

**SHOULD A LEGAL ANALYSIS OF THE
ADEQUACY OF WARNING LABELS CONSIDER
ISSUES RELATING TO USE OF PRODUCTS BY
NON-ENGLISH SPEAKERS?**

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I. INTRODUCTION TO PRODUCT WARNINGS

It might be said that the moral basis of modern product liability law can be summarized as a compact between manufacturers and consumers that products available for purchase will perform to reasonable standards of quality and safety. An important part of this tacit agreement requires that a manufacturer inform the buyer of any potential dangers that may be inherent to the product, and then instruct the buyer how to use the product safely so as to avoid such dangers as far as possible. This is commonly referred to as the legal "duty to warn," defining the scope of a manufacturer's responsibility when "he has knowledge, or by application of reasonable, developed human skill and foresight should have knowledge" of possible harm through the use of a product.¹ Generally, the manufacturer has a duty to warn

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¹ RESTATEMENT (SECOND) OF TORTS § 492A cmt. j (1965).

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consumers or potential users when the product is dangerous, when the manufacturer is aware of a potential danger, if the danger is present when the product is being used in its intended manner, and if the danger is not obvious or known to the user.² The duty to *warn and instruct* is a significant one under product liability law in the United States.

Florida law provides an important insight into the standards related to the required conduct of a manufacturer: “A manufacturer and distributor of a product have a duty to warn of the inherent dangers associated with a product when the product has dangerous propensities.”³ According to the Restatement (Third) of the Law of Torts, Products Liability, by placing this duty on the manufacturer, society is providing an incentive to “achieve optimal levels of safety in designing and marketing products.”⁴

Once it has been established that a warning is legally mandated, the manufacturer is required to assure that the warning is “adequate” in order to avoid potential liability.⁵ The purpose of the warning requirement is to assure that the user, “by the exercise of reasonable care, will have fair and adequate notice of the possible consequences of the product’s use or misuse.”⁶ The adequacy of any warning must take into account both the intended and any foreseeable *uses* of a product, as well as the intended and foreseeable *users* of a product. There are three main criteria for judging the adequacy—or inadequacy—of any warning:

² Kenneth Ross and Matthew W. Adams, *Legally Adequate Warning Labels: A Conundrum for Every Manufacturer*, FOR THE DEFENSE, Oct. 2008, available at

<http://www.productliabilityprevention.com/images/6-LegallyAdequateWarningLabelsAConundrumforEveryManufacturer.pdf>

³ *Advance Chem. Co. v. Harter*, 478 So. 2d 444 (Fla. 1st Dist. Ct. App. 1985).

⁴ RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. a (1998).

⁵ DAVID. T OWEN, *PRODUCTS LIABILITY LAW* 594-95 (2d ed. 2008).

⁶ *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 248-49 (Fla. 1st Dist. Ct. App. 1984).

- (1) The warning must be displayed so as to reasonably catch the attention of the user;
- (2) The warning must fairly apprise a reasonable user of the nature and extent of the danger and not minimize any danger associated with the use of a product; and
- (3) The warning must instruct the user as how to use the product so as to avoid the potential danger.⁷

The scope of the duty of a manufacturer, seller, or distributor's is not invariable. As the marketplace changes, so does the definition and scope of the adequacy of any warning or instruction. The adequacy of a warning may also be dependent on the nature of the foreseeable *environment of use of a product*.⁸ As the structure and components of this environment change, the requirements for adequacy can often be challenged to meet new demands and expectations.

II. THE AMERICAN ENVIRONMENT

The *2011 American Community Survey* estimates that there are nearly 330 million people in the United States.⁹ Nearly 61 million, over the age of five, speak a language other than English at home, and over 25 million Americans speak English "less than very well." Of the 37.6 million respondents who speak Spanish, the Census Bureau estimated that 56.3% spoke English "very well," 16.9% "not well," and 9% "not at all." Over the past thirty years, the U.S. saw an 147% increase in the number of people that spoke a language other than English at home. It is projected that

⁷ RICHARD J. HUNTER, JR., JOHN H. SHANNON & HENRY J. AMOROSO, PRODUCTS LIABILITY: A MANAGERIAL PERSPECTIVE 19 (2012).

⁸ *E.g.*, *Lawrence v. Raymond Corp.*, No. 3:09 CV 1067, 2011 US Dist. LEXIS 85798 (N.D. Ohio Aug. 4, 2011); *Tober v. Graco Childrens' Prods., Inc.*, No. 1:02-cv-1682-LJM-WTL, 2004 U.S. Dist. LEXIS 9010 (S.D. Ind. Mar. 4, 2004).

⁹ U.S. CENSUS BUREAU, LANGUAGE USE IN THE UNITED STATES: 2011 AMERICAN COMMUNITY SURVEY REPORTS (2011), *available at* <https://www.census.gov/prod/2013pubs/acs-22.pdf>.

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by 2020, as many as 71.8 million people will speak a language other than English at home.¹⁰

Obviously, the millions of Americans who are not fluent in English purchase and use products just like the majority of English-speakers. Undeniably, most of these products contain warnings and instructions written only in English. However, at the same time, savvy marketers have taken account of their non-English speaking customers by advertising in their native languages and using clever, eye-catching graphics to secure their market positions and sales. As the size of the non-English-speaking market increases, manufacturers must recognize that it is clearly foreseeable that their products will be used by consumers who may not be able to read their “English-only” warnings, labels, and instructions. Yet, there is very little definitive legal guidance for the appropriate incorporation of pictorial or foreign-language materials in product warnings in light of the reality of the consumer-mix. But, this begs the question: Should there be?

III. GOVERNMENT LABELING STANDARDS

In 1991, the American National Standards Institute published non-mandatory consensus standards concerning product labeling, referred to as *ANSI Z535*.¹¹ It outlines recommendations for developing safety labels, including acceptable formats for multilingual labels. However, ANSI Z535 does not specify *when* a manufacturer must include a label in a foreign language. With reference to this issue, ANSI Z535 notes:

¹⁰ *Id.*

¹¹ AMERICAN NATIONAL STANDARDS INSTITUTE, INC., PRODUCT SAFETY SIGNS AND LABELS, ANSI Z535.4-2011 (2011), *available at* www.nema.org/Standards/ComplimentaryDocuments/Z535-4-Contents-and-Scope.pdf; *see generally* Gil Fried & Robin Ammon, Jr., *What is Appropriate Signage for the Sport Industries?*, 11 J. LEGAL ASPECTS SPORT 181 (2001).

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.¹²

The Restatement (Third) of Torts, Products Liability also provided guidance to companies creating product labels.¹³ The Restatement says that a warning is inadequate if "the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings."¹⁴ However, there is no further definition of the qualifier "reasonable" in this context. The comments to section 2 of the Restatement recognize the ambiguity of these labeling guidelines. They state: "No easy guideline exists for courts to adopt in assessing the adequacy of product warnings and instructions. In making their assessments, courts must focus on various factors,

¹² Kenneth Ross, *Multilingual Warnings and Instructions: An Update*, DRITODAY, Oct. 25, 2012, available at <http://dritoday.org/feature.aspx?id=449> (quoting AMERICAN NATIONAL STANDARDS INSTITUTE, INC., PRODUCT SAFETY SIGNS AND LABELS, ANSI Z535.4-2011 (2011), available at www.nema.org/Standards/ComplimentaryDocuments/Z535-4-Contents-and-Scope.pdf).

¹³ Spencer H. Silverglate, *The Restatement (Third) of Torts: Products Liability- The Tension Between Product Design and Product Warnings*, 75 FLA. B.J. 11 (2001), available at www.floridabar.org.

¹⁴ RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(c) (1998).

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such as content and comprehensibility, intensity of expression, and the characteristics of expected user groups.”¹⁵

As difficult as these “factors” are to define, they are even more difficult to apply for a court. Given the increasing 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 an effective method to communicate warnings and instructions to consumers poses an important marketing and legal challenge. However, as was determined in *Spruill v. Boyle-Midway, Inc.*, one thing is certain: “an insufficient warning is in legal effect no warning.”¹⁶ Therefore, even adequate safety instructions that are not communicated effectively to the end-user might not meet the requirement of *reasonability* or *adequacy*.

Many consumers who have purchased and used products without being able to read or understand their dangers and who then suffer some injury have attempted to hold manufacturers liable for failing to warn or for issuing inadequate warnings. Without any formal legislation, statutory language, or an administrative rule guiding manufacturers in the creation of multi-lingual or pictorial product labeling, consumers can only rely on case law to support their claims. The most commonly cited case is *Stanley Industries, Inc., v. W. M. Barr & Co., Inc.*¹⁷

In *Stanley*, the District Court in Florida made some general comments as to the issue of the adequacy of warnings: “Preliminarily this court observes that a warning is adequate if it is communicated by means of positioning, lettering, coloring, and language that will convey to the typical user of average intelligence the information necessary to permit the user to avoid

¹⁵ *Id.* at § 2 cmt. i.

¹⁶ 308 F.2d 79, 87 (4th Cir. 1962).

¹⁷ *Stanley Indus., Inc. v. W.M. Barr & Co., Inc.*, 784 F. Supp. 1570 (S.D. Fla. 1992).

the risk and to use the product safely.”¹⁸ In evaluating the adequacy of any warning, the court is required to weigh the following five factors:

1. The dangerousness of the product;
2. The form in which the product is used;
3. The intensity and form of the warning given;
4. The burdens to be imposed by requiring the warnings; and
5. The likelihood that the particular warning will be adequately communicated to those who will foreseeably use the product.¹⁹

Does the communication of information extend to the actual language of any warning?

IV. A DISCUSSION OF THE RELEVANT CASE LAW: A CHECKERED HISTORY OF CONFLICTING PRECEDENTS

We begin with a detailed discussion of *Stanley Industries*. On August 30, 1988, there was a fire at a Gallery Industries plant in Southern Florida. The fire was attributed to the spontaneous combustion of rags soaked in Kleanstrip Boiled Linseed Oil, which were used by the plaintiff’s employees to oil a cutting table earlier that day. W.M. Barr manufactured, packaged, and distributed the linseed oil products. Management-level employees from Gallery purchased the linseed oil from Home Depot.²⁰

The two employees of Stanley Industries who used the oil were brothers from Nicaragua whose primary language was Spanish. The product warning label on the oil was in English, and there were no graphics, symbols, or pictographs on the label to

¹⁸ *Id.* at 1575 (quoting M. Stuart Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 89 W. VA. L. REV. 221, 234 (1987)).

¹⁹ *Id.* (quoting *Dougherty v. Hooker Chem. Corp.*, 540 F.2d 174, 179 (3d Cir. 1976)).

²⁰ *Id.*

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serve as pictorial warnings. Stanley Industries argued that the defendants had a duty to fairly and adequately warn Spanish-speaking product users in Spanish because they had jointly advertised and promoted products in various Hispanic media in the Miami area.²¹

In denying a motion for a summary judgment (Glossary, Entry I) filed by the defendant, the U.S. District Court for the Southern District of Florida issued a decision that turned out to be quite prescient to the future of product warning litigation. A key factor in the decision revolved around the Hispanic advertising and marketing practices of the defendants. Home Depot regularly advertised in Spanish on Hispanic television and radio and in Hispanic newspapers. Home Depot had also marketed a number of its products with bilingual instructions. “The labels contained no graphics, symbols or pictographs on either side of the label alerting users to the product’s dangerous propensities.”²² The court in *Stanley* framed the threshold issue in terms of a *duty* to these non-English speaking users.

Having denied the defendant’s motion for a summary judgment, the District Court held that it was for the *jury* to decide whether the defendants could have reasonably foreseen that the product would be used by non-English speakers. The court also held that the *jury* must decide whether a warning should at least contain pictorials for non-English speaking purchasers or users under these specific facts and circumstances. In citing *Hubbard-Hall Chemical Co. v. Silverman*, the District Court in Florida stated that the jury would be required to determine “... that the warning... would not, because of its lack of a skull and crossbones or other comparable symbols or hieroglyphics, be inadequate...”²³ Furthermore, the court found that it was for the jury to decide

²¹ *Id.*

²² *Id.* at 1572.

²³ *Id.* at 1576 (citing *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402, 405 (1st Cir. 1965)).

whether the warning must contain words in a language other than English or must contain pictorials.²⁴

After the trial which took place in November 1993, the jury nevertheless returned a verdict in favor of the defendant, Home Depot. The jury in this case essentially decided 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 had advertised their products in Spanish.²⁵ However, the floodgates were beginning to open—at least as far as considering the threshold questions of whether a duty existed and who would make the determination as to the adequacy of any warnings given.

Despite the verdict in its favor, Home Depot subsequently encouraged many of its suppliers to include Spanish on all warning labels and instructions. This appears to be more of a preventive measure, but it is still a public recognition of the need to address the ever-expanding Hispanic market in a manner that would be conducive to their safety, as well as meeting their needs as consumers.²⁶

In contrast to *Stanley Industries*, in *Hubbard-Hall Chemical Company v. Silverman*, the U.S. Court of Appeals for the 1st Circuit in Boston, Massachusetts sustained a jury finding that the seller's warning was inadequate.²⁷ The defendant, Hubbard-Hall, was the manufacturer and seller of 1.5% Parathion dust, which is used as an insecticide. The defendant sold bags of this dust to Mr. Vivieros, who operated a farm in Taunton, Massachusetts. The farm employed Manuel Velez-Velez and Jaime Ramos-Sanches, who were both natives of Puerto Rico. One

²⁴ *Id.*

²⁵ Kenneth Ross, *The Duty to Warn Illiterate or Non-English Reading Product Users*, IN-HOUSE DEFENSE QUARTERLY, Winter 2008, at 29-33, available at <http://www.productliabilityprevention.com/images/2-DutytoWarnIlliterateandNonEnglishReadingProductUsers.pdf>.

²⁶ *Id.*

²⁷ *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402 (1st Cir. 1965).

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of the employees could read some English and the other could not read any.²⁸

In August of 1959, Velez-Velez and Ramos-Sanches dusted the farm with Parathion dust several times during the week. Mr. Vivieros stated that he told the employees that the chemicals were dangerous and if they did not follow directions, they might die. On August 14, 1959, Vivieros observed the plaintiffs working without protective masks or coats. That afternoon, they were brought to the hospital in semi-comatose states and died almost immediately.²⁹

The legal issue in *Hubbard-Hall* was whether there was sufficient evidence of negligence on the part of Hubbard-Hall to permit a jury to hold it liable for these two deaths. The Parathion dust had been labeled according to the standards of the U.S. Department of Agriculture. The trial court decided that the manufacturer should have *foreseen* that “its admittedly dangerous product would be used by, among others, persons like the deceased, who were farm laborers, of limited education and reading ability, and that a warning [even if it complied with federal statutory requirements] would not... be adequate.”³⁰ The defendant had also raised the issue whether the lawsuit should have been dismissed on federal preemption grounds because the defendants had complied with applicable federal law.

Concerning the issue of federal preemption (Glossary Entry II), the Court of Appeals stated that Department of Agriculture approval of the label is considered more of a satisfaction of conditions for regulating the product in interstate commerce, rather than for the purposes of establishing product liability standards relating to the adequacy of a product warning. As to the issue of preemption, the court noted: “Nor is it argued that the Federal Insecticide, Fungicide, and Rodenticide Act [FIFRA], Congress had occupied the whole field of civil liability between private

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 405.

parties in tort actions founded on negligence....”³¹ Therefore, the Court of Appeals upheld the decision for the plaintiffs.³²

In 1993, in *Ramirez v. Plough, Inc.*, the Supreme Court of California considered a case involving warning labels on non-prescription medication.³³ The plaintiff, Jorge Ramirez, was a minor whose mother gave him SJAC (St. Joseph Aspirin for Children), a product manufactured and distributed by the defendant. He contracted Reye’s syndrome as a result of ingesting this nonprescription drug. The aspirin was purchased and then administered by the plaintiff’s mother, who could not read English, but was literate in Spanish. The key factor in this case was that the aspirin was advertised to and used by non-English-speaking literate Hispanics.³⁴

The California Court of Appeals, in reviewing the motion for a summary judgment granted to the defendant at trial, held that the adequacy of warnings was normally one of fact and an issue for the jury, as had been decided in *Stanley*. The California Supreme Court, in the review of the judgment of the Court of Appeals, later affirmed the summary judgment for the defendant that had been granted by the trial court, finding that the manufacturer did *not* have to add Spanish language warnings and instructions on its packaging as a matter of law. The court stated that the burden would be too onerous to require the inclusion of languages for all foreseeable users of the aspirin. The court held that the plaintiff’s claim of inadequate warnings was in fact precluded (preempted) by federal and state regulations and that the legislature had “deliberately chosen not to require that manufacturers also include warnings in foreign languages.”³⁵ Therefore, the California Supreme Court asserted that requiring a language other than

³¹ *Id.* at 405; Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (2000).

³² *Hubbard-Hall*, 340 F.2d at 402.

³³ 25 Cal. Rptr. 2d 97 (1993).

³⁴ *Id.*

³⁵ Ross, *supra* note 25, at 29-33.

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English "...is a matter of public policy for consideration by the appropriate legislative bodies and not by the Courts."³⁶ Interestingly, the court also noted that it had not decided whether a manufacturer would be liable to a consumer who had relied upon foreign-language advertising that was *materially misleading* (essentially a fraud standard) as to product risks and who was unable to read English language package warnings.³⁷ That was a separate issue to be litigated in another forum and in another case.

In *Medina v. Louisville Ladder, Inc.*, plaintiffs, Arnaldo Medina and his wife, Luz Lopez, had asserted that the ladder they had purchased from a Home Depot in Osceola County, Florida was defective because it lacked warnings and instructions in Spanish.³⁸ Medina has a very limited ability to read English, so he hired a local handyman to help install the ladder. However, his handyman could not read English either. The ladder was installed improperly, with gaps existing at the joints. On January 2, 2006, while Medina was on the ladder, it collapsed, severely injuring his elbow. The plaintiffs relied on *Stanley* to support their claims. The defendants filed a motion for summary judgment.³⁹

The court considered the *Stanley* opinion, noting that in the years since the opinion, no Florida case, state or federal, has determined that bilingual warnings and instructions were required under existing law. The court found as a matter of law that there was no legal duty to provide bilingual labels and thus granted defendant's motion for summary judgment.⁴⁰

³⁶ *Id.* (citing *Ramirez v. Plough, Inc.*, 25 Cal. Rptr. 2d 97, 108 (1993)).

³⁷ *Ramirez*, 25 Cal. Rptr. 2d at 108-09.

³⁸ *Medina v. Louisville Ladder, Inc.*, 496 F. Supp. 2d 1324 (M.D. Fla. 2007).

³⁹ *Id.*

⁴⁰ *Id.*

V. A RECENT VIEW

Farias v. Mr. Heater, Inc., is a recent case regarding a foreign-language requirement on consumer product warning labels.⁴¹ The case reached the Eleventh Circuit Court of Appeals in 2012. The plaintiff, Lilybet Farias, was a Spanish-speaking resident of Miami, Florida. She purchased two portable outdoor propane-fired heaters from Home Depot, which had been manufactured and distributed by Enerco and Mr. Heater, located in Cleveland, Ohio for national sales and distribution. The warnings on these heaters appeared only in English. “In direct contravention of the warnings included with the product,” Farias used the heaters inside her home, placing one of the two heaters she had purchased within two or three feet of her living room sofa.⁴² Contrary to the instructions and warnings, she also used the heater indoors for several hours. When she later turned off the heater, she did not close the valve on one of the gas tanks before going to sleep. Her home caught on fire, causing approximately \$300,000.00 in damages.⁴³

Farias claimed that the defendants failed to adequately warn her of the risk of using the gas tanks indoors. Specifically, the plaintiff argued that the warnings were inadequate because the written warnings were in English and the pictorials were at best ambiguous. The defendants brought a motion for summary judgment.⁴⁴

The trial court ruled that marketing practices do not create a duty to provide bilingual warning labels or instructions, as a

⁴¹ *Farias v. Mr. Heater, Inc.*, 684 F.3d 1231 (11th Cir. 2012).

⁴² Gregory M. Cesarano, Douglas J. Chumbley and David L. Luck, *Does Florida Recognize a Duty to Warn in Spanish or Additional Languages Other Than English?*, JDSUPRA, July 2, 2012, available at <http://www.jdsupra.com/legalnews/does-florida-recognize-a-duty-to-warn-in-50123>.

⁴³ *Id.*

⁴⁴ *Farias v. Mr. Heater, Inc.*, 684 F.3d 1231 (11th Cir. 2012).

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matter of law. They found the English-only warnings to be accurate, clear, and unambiguous. Applying Florida law, which is consistent with the Restatement (Third) of Torts, Products Liability, the court reasoned that a warning must be adequate in the eyes of a reasonable person, rather than on a more individualized, specific plaintiff basis.⁴⁵

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, as had been decided in *Stanley*. Farias claimed the pictures on the heater packaging were ambiguous and confusing, and that because the defendants actively marketed the product to Miami's Hispanic community, the case should go before a jury. The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's finding that the existing warnings, instructions and pictures were adequate. They also held that *Stanley* case did not apply here because there was insufficient evidence that Enerco or Home Depot had targeted advertising or marketing efforts specifically toward the Hispanic community through Hispanic media outlets.⁴⁶ It is worth noting that the District Court had found:

Unlike Stanley Industries, Inc. in which Judge Moreno decided that the defendant had advertised in Miami's Hispanic media and purposefully directed its sales pitch towards Spanish speakers, there is no evidence here that Home Depot, Mr. Heater, or Enerco took such steps. Instead, all parties admit quite the opposite as it pertains to Home Depot. Moreover, since Home Depot was the party responsible for advertising its products, it stands to reason that neither Mr. Heater nor Enerco directed

⁴⁵ *Id.*

⁴⁶ *Id.*

their sales towards the Hispanic community. As such, Plaintiff's reliance on Stanley Industries, Inc. is misplaced.⁴⁷

VI. AN ANALOGY TO THE DOCTRINE OF UNCONSCIONABILITY: IS IT APPROPRIATE?

One important insight to seeking a possible resolution of the issues surrounding the adequacy of English-only instructions or warnings given to non-English consumers or users of products may be found through an analogy to the development of the doctrine of unconscionability. At its origin, the doctrine was most often associated with a variant of proving contract fraud.⁴⁸ In order to raise the defense of unconscionability, a party is not required to argue that the defendant actually committed fraud—only that the defendant misled the plaintiff either by the nature of the contract or by taking advantage of the plaintiff's ignorance or other special circumstances such as race, language, literacy, education, national origin, etc.⁴⁹

Unconscionability was raised as a defense in a contract enforcement action (or perhaps in a related action to reform or rewrite a contract) in the era when courts were committed to the enforcement of the time-honored doctrines of "freedom of contract" and *caveat emptor* ("let the buyer beware"). Spurred on by the writing of Professor Corbin (who commented about the issue in the context where the terms of the contract are "so extreme as to appear unconscionable according to the mores and business practices of the time and place"), found in the jurisprudence of

⁴⁷ *Id.* at 1291.

⁴⁸ Bill Long, *Unconscionability: Understanding 2-302* (Feb. 8, 2005), <http://www.drbilllong.com/Sales/U.html>.

⁴⁹ RICHARD J. HUNTER, JR., JOHN H. SHANNON, HENRY J. AMOROSO & SUSAN O'SULLIVAN-GAVIN, *THE LEGAL ENVIRONMENT OF BUSINESS: A MANAGERIAL AND REGULATORY PERSPECTIVE* 92-98 (Richard J. Hunter, Jr., ed. 2005).

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Chief Justice Stone as early as 1912 (“who described the concept of unconscionability as underlying “practically the whole content of the law of equity”), and the inclusion of Section 2-302 into the Uniform Commercial Code, courts increasingly moved to develop a doctrine that aided the innocent and ingenuous purchaser, often the victim of “exploitive and callous practices which shocked the conscience of both legislative bodies and the courts.”⁵⁰ Unconscionability was known by many other names—including what one author has termed as “fraud light.”⁵¹ At its essence, unconscionability was seen as a tool to fight (“fight back”) against the power of the potentially oppressive seller in a commercial transaction.⁵²

Unconscionability became the vehicle by which courts would reflect the “moral sense of the community” in commercial transactions. Cases such as *Williams v. Walker-Thomas Furniture Store* (Judge J. Skelly Wright) and *Jones v. Star Credit Corporation* (Judge Sol Wachtler) became the watchwords of the application of this new theory.⁵³ In *Jones*, for example, Judge Wachtler (ironically who would later resign in disgrace amidst a sex scandal) decided that a contract under which the defendant had sold a home freezer unit, which had a retail value of \$300, for \$900, plus credit charges, credit life insurance, credit property insurance, etc., where the final total reached nearly \$1,450, was an “unconscionable as a matter of law.”

It is most interesting however, that just as courts and judges have struggled with creating a hard and fast rule in the area of the efficacy of product warnings where the purchasers or users have been non-native speakers, Judge Wachtler candidly wrote:

⁵⁰ *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264, 265 (N.Y. Sup. Ct. 1969).

⁵¹ Bill Long, *Unconscionability: Understanding 2-302* (Feb. 8, 2005), <http://www.drbilllong.com/Sales/U.html>.

⁵² *Jones*, 298 N.Y.S.2d at 266.

⁵³ *Williams v. Walker Thomas Furniture Store*, 198 A.2d 914 (D.C. App. 1964); *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264 (N.Y. Sup. Ct. 1969).

"Concededly, deciding the issue is substantially easier than explaining it."⁵⁴ Thus, Judge Wachtler decided that the context of the contract was equally as important as were the words of the economic bargain because the seller (and the credit corporation to which the contract had been assigned) had preyed on the "poor and illiterate without risk of either exposure or interference."⁵⁵ As Judge Wachtler concluded, the plaintiff's, having paid more than \$600, had furnished consideration more than sufficient to acquire the freezer. The court permitted the contract to be *reformed* or rewritten to terminate any further obligation on the part of Mr. and Mrs. Jones.

As noted by the court in *Wille v. Southwestern Bell*,⁵⁶ a major breakthrough in the development of the doctrine of unconscionability took place in the codification of the concept into Section 2-302. Note the language:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.⁵⁷

⁵⁴ *Jones*, 298 N.Y.S.2d at 266.

⁵⁵ *Id.*

⁵⁶ *Wille v. Sw. Bell Tel. Corp.*, 219 Kan. 755 (1976).

⁵⁷ U.C.C. § 2-302 (2012).

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Yet, the Code provided no definition of the “parameters or limits” of unconscionability. Was a definition required or were the code writers trying to make a more subtle point in much the same vein as when Justice Potter Stewart's defined pornography with the famous words: "I know it when I see it"?⁵⁸ The court in *Wille* offered an insight when it stated: “Perhaps that was the real intent of the drafters of the code. To define is to limit its application and to limit its application is to defeat its purpose.”⁵⁹

What the court was doing was turning the previously sacrosanct doctrine of *caveat emptor* into a not so subtle warning to potentially unscrupulous businessmen: *If you cross the line—and we are not going to tell you precisely where this line has been drawn—you run the risk of a court declaring that what you did was unconscionable.* Enter the concept of *caveat venditur*—or let the seller be wary!

While the UCC provision was touted merely as codifying the common law, Comment 1 indicates that unconscionability was a doctrine whose precise contours were in fact not well defined. Indeed, an early definition of unconscionability had been provided by Lord Chancellor Hardwicke in the case of *Chesterfield v. Jensen*, when he characterized an unconscionable contract as “A contract that such as no man in his senses and not under delusion would make on one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains; and of such even the Common Law has taken notice.”⁶⁰

Professor Gordon Leff referred to the putative doctrine with "no reality referent" that was really only "an emotionally satisfying incantation."⁶¹ However, Professor Leff noted the distinction between *procedural* and *substantive unconscionability* that most

⁵⁸ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

⁵⁹ *Wille*, 219 Kan. at 757.

⁶⁰ *Id.* (quoting *Chesterfield v. Janssen*, 28 Eng. Rep. 82 (1750); *Hume v. U.S.*, 132 U.S. 406, 411-13 (1889)).

⁶¹ Bill Long, *Unconscionability: Understanding 2-302* (Feb. 8, 2005), <http://www.drbilllong.com/Sales/U.html>.

courts would apply. In essence, procedural unconscionability would lie in three kinds of circumstances: (1) where the seller took advantage of a buyer's *limited understanding of English*; (2) where the contract was so confusing and filled with opaque phrases that no one, really, could be charged with knowing what it meant; or (3) when the seller used "high pressure" tactics, removing the reality of "meaningful choice" to close the deal. Substantive unconscionability, in contrast, would focus on the *ends* of the bargaining process and would evaluate the actual terms of the contract. For example, how "one-sided" and fundamentally unfair are the actual terms of the contract?

Comment 1 to Section 2-302 relates: "The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."⁶²

By the time Judge Harman had handed down his decision in *Wille*, courts had developed factors relating to the issue of oppression and analyzing the relative bargaining positions of the parties.⁶³ These include:

1. the use of the use of printed form or boilerplate contracts drawn skillfully by the party in the strongest economic position, which establish industry-wide standards offered on a take-it-or-leave-it basis to the party in a weaker economic position;
2. a significant cost-price disparity or excessive price;
3. a denial of basic rights and remedies to a buyer of consumer goods;
4. the inclusion of penalty clauses'

⁶² U.C.C. § 2-302 cmt. 1 (2013).

⁶³ *Wille v. Sw. Bell Tel. Corp.*, 219 Kan. 755 (1976).

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5. the circumstances surrounding the execution of the contract, including its commercial setting, its purposes and actual effect;
6. the hiding of clauses which are disadvantageous to one party in a mass of fine print trivia or in places which are inconspicuous to the party signing the contract;
7. phrasing clauses in language that is incomprehensible to a layman or that divert his attention from the problems raised by them or the rights given up through them;
8. an overall imbalance in the obligations and rights imposed by the bargain;
9. *exploitation of the underprivileged, unsophisticated, uneducated and the illiterate;* and
10. inequality of bargaining or economic power.⁶⁴

UCC 2-302 also provides a method for resolving a claim of unconscionability that has seemed rather vexatious not only in this area but also in issues surrounding the nature of rules in product advertising to non-English speakers. According to the statutory provision, it is the judge, rather than the jury, that decides if a term is unconscionable. Having made such a finding, the judge enjoys wide latitude to deal with the situation and may strike the unconscionable clause, void the entire contract, or rewrite the contract so as to avoid any unconscionable result. In order to assure a fair determination of the issue, a hearing is almost always required before passing judgment on the unconscionability of a provision—a hearing at which the parties may offer evidence as to the unconscionable nature (or lack thereof) of an alleged unconscionable provision. It is apparent, however, that it be a rare occasion where procedural unconscionability *alone* will be enough

⁶⁴ *Id.* at 757-759.

to void a contract. In most all cases, *both* procedural and substantive unconscionability will be present. Rarely can a corporation or an experienced businessman (as was Mr. Wille with at least thirteen years of experience dealing with business and pre-printed contracts) argue the doctrine should be applied.⁶⁵ Might the doctrine of unconscionability provide a suitable bridge to the analysis of the adequacy of product warnings in relation to non-English speakers?

VI. CONCLUSIONS, OR RATHER, SOME POSSIBLE ALTERNATIVES

As the American business environment continues to expand and diversify on ethnic and demographic grounds, the legal and technical requirements for providing adequate safety communications to those who do not read or speak English will likewise evolve. Manufacturers who are responsible for creating warning labels and instructions for their products must consider the unique characteristics of their customers and must apply the necessary safeguards to ensure their safety. From a purely marketing standpoint, the manufacturer's goal should be to adequately communicate safety information to all foreseeable users so as to attract these consumers into buying their products. However, for many manufacturers, this is a near impossible feat as America broadens into many cultures, languages, or ethnic groupings.

The attention brought to this issue by cases like the ones described above have encouraged many manufacturers, sellers, and distributors to re-think their existing strategies and to try, when appropriate, to issue multilingual safety communications. Some manufacturers are including bilingual or even trilingual (English, Spanish and French) labels and instructions with their products.

⁶⁵ RICHARD J. HUNTER, JR., JOHN H. SHANNON & HENRY J. AMOROSO, PRODUCTS LIABILITY: A MANAGERIAL PERSPECTIVE 150 (2012).

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There are also several government agencies that have required manufacturers who fall under their jurisdiction to attach bilingual or pictorial labels to some of their products.⁶⁶

To decrease the burden on the manufacturer, another potential solution would be to translate only the most important signal words (i.e., WARNING, CAUTION or DANGER) into multiple languages and add a pictorial on the label to clearly illustrate the hazard. The remainder of the label would continue to be found in English. The manufacturer might also choose to include a multilingual direction to consult a supervisor or a product website to retrieve safety information in alternate languages.

Many products now utilize *Quick Response* or QR codes to provide their users with additional company or product information. This might be a helpful way to incorporate technology into the spread of safety information while also limiting the cost to the manufacturer in a specific, targeted environment.

Based on the legal precedents, are we to conclude that English-only warning labels are always legally adequate, even when a large portion of the expected users speak very little English? Are manufacturers and sellers only able to be found liable if there is evidence of active marketing campaigns toward non-English speaking populations? In finding that the defendants' warnings were adequate, the Eleventh Circuit distinguished the facts in *Farias* from those of the *Stanley* case, in which the Southern District of Florida denied summary judgment to the manufacturer on the plaintiff's failure to warn claim because "given the advertising of defendants' product in the Hispanic media and the pervasive presence of foreign-tongued individuals in the Miami

⁶⁶ Kenneth Ross and Matthew W. Adams, *Legally Adequate Warning Labels: A Conundrum for Every Manufacturer*, FOR THE DEFENSE, Oct. 2008, available at <http://www.productliabilityprevention.com/images/6-LegallyAdequateWarningLabelsAConundrumforEveryManufacturer.pdf>.

workforce, it is for the jury to decide whether a warning, to be adequate, must contain language other than English or pictorial warning symbols."⁶⁷

It appears as though courts are hesitant to impose often burdensome requirements on manufacturers due to fears of setting an unrealistic precedent or because mandating non-English warning labels is a matter for legislative action and not for the resolution by a court.

There is also a practical consideration. If society (either through *stare decisis*, or statute, or administrative fiat, or perhaps by extending the concept of unconscionability to such situations) were to impose a requirement to include warning labels for all foreseeable users of a product, how many languages will need to appear? There are over 150 languages spoken in this country. Furthermore, the inclusion of additional languages on a warning may serve to "clutter" the label and result in what marketers call "habituation," thereby diminishing the effectiveness of the entire message.

Unlike a larger issue such as the imposition of strict liability in tort for most product cases, largely accomplished through the efforts of judges like Roger Traynor, it would most likely take a legislative action to institute a multilingual warning label standard. Based on the ambiguity and generality of the terms in the Restatement and in the ANSI Z535, this is highly unlikely to occur in the near future, although the lessons of the development of the concept of unconscionability may provide a useful insight into the future resolution of the issue. One clear path may be to focus on the *marketing aspects* of the controversy; that is, requiring product warnings in a language other than English where the manufacturer has chosen to enter and then to advertise in a non-English speaking market in a language other than English.

⁶⁷ Stanley Indus., Inc. v. W.M. Barr & Co., Inc., 784 F. Supp. 1570, 1576 (S.D. Fla. 1992).

GLOSSARY

I. Summary judgment: A judgment in a summary proceeding, as one rendered pursuant to statute against the sureties on a bond furnished in an action.⁶⁸ A judgment in certain actions specified in the statute providing the remedy, rendered upon plaintiff's motion, usually with supporting affidavits, upon the failure of the defendant to controvert the motion by filing an affidavit of defense or his failure to file an affidavit of defense or affidavit of merits sufficient to show the existence of a genuine issue of fact.

A motion for summary judgment is not a trial; on the contrary it assumes that scrutiny of the facts will disclose that the issues presented by the pleadings need not be tried because they are so patently insubstantial as not to be genuine issues at all. Consequently, as soon as it appears upon such a motion that there is really something to "try," the judge must at once deny it and let the cause take its course in the usual way.⁶⁹

II. Preemption: Congress may intend to "occupy the field" in a given area where: federal regulations may be so pervasive or the federal interest so dominant as in federal labor legislation or in nuclear waste disposal; where a state law or statute conflicts with a federal rule; where a state law or statute stands as an "obstacle" to the accomplishment and execution of the purposes of Congress; or where it would be a physical impossibility to comply with both federal and state law.⁷⁰

⁶⁸ 50 Am. J1st. Sur. § 209.

⁶⁹ BALLENTINE'S LAW DICTIONARY (Lexis 2010).

⁷⁰ RICHARD J. HUNTER, JR., JOHN H. SHANNON & HENRY J. AMOROSO, PRODUCTS LIABILITY: A MANAGERIAL PERSPECTIVE 78 (2012).

