Bilingual warning labels not required

By Janine Schwerter

A recent products liability case will be useful in providing guidance to manufacturers and distributors on product warning labels and instructions.

The 11th U.S. Circuit Court of Appeals ruled that general marketing to a non-English speaking population does not create a duty to provide bilingual warning labels or instructions, as a matter of law. On appeal, the court affirmed summary judgment for the defendants, finding that the district court was correct in resolving the question of the adequacy of the English warnings and instructions as a question of law, because they were objectively accurate, clear and unambiguous; and in finding no question of fact for a jury when the plaintiff did not demonstrate that the defendants regularly and actively targeted the Spanish speaking population through Hispanic media outlets.

The plaintiff, a Spanish-speaking resident of Miami, Fla., purchased two propane gas-fired infrared portable heaters from Home Depot, manufactured by Enerco and Mr. Heater. She used the portable heaters inside her home, and when she failed to close the valve on one of the gas tanks before going to sleep, her home caught on fire, causing approximately $300,000 in damages. She claims that the defendants failed to adequately warn her of the risk of using the gas tanks indoors. She brought suit alleging strict products liability and negligent failure to warn. The defendants brought a motion for summary judgment, which was granted by the district court.

On appeal, the plaintiff argued that the adequacy of the warnings accompanying the product was a question of fact to be determined by a jury. She claimed that the pictures and visual graphics were inconsistent with the warnings, creating ambiguity. In addition, while conceding that Florida does not automatically impose a duty to provide bilingual warnings, she argued that because the defendants marketed the heaters to Miami's Hispanic community, the question of providing an English-only warning was a question of fact for the jury.

The court engaged in a two-part analysis to address the plaintiff's claims. First, citing various warnings and instructions accompanying the products, the court affirmed the district court's finding that the English language warnings, instructions and pictures of the product being used outdoors adequately notified consumers of the potential harmful consequences of the indoor use of the gas heater, including the risk of fire. Additionally, the court did not find ambiguity between the warnings and pictures of the product in use, noting that they all depicted use of the product in outdoor activities.

The court also found that, notwithstanding Home Depot's recently instituted policy for requiring its vendors to use bilingual packaging, there was no evidence that Home Depot specifically marketed Mr. Heater to Spanish-speaking customers primarily or pervasively through the use of Hispanic media outlets.

This recent ruling is a welcome addition to products liability jurisprudence, as the history of non-English warning labels has been further complicated by the fact that federal and state regulations are not always consistent. For example, in 1988, the Food and Drug Administration enacted a permanent regulation requiring a Reye syndrome warning on the label of other-the-counter drug products containing aspirin. In a statement issued by the FDA regarding this regulation, the agency acknowledged the potential need for bilingual labeling, stating that "in the 50 states all required labeling must appear in English, the regulations do not preclude the distribution of labeling in a language other than English ... [the] FDA encourages the preparation of labeling to meet the needs of non-English speaking or special user populations so long as such labeling fully complies with agency regulations." However, the fact that an administrative

agency may encourage manufacturers to include multilingual warnings and make them aware of the need to provide bilingual instructions and warnings to non-English-speaking consumers does not mean that manufacturers are bound by the FDA's non-binding statement.

Indeed, the rules regarding bilingual warnings labels at the state level have developed primarily out of the general principles of the American tort common law.

In a 1965 case, *Hubbard-Hall Chemical Co. v. Silverman*, 340 F.2d 402 (1965), the 1st Circuit held that it was reasonable that the defendant should have foreseen that its product, an insecticed, would be used by farm laborers of limited education and reading ability. The defendant was the manufacturer of an insecticide that, according to the warning instructions, "May Be Fatal If Swallowed, Inhaled or Absorbed Through Skin." The packaging did not contain any symbols or warning illustrations. Two Puerto Rican farm workers incorrectly used the insecticide and became seriously ill and died as a result. Neither worker was proficient in English and they couldn't read the warnings on the insecticide container. Their estates filed suit against the insecticide manufacturer, alleging that defendant negligently failed to label its product to sufficiently warn users of the inherent danger in its use. The 1st Circuit affirmed a verdict for the plaintiffs. In *Hubbard*, it appears that defendant could have corrected the labeling inadequacy with pictures or illustrations, but the instructive principle was that foreseeability was key when a manufacturer knows that a product will be used by certain cultural or ethnic populations.

In contrast, in *Ramirez v. Plough, Inc.*, 6 Cal. 4th 539 (1993), the state Supreme Court held that statutory compliance was a total defense to tort liability involving bilingual warning labels. There, a Spanish-speaking mother gave her infant over the counter children's aspirin. Relying in part on the FDA statement discussed above, the court found that, under certain circumstances, both California and the FDA require Spanish warnings. Therefore, the lack of an express bilingual warning requirement constituted a deliberate decision not to include a duty for drug manufacturers to provide bilingual warnings.

As the marketplace changes, so too does the legal duty to provide adequate warnings and instruction in an environment where the definition of the word "adequacy" is routinely challenged. The recent 11th Circuit decision upheld the clear and unambiguous English language warnings accompanying products sold in non-English speaking populations, absent a showing of pervasive marketing primarily and directly targeting the non-English speaking community. By clarifying the parameters in which bilingual warnings and instructions are warranted, the 11th Circuit provided more than adequate guidance for manufacturers and distributors of consumer goods.

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