

The Duty to Warn Illiterate or Non-English-Reading Product Users

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 and technical standards in the United States and provide recommendations to manufacturers about using multi-lingual labels and pictorials.

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

The Census Bureau, in its 2006 American Community Survey, found that approximately 20 percent of the U.S.

population, or 56 million people, speak a language other than English. And, of that number, 44 percent, or 24.6 million, speak English less than “very well.”

The Census Bureau also estimated the number of “linguistically isolated” households in the U.S.; meaning that all members of the household 14 years and over have at least some difficulty with English. For Spanish speaking households, 27.6 percent are considered isolated. For Asian and Pacific Island languages, 27.4 percent of the households are isolated.

Concerning illiteracy, the U.S. Department of Education, in 2003, performed *A National Assessment of Adult Literacy*, updating the last assessment performed in 1992. In particular, the assessment estimated illiteracy in “prose literacy” and “document literacy.” The Department of

Education estimated that 11 million people were “nonliterate” in English. And, they concluded that, among adults who spoke Spanish or Spanish and another non-English language before starting school, 61 percent had “Below Basic” skills in prose literacy and 49 percent were “Below Basic” in document literacy.

Given these statistics, it is arguable that manufacturers should be providing safety information in some way other than just in English. While foreseeing the non-English reading and illiterate user population is easy, trying to communicate with those so-called “average users” is much more difficult. Problems abound in getting the “right” product to the right user population, selecting the correct foreign language or pictorial, dealing with total or partial illiterates, and even if these problems are solved, getting the users to read and understand the information presented.

But first, let us examine what the courts are saying in this area.

U.S. Case Law

The two main ways to communicate effectively to illiterate or non-English reading product users is by use of their mother tongue or by use of commonly understood



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pictorials. However, U.S. common law provides little guidance on when foreign languages or safety pictorials or symbols are appropriate or required. In fact, there have been very few cases discussing the necessity to communicate to product users in the United States who do not read English or are illiterate.

Many years ago, a U.S. federal appellate court set forth two essential characteristics of a legally adequate warning: (1) it must be in such a form that it could reasonably be expected to catch the attention of a reasonably prudent person in the circumstances of its use; and (2) 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. See *Spruill v. Boyle-Midway, Incorporated*, 308 F.2d 79 (4th Cir. 1962).

Given that definition, can manufacturers assume that the “average user” is literate in English? Based on the statistics above, the answer is certainly “no.”

Despite the existence of many non-English reading or speaking and illiterate U.S. residents, there have been very few significant legal opinions that have considered the issue of whether safety communications in anything other than English should be required. Several 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, the plaintiff alleged that a fire, which occurred in the plaintiff’s facility, was caused by the spontaneous combustion of rags soaked in the defendant’s linseed oil. The linseed oil was being used by two employees who were brothers from Nicaragua and whose primary language was Spanish.

The 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 the 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

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defendants arranged, jointly and cooperatively, to 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 multi-lingual 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 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 the 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. Until recently, as discussed

below, the *Stanley Industries* case had not been followed or rejected by another court in Florida.

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 it 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 such communications were not necessary in this case.

It should also be noted that 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 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." Since this ruling, the *Ramirez* case has never been overruled in California or cited negatively by any court.

Another early major case considering this issue was *Campos v. Firestone Tire & Rubber Company*, 98 N.J. 198, 485 A.2d 305 (1984), superseded by statute as stated in *Dewey v. R.J. Reynolds Tobacco Co. v. Silverman*, 577 A.2d 1239, 1253 (N.J. 1990). The plaintiff in this case immigrated to the United States in 1971 from Portugal. The accident, which occurred in 1978, involved the explosion of a truck tire rim and tire while being mounted. The manufacturer provided various warnings and instructions in English. However, the plaintiff could not read or write Portuguese or English.

The plaintiff won in the trial court on a failure to warn theory, and the judgment was appealed. In addition to holding that the manufacturer had a responsibility to warn of what was arguably an obvious hazard, the New Jersey Supreme Court also stated that:

In view of the unskilled or semi-skilled nature of the work and the existence of many in the work force who do not read English, warnings in the form of symbols might have been appropriate, since the employee's 'ability to take care of himself' was limited.

Most recently, the federal district court in Orlando considered the efficacy of the *Stanley Industries* decision from 1992. The 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 the defendants were negligent in failing to include them in that language. They relied on the *Stanley Industries* case to support their allegations. The 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, had 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 the defendant's motion for summary judgment. This is a significant ruling since no defendant wants to have a jury decide such an issue and defendants would prefer to have it decided in their favor as a matter of law. (DRI members Rasch Brown and Eugene Terk of Frilot L.L.C. represented Louisville Ladder in this case.)

With the exception of the *Medina* case, the other cases discussed above and most all of the other rulings on this issue hold that the jury will generally decide whether a label is adequate based on the circumstances of an individual case. Even so, there is enough language in these cases to suggest that if a manufacturer is selling a product in areas where the average user likely will not speak English or possibly not read at all, it should at least consider including a pictorial that identifies the hazard, and, possibly, include a word message in a foreign language.

Therefore, as of today, while 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, manufacturers should not rest easy and assume that the law will not change. It is very possible that some court or jury might rule in the future that a foreign language or pictorial is necessary in certain situations.

U.S. Labeling Standards

In 1991, the American National Standards

Institute published voluntary consensus standards, referred to as ANSI Z535, concerning product safety labeling. In these standards, pictorials are not required, but are acceptable. And, while multi-lingual label formats are shown, there is no requirement or discussion of when it is appropriate to add a foreign language to any particular safety sign.

One of the subparts, ANSI Z535.3, provides criteria for symbols or pictorials to be used in safety labels in the United States. The introduction to ANSI Z535.3-2006 states:

The U.S. population is multi-ethnic, highly mobile, and derived from a multiplicity of social and educational backgrounds, with different reading skills and word comprehension. These factors complicate the effectiveness of word-only signs. Effective safety symbols have demonstrated their ability to provide critical information for accident prevention and for personal protection. Labels with safety symbols can promote greater and more rapid communication of the safety message, and therefore, greater safety for the general population.

In addition, a related subpart, ANSI Z535.4, provides guidelines for developing safety labels. This subpart does not require the inclusion of pictorials or symbols, but it does encourage their use whenever practical. It also provides, in an unofficial annex, acceptable formats for multi-lingual labels, all of which include pictorials, but the subpart 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 over 23 million Americans speak a language other than English in their homes.

A 2007 revision to ANSI Z535.4 allows labels that have only pictorials and no words. This change basically acknowledges the labeling standards promulgated by the International Organization for Standardization (ISO) and could allow a manufacturer to comply both with ISO and ANSI standards with one set of pictorial only labels. This revision made no changes concerning multi-lingual safety labels.

And, lastly, a new subpart, ANSI Z535.6, was issued in 2006 for instructions. This standard does not contain any discussion of multi-lingual manuals, although it does provide guidance on how to incorporate pictorials used on safety labels into the text of the instructions.

Therefore, the main safety label standard in the U.S. does not require multi-lingual labels and provides 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 labeling, 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 as a result of NAFTA or customer demands.

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. For example, in 1994, the U.S. Consumer Product Safety Commission issued a notice of proposed rulemaking that would require, in part, a Spanish safety message or a pictorial be included on packages of charcoal to clarify the dangers of burning charcoal indoors because of carbon monoxide fumes. The basis for requiring the Spanish message came from CPSC data that indicated that 80 of 137 victims were members of ethnic minorities, and more than half of these were Hispanic.

However, despite the fact that many of the individuals in the target population were Hispanic, the Commission opted to require only a pictorial along with the English message, rather than requiring a warning in Spanish, because the Commission determined that the pictorial message would more effectively communicate the warning to a larger number of the target population with less confusion.

According to the clinical psychologist who administered the Commission’s test comparing the effectiveness of pictorial and written warnings, and who works with low-income Hispanics, “many in the target population are unable to read either English or Spanish. Therefore, a safety message in Spanish instead of a pictorial would not necessarily reach those Hispanics who do not read English.”

Under these circumstances, a pictorial warning was deemed to be more appropriate because the pictorial would communicate effectively to both literate and non-literate Spanish speakers, non-literate English speakers and non-English speaking persons not in the targeted Hispanic community. Another example of government action is when the California legislature adopted a law requiring five-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.

What to Do for U.S. Sales

As discussed above, with a few narrow exceptions, neither U.S. law nor voluntary consensus technical standards specifically require that foreign languages, symbols or pictorials be used on safety labels that are attached to products, 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 considering product safety and liability prevention. Because the goal is to provide a reasonably safe product, a manufacturer or retailer may decide to exceed any enunciated or anticipated legal or technical requirements in the hope that accidents will be prevented.

The easiest way to present safety information where you are concerned about non-English reading or illiterate product users is to include comprehensible or gen-

erally accepted pictorials that at least portray the type of hazard and possibly the consequences of encountering it.

Many such pictorials and symbols exist today, more are being developed, and some have been tested on focus groups consisting of expected user populations. One problem, however, with some pictorials is that they cannot communicate the probability of an incident occurring and/or how to avoid the hazard, messages that are required by the law and standards. Thus, full reliance on a pictorial to transmit the entire message may be risky in the event of an accident.

In addition, one of the leading safety organizations in the world, the British Department of Trade and Industry, said about pictorials:

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.

Therefore, where you are in doubt as to the efficacy of the pictorial, the best approach is either to add words that assist the pictorial in more fully and clearly communicating the message or test the pictorial on expected user populations to confirm that they are comprehensible and adequate. However, testing has its risks, too, since the results may confirm that a certain pictorial does not communicate the necessary message, and, therefore, should not be used without words.

Considering foreign languages, manufacturers should be careful before putting them in labels on their products and in their instructions. 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 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. For example, in Minnesota, there are several non-Spanish foreign language newspapers and television stations for the Somali and Hmong population. Do warnings have to be provided in these languages for products sold in Minnesota? I don't think so.

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, as was the case with Mr. Campos and with the target audience for charcoal. 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 arguably also provide an instruction manual in the same foreign language that it provides on the safety label or the message is incomplete.

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 la-

bel, they could ask someone who reads English to translate. Also, in this situation, the label could include a reference to the company website that could include 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.

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 the 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 that has been suggested 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 suggested is to include a toll-free customer information number on the label of the product informing consumers 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 prop-

erly 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.

There are risks no matter what course of action a manufacturer takes 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. Therefore, a manufacturer should make a risk assessment of which strategy to take and whether it will be defensible if challenged.

A manufacturer's goal in this area is to communicate safety information adequately 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 communicate all necessary safety information adequately 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. 