To product liability attorneys:

What This Warnings Expert Witness Knows

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Introduction:

Failure to warn is a common count in product liability cases, for logical reasons. To sue under a claim that a product caused an injury is to claim that the product was defective, dangerous—or worse—unreasonably dangerous. Continuing the logic, a prudent person, who is unaware of said conditions, needs to be warned.

No matter how straightforward that logic, it is subject to challenges, e.g., factoring in the conditions, under which, the alleged injury occurred, in determining whether a warning would have changed the occurrence. Therein establishes the adversarial relationship between the opposing attorneys. As Plaintiff's attorney and Defendant's attorney formulate their respective strategies, pursued through investigations, pleadings, and discovery, each side might see the need to retain an expert witness in warnings.

After recognition of the need, comes the task of identifying candidates, evaluating them, and making a choice. With the objective being to add a valuable member to the team, even an experienced attorney might not grasp all of the nuances that differentiate among those who hold themselves out as expert witnesses in warnings.

When both sides have retained an expert witness, the so-called *battle-of-the-experts* need not result in a draw. The better expert witness can be the decisive difference in a favorable verdict or a favorable settlement. Such an expert witness will have the requisite education, training, and experience to provide the sought-after value. The expert witness, in providing that value, never should be the proverbial *"hired gun,"* nor should the expert witness behave as an advocate.

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What a warning is and what a warning is not:

A warning is a communication, meant to affect the behavior of an otherwise safety-minded person, by alerting to a non-obvious hazard. The desired effect on behavior is that the targeted person does (or in some instances, refrains from doing) specified actions, to avoid harmful consequences. To fulfill its assignment, a warning must meet certain requirements as to content and format. Content refers to what the warning conveys, e.g., through text, symbols, icons, etc. Format refers to arrangement and presentation, e.g., how discernible and interpretable the warning is. For some products, content and format are mandated by federal regulation. For other products, content and format need to be consistent with industry standards and industry best practices.

If a purported warning meets requirements concerning content and format, it can be considered an adequate warning. *Adequate* is the operative term; for, an inadequate warning is tantamount to no warning, whatsoever.

A warning has the best chance of being adequate if it incorporates certain elements. The first is a **signal word,** one chosen in reflection of the severity of the hazard. The second is a specific **identification** of the hazard. The third is **instructions** regarding what to do to avoid being harmed by the hazard. A fourth (when applicable) is instructions regarding **emergency medical measures**.

As a theoretical example incorporating those elements, a warning for a corrosive household chemical could read: *Danger! Can cause severe burns to skin and eyes. Always use protective gloves and goggles. In case of bodily contact, flush with water and seek medical attention.* The warning need not, and should not, stop there, but continue to provide other instructions, among them: *Keep out of reach of children.* So even when a product poses a principal hazard, additional hazards should be included in an expanded warning, provided that those hazards are reasonably foreseeable.

Warnings are the stuff of theory, based on a body of literature that borrows from other disciplines, such as ergonomics & human-factors, psychology, and engineering. Derived from such associations is what's known as the 3-Step Hierarchy. **Step 1** is to design out the hazard, to the extent feasible. **Step 2** is to implement safeguards against residual hazard. **Step 3** is to devise adequate warnings. The 3-Step Hierarchy is inflexibly sequential, with no step to be taken out of turn and no step to serve as a substitute for a previous step.

A warning—whatever its judged adequacy—is never a license to market a product that is defective or that is unreasonably dangerous, especially when corrections are technologically and economically feasible. If a product has a design defect, a warning will not correct it. Neither is a warning a correction when the product is unreasonably dangerous, that is to say, dangerous beyond the expectations of a reasonable person.

An adequate warning does not guarantee compliance; rather, it affords the targeted person the opportunity to voluntarily comply. As an analogy, when someone ignores a red traffic light, it doesn't mean that the device did not fulfill its function.

A warning is not the same as a Material Safety Data Sheet (aka Safety Data Sheet). The latter is a document for employees who work in the presence of chemicals. The document provides information about a chemical's hazards, properties, health effects, safe handling, and

first-aid measures. There are instances, however, when an evaluation of a Material Safety Data Sheet can be helpful in a product liability case.

When a warning is warranted:

A warning is warranted when a product embodies a hazard that poses a non-obvious risk of harm, when used as intended or misused in a manner that is reasonably foreseeable. The associated duty to warn applies to the product's manufacturer, expected to be the most knowledgeable about the product's characteristics and propensities. Such knowledge is expected to have been acquired through the manufacturer's own research, in addition to having stayed abreast of industry standards, trends, and best practices. The duty to warn, however, also can attach to any intermediary in the supply chain, including the retailer.

What courts consider:

In deciding the adequacy of warnings, courts look to various interdependent and overlapping factors.

● **Unambiguous and specific.** Since warnings are a form of communication, they need to be interpreted and understood, devoid of uncertainty. Word choice is crucial, and, when appropriate, can be made more effective with icons and pictograms.

● **Conspicuous and available.** To be effective, warnings must be noticed, i.e., stand out and not recede into the background. Location, along with fonts, sizes, colors, borders, and symbols are means to that end. Warnings need to be available at the time of product use, even as a reminder, in cases of having been previously read. The package is a common medium for displaying product warnings. With multiple packages, e.g., a bottle inside a carton, both should carry warnings. For some products, however, e.g., stepladders, warnings should be permanently affixed. When warranted, warnings should reference other product information, such as inserts, foldouts, and owner's manuals.

● **Consistent with the severity of the hazard(s).** An example is the choice of a signal word. A hazard, for example, that is deserving of the signal words, *Warning* or *Danger,* should not be assigned one that implies a hazard that is less severe. All of the elements of any

warning should combine to truthfully reflect the nature of the hazards. Manufacturers don't want warnings to have a negative effect on sales; nonetheless, such concern must be subordinated to the consumers' right to be adequately warned.

● **Tailored to the proper population.** Products are targeted to certain direct-user populations, but in some instances, the warnings need to be targeted to a different population. An example is toys, designed for children, but, the associated warnings should be directed to adults. Warnings need to reflect the average literacy levels of the targeted population; hence, simple language is best, scrubbed of unnecessary jargon and complexity. The same holds for warnings that are rendered in more than one language. Universally-understood pictograms can aid the cause.

● **Compliant with applicable regulations, industry standards, and best practices.** Federal regulations mandate that certain product categories carry warnings and even mandate the content and format of same. For other product categories that, arguably, should carry a warning, manufacturers need not be left totally to their own ingenuity, because there are resources that can provide guidance.

● **Reflective of what the manufacturer knows or should know.** The manufacturer is expected to know more about its own product than does the general public. It's incumbent, therefore, for the manufacturer to provide adequate warnings. That's also true when the manufacturer becomes aware of information that justifies a revised warning, after the product has been placed into the commercial stream.

The Reasonable Person Standard:

The reasonable person standard asks: *What would a reasonable person do under the at-issue circumstances?* The answer has to be more specific than, *act reasonably;* otherwise, it would be circular reasoning. A determination of reasonableness not only hinges on decisions made but also on the process by which those decisions were made. The seeming objectivity of the reasonable person standard masks its subtle subjectivity. That's because the *reasonable person* is a theoretical fiction, who is fleshed out by a given fact pattern.

Plaintiff's attorneys rely on the reasonable person standard to argue that an adequate warning was warranted, but that the Defendant either provided an inadequate warning or no warning, whatsoever. Defense attorneys rely on the reasonable person standard to argue that no warning was warranted or that the supplied warning was adequate. Affirmative defenses include: the hazard was obvious; Plaintiff was a sophisticated user; there was an assumption of risk; Plaintiff committed a misuse that was not reasonably foreseeable; the product underwent alteration and/or tampering; and, there was contributory negligence.

About Sterling Anthony, B.S., MBA, CPP:

I am a management consultant, specializing in marketing, packaging, logistics, and human factors. I have applied those specialties in projects involving consumer nondurables, industrial durables, institutional products, and workplace operations. My clients include Fortune 500 firms and government agencies.

Before becoming a consultant, I had careers as an industry employee and as a university professor. Throughout my work-life, I have gained education, training, and experience that allow me to combine warnings theory with practical application. I have designed warnings for products, owner's manuals, machinery, and retail establishments.

As an expert witness, I have been retained in a variety of warnings cases. I have attorney references who can attest to my professionalism. I possess proven analytical skills. I am a capable communicator, both in the spoken and written word. I meet the scheduling and deadlines of the retaining attorney. I believe in setting expectations high and then exceeding them.

I have been a Plaintiff's expert in some cases that contributed to regulatory changes. One resulted in warnings for baby oil. Another resulted in warnings for charcoal briquettes. Yet another resulted in warnings for heated waterbeds. I also have been a Defendant's expert in cases, wherein, I opined in favor of the warnings.

I invite any attorney seeking the best in services from a warnings expert witness to contact me.

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