

Everything You Want To Know About Warnings In Less Than 2 Hours

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I. Current Problems With Warnings

Most product manufacturers understand that they have a duty to warn customers of known dangers of the intended use of their products as well as the hazards of the foreseeable unintended use of their products. This determination is made at the time the product is offered for sale. Problems arise when the manufacturer asks questions about the warnings, such as:

- How many warnings should be included? Should there be warnings about every potential misuse of the product to avoid liability, or will that be so many warnings that a reasonable consumer would likely not read any of them?
- Where should the warning be located to reach the end user? With more purchases being made on the Internet, should such warnings be on the product, in the instruction manual, or also at the point of sale?
- How should the warnings be conveyed to the end user? Should the warnings be in multiple languages? Should the warning include pictures or videos when the manufacturer doesn't know which language the end user will understand? Will all users understand what the pictures represent?
- Which warnings are needed to make an "adequate warning" under the law to avoid liability? Under what circumstances should a product warning be amended, and does that increase the risk of a manufacturer's liability concerning the prior warning?

These are just a few of the issues that attorneys advising product manufacturers and risk management departments need to consider when deciding on product warning language. The information below is intended to give you short answers to each of these issues from the perspectives of a warnings expert and defense attorneys.

II. The Historical Development Of Product Warnings

Today we live in a world with warnings on alcohol containers; new products have safety manuals which are too long and complicated; and ladders come with safety labels telling the user not to stand on the top step. Virtually all products come with a variety of warnings and instructions; some helpful, and others clearly meant to provide legal cover when consumers misuse the product. And so we as defense counsel are often called upon to defend products, particularly older ones, where the warnings and instructions are not so comprehensive. It helps first to understand the history of how we got to the point

where we are today before we look askance at either the warnings of older products or what manufacturers do today.

A. Products Pre-1960s

Of course we all know one of the key cases in product liability case law is the tale of Mr. MacPherson in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916). There, Mr. MacPherson purchased a car with a defective tire which crumbled on him. Buick's primary defense was lack of privity, as Mr. MacPherson bought his car from a dealer, and not the manufacturer. Then Judge (and someday to be the famous Justice) Cardozo made short shrift of that argument, and in doing so put forth a duty which became boilerplate law largely until the early 1960s. He wrote, "If the nature of a thing is such that it is reasonably certain to place life or limb in peril when negligently made, it is then a thing of danger. If he is negligent, where danger is to be foreseen, liability will lie." *Id.* at 389. So for liability to be found there had to be a "danger" which placed "life or limb in peril" and the product had to have been "negligently made." There was nothing about warnings.

A few years later, in 1934, the First Restatement of Torts was issued, and with it Section 388 which addressed the negligence of suppliers of "chattels" where the product was considered "dangerous for the use to which it is supplied." In those instances, a supplier was expected to "inform them (consumers) of its dangerous condition." Restatement of Torts (First) Section 388 (1934). So at this point in time, warnings were required only where a condition was deemed "dangerous" and then a negligence standard would be applied. Which thus brought into play in many states the then absolute bar of contributory negligence, a difficult hurdle for many plaintiffs to overcome. Moreover, there generally was no duty to warn of obvious dangers or to consider unforeseeable or inappropriate uses of the product. Such was the state of warnings until the early 1960s.

B. Strict Liability and the Failure to Warn

Strict liability arose in response to the often insurmountable problems plaintiffs faced in proving negligence and breach of warranty claims. A major landmark case came from California, *Greenman v. Yuba Power Tools Co.*, 377 P.2d 897 (1963), in which the court adopted strict liability as a theory of recovery. Two years later, Section 402A of the Restatement of Torts (Second) passed, providing strict liability for one who sold a product in a defective condition which was unreasonably dangerous and failed to meet the expectations of a reasonable consumer. The drafters combined concepts of warranty (defect) with concepts of negligence (unreasonably dangerous). In doing so, the Restatement drafters addressed warnings, but without providing for a strict liability duty to warn. Comments to the Restatement stated that the purpose of warnings was to prevent a product from being unreasonably dangerous. So lack of a warning would not make a product defective; according to the Restatement, warnings were intended only to prevent an otherwise nondefective product from being considered

defective. The standard required the product to meet the reasonable expectations of the consumer. Section 388 remained part of the Restatement, however, requiring as before that a manufacturer has a duty to warn whenever there is awareness of a danger by the manufacturer and no reason to believe a user will realize it. Warnings were not required where the dangers were generally known or recognized.

As time went on, however, the cases distinguished the duty to warn as separable from the duties to manufacture and design a safe product. Depending on the state, courts allowed warning theories based on negligence, breach of warranty, or strict liability, sometimes alternatively or together, asking whether the product was reasonably safe and other times using negligence principles. Under strict liability, the unreasonably dangerous nature of the product was still the focal point, and the user's own misconduct was irrelevant. Under a negligence approach the conduct of both parties was considered. Still other states employed a quasi-strict liability approach, looking at both the knowledge of the consumer and the design hazards in the product. This all led to a great deal of uncertainty of what was required across the 50 states.

C. The Impact of OSHA

With the passage of the Occupational Safety and Health Administration Act in 1970 came a requirement for hazard communication for the workplace. The Act gave workers the right to know about hazards associated with various aspects of the workplace, including the use of chemicals, flammable liquids, and industrial machinery so as to prevent or avoid injury. Hazards were broadly defined as that which could cause any adverse physical or health effect. While not directly impacting the duty to warn, it led to a gradual movement from warning about defects or unreasonably dangerous conditions to an emphasis directed to hazards. Hazard identification and elimination became the norm, as opposed to emphasizing just defects and unreasonably dangerous conditions. Today, manufacturers routinely employ hazard analysis in design of their products, with a focus to eliminating hazards to their users. For those hazards which cannot be eliminated, warnings and instructions can help make the product reasonably safe.

D. The Restatement of Torts (Third) and Warnings

In 1998 the American Law Institute adopted the Restatement of the Law (Third) Torts: Product Liability. The Restatement (Third) was intended to clarify some of the ambiguities of the Second Restatement by providing definitions and standards for claims involving duty to warn, negligence, and strict liability. Section 2 specifically defined one category of defect as "inadequate instructions or warnings" which render the product "not reasonably safe." In comment (i) of Section 10, the duty is such that a manufacturer must provide reasonable instructions and warnings about risks of injury posed by products and to inform

persons how to use and consume products safely. Sellers down the chain are also required to warn when doing so is feasible and reasonably necessary.

The Restatement (Third) makes it clear that a seller has no duty to warn about risks that should be obvious or generally known by foreseeable product users. The relevant time period for assessing adequacy is at the time of sale or distribution. Some states have adopted the Restatement (Third), while others have not. The principles behind it, however, should give guidance to what manufacturers need to consider in meeting their warning and instruction responsibilities.

E. The Standardization of American Safety Information and Signs

The American National Standards Institute (ANSI) in 1991 put forth five standards in an attempt to provide harmony and definition to the variety of safety and warning signs. Up to this point, safety labels were inconsistent and there was no guidance on formatting, color selection, or process. The standards have since been revised through the years, and now comprise the following six individual standards:

- ANSI Z535.1: Standard for Safety Colors
- ANSI Z535.2: Standard for Environmental and Facility Safety Signs
- ANSI Z535.3: Standard for Criteria for Safety Symbols
- ANSI Z535.4: Standard for Product Safety Signs and Labels
- ANSI Z535.5: Standard for Safety Tags and Barricade Tapes (for Temporary Hazards)
- ANSI Z535.6: Standard for Product Safety Information in Product Manuals, Instructions, and other Collateral Materials.

The standards set forth a system of hazard identification, identification of risk of harm, and steps to be taken to avoid the hazard. The standards employ a system of signal words of danger, warning, causation, notice, or Safety Instructions. For manuals, the standard provides requirements for the purpose, content, format and location of different kinds of safety messages. These standards today are relied upon by manufacturers and are generally accepted as evidence of current state of the art by experts in warning litigation.

F. The Development of European Warning Requirements

Prior to 1985, all EU Member States had their own body of law regarding product liability. With the development of the European Union, Directive 6 of the EC Products Liability Directive was adopted and promulgated a consumer expectation standard for defect. Article 6 provides that a product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including: "(a) the presentation of the product." This phrase is broad enough to encompass warnings, instructions, and even promotional materials from the manufacturer.

The EU has since promulgated standards to give specific guidance called European Norms (ENs). They are used to ensure that the requirements set forth in European directives are fulfilled. For example, EN 292-2, Safety of Machinery-Basic Concepts, General Principles for Design, states that "Markings, signs, and written warnings shall be readily understandable and unambiguous, especially as regards the function(s) of the machine to which they are related. Readily understandable signs (pictograms) shall be used in preference to written warnings."

Much work has been done in recent years to harmonize European standards with American standards, with both sides of the Atlantic making concessions to meet the other's needs. This work continues today. Efforts are being made to harmonize various aspects of the EU's emphasis on pictorials as labels compared with the ANSI Z535's reliance on written messages.

G. Warnings Today

Manufacturers today have a conflicting path to follow when it comes to warnings. They must comply with the variety of state and federal common law rules regarding defect, negligence and warranty. The basic requirements remain, however, that a product must meet the expectations of the consumer and not be unreasonably dangerous. Manufacturers are required to provide warnings which make the product reasonably safe. They must instruct the end user in the safe use of the product in a way that lasts the life of the product. And in acting in a reasonable manner (negligence avoidance), a manufacturer must warn of hazards which keep the consumer reasonably safe. To do this, the manufacturer must give consideration to the requirements of ANSI and the European Community, and draft safety information which complies with these standards. It should be noted that the fact that one has met a safety standard in the US doesn't insure the product will not be deemed to be defective or that the conduct of the manufacturer will not be considered negligent. Compliance with a standard is but one factor to consider in determining the negligence of a manufacturer. But the absence of this proof of compliance, or actual violation of a standard, will most certainly be used by the injured party to have the opposite effect. So manufacturers are well advised to know the standards, follow them to the extent it is reasonable to do so, and be ready with an explanation should compliance not be possible.

III. Should A Manufacturer Add Warnings To A Product After It Has Been Sold?

A. The Duty to Warn May Not End With the Sale

Historically, the duty to warn ended with the sale of the product. The manufacturer was charged with knowledge only as of the date of sale. Information about subsequent uses unintended or unforeseen by the manufacturer was for future products and designs, and would not form the basis for liability on the original product. In recent years, however, courts and the Restatement of Torts have increasingly attached a post-sale duty to warn for products which were at the time of sale reasonably safe for use. While states are inconsistent in their present interpretations, manufacturers are well advised to understand the general state of law which may require post-sale action.

B. Evolution of the duty

The earliest decisions in which post-sale duties were imposed involved latent defects that involved a risk of loss of life or serious bodily injury. The leading case of *Comstock v. General Motors Corp.*, 99 N.W. 627 (1959), involved a brake defect which had not been made known to consumers, but only to dealerships. The court recognized a duty to warn after the time of sale when there exists “a latent defect which makes the product hazardous” and becomes known to the manufacturer shortly after the product has been put on the market. Courts that followed the Comstock holding strictly adhered to the requirements of “latent defect” and that the knowledge of defect must have been received “shortly after the product has been put on the market.”

The Restatement of Torts (Second) followed a somewhat similar approach a few years later. In strict liability, a continuing duty existed only if the defect existed at the time the product was placed into commerce. Section 402(A) comment (g) limited application of strict liability to those situations where the product is, at the time it leaves the seller’s hands, in a condition not contemplated by the ultimate seller. In other words, the warning defect had to have existed at the time of the initial sale.

Cases involving failure to update or warn about technological improvements in the servicing of older products soon had an impact on the limitation that the defect had to exist at the time of sale. The leading case involved a sausage stuffer which had been serviced through the years without updating to later and safer designs. There the Wisconsin Supreme Court in *Kozlowski v. John E. Smith’s Sons Co.*, 275 N.W.2d 915 (1979), distinguished mass consumer products from industrial machines and found a limited continuing duty to warn of dangers in their products. The court said it was not creating a duty to warn of new safety devices on products. But the court distinguished consumer products from industrial, stating:

A sausage stuffer and the nature of that industry bears no similarity to the realities of manufacturing and marketing household goods such as fans, snow-blowers or lawn mowers which have become increasingly hazard proof with each succeeding model. It is beyond reason and good judgment to hold a manufacturer responsible for a duty of annually warning of safety hazards on household items, mass produced and used in every American home. It would place an unreasonable duty upon these manufacturers if they were required to trace the ownership of each unit sold and warn annually of new safety improvements. *Id.* at 923-24.

Kozlowski has since been cited with approval by some courts and rejected by others. Manufacturers can only take heed of the distinctions made by the court in imposing liability for a no longer up-to-date product.

The Restatement of Torts (Third) followed up on *Kozlowski* and the cases which followed it by including a post-sale duty to warn under certain circumstances when enacted in 1998. The Reporters for the Restatement considered post-sale warnings to be the “most expansive area in the area of products liability law” and the most controversial. Section 10 of the Restatement (Third) provides as follows:

* * * *

Section 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.

According to Section 10(b), a seller can be liable only if a reasonable person would have supplied such a warning. A theory of negligence is appropriate to measure the manufacturer's conduct and, as such, manufacturers must do what is reasonable considering the factors of section (b).

The Restatement (Third) also speaks to the duty of product successors to engage in post-sale warnings. Liability may be imposed where a successor undertakes or agrees to provide services for maintenance or repair or enters into a similar relationship with purchasers of the predecessor's products giving rise to actual or potential economic advantage to the successor and a reasonable person would provide a warning. The section addressing successor liability further provides that a reasonable person in the successor's position would provide a post-sale warning if the four conditions in Section 10 are met.

Finally, manufacturers of pharmaceuticals have seen greater obligations with respect to continuing duties to warn, particularly with a duty to remain apprised of new scientific and medical developments and to inform the medical community of pertinent developments related to treatment and side effects. This enhanced duty arises out of the unique role medical professionals play as learned intermediaries and the source for information for their patients. This duty has been extended in limited situations to others who are in superior positions with respect to product knowledge, such as pilots of helicopters and manufacturers of automobiles.

C. Practical Considerations for Manufacturers and Post-Sale Warnings

Several factors from the Restatement and case law are consistently cited to guide manufacturers as to what are their post-sale warning obligations. First and foremost, a manufacturer will be evaluated under a reasonable care standard. So a manufacturer must ask: what is reasonable under the circumstances? Step one is to have a reason for the decision, one way or the other.

The cases teach that the most important factors in determining any warning obligation are the severity of the harm to be suffered and the likelihood it will take place. The greater the nature of the harm, the more incentive a manufacturer should have to avoid it. Closely related to this is the likelihood that the harm will take place. This is where prior claims, accident reports, and warranty claims can make all the difference. While a single accident or event may not make a situation foreseeable, several can make an unforeseeable misuse or product modification into something foreseeable. Failure to address prior accidents may form the basis for a plaintiffs' claim for punitive damages to "send a message" or "punish" an inattentive manufacturer. But the severity of the harm can be so great that perhaps even one event can lead to a post-sale duty to warn, particularly if it is possible the event can happen again. It's a judgment call, and a manufacturer's decision will be evaluated on a reasonableness standard.

Among the factors courts have also looked at in determining whether a post-sale

warning is needed include the following:

- (1) Can product users be identified?
- (2) How many products are in the marketplace?
- (3) Is there continuing contact with customers?
- (4) Is the consumer unaware of the risk of harm?
- (5) Can a warning be effectively communicated and acted on?
- (6) And as stated above, is the risk of harm sufficiently great to justify the burden of providing a warning?

It cannot be emphasized enough that the first and foremost factor is the severity of the harm. The more serious the harm, the more a responsible manufacturer should consider post-sale warnings.

Manufacturers also need to be cognizant of their ever expanding regulatory requirements in the United States and around the world. Often the regulatory reporting responsibilities and obligations are more stringent than what is required under the common law. Each manufacturer must be well advised to know the requirements of the agencies which govern their products, such as the Consumer Product Safety Commission, the Food and Drug Administration, and the Occupational Safety and Health Administration. Non-compliance with applicable regulations will be fodder for a plaintiff's attorney in any product liability lawsuit.

D. The Impact of Post-Sale Warnings

Manufacturers often take solace in Rule 407 of the Federal Rules of Evidence, which purports to keep design changes and warning improvements out of evidence. The concern is that the new design or warning will be viewed as a concession of liability or an example of what should have been done at the time of manufacture. The assertion that "they should have done this in the beginning" is not what defendants want to hear at trial.

Yet Rule 407 has enough exceptions one can drive a truck through them. Most good plaintiffs' attorneys will be able to find one reason or another to get the remedial measures introduced for "limited purposes." And we all know how non-effective limiting instructions from the court often can be.

Rule 407 itself is fairly innocuous and seems to support the societal goal of having manufacturers continually strive to improve their products without the fear that the improvements will be used against them. The rule itself reads:

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;

- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or—if disputed— proving ownership, control, or the feasibility of precautionary measures.

From a practical standpoint, a manufacturer should assume that more often than not the remedial measures will come into evidence. That, however, is not necessarily a bad thing. The remedial measure or warning eliminates or reduces the inclination of the jury to want to “get the manufacturer’s attention” so that the company changes what the jury perceives to be as a bad design or warning. The post-sale conduct also supports the defense theme that the manufacturer is a responsible company which cares about safety. People understand that companies will update and improve their products, and indeed will expect nothing less. So jurors will not be shocked should they learn that the manufacturer has improved the product or its warnings over time. Bottom line, the plaintiff may be doing the defendant manufacturer or seller a favor by introducing manufacturing, design, or warning/instruction changes into evidence.

IV. What Should A Manufacturer Do If It Determines That Its Existing Warning Is Deficient?

If a manufacturer decides to change its existing warnings, it does not necessarily make the prior warning deficient or inadequate *per se*. For example, if a manufacturer finds a minor mistake in its written warnings or instructions, it should correct the language immediately to improve it for future sales. However, if the manufacturer determines that there is a major mistake with its existing warnings, then it should take steps to voluntarily recall the product to avoid the potential for misuse.

Restatement (Third), Section 11, specifically states that a seller or distributor is not liable for a failure to recall a product unless the recall is required by statute or regulation or the seller has voluntarily undertaken to recall the product and did so negligently. So if a company voluntarily undertakes a post-sale activity, it best be done in a reasonable and responsible manner or a claim of negligent recall or post-sale warning could be brought.

The manufacturer may also opt to modify an existing product – instead of just changing the warning language - to avoid the potential for personal injury or property damage altogether rather than to continue designing it with the potential danger and then warning about it. Why? Plaintiff’s counsel will take a manufacturer's good warning (*e.g.*, product is flammable) and say that it is a design defect (because the product could have been made non-flammable). In sum, a manufacturer's good warning could turn into an admission of bad design if there was a reasonable alternative available.

V. What Is An Adequate Warning?

A. Factors Courts Consider When Determining if a Warning is Adequate to Avoid Liability.

Whether a warning is adequate is generally a question of fact, but in some cases the court can decide that the duty to warn has been discharged as a matter of law when the facts are undisputed. An adequate warning is determined by assessing its content (what is stated), its form (the manner in which it is stated), and method of conveying the facts. Specifically, the warning must be reasonable under the circumstances to alert the intended user to the risks or dangers associated with using the product. The duty to provide adequate warnings about a product is to give a reasonable warning, not the best possible one. A manufacturer need not warn of every mishap or source of injury that one can imagine flowing from the product because to do so would dilute the force of any specific warning.

Courts across the U.S. have considered the following factors in assessing the adequacy of any product warning:

1. Attracts the user's attention due to its prominence (*i.e.*, position, size, or coloring);
2. Clarity of the warning to make the risks understandable to the average user (whether it includes specific, simple, clear, and accurate directions and information to enable product to be used safely, such that if the injured person had complied with the warning, there would have been no injury);
3. Degree of intensity of the warning that would cause a reasonable person to exercise caution commensurate with the potential danger (*i.e.*, severe hazards get more warnings);
4. Explanation of the consequences for failure to follow the warning;
5. Knowledge, training, and experience of the person using the product;
6. Identification of dangers of product misuse and when the product deteriorates;
7. Openness and obviousness of any danger to a person using the product;
8. Reasonably calculated to reach the end user and advise all foreseeable users of the existence and seriousness of the danger involved;

9. Risk of the warning falling off, getting lost, becoming obscured, or deteriorating;
10. Space available on the actual product;
11. Utility of the manual as a location for warnings, and whether there is a reasonable expectation that the manual will be followed;
12. Use of the product without incident prior to the accident; and
13. Compliance with all applicable regulations, industry standards and codes (including whether other manufacturers in the same industry use similar warning language).

B. How do Pictures and Bilingual Warnings Make it Adequate?

The fact that a warning might have been more helpful if it contained a pictorial warning rather than only a written one will not give rise to liability when the plaintiff read and understood the existing written warning. However, when it is reasonably foreseeable that non-English speakers will use the product, then symbolic or bilingual safety admonitions will be needed to make a warning adequate.

C. Should a Manufacturer Test its Warnings on Potential Consumers to Determine if the Warnings are Adequate?

Short answer is Yes. Once a manufacturer initially determines the content and location of the warnings it plans to use on its products, packaging, and in its instruction manuals (including any symbols and languages), it should then test its warnings and instructions with a focus group of potential users of the product. This allows the manufacturer to determine which warnings, if any, were not fully understood as written or were not necessary for proper use of the product. Focus group feedback would also help to determine if additional warnings were needed based on users' common questions when using the product. Finally, a manufacturer should document such focus group research as the basis for why it included certain warnings or instructions with the product, as a way to justify that its existing warnings were adequate for the reasonably foreseeable user.

D. Recent Cases Where Court Found Warnings were Adequate and Manufacturer Was Not Liable.

In the last five years, several courts have found that a manufacturer adequately discharged its duty to warn at the time a product entered the stream of commerce, and was not liable for plaintiff's injuries. The reasons courts found the warnings to be adequate are described below:

- Manufacturer provided several safety instructions and warnings of arm amputation on the concrete pump itself and in the operator's

manual, which plaintiff admitted reading and failing to follow. *Fisher v. Multiquip, Inc.*, 96 A.D.3d 1190 (N.Y. 2012);

- Instructions decal with pictogram illustrating potential injury affixed to heavy-duty support stands used by mechanics to repair a semi-truck trailer's brake system provided sufficient warnings of needing to use stands' support pins to avoid personal injury. *Weigle v. SPX Corp.*, 729 F.3d 724 (7th Cir. 2013);
- Manufacturer adequately warned prescribing physician of increased risk of deep vein thrombosis associated with use of birth control patch to discharge its duty to warn. *Legard v. Ortho-McNeil Pharm., Inc.*, 833 F.Supp.2d 775 (N.D. Ohio 2011);
- General types of warnings that accompanied dog chew toys adequately warned pet owners of dangers of ingesting larger pieces, and provided instructions on what owners should do to keep product safe. *Stanley v. Central Garden and Pet Corp.*, 891 F.Supp.2d 757 (D. Md. 2012);
- Even though stun gun manufacturer could have provided a stronger warning and more information with its product, those further details could have detracted from officer's ability to process the existing warning and, thus, the warning given was sufficient as a matter of law. *Marquez v. City of Phoenix*, 693 F.3d 1167 (9th Cir. 2013);
- Two warnings on box of a baby seat, on a leaflet, and two warnings on the seat itself (which had faded over time), clearly stating that an infant could get out of the seat and that seats should never be used on any elevated surfaces, were sufficient to catch the attention of consumers and were of intensity justified by magnitude of risk, so as to constitute an adequate warning. The fact that plaintiffs disregarded the warnings on the packaging shortly after purchase did not render those warnings moot. *Groesbeck v. Bumbo Int'l Trust, et al.*, ___ F.Supp.3d ___ [2015 WL 5282798] (D. Utah 2015);
- Warning label on product adequately warned operators not to reach into pinch points regardless of which mode the machine was operated in and, thus, manufacturer was not liable to end user who read and understood the warning, and whose hand was burned when it was trapped in pinch point because operator routinely ignored the warning. *Wilson v. Sentry Ins.*, 993 F.Supp.2d 662 (E.D. KY 2014);

- Manufacturer of molding line provided adequate warning in safety manual as to how to properly use and repair machine and further, manufacturer could not be held liable for plaintiff's injuries because danger of machine was obvious to user. *Broyles v. Kasper Machine Co.*, 865 F.Supp.2d 887 (S.D. Ohio 2012).

VI. In Certain Situations, Manufacturers Can Also Avoid Liability Where An Inadequate Warning Did Not Cause Plaintiff's Injury

A warning may be inadequate if either (1) its physical characteristics are so small or obscure that the reasonable user would not read it; or (2) it fails to inform the reasonable user of the pertinent hazard and how to avoid it. An inadequate warning can result in a manufacturer's liability, even if the product performed exactly as it was intended (*i.e.*, no manufacturing defect; no design defect). However, if defense counsel can establish that an additional warning would not change the behavior of the end user, then the inadequate warning did not cause the injury. *See e.g.*, *Cross v. Forest Laboratories*, ___ F.Supp.3d ___ [2015 WL 1534458] (N.D. MS 2015) and *McDowell v. Eli Lilly and Co.*, 58 F.Supp.3d (S.D.N.Y. 2014) (drug was not proximate cause of patient's injuries when medical practitioners testified that a different warning containing information patient alleged was missing from the prescribed drug labeling would not have changed decision to prescribe drug to patient); *Fredette v. Town of Southampton*, 95 A.D.3d 940 (N.Y. 2012) (motorcycle manufacturer not liable for inadequate warnings in its manual where plaintiff observed a hazard and drove around it the first time, and then drove through the hazard the second time causing his injuries).

Defense counsel should also seek evidence that the end user never read any of the existing warning materials and, thus, the end user would not have read any additional warning provided by the manufacturer. In this situation, an adequate warning would have been futile to alter the end user's actions. *See e.g.*, *Bachtel v. Taser Int'l*, 747 F.3d 965 (8th Cir. 2014).

Defense counsel can also argue that a manufacturer's warnings were not the proximate cause of plaintiff's injury because the injury still would have happened even if the manufacturer had provided different warnings with the product. *See e.g.*, *Rowland v. Novartis Pharm. Corp.*, 34 F.Supp.3d 556 (W.D. Pa. 2014).

Finally, defense counsel should consider whether the learned intermediary doctrine would apply to bar claims against a manufacturer for inadequate warning. *See e.g.*, *Centocor, Inc. v. Hamilton*, 372 S.W.3d 140 (TX. 2012) (when a prescribing physician is aware of a medication's rare side effects and decides to prescribe it anyway, any inadequacy of a manufacturer's warning regarding the side effects of the product is not the cause of the patient's injuries arising from the use of the product).

VII. The Future Of Product Warnings

The future of product warnings is interesting because there are several design directions that could materialize. Today, manufacturers are exploring some of these directions in their efforts to “meet or exceed” current standards applicable to product safety labeling. Understanding the current ANSI Z535 safety label standards applicable to one’s product is the right place to start when it has been determined that a warning is needed. Using these standards to develop warnings that effectively communicate safety information to product users will continue to be a manufacturer’s warnings program’s primary objective. The interesting thing, here, is that both the ability to access information and the characteristics of users are changing. And that opens up future possibilities for on-product warning design.

A. Access to Information Changes Everything

Looking back over the 25 years since the ANSI Z535.4 Standard for Product Safety Signs and Labels was first published in 1991, many things have changed. The nature of work performed in many industries has become more complex as both machinery and processes are increasingly automated. Automation leaves fewer people exposed to potential hazards. Yet with automation comes more sophisticated equipment, guarding and warnings. Highly trained people are often needed to perform maintenance on such equipment and manufacturers of this machinery need to provide warnings and instructions that will allow them to do so safely. In the future, the manufacturer of complex commercial and industrial equipment will be faced with developing product warnings that either communicate all of the necessary safety information or, like the consumer product manufacturers discussed below, design their labels to point to sources for this information.

Manufacturers of consumer products face similar issues related to warning design, though often with less certainty about the characteristics, knowledge and level of training their product users will possess. This challenge was present 25 years ago. What is changing is the growing ability of manufacturers to deliver content, including warnings and instructions, online with the expectation that such information will be able to be easily accessed. With the increasing popularity of smart phones and tablets (both of which give users immediate access to the Internet), the need to communicate long, detailed instructional safety information on consumer product warnings may become obsolete. Incorporating URLs and QR codes into on-product warning labels will link viewers to detailed online safety information. Online videos will also provide a quick and easy ability for users to understand safety information. This possibility is driving the ANSI Z535 committee to seriously consider creating a seventh standard in the Z535 series to define best practices for communicating safety information in alternative (non-print) media.

B. Choosing Symbols Over Words

Two other factors will also drive the look and feel of future product warnings:

1. The growing desire by manufacturers to ship the same products worldwide (which presents issues related to providing warnings in various languages); and
2. The need to effectively communicate safety to a population that is increasingly more visually oriented (and possibly less likely or willing to read word messages).

Both of the above factors end in the same conclusion: a greater reliance on using symbols and illustrations on product warnings to replace words. The growing ability (and preference) of the latest generations to learn visually will, in itself, change the fear manufacturers and their legal counsel have towards the use of symbol-based warnings. In the future, well-designed graphic-based warnings may well be judged to be more effective at communicating their safety messages (and thus, more legally “adequate”) than the word-message-based product safety labels in use today.

VIII. Conclusion

Legal liability surrounding product warnings since the early 1900s, but has become more prevalent in recent years. Simply because a plaintiff’s counsel alleges that your client has not fulfilled its duty to warn about product hazards does not mean that the claim will succeed. A warning can be determined to be adequate even if an injury occurs, or an inadequate warning may not be the cause of an injury. However, it is best for a manufacturer to routinely reevaluate its existing warnings before such a lawsuit is ever filed to determine if additional warnings or symbols are needed, whether outdated warnings need to be updated, how best to communicate warnings in different languages and through the Internet to keep warnings and instructions up to date, and ultimately whether the product should be modified to reduce the need for certain warnings. If there is an industry standard warning or language that has been approved by ANSI, it should be used. Otherwise, warning language should be tested on potential users to ensure the message is clearly communicated and easily seen so that it is likely to be followed.