Note

Discharging the Duty to Warn with Multilingual Warning Labels

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I. INTRODUCTION

As the number of non-English speakers in the United States grows, there is an increasing debate over whether multilingual warning labels should be required. Currently, the general law of product liability warnings does not demand multilingual warnings, and multilingual warnings have not been mandated by any legislature. Additionally, most case law in the United States has not found manufacturers liable for lack of a multilingual warning label. Despite the positive aspects of multilingual warning labels, a manufacturer should not be held liable for failing to provide multilingual warning labels due to the lack of consensus in the courts and the impossibility of full implementation.

While there are suggestions that this problem can be remedied by legislative action, similar to the Canadian and European examples, this solution may not come quickly or at all. Instead, a possible alternative is to relieve the manufacturer of the duty to warn once he has warned the employer who is in the best position to warn his own employees, including those who may be illiterate. This solution will not fix all problems related to multilingual warning labels, but will remedy several of the complications surrounding the issue of warning labels.

This Note seeks to analyze the issues regarding multilingual warning labels in the United States and abroad, as well as discuss possible solutions to these problems. Part II briefly outlines the general rules in product liability regarding the duty to warn and summarizes the case law regarding

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multilingual warning labels in the United States, while providing an overview of the relevant rules regarding warning labels abroad. Part III analyzes where case law regarding multilingual warning labels is evolving in the United States and how rules abroad are relevant in order to discuss three proposed possible solutions to remaining problems. Part III also advocates for a new solution that will address injuries in the workplace to at least begin solving the problems presented by the increasing prevalence of non-English speakers in the United States. This Note concludes that manufacturers should not be liable for a failure to provide multilingual warning labels, and that manufacturers' potential liability should be discharged in workplace accidents where a warning was provided to the injured person's employer.

II. THE DUTY TO WARN IN THE UNITED STATES AND ABROAD

A. GENERAL RULES REGARDING THE DUTY TO WARN IN THE UNITED STATES

Claims related to failure to warn were uncommon until the 1900s.[1] The "duty to warn" is essentially a duty of "informational obligations" on the part of the manufacturer.[2] The *Restatement (Third) of Torts: Products Liability* provides the general rule regarding the duty to warn in the United States:

> A product . . . is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.[3]

The Restatement is a secondary authority that is persuasive and may be adopted by courts.[4] The Restatement does not

1. *E.g.*, Francis H. Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 AM. L. REG. 209 (1905).

2. *See* DAVID G. OWEN, PRODUCTS LIABILITY LAW 584 (2d ed. 2008).

3. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

4. Restatements are intended to be statements of what the common law

directly address the issue of what languages a warning should be written in, and therefore is not relied upon in cases relevant to multilingual warning labels.[5] In contrast, the case law in the United States itself, while limited, does address this subject.[6]

B. MULTILINGUAL WARNING LABELS IN THE UNITED STATES AND ABROAD

Case law in the United States regarding multilingual warning labels goes both ways, and does not give clear guidance to a manufacturer considering what languages in which to write warning labels.[7] In addition, the case law itself is sparse and most of it comes from federal district courts, with particular emphasis on Florida.[8] An assessment of the relevant cases is necessary, however, in order to have a good frame of comparison when viewing the rules regarding multilingual warning labels abroad.[9] The cases from the United States have been divided into two categories: workplace-related accidents and all other accidents.

1. A Manufacturer Could Be Liable for Accidents in the Workplace

In the majority of cases on point, the manufacturer is *not* found liable even without providing a label in multiple languages.[10] There are some cases, however, in which the manufacturer *is* found liable, or a jury question precludes summary judgment for the manufacturer, when only an English-

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is, so if a court adopts the Restatement, it is adopting law that already exists.

5. *See* David L. Luck & Douglas J. Chumbley, *A Legal Guessing Game: Does U.S. Common Law Require Manufacturers and Suppliers of Consumer Products to Warn in Languages Other Than English?*, 79 DEF. COUNS. J. 192, 193 (2012).

6. *See infra* Parts II(B)(1), (2).

7. Luck, *supra* note 5, at 194 ("Unfortunately, extant U.S. case law addressing if and when product manufacturers and suppliers are required to provide bilingual or multilingual product warnings does not lend much certainty for those seeking a clear compliance strategy.").

8. *See generally* Marjorie A. Caner, Annotation, *Products Liability: Failure to Provide Product Warning or Instruction in Foreign Language or to Use Universally Accepted Pictographs or Symbols*, 27 A.L.R. 5TH 697 (1995).

9. *See infra* Part II(B)(3).

10. *See infra* notes 9–37, 39–64 and accompanying text.

language warning label was provided.[11] Neither of these scenarios is more or less prevalent in the workplace over any other environment, however, there are enough workplace-related injuries in multilingual warning label cases that warrant a division in this way.

One of the first cases to address whether multilingual warning labels are necessary was *Hubbard-Hall Chemical Co. v. Silverman*.[12] In this case, both of the employees were natives of Puerto Rico.[13] One employee was able to read some English but was not fluent, while the other employee could not read any English at all.[14] The employer testified that he told his laborers that the chemicals including Parathion were dangerous, and that if they did not use the masks and coats and follow instructions they were likely to die.[15] The United States Court of Appeals for the First Circuit held it was a matter for the jury to decide whether a manufacturer of poisonous insecticide should have foreseen that its product would be used by farm laborers of limited education and reading ability,[16] and whether a warning, even if it were in the form of a label submitted to the Department of Agriculture, would be adequate without symbols warning of the insecticide's dangerous condition.[17] The jury found the manufacturer liable in the District Court, and the Court of Appeals affirmed this judgment.[18]

In *Campos v. Firestone Tire & Rubber Co.*, a similarly decided case, the court held that a manufacturer *could* be found liable when only providing an English warning label, but this decision is best left to the jury.[19] In this case, the plaintiff could read in neither English nor his native tongue of Portuguese.[20] As a result, he could not read a sign in the truck-tire assembly operation where he worked that warned of the risk of explosion of improperly mounted tires.[21] He was later severely injured when a truck wheel and tire he was inflating exploded after he

11. *See infra* notes 9–37, 39–64 and accompanying text.
12. Hubbard-Hall Chemical Co. v. Silverman, 340 F.2d 402 (1st Cir. 1965).
13. *Id.* at 403.
14. *Id.*
15. *Id.* at 404.
16. *Id.*
17. *Hubbard-Hall Chemical Co.*, 340 F.2d at 405.
18. *Id.*
19. Campos v. Firestone Tire & Rubber Co., 485 A.2d 305 (N.J. 1984).
20. *Id.* at 307.
21. *Id.*

inserted his hand into the protective cage.[22] The plaintiff had already been in a similar accident earlier.[23] The court found that because many people in this line of work do not read English, warnings in the form of symbols might have been appropriate.[24] However, the court found there was a question of fact as to whether the presence of an adequate warning, even if given, would have prevented the mechanic from being injured, given evidence of the prior accident.[25] Also, there was evidence that the mechanic's conduct in putting his hand into the cage was an "instinctive reaction,"[26] and that a warning in the form of symbols therefore would not have prevented the accident.[27] Thus, the court concluded that retrial was necessary to find out if the lack of symbolic warnings was the proximate cause of the plaintiff's injuries.[28]

The most recent similarly-decided case is *Stanley Industries, Inc. v. W.M. Barr & Co.*,[29] an action by the owner of a factory against the manufacturer of a linseed oil product for damage from a fire caused by the spontaneous combustion of rags as a result of use of the product by factory workers.[30] Two factory employees whose primary language was Spanish used the linseed oil product.[31] The product label, containing warnings concerning spontaneous combustion and disposal of rags in English, contained no graphics, symbols, or pictographs on either side of the label.[32] The manufacturer had marketed the product in the Hispanic community in the Miami area.[33] The court denied the manufacturer's motion for summary judgment and stated it was a question of fact for the jury whether, in light of the advertising of the product in the Hispanic media and the "pervasive presence of foreign-tongued individuals in the Miami workforce,"[34] the product warning should have contained

22. *Id.*
23. *Id.* at 308.
24. *Id.* at 310.
25. *Id.* at 311.
26. *Id.*
27. *Id.*
28. *Id.* at 312.
29. Stanley Indus., Inc. v. W.M. Barr & Co., 784 F. Supp. 1570 (S.D. Fla. 1992).
30. *Id.* at 1572–73.
31. *Id.* at 1572.
32. *Id.*
33. *Id.* at 1573.
34. *Id.* at 1576.

language other than English or pictorial warnings in order to be adequate.[35] This case did not conclude that the manufacturer was liable, but nonetheless left the finding of fact to the jury.[36]

Verbal warnings given to an employee by an employer in addition to the manufacturer's printed, English-language instructions, were held to preclude the manufacturer's liability, by the court in *Bautista v. Verson Allsteel Press Co*.[37] This was an action against the manufacturer of a press brake machine for injuries sustained while a factory worker was attempting to clear a sheet of metal.[38] The court held that the jury's finding that the manufacturer's English-language warnings were sufficient to warn of the dangers of clearing the machine while it was still in operation "was not against the manifest weight of the evidence."[39] The court based its holding on the fact that the worker was verbally warned not to place his hands between the closing dies of the machine or to keep the treadle depressed,[40] both actions he nevertheless did prior to the accident,[41] and the fact that the evidence suggested no alternative method for warning.[42]

2. Other Environments Where the Absence of Multilingual Warning Labels Caused Accidents, But Not Liability

In the following cases which occur in environments other than the workplace, the manufacturer was not found liable even though warning labels were only provided in one language.[43] One of the more commonly critiqued[44] multilingual warning label cases is likely *Ramirez v. Plough, Inc*.[45] In *Ramirez*, a four-month-old child contracted Reye's Syndrome after being given

35. *Id.*
36. *Id.*
37. Bautista v. Verson Allsteel Press Co., 504 N.E.2d 772 (Ill. App. 1st Dist. 1998).
38. *Id.* at 775.
39. *Id.* at 776.
40. *Id.*
41. *Id.*
42. *Id.*
43. *See infra* notes 48–75 and accompanying text.
44. *E.g.*, Linda M. Baldwin, Ramirez v. Plough, Inc.*: Should Manufacturers of Nonprescription Drugs Have A Duty to Warn in Spanish?*, 29 U.S.F. L. REV. 837 (1995).
45. Ramirez v. Plough, Inc., 863 P.2d 167 (Cal. 1993).

aspirin.[46] The child's mother sued the manufacturer for failure to include a Spanish-language warning on the aspirin bottle.[47] In the end, the court held the manufacturer was not liable for failing to label a non-prescription drug with warnings in any language other than English, where state and federal regulations required only English-language labels.[48]

In *Medina v. Louisville Ladder, Inc.*,[49] a Spanish-speaking plaintiff purchased an attic ladder, which included English instructions and warnings.[50] Neither the plaintiff nor his handyman understood English,[51] and because of this they installed the ladder improperly.[52] The ladder eventually collapsed, injuring the plaintiff.[53] The plaintiff sued the product retailer and the manufacturer, contending that Spanish warnings were required because the product was sold in a region with a high concentration of Spanish speakers.[54] The district court determined that Florida does not impose a common-law duty to provide bilingual installation instructions and warnings,[55] and in doing so, the district court refused to follow *Stanley*.[56]

The most recent case to address whether product manufacturers owe a duty to warn in a language other than English is *Farias v. Mr. Heater, Inc.*[57] The plaintiff spoke Spanish but little English. Here, the plaintiff purchased space heaters with warnings in English only.[58] The product was not marketed to Spanish-speaking customers by use of the Hispanic media.[59] While the plaintiff said she relied on illustrations, none of the illustrations depicted the product being used inside a dwelling and the warnings explicitly stated the product should

46. *Id.* at 169.
47. *Id.* at 170.
48. *Id.* at 178.
49. Medina v. Louisville Ladder, Inc., 496 F. Supp. 2d 1324 (M.D. Fla. 2007).
50. *Id.* at 1326.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 1330.
55. *Id.* at 1329.
56. *E.g.*, Stanley Indus., Inc. v. W.M. Barr & Co., 784 F. Supp. 1570 (S.D. Fla. 1992).
57. Farias v. Mr. Heater, Inc., 757 F. Supp. 2d 1284, 1287 (S.D. Fla. 2010), *aff'd*, 684 F.3d 1231 (11th Cir. 2012).
58. *Farias*, 684 F.3d 1231.
59. *Id.* at 1236.

be used outdoors only.[60] The plaintiff used the product indoors and her residence suffered severe fire and smoke damage, but she was uninjured.[61] The district court distinguished and limited *Stanley*[62] to situations in which the defendant engages in Spanish-language product marketing, but then fails to provide Spanish instructions and warnings with the product,[63] and instead relied on *Medina*.[64] The United States Court of Appeals for the Eleventh Circuit affirmed the district court and concluded that a manufacturer is under no obligation under Florida law to provide Spanish-language warnings unless the product is marketed to Spanish-speaking customers.[65]

Conversely, in *Fuentes v. Shin Caterpillar Mitsubishi, Ltd.*,[66] an unpublished opinion, the plaintiff argued the warning was defective because it was *not* written in English.[67] The plaintiff was injured while using a wheel loader when the loader's warnings were written only in Japanese.[68] The defendant argued that as a Japanese manufacturer, which sold products only to Japanese buyers, it had no duty to provide warnings in English.[69] The court reasoned that if a Japanese manufacturer places a product in the stream of commerce, it is reasonably foreseeable that the product will be used in the United States. Therefore, the court stated the safety warnings regarding the risks of operation should be in English.[70] However, the court granted summary judgment in favor of the defendant because the plaintiff failed to present evidence sufficient to raise a reasonable inference that the defendant knew its product

60. *Id.* at 1235.

61. *Id.* at 1233.

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

63. *Id.*

64. Medina v. Louisville Ladder, Inc., 496 F. Supp. 2d 1324, 1329 (M.D. Fla. 2007) ("[i]n the more than 15 years since *Stanley* was decided, not a single published Florida case (state or federal) has relied on the decision to conclude that bilingual warnings and instructions may be necessary under Florida law. According to the same database, no published Florida decisions (state or federal) have relied on *Hubbard-Hall* or *Campos*, the cases cited in *Stanley*, for that purpose, either.").

65. *Farias*, 684 F.3d at 1236.

66. Fuentes v. Shin Caterpillar Mitsubishi, Ltd., No. H023840, 2003 WL 22205665 (Cal. Ct. App. Sept. 23, 2003).

67. *Id.* at *5.

68. *Id.* at *2.

69. *Id.* at *10.

70. *Id.*

would be imported to the United States.[71] The court noted there was no evidence that the defendant: a) advertised in the United States; b) had knowledge that its direct customers sold products in markets outside of Japan; c) sold any products to a United States vendor; or d) derived any economic benefit from the importing of the product to the United States.[72]

In summary, the case law on this subject points to not holding manufacturers liable for English-only warnings unless they advertise in a non-English-speaking market. And the courts do not seem likely to follow the cases in which the manufacturer was found liable.[73] Simultaneously, while there are not many cases regarding whether multilingual warning labels should be required, at least half of the major cases assessing this question contain injuries occurring in the workplace.[74] For a full comparative frame of reference, however, analysis of Canada and the European Union is necessary.[75]

3. Rules Regarding Warning Labels Abroad

Other countries view multilingual warning labels differently. It is interesting to compare the rules in the United States with the rules in Canada and countries in the European Union, two other regions where one of the possible language choices for warning labels might be English. For example, in Canada, a country with two official languages,[76] there is clear guidance to manufacturers regarding Canadian bilingual packaging requirements.[77] Subsection 6(2) of the Consumer Packaging and Labelling Regulations[78] requires that all mandatory label information be shown in English and French

71. *Id.* at *12.

72. *Id.*

73. *See generally supra* note 56 and accompanying text (holding that a manufacturer had no duty under Florida law to provide bilingual installation instructions and warnings for a ladder).

74. *See supra* Part II(B)(1).

75. *See* Part II(B)(3).

76. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) [hereinafter Canadian Charter] (stating that "English and French are the official languages of Canada and have equality of status") [hereinafter Canadian Charter].

77. *See generally* Consumer Packaging and Labelling Regulations, C.R.C., c 417 (Can.) (outlining Canada's English and French bilingual packaging regulations).

78. *Id.*

except the dealer's name and address, which can appear in either language.[79] Limited exemptions from the bilingual labeling requirement are provided in subsections 6(3) and 6(7) of the Regulations for local or test market products,[80] and specialty products.[81] Subsection 6(9) of the Regulations provides an exemption from the bilingual labeling requirements when the product requires knowledge of a language for its proper use.[82] The label information for these products may be displayed in the language appropriate to the use of the product.[83]

Similarly, the European Union also has requirements, but prefers pictorials.[84] Though the European Member States have not had a case directly on point with this issue, a recent dispute between two Belgian department stores provides some insight. In *Colim NV v. Bigg's Continent Noord NV*,[85] the Court of Justice of the European Union addressed the issue of whether Member

79. *Id.* ("All information required by the Act and these Regulations to be shown on the label of a prepackaged product shall be shown in both official languages except that the identity and principal place of business of the person by or for whom the prepackaged product was manufactured, processed, produced or packaged for resale may be shown in one of the official languages.").

80. *Id.* § 6(3) ("Subject to subsections (4) to (6), a local product or test market product is exempt from subsection (2) if (a) it is sold in a local government unit in which one of the official languages is the mother tongue of less than 10 per cent of the total number of persons residing in the local government unit; and (b) the information required by the Act and these Regulations to be shown on the label of a prepackaged product is shown in the official language that is the mother tongue of at least 10 per cent of the total number of persons residing in the local government unit.").

81. *Id.* § 6(7) ("A specialty product is exempt from subsection (2) if the information required by the Act and these Regulations to be shown on the label of a prepackaged product is shown in one of the official languages.").

82. *Id.* § 6(9) ("A prepackaged product that is within one of the following classes of prepackaged products is exempt from subsection (2) if the information required by the Act and these Regulations to be shown on the label of a prepackaged product is shown in the language that is appropriate to the product: (a) greeting cards; (b) books; (c) talking toys; (d) games in which a knowledge of the language used is a basic factor essential to the use of the game.").

83. *Id.*

84. Council Directive 2006/42, Annex I, 2006 O.J. (L 157) 24, 47 (EC) ("Information and warnings on the machinery should preferably be provided in the form of readily understandable symbols or pictograms. Any written or verbal information and warnings must be expressed in an official Community language or languages, which may be determined in accordance with the Treaty by the Member State in which the machinery is placed on the market and/or put into service and may be accompanied, on request, by versions in any other official Community language or languages understood by the operators.").

85. Case C-33/97, Colim NV v. Bigg's Continent Noord NV, 1999 E.C.R. I-3175.

States may require information appearing on imported products to be given in the language of the area in which those products are sold or in another language which may be readily understood by consumers in that area.[86] The plaintiff argued that numerous products offered for sale in the defendant's store were not labeled in Dutch, the language of the area.[87] The seller then counter-claimed that the plaintiff was likewise selling various products in its store without labeling them in Dutch.[88] The court found that Member States may adopt national measures requiring that labeling information on all national and imported products be provided in the language of the area in which the products are sold, or in another language which may be readily understood by consumers in that area.[89] The court limited its holding by stating any national laws adopted by Member States with these requirements must "be restricted to information which the Member State makes mandatory and which cannot be appropriately conveyed to consumers by means other than translation."[90]

In both the United States and abroad, the trend is not to require multilingual warning labels except in the particular circumstances where a manufacturer advertised specifically to a group of non-Native English speakers, or when the potential consumer's language is clear to the seller or manufacturer. This lack of movement towards implementing multilingual warning labels will be analyzed in the next Part,[91] as well as the possible solutions that could potentially fix this problem.[92]

III. ANALYSIS

A. ATTEMPTS TO IMPLEMENT MULTILINGUAL WARNING LABELS

As the United States' population is becoming increasingly diverse, the issue of whether to provide a warning label in more than one language is becoming imperative. The current conclusion of case law is that manufacturers will not be found liable for not providing multilingual warning labels in the

86. *Id.* at I-3214.
87. *Id.* at I-3208.
88. *Id.* at I-3209.
89. *Id.* at I-3216.
90. *Id.*
91. *See* Part III.
92. *See infra* Part III(B).

United States unless the manufacturer advertises specifically to a non-English-speaking community.[93] This is probably the correct decision because without it manufacturers can always be found liable if the plaintiff speaks any language other than English. There is no way a manufacturer can provide for all the languages spoken in the United States on one warning label, and the more information provided on the warning label, the less likely it is to be read.[94] Also, choosing the languages one thinks are most likely to be spoken, such as English and Spanish, may in itself subject a manufacturer to liability for leaving out a different language. With the diversity of cultures in the United States, it is hard to promote symbolic warnings as is promoted by the European Union because there could be cultural misunderstandings of certain symbols. Because of the lack of foreseeability of the end user, it is not proper to require a manufacturer to provide multilingual warning labels.

There are also separate problems that might not be resolved by the provision of a multilingual warning label. One example is the "read and heed" presumption that some states have in regard to warning labels.[95] Typically, this presumption appears in failure to warn cases where there is no warning, and this permits the finder of fact to presume that the injured person would have heeded an adequate warning, had one been provided.[96] This presumption would be complicated by the fact that some in the international community domestically cannot read English, and therefore cannot heed an adequate warning even if provided. This could also apply even if an adequate warning included a multilingual warning label if that plaintiff cannot read in his or her own native tongue. To counter this problem, pictorial warnings have been suggested, but these do not actually solve

93. *See supra* Part II.

94. Marc Green, *The Psychology of Warnings*, MARC GREEN PHD, http://www.visualexpert.com/Resources/psychwarnings.html (last visited Mar. 6, 2016) ("Unfortunately, the Canadian requirement for bilingual warnings on many products means that specific, and therefore longer, warnings will result in small print which viewers may not bother reading. (Yes, longer warnings are less likely to be read. Creating specific, but brief warnings, is a fine art.)").

95. *Who Heeds The Heeding Presumption?*, DRUG AND DEVICE LAW (Nov. 7, 2014), http://druganddevicelaw.blogspot.com/2014/11/who-heeds-heeding-presumption.html (conducting a 50-state survey of the heeding presumption and finding that it is "something that exists in some states (Massachusetts, Missouri, Oklahoma), doesn't in others (California, Connecticut, Alabama), and is limited in still others (New, Jersey, Pennsylvania, Texas)").

96. 27 MINN. PRAC., *Products Liability Law* § 4.16 (2014 ed.), Westlaw (database updated 2015).

the problem when cultural differences prevent an illiterate from understanding the pictorial or when the pictorial is generally misinterpreted. Symbolic warnings can also be potentially too large to fit on the product itself.

Another important question is what constitutes "marketing" to a certain community? One possible answer from the case law is that advertisements via television or in the foreign language itself constitute marketing to that community.[97] If further cases on this topic arise, however, this question may have to be addressed.

Ultimately, the result from the U.S. case law is consistent with laws abroad. There are policy reasons, however, for the United States to have less regulation regarding labeling in different languages than Canada, and there are cultural reasons the United States has less regulation than the European Union. In Canada, both English and French are explicitly stated in the Canadian Constitution to be regarded as the national languages and should be treated equally as such.[98] In contrast, the United States does not have such explicit language in its Constitution. This constitutional provision is the policy reason that Canada has more regulation regarding labeling in different languages; it is clear that in Canada at least two languages must be on most products. And as for the European Union, the rule seems to be that the language of the area in which the product is sold is the language in which the product should be labeled, and the Member State can make mandatory the provision of any language that can be understood in the region where the product is sold.[99]

There are similarities in U.S. case law that *Stanley* covers,[100] where advertisements to a certain foreign language-speaking community could create a duty on the part of the manufacturer to provide warning labels in that language.[101] In this case, the court considered the prevalence of Spanish-speakers in the Miami area, similar to the theory in *Colim NV*[102]

97. *See supra* Parts II(B)(1), (2) for relevant cases.

98. *See* Canadian Charter, *supra* note 76.

99. KEVIN THUILLIER, EUROPEAN UNION: EU MARKING, LABELING AND PACKAGING–AN OVERVIEW (2011), http://web.ita.doc.gov/tacgi/OverSeasNew.nsf/ddce3b5aade1787c8525789d0049aeb2/628a8037ff4aa3d68525789d0049cea3/$FILE/EU%20labeling.pdf.

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

101. *Id.* at 1573.

102. Case C-33/97, Colim NV v. Bigg's Continent Noord NV, 1999 E.C.R. I-

from the European Union. While this similarity exists, courts have shied away from *Stanley*,[103] so this reasoning is unlikely to be persuasive in the future. This may be because there are cultural differences between the European Union Member States and the United States. In the European Union, it is easier to pin down what languages people in a certain region might speak, whereas in the United States it is not as simple. While one would like to add Spanish as the secondary language on product warning labels, in Minnesota, Hmong or Somali are likely better secondary language options because of the prevalence of these groups in this area.[104] But this could change, and it is hard to predict future cultural changes in certain regions in the United States.

Since the cases point towards not finding manufacturers liable,[105] and there are good policy and cultural reasons not to do so, there must be another way to deal with multilingual warning labels in an increasingly diverse community. As Kenneth Ross stated in his article *Multilingual Warnings and Instructions: An Update*,[106] "It is much more difficult, if not impossible, to adequately communicate all necessary safety information to all foreseeable product users. Nevertheless, attention to this issue can help minimize future liability in the United States as well as provide a better quality product that is safer and easier to use."[107] Some possible solutions proposed by various commentators include changes implemented by the law, the legislature, or the manufacturers themselves.

1. Judicial Change of Rules Regarding Multilingual Labels is Unlikely to be Successful

One of the solutions proposed to address this problem of warning the international community in the United States was

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103. *See supra* note 64 and accompanying text.

104. Mark Roth, *The Twin Cities Diversified with an Influx of Hmong, Somali Refugees*, PITTSBURGH POST-GAZETTE (Sept. 28, 2014), http://www.post-gazette.com/newimmigrants/2014/09/28/Pittsburghs-New-Immigrants-Minneapolis-St-Paul-diversified-with-influx-Hmong-Somali-refugees/stories/201409280003.

105. *See supra* Part II(B).

106. Kenneth Ross, *Multilingual Warnings and Instructions: An Update*, PRODUCT LIABILITY COMM. NEWSL., Oct. 2012, at 8, http://www.productliabilityprevention.com/images/Strictly_Speaking_Multilingual_Summer_2012.pdf.

107. *Id.*

to leave changes of the law to the judicial system itself. For example, in Ramirez v. Plough, Inc.*: Should Manufacturers of Nonprescription Drugs Have A Duty to Warn in Spanish?*,[108] Baldwin asserts that the courts are well equipped to examine changes in the law concerning negligent failure to warn because they have "traditionally taken an active role in developing tort law."[109] There are, however, a few problems with this assertion. First, if this argument is being made in the hope that multilingual warning labels will become a new requirement of manufacturers, the law is not a good source to rely on in its current state. As previously discussed, the law has been pointing in the direction of *not* holding manufacturers liable for not providing multilingual warning labels unless they advertise in a language or to a community where a multilingual warning label would seem necessary. With courts' current reliance on foreseeability, and the current difficulty in foreseeing what languages a warning label should be written in (especially without any guidance from the legislature), courts are reluctant to mandate a law requiring multilingual warning labels.

According to Thomas H. Lee in *A Purposeful Approach to Products Liability Warnings and Non-English-Speaking Consumers*:

> [T]ort law should not allow prejudice and bias to sanction a two-tiered system, in which those who speak the "right" language are compensated for their harms and those who profit from persons who speak the "wrong" language are undeterred from selling them unsafe products. To paraphrase Judge Cardozo, it is time to put the source of the obligation to non-English-speaking Americans where it ought to be. It is time to put its source in the law.[110]

This reasoning for leaving changes towards multilingual warning labels to the courts is persuasive. But even Lee agrees, "The law has not made movements in either direction, however,

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108. Baldwin, *supra* note 44.

109. *Id.* at 868 ("As Professor Guido Calabresi asserts, the expertise of judges in the common law area justifies judicial lawmaking. Judges' deliberate and progressive analysis is one of the prerequisites for continuity in case law. Since the products liability issue in Ramirez deals with tort law, the [S]upreme [C]ourt should have taken an active lawmaking role rather than simply deferring to legislative and administrative bodies.").

110. Thomas H. Lee, *A Purposeful Approach to Products Liability Warnings and Non-English-Speaking Consumers*, 47 VAND. L. REV. 1107, 1142 (1994).

and it is unlikely that the law will take any major steps without the legislature."[111] And while the legislature might be in the best position to make changes regarding multilingual warning labels, this possible solution also has its weaknesses.

2. Legislatures Are in the Best Position to Make Changes Regarding Multilingual Warning Labels, Though Such Changes Are Unlikely to Happen

Like Lee suggests in *A Purposeful Approach to Products Liability Warnings and Non-English-Speaking Consumers*,[112] the court in *Ramirez*[113] implicitly suggests that the legislature is in the best position to make changes regarding multilingual warning labels. The *Ramirez* court held that the manufacturer was not liable for failing to label a nonprescription drug with warnings in any language other than English, where state and federal regulations required only English-language labels.[114] In these types of cases, legislative help could show what a manufacturer is required to have on the label, and make it clear what languages are necessary and required.[115]

There are some benefits of letting the legislature, or Congress specifically, control the rules regarding multilingual warning labels. These benefits are set forth in David L. Luck and Douglas J. Chumbley's *A Legal Guessing Game: Does U.S. Common Law Require Manufacturers and Suppliers of Consumer Products to Warn in Languages Other Than English?*. They write:

> This might be one area in which more, not less, regulation is preferred in order to promote reasonable certainty as to which languages should be represented in the information provided with consumer products sold in the United States. Further, to ensure national uniformity for our national market, and to avoid potential Commerce Clause concerns, perhaps that regulation should come from Congress, not the legislatures of the several states. That way, all players will know the rules of the game: warn in English and

111. *Id.*
112. *Id.* at 1129.
113. Ramirez v. Plough, Inc., 863 P.2d 167, 167 (Cal. 1993).
114. *Id.* at 178.
115. To date, no legislation has been proposed as a result of *Ramirez*.

> whatever other languages the federal government identifies as sufficiently widespread, and you will be insulated from liability for declining to warn in other languages. At present, however, in areas not already subject to language-based governmental regulation, manufacturers, suppliers, and legal advocates will have to make do with the limited case law discussed above in crafting their compliance strategies.[116]

Luck and Chumbley are stating the legislature is in the optimal position to make changes towards the requirement of multilingual warning labels. One of the big advantages of leaving rulemaking to Congress is national uniformity in what languages must be provided on a warning label—providing insulation from liability for not providing for other languages.[117] But, as Luck and Chumbley explain, until these changes are made, manufacturers must rely on case law, which is currently in their favor in most instances.[118]

Other sources suggest the reasons it is not best to leave changes in the law to the legislature[119] and articulate certain obstacles the legislature might face in making such changes.[120] In any case, it is unlikely that reliance on the legislature will lead to a speedy or successful solution to this problem either. This is because of the same difficulty of foreseeability.

In contrast to Canada, where the Canadian Constitution provides for equal recognition of both English and French,[121] and

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116. David L. Luck & Douglas J. Chumbley, *A Legal Guessing Game: Does U.S. Common Law Require Manufacturers and Suppliers of Consumer Products to Warn in Languages Other Than English?*, 79 DEF. COUNS. J. 192, 204 (2012).

117. *Id.*

118. *Id.*

119. See Baldwin, *supra* note 44, at 867–68 ("Contrary to the [*Ramirez*] court's reasoning, legislative and administrative bodies do not necessarily have superior technical and procedural lawmaking resources. High turnover rates and low annual salaries affect the quality of leadership and sophistication of state legislative bodies. Busy agendas, limited time and resources, lack of sufficient expertise, and an inability to foresee potential problems also contribute to legislative inaction. Moreover, legislators often intentionally avoid policy decisions for political reasons. Thus, passively waiting for legislative and administrative bodies to review the feasibility and availability of foreign language labeling may be futile.").

120. Richard Pierce, *Institutional Aspects of Tort Reform*, 73 CAL. L. REV. 917, 920 (1985) (stating that there is resistance from trial lawyers and a tendency for legislators to compromise when making tort reforms).

121. *See* Canadian Charter, *supra* note 76 (regarding Canada's constitutional language requirements).

in contrast to the European Union, where various languages are likely to be spoken in a certain region where a product is sold,[122] the United States fails to encourage, let alone recognize, any other language as dominant as English.

The U.S. Constitution does not provide for specific languages, and it is not always obvious depending on region what language the people in that region speak. As previously explained, when selling a product in Minnesota, one would not expect that rather than the addition of Spanish alone, Hmong and Somali are the languages that should be provided on a multilingual warning label.[123] It is hard to imagine how specific the legislation would have to be to cover each region distinctly, so it does not seem to be a viable solution in the current climate of the United States.

3. Manufacturers Are in the Worst Position to Make Changes Regarding Warning Labels

Some sources suggest manufacturers are in the best position to make changes towards implementing warning labels. One example of such an argument is in Keith Sealing's *Peligro!: Failure to Warn of A Product's Inherent Risk in Spanish Should Constitute A Product Defect*, where Sealing states:

> Courts—such as the California Supreme Court in *Ramirez*—have been slow to move the common law along, and in some cases suggest that this is a legislative matter. But too many legislatures have demonstrated that they are more interested in preserving English as the official language than they are in the safety of more than thirty-five million Hispanic consumers and employees. Some manufacturers are taking it upon themselves to provide Spanish-language warning labels, and indeed some members of the defense bar are warning that they ought to do so.[124]

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122. *See supra* text accompanying notes 85–91 (considering the European Union's warning language requirements).

123. *See* Roth, *supra* note 104 (analyzing increasing population of Hmong and Somali refugees in Minnesota).

124. Keith Sealing, *Peligro!: Failure to Warn of a Product's Inherent Risk in Spanish Should Constitute a Product Defect*, 11 TEMP. POL. & CIV. RTS. L. REV. 153, 178–79 (2001).

Sealing has various arguments for why courts and legislatures are not in the best position to make changes towards implementation of multilingual warning labels: courts are slow and some legislatures want to preserve the English language in the United States.[125] Instead of relying on these two sources, Sealing proposes that it is up to members of the defense bar or manufacturers to make movements toward multilingual warning labels themselves.[126]

This, however, is the weakest possible solution. Warning labels only have so much room for words, and while a popular misconception, warning labels are not free, and manufacturers know this. Manufacturers prioritize warning about certain frequent issues more than matters such as multilingual warning labels, which come up infrequently in litigation and in which manufacturers are unlikely to be liable. If it is up to manufacturers to find a solution to this problem, the problem is unlikely to be solved.

In summary, all possible proposed sources for solutions such as the law, the legislature, and the manufacturers themselves, are likely to fail in bringing any real change to the rules regarding multilingual warning labels. There may be another solution, however, that can at least solve some of the problems brought by such cases.

B. A POSSIBLE SOLUTION TO PROBLEMS REGARDING WARNINGS IN THE WORKPLACE AND NEW FACTORS THAT COULD CHANGE THIS ANALYSIS IN THE FUTURE

Some of the problems raised in the solutions above were that the judges would never make drastic changes without prior legislation, that legislation is unlikely to adequately solve these issues, and manufacturers are not worried because litigation is infrequent and typically ends in their favor. This shows that some other solution may be necessary. While not a solution to all of the cases or situations that could happen regarding multilingual warning labels, one possible solution can be found within the employment relationship. By discharging the manufacturers' liability after a warning to the employer who has knowledge of their employees' language abilities, as well as which products these employees will come into contact with,

125. *Id.*
126. *Id.*

many common accidents can be prevented, as employees will be informed of potential dangers by their employers.

1. Liability within the Employment Relationship

It may be better to impose the duty to warn on the employer in workplace scenarios. Many of the above cases occur in the workplace,[127] and in this situation, the employer knows the literacies of their employees better than anyone. The employer is therefore in a better situation to warn of the dangers of the products they provide in their workplace. This is similar to the "learned intermediary" theory,[128] and can be applied in the case of multilingual warning labels as well. In order for this solution to be effective, the manufacturer first needs knowledge that the product they are selling is to an employer, and not simply a normal consumer. But even if the manufacturer does not know they are selling to an employer, that manufacturer still has a general duty to warn their consumer, and the employer would know what to do with this warning once received. Once this element of knowledge is established (which should be obvious to manufacturers of huge machinery or other like items which would require multi-person use), the manufacturer must convey the warning to the employer. This can be verbal, but should be written if possible on the product itself. The employer should have knowledge of the employees working for it as well as their literacies. The employer can then use this knowledge to their advantage in warning employees who come in contact with a certain product of the possible dangers, and if a specific warning is needed in a particular language, that employer will have the duty of asking the manufacturer for such warning. With the cooperation of the manufacturer and the employer, many workplace accidents, including those as a result of a language barrier, can be prevented.

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127. *See supra* Part II(B)(1).

128. The "learned intermediary" has traditionally applied in the context of prescription drugs, requiring drug manufacturers to provide adequate warnings to prescribing physicians but not to the patients who ultimately consume the drugs. Keith A. Laughery, *Warnings in the Workplace: Expanding the Learned Intermediary Rule to Include Employers in the Context of the Product Manufacturer/Employer/Employee Relationship*, 46 S. TEX. L. REV. 627, 632–33 (2005) ("Forty-eight states currently recognize the LIR in context of the drug manufacturer/doctor/patient relationship.").

a. Sources of Support for this Proposal in Case Law

A great example of this proposal is found in *Bautista*.[129] In this case, verbal warnings given to an employee by an employer in addition to the manufacturer's printed, English-language instructions, precluded the manufacturer's liability.[130] The court held that the jury's finding that the manufacturer's English-language warnings were sufficient to warn of the dangers of clearing the machine while it was still in operation "was not against the manifest weight of the evidence,"[131] given the fact that the worker was verbally warned not to place his hands between the closing dies of the machine or to keep the treadle depressed.[132] In this case it seems the court is assuming the manufacturer's warning, and the employer's verbal warning, were sufficient to preclude liability.[133] However, it should be remembered that a verbal warning in English may not always be sufficient if the English warning was given to a worker who does not understand English. In such a case, some other sort of warning such as manufacturer-created symbolic warnings may become necessary.[134]

b. Application of this Proposal to the Workplace Cases

This proposed solution could be applied to the workplace cases discussed earlier.[135] When applied, the results of these cases will seem clearer than the results as they currently stand. In *Hubbard-Hall*,[136] the employer testified that he told his workers that "the chemicals including Parathion were dangerous, and that if they did not use the masks and coats and follow instructions they were likely to die."[137] Under this new proposal, the analysis could end with the employer's warning to the plaintiffs, and the manufacturer would be discharged from

129. Bautista v. Verson Allsteel Press Co., 504 N.E.2d 772, 772 (Ill. App. 1st Dist. 1998).

130. *Id.* at 776.

131. *Id.*

132. *Id.*

133. *Id.*

134. *But see* text accompanying *supra* notes 12–20 (discussing reasons symbolic warning labels may sometimes be ineffective).

135. *See supra* Part II(B)(1) for cases on this point.

136. Hubbard-Hall Chemical Co. v. Silverman, 340 F.2d 402 (1st Cir. 1965).

137. *Id.* at 404.

liability upon a finding that he warned the employer who subsequently warned his employees. This result would be fair because neither the manufacturer, nor the employer, should have to pay when the plaintiffs decide to disregard sufficient warnings.

In *Campos*,[138] there was a warning sign,[139] but no evidence that the employer had individually warned the employees.[140] The accident also seemed to be the result of an instinctive reaction that caused the injury,[141] and may not have been prevented by any kind of adequate warning. Whatever the jury finds from these facts, the manufacturer in this case would be discharged of the possibility of liability *if* there was evidence the manufacturer had warned the employer. It would be up to the employer, who hired workers who he would know to be illiterate, to warn those employees of the product's dangers in whatever way best conveys the message, and if sued, to prove that he had provided an adequate warning to his employees. This may be proven from the evidence in this case that the plaintiff had been in a prior similar accident,[142] and it is likely that the employer made a warning after the last accident, but this is just stipulation.

In *Stanley*,[143] an action by the owner of a factory against the manufacturer of a linseed oil product for damage from a fire caused by the spontaneous combustion of rags as a result of use of the product by factory workers,[144] the employer would likely not even be able to sue! The manufacturer would have warned the employer directly, who could take this warning and convey it to his workers in whatever way works best. If the employer believed a foreign language-warning label was required, the employer could request this of the manufacturer. After the manufacturer warns the employer, however, it is unlikely that the employer can then sue the manufacturer for failure to warn. The manufacturer in this case might still have a duty to provide multilingual warning labels to the general public, however,

138. Campos v. Firestone Tire & Rubber Co., 485 A.2d 305 (N.J. 1984).
139. *Id.* at 307.
140. *See id.*
141. *Id.* at 311.
142. *Id.*
143. Stanley Indus., Inc. v. W.M. Barr & Co., 784 F. Supp. 1570 (S.D. Fla. 1992).
144. *Id.* at 1572–73.

because he advertised directly to the Hispanic community,[145] and therefore should be able to predict that he will have Spanish-speaking consumers. But the employer himself would not have a remedy for failure to provide multilingual warning labels if that employer was warned directly.

The facts of *Stanley* could lead to a problem with delegating the duty to warn to the employer in employment situations. Can the manufacturer be liable if he provides multilingual warning labels to the general public because he advertises to a certain foreign language-speaking community, but does not provide multilingual warning labels to the employer to use at his workplace unless requested to do so? And if so, should the employer or the injured worker be able to recover from such manufacturer? There is no good answer to these questions, and they would have to be addressed by the courts if and when they arise.

While this proposal may fix some problems caused by the growing diversity in the United States, it will not solve all problems. Nevertheless, there may be new factors in the future that could change this analysis altogether.

2. New Factors that Could Change this Analysis

Some new factors that warrant consideration are the United States' future diversity. There are cultural reasons we may want to continue to encourage immigrants to learn English, and if new immigrants and their children do continue to learn and become fluent in English, this problem may become completely moot.

Keeping incentives alive for immigrants to learn English is a real concern in the United States, where it is not foreseeable what language one would speak by simply looking at the region. According to Christopher Maciejewski in *The Dilemma over Foreign-Language Labeling of over-the-Counter Drugs*:

> English is the common language of the United States. To indiscriminately impose a duty to warn in foreign languages upon every manufacturer of over-the-counter drugs creates an undesirable precedent. Such a duty would negate the incentive for immigrants in this country to learn English and become more productive members of society. In today's intensely competitive

145. *Id.* at 1573.

> global economy, our society cannot afford such a luxury.[146]

In looking at possible solutions for the problem of multilingual warning labels, the discussion is actually intended to help the international community domestically succeed in the United States. If being fluent in English is a trait that would assist such immigrants in becoming successful, there should not be a disincentive to gain fluency because survival is possible without knowing English. All of the accidents previously mentioned, including the death of a four-month-old child, could have been prevented if fluency in English was achieved.

Additionally, the older generation of new immigrants will eventually age out and English will become the predominant language for these immigrants' children, making this question moot in the United States. Complete integration is something to look forward to, but until then, some solution should be contemplated, and that is what has been done here at least regarding the employment relationship.

IV. CONCLUSION

After comparing international laws on product warning labels with the laws of the United States, it is clear that the international community must be warned of domestic hazards. Without case law or legislative statutes to provide clear guidance, it is hard to know how to implement the correct multilingual warning or symbols onto their product.

In the United States, the law is leaning towards withholding liability for manufacturers for not providing multilingual warning labels. In Canada and the European Union, there are different arguments, but these arguments come from different political and cultural principles. The Canadian Constitution states that both English and French are on equal terms, and thus, it makes sense that both languages be on most product warning labels. As stated above, there is no such provision delegating the responsibility to provide applicable languages, so there are political reasons not to include more than one language. There are also cultural reasons that contrast the United States from the European Union. The European Union

146. Christopher S. Maciejewski, *The Dilemma Over Foreign-Language Labeling of Over-the-Counter Drugs*, 15 J. LEGAL MED. 129, 154 (1994).

can use general pictorials that everyone understands because they are aware of the meanings that their cultures will derive from symbols. In the United States, our diversity of cultures precludes us from using symbols, as there could be cultural misunderstandings.

While there have been many possible proposals of sources that could solve this problem, such as judges, legislators, or the manufacturers themselves, none will lead to real solutions. The law is slow to change without legislative proposals, legislatures will not make changes when it is not foreseeable which languages would need to be addressed in each region, and manufacturers are benefitting from the law as it currently stands.

To address part of this problem, a potential solution in the workplace would relinquish manufacturers of the duty to warn once they have informed the employer, leaving it to them and their knowledge of their employees to warn of the product's dangers. Such a solution will not fix all problems, but until one that does is enacted, manufacturers must follow current case law that holds that they are not liable for the omission of multilingual warning labels, so long as they do not market to a non-English-speaking community.