how to avoid the hazard. These requirements are consistent with the cases that require a label to convey the "nature and extent" of the danger.

The ANSI standard defines a symbol or pictorial as a graphic representation intended to convey a message without the use of words. It goes on to say that the symbol or pictorial may represent a hazard, a hazardous situation, a precaution to avoid a hazard, a result of not avoiding a hazard, or any combination of these messages. Z535.4 also states that symbols should be readily understood and effectively communicate the message. The courts also talk about labels that are "comprehensible" to the average user.

In 2002, the ANSI standard was changed to allow the manufacturer to use a symbol to substitute for all or a portion of the required messages in the word message "if it has been demonstrated to be satisfactorily comprehended … or there is a means (e.g., instructions, training materials, manuals, etc.) to inform people of the symbol's meaning."

The original text of the ANSI standard did not allow a manufacturer to substitute a part of the message with a symbol unless the symbol had been tested to be "satisfactorily comprehended." The 2002 change was meant to allow symbols that haven't been tested be on a label as long as they were described in the manual.

However, while the 2002 ANSI standard allowed for symbols to take the place of words in the message panel, manufacturers realized that they should be careful before they fully rely on a symbol to fully communicate the message. Since symbols may represent a hazard, a hazardous situation, a precaution to avoid a hazard, a result of not avoiding a hazard, or any combination of these messages, it would be unusual for a symbol to be able to replace all word messages that are generally required by the law or the standard.

Also, in 2002, the ANSI Z535.3 standard, which deals with symbols on safety labels, was changed to add a reference to the type of symbols used in the European ISO standard. The revision said that the formats for symbols in the ISO standard "may be considered." This was the first attempt to harmonize the ANSI and ISO labeling standards.

ISO Labeling and Product Standards

The International Organization for Standardization (ISO) has a labeling standard, ISO 3864-2, that is very different than ANSI Z535. Symbols are the essential ingredient of this labeling system. Through the use of shape, colors, and symbols, ISO believes that each symbol can adequately communicate a safety message.

Such a system is preferable in Europe because there are many languages spoken and read in different countries and there are open borders which allow products to easily move from country to country. The result can be that for many products, the manufacturer may not know where the product will be initially used or subsequently used during its lifetime. Having symbols that transmit at least part of the message provides some warning of the hazard.

Another reason for the different systems is that European employers provide more safety training on the job. The result is that symbols don't have to be readily comprehensible to someone with no training. The assumption is that the

employee encountering a symbol on a machine in the workplace will have been trained as to the symbol's meaning.

And with consumer products, there are government safety agencies in many European countries that are active in trying to educate consumers as to the meaning of safety symbols placed on consumer products.

In the U.S., it is very different. Manufacturers generally can't assume that the employee has had safety training, so safety labels over the years have had word messages and symbols to try to communicate quickly and completely the entire message required by the law and the standards.

And there is little attempt by the government or manufacturers to try to educate consumers on the meaning of safety symbols. This is because most labels have word messages that transmit the entire message.

In any event, the ISO standard has developed a much more comprehensive system of symbols than ANSI Z535. Below is an example of the different shapes for ISO 3864-2.

Hazard Description Mandatory Action Prohibition

Separate symbol/pictorial label formats.

These labels are typically used in combination with one another (i.e. the hazard description label is combined with a mandatory action label and/or a prohibition label.

The formats are combined to portray the entire message. The following is a sample label that contains a description of the hazard and how to avoid it, including prohibited actions and a mandatory action.

Given the development of the ISO standard and the desire of manufacturers to be able to use one set of labels for worldwide use, the ANSI committee met in September 2004 to consider further harmonization of the ANSI and ISO systems in the area of symbols.

ANSI Revisions

In Annex C to the current ANSI Z535.4, it says that "it may be possible for a safety sign or label to be in conformance with ANSI Z535.4 and an ISO standard." It didn't describe how it may be in conformance and the Annex is not an official part of the standard. As a result, while the committee in 2002 raised this possibility, it did not officially allow for the manufacturer to say that a particular label complied with both the ANSI and ISO standards.

This issue was addressed and resolved by the ANSI Z535 Committee in September. The committee voted to include in the 2006 version language which will allow the manufacturer who sells in the U.S. to comply with the ISO standard and not the ANSI standard. In a reference to ISO 3864-2, the new version of the standard will say that the ISO standard may be used as an "alternate standard" to the ANSI standard.

The result of this revision is that manufacturers will finally be able to use symbol only labels in the U.S. without running the risk of having a plaintiff's lawyer claim that their label violated the ANSI Z535 standard. This change, if approved by ANSI, will give manufacturers the opportunity to make significant changes in their labels, both in the U.S. and elsewhere. But are such changes a good idea?

Legal Concerns

The requirements in the law and in the ANSI standard for warning adequacy may not be satisfied with some symbol only labels. In some cases, it may be very

hard to create a symbol that portrays some of the message requirements. Symbols are excellent at portraying the hazard and injury that can be suffered if encountering the hazard and not so good at portraying the severity of the injury, the probability that the injury will occur, and how to avoid the hazard.

Despite this, it is very possible that some symbols that do not transmit all of this information will be deemed sufficient because they provided enough information to put the reader on notice of a potential hazard and put the responsibility on the reader to get more information about the severity, probability, or how to avoid it.

Some courts have encouraged the use of symbols when potential readers are illiterate or do not read English. The courts feel that transmitting at least the hazard should be sufficient to put the reader on notice. This argument can be made when symbol only labels are used.

However, some safety experts are skeptical about the use of symbol only labels. The British Department of Trade and Industry said:

> Pictograms are not the language free answer to written safety warnings. There is no clear objective evidence to suggest that they have any significant effect on ultimate compliance with safety warnings on products. Therefore the desire to decrease text information on packaging due to the internationalisation of markets must not take the route of language free pictorial warnings unless they have been proven to be effective across all the relevant cultures.

DTI mentioned the use of symbols if they have been "proven" to be effective. This means that the symbols have undergone comprehension testing.

As more manufacturers decide to go to symbol only labels, more of them are considering comprehension testing in the U.S. and Europe. The ANSI Z535.3 standard contains a testing protocol for testing in the U.S. And there is a specific ISO standard for testing the comprehension of symbols.

These developments will be interesting to watch. How many manufacturers will go to symbol only labels? How many symbols will be tested? Will plaintiff's lawyers challenge the testing protocols, the lack of testing, and the adequacy of the symbols? Time will tell.

Conclusion

This area is dangerous because it is so easy for a plaintiff to argue that the manufacturer should have done something different. If the label had words, then all they had to do is add a few more words and the accident would not have happened. If there are only symbols, then the plaintiff didn't understand it and all they had to do was test the label for comprehension. The remedy is cheap and simple and it may be hard to defend a particular label given a serious injury and sympathetic plaintiff.

Manufacturers can certainly use symbol only labels in the U.S. At least they will be able to say that the label complies with ANSI Z535. However, compliance with a voluntary standard is not an absolute defense. Therefore, they need to be prepared to argue that the symbol adequately transmitted sufficient information.

Using symbols that have been in use for years and have possibly been tested is one answer. Testing new symbols in the U.S. is another possibility. However, manufacturers will have to live with the testing results. If DTI is correct, some testing may confirm what the manufacturer doesn't want to hear - that the symbol is not comprehensible.