

WARNING: SILENCE CAN CAUSE SEVERE HARM SPANISH LANGUAGE AND CIVIL LIABILITY FOR INADEQUATE WARNINGS AND INSTRUCTIONS¹

Glenda Labadie-Jackson²

La humanidad entrará en el tercer milenio bajo el imperio de las palabras. No es cierto que la imagen esté desplazándolas ni que pueda extinguirlas. Al contrario, está potenciándolas: nunca hubo en el mundo tantas palabras con tanto alcance, autoridad y albedrío como en la inmensa Babel de la vida actual. Palabras inventadas, maltratadas o sacralizadas por la prensa, por los libros desechables, por los carteles de publicidad; habladas y cantadas por la radio, la televisión, el cine, el teléfono, los altavoces públicos; gritadas a brocha gorda en las paredes de la calle o susurradas al oído en las penumbras del amor. No: el gran derrotado es el silencio.³

¹ The original version of the article was written in Spanish to illustrate metaphorically the increasing need to “warn in Spanish.”

It is worth noting that despite the significant and growing number of Latinos and Spanish-speakers in the United States, there are almost no articles published in Spanish in American law journals. The same can also be said about journals that focus on issues of particular or unique importance to Latinos.

It is estimated that over three hundred law journals and reviews are published in the United States. See Michael J. Saks et al., *Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart*, 28 SUFFOLK U. L. REV. 1163, 1173 (1994). However, an informal search in the *Westlaw* database reveals that only eleven law journals have sporadically published articles written in Spanish: Berkeley La Raza Law Journal, California Western Law Review, Gonzaga Journal of International Law, International and Comparative Law Journal, Miami International and Comparative Law Review, National Resources Journal, the St. Louis University Law Journal, Tulane Law Review, United States-Mexico Law Journal, University of Detroit Mercy Law Review, and University of Miami Law Review.

² Associate Professor, University of Puerto Rico School of Law. Visiting Scholar, Harvard Law School 2007-2008; Ph.D. Candidate, Civil Law Doctoral Program, University Pompeu Fabra, Spain; L.L.M., Harvard Law School, 1999; J.D., *summa cum laude*, 1997, University of Puerto Rico; B.A., *summa cum laude*, 1994, University of Puerto Rico.

³ Gabriel García Márquez, Address at the First International Congress of the Spanish Language: *Botella al Mar para el Dios de las Palabras* (Mar. 26, 2004), available at <http://www.elpais.com/diezmil/pdf/cultura/PEX181004-SA173EREXTZZ4sss.pdf>. As translated by the HLLR editorial staff, the quote in English reads:

Humanity enters the third millennium under the empire of words. It is not true that the image is displacing words nor that it can extinguish them. On the contrary, it is pushing them to their highest potential: there never were in the world so many

A decade and a half has passed since the most recent decision dealing with the critical question of what language or languages should be used to communicate a product's warnings and instructions.⁴ A series of recent events that have transformed the breath and scope of the Latino⁵ community underscores the need to reexamine this relevant and increasingly important modern tort law issue.

The legal community has generally treated with silence the question of whether warnings and instructions should be provided in languages other than English. The influential *Restatement (Third) of Torts*⁶ omits any reference to the controversy at hand. Likewise, noteworthy U.S. tort law commentators, such as Prosser, Dobbs, Harper, James, and Gray, do not grapple with the controversy or they limit themselves to reporting the pertinent case law.⁷ In addition, there is a dearth of law review articles on this issue.⁸ Rather, the majority of the relevant literature is comprised by commentaries or notes.⁹

words with so much reach, authority, and freedom as in the immense Babel of today's current world. Made-up words, mistreated words, or words consecrated by the press, by disposable books, by billboards, spoken or sung on the radio, television, movies, telephone, public speakers; screamed with a broad brush on the street walls or whispered in the ear in the penumbras of love. No: the defeated one is silence.

⁴ See *Ramirez v. Plough, Inc.*, 863 P.2d 167 (Cal. 1993). The court decided that given the concrete facts of the case, absent a law or regulation requiring so, an aspirin manufacturer was not required to include instructions or warnings in Spanish. See *id.* at 177.

⁵ There is an important debate about the different connotations and implications of the terms "Latino" and "Hispanic." This is a complex issue because both terms are generally used to designate people with different and diverse backgrounds, races, religious beliefs, and languages. For a detailed discussion of this issue, see Ediberto Román, *Common Ground: Perspectives on Latino-Latina Diversity*, 2 HARV. LATINO L. REV. 483 (1997); Berta Esperanza Hernández-Truyol, *Building Bridges – Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM HUM. RTS. L. REV. 369 (1994); Suzanne Oboler, *The Politics of Labeling: Latino/a Cultural Identities of Self and Others*, 75 LATIN AM. PERSP. 18 (1992); Laura E. Gómez, *The Birth of the "Hispanic" Generation: Attitudes of Mexican-American Political Elites toward the Hispanic Label*, 75 LATIN AM. PERSP. 45 (1992); Ángel R. Oquendo, *Re-imagining the Latino/a Race*, 12 HARV. BLACKLETTER L.J. 93 (1995).

When used in this article, the term "Latino" refers to people in whose country of origin—or the country of origin of their ancestors—the predominant language is Spanish, as opposed to its broader general meaning. The term "Hispanic" is only used when a cited source expressly uses it.

⁶ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1997).

⁷ See 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, 168-69 (2001).

⁸ See, e.g., *id.* at 169 (describing Douglas R. Richmond, *When Plain English Isn't: Manufacturers' Duty to Warn in a Second Language*, 29 TORT & INS. L.J. 588 (1994) and Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027 (1996)).

⁹ See, e.g., Christopher S. Maciejewski, Commentary, *The Dilemma Over Foreign-Language Labeling of Over-The-Counter Drugs*, 15 J. LEGAL MED. 129 (1994); Thomas H. Lee, Note, *A Purposeful Approach to Products Liability Warnings and Non-English-Speaking Consumers*, 47 VAND. L. REV. 1107 (1994); R. Geoffrey Dillard, Note, *Multilingual Warning Labels: Product Liability, "Official English," and Consumer Safety*, 29 GA. L. REV. 197 (1994); Roger Enríquez, Note, *I'm Warning You: Over-the-Counter Drug Manufacturers That Advertise in Spanish Should Warn in Spanish*, 4 J. GENDER RACE & JUST. 353 (2001); S. Mark Mitchell, *A Manufacturer's Duty to Warn in a Modern Day Tower of Babel, Recent Development*, 29 GA. J. INT'L & COMP. L. 573 (2001); Linda M. Baldwin, Note, *Ramirez v. Plough*,

The current and projected social, demographic, economic and cultural profile of Latinos in the United States will not tolerate the persistent silence or whispers for another decade and a half. Recognizing a legal norm that requires bilingual warning labels cannot be delayed. This article brings forth some general considerations with the purpose of breaking through the flood-gates of this important, albeit incipient, debate.

I. PROFILE OF LATINOS IN THE UNITED STATES

A. Demography

The most recent demographic projection by the U.S. Census Bureau reveals that Hispanics¹⁰ comprise the largest minority group in the United States¹¹ and that the Hispanic population has experienced the most growth of any minority group in the last few years.¹² Thus, it is estimated that by the year 2050 the number of Hispanics in the United States will be more than 100 million, which will equal a fourth of the total population of the country.¹³

Inc.: Should Manufacturers of Nonprescription Drugs Have a Duty to Warn in Spanish?, 29 U.S.F. L. REV. 837 (1995).

¹⁰ In 1970, the U.S. Census Bureau used the term “Hispanic” for the first time as a subjective criteria for self-identification. A person was defined as “Hispanic” if he considered himself Mexican, Puerto Rican, Central or South American, or “Spanish.” See Rubén G. Rumbaut, *The Making of a People*, in *HISPANICS AND THE FUTURE OF AMERICA* 16, 21 (Marta Tienda & Faith Mitchell eds., 2006).

The U.S. Census now considers a person to be of “Hispanic origin” if, regardless of race, the person identifies himself as a Mexican, Puerto Rican, Cuban, or “Spanish, Hispanic, or Latino.” See U.S. CENSUS, SERIES P20-475, *THE HISPANIC POPULATION IN THE UNITED STATES: MARCH 1993, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS*, (1993), available at <http://www.census.gov/population/www/socdemo/hispanic/hispdef.html>.

¹¹ It is estimated that more than forty-four million Hispanics live in the United States and thus constitute approximately fifteen percent of the total U.S. population. Press Release, U.S. Census Bureau, *Minority Population Tops 100 Million* (May 17, 2007), <http://www.census.gov/Press-Release/www/releases/archives/population/010048.html>. This figure does not include the close to four million residents of Puerto Rico.

The Hispanic community is concentrated in California, Texas, and Florida. See *id.* In New Mexico, Hispanics comprise forty-four percent of the total population of the state. *Id.* Other states with high populations of Hispanics are Arizona, Colorado, Georgia, Illinois, Massachusetts, Nevada, New Jersey, North Carolina, Pennsylvania, and Washington. *Id.* (select link to tbl. 2).

When analyzing these statistics, it is important to take into account that it seems that the U.S. Census Bureau has consistently undercounted the number of Hispanics in the United States, particularly illegal immigrants. See U.S. CENSUS MONITORING BD., *FINAL REPORT TO CONGRESS 6* (2001), available at http://govinfo.library.unt.edu/cmb/cmbp/reports/final_report/FinalReport.pdf; Hannah Wolfson, *Hispanic Population—and its Influence—Growing*, *SAN DIEGO DAILY TRANSCRIPT*, Mar. 22, 2001; Cindy Rodríguez, *Census Bolsters Theory Illegal Immigrants Undercounted*, *BOSTON GLOBE*, Mar. 20, 2001, at A4.

¹² Press Release, U.S. Census Bureau, *supra* note 11.

¹³ Press Release, U.S. Census Bureau, *Census Bureau Projects Tripling of Hispanic and Asian Populations in 50 Years; Non-Hispanic Whites May Drop to Half of Total Population* (Mar. 18, 2004), <http://www.census.gov/Press-Release/www/releases/archives/population/001720.html>.

B. Language

The United States has the third largest population of Spanish speakers in the world.¹⁴ Spanish tops the list of foreign languages spoken in the country.¹⁵ In fact, it is estimated that approximately eighty percent of Hispanics speak Spanish in their homes.¹⁶ Of this group, close to half do not speak English or do not speak it well.¹⁷ It is very probable that the number of Latinos who cannot read English is even higher.¹⁸

C. Purchasing Power

Although the educational profile of Latinos in the United States is characterized by relatively poor formal-academic attainment and higher than average high school and university dropout rates,¹⁹ Latinos' purchasing power has rapidly increased in recent years.²⁰ Today their purchasing power is close to 700 billion dollars, and it is projected to be one trillion dollars in 2010.²¹

D. Advertising and Mass Media

In recent times, several companies in many industries have created aggressive advertising initiatives to capture the attention of Latino consum-

¹⁴ POPULATION RES. CTR., EXECUTIVE SUMMARY, A POPULATION PERSPECTIVE OF THE UNITED STATES (2002), available at <http://web.archive.org/web/20070604165856/http://www.prcdc.org/summaries/uspopperspec/uspopperspec.html>.

¹⁵ HYON B. SHIN & ROSALIND BRUNO, U.S. CENSUS BUREAU, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000 3 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf>.

¹⁶ See *id.* Some studies show that the classic three-generation model of language acquisition fits the experience of Latinos. According to this model, the first generation is mainly monolingual. The second generation is bilingual. By the third generation, English is the preferred language. See Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293, 312-17 (1989).

¹⁷ Califa, *supra* note 16, at 294. These numbers may not be accurate because it is probable that a significant sector of the non-English-speaking community does not respond to the census, and those who do could exaggerate their abilities to communicate in English. See Rachel F. Moran, *Irritation and Intrigue: The Intricacies of Language Rights and Language Policy*, 85 NW. U. L. REV. 790, 801 n.66 (1991) (reviewing BILL PIATT, *¿ONLY ENGLISH?: LAW AND LANGUAGE POLICY IN THE UNITED STATES* (1990)).

¹⁸ NAT'L COUNCIL OF LA RAZA, THE EDUCATION OF HISPANICS: STATUS AND IMPLICATIONS 36 (1986).

¹⁹ See NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., STATUS AND TRENDS IN THE EDUCATION OF HISPANICS (2003), available at <http://nces.ed.gov/pubs2003/2003008.pdf>.

²⁰ See Jeffrey M. Humphreys, *The Multicultural Economy 2003: America's Minority Buying Power*, 63 GA. BUS. & ECON. CONDITIONS 1, 6-7 (2003), available at <http://www.selig.uga.edu/forecast/GBEC/GBEC032Q.pdf>.

²¹ Elizabeth Malkin, *Spanish Bank Courts Hispanic Customers in United States*, N.Y. TIMES, Sept. 22, 2004, at W1.

ers.²² In fact, the Spanish-language mass media has experienced remarkable growth in the recent years.²³

II. PRODUCT LIABILITY – INADEQUATE WARNINGS OR INSTRUCTIONS: GENERAL PRINCIPLES

Although modern products liability law tends to differ – sometimes dramatically – across states, general principles of common law typically govern.²⁴ For example, manufacturers may be held liable for injuries caused by manufacturing defects, design defects, or defects based upon inadequate instructions or warnings.²⁵

A failure to warn claim arises when the manufacturer does not fulfill its duty to warn the consumer of the dangers or risks associated with using a product or does not instruct the consumer about how to use the product in a sufficiently safe way.²⁶ Nevertheless, a manufacturer is not required to warn of every possible or imaginable risk that could result from using the product. Accordingly, manufacturers do not have the duty to warn about risks that either are “obvious” to the consumer or are so remote that their happening is not reasonably foreseeable.²⁷ In addition, the failure to warn doctrine imposes liability when the manufacturer knew or should have known the danger or risk involved and did not provide an adequate warning.²⁸ Thus, the fundamental criteria that govern the analysis are whether the risk was foreseeable and whether the warning or instruction was adequate.²⁹ These criteria seek to promote the safe use of products, reduce the risk of injury, and encourage consumers to make informed decisions.³⁰

For a long time, the duty to warn doctrine was not controversial and largely escaped criticism.³¹ This may have been because it was considered a reasonable principle: manufacturers should warn of the dangers that may

²² Approximately two billion dollars is spent annually in advertising directed towards Latinos. See Greg Johnson, *Latinos' Money Talks; Question Is, in Which Language?*; *Spanish and English Agencies Are Debating Which Approach Is More Effective in Courting the Rapidly Growing Market*, L.A. TIMES, Nov. 3, 1999, at C1.

²³ See Nicole Serratone, *How Do You Say “Big Media” in Spanish? Spanish-Language Media Regulation and the Implications of the Univision-Hispanic Broadcasting Merger on the Public Interest*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 203, 228-37 (2004).

²⁴ See W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 98 (5th. ed. 1984) (describing the role of the common law in strict products liability torts).

²⁵ See *id.* § 95 (describing the various available tort causes of action and remedies in products liability law).

²⁶ 1 DAVID G. OWEN, ET AL., *MADDEN AND OWEN ON PRODUCTS LIABILITY* § 9.1 (3d. ed. 2000).

²⁷ See 2 DAN B. DOBBS, *THE LAW OF TORTS* § 363 (2001).

²⁸ *Id.*

²⁹ OWEN, ET AL., *supra* note 26, § 9.1.

³⁰ *Id.*

³¹ See Michael S. Jacobs, *Toward a Process-Based Approach to Failure-to-Warn Law*, 71 N.C.L. REV. 121, 124 (1992).

result from using a product, so that the risk of injuries can be reduced.³² Another plausible explanation is that the fundamental criteria upon which the doctrine is based (looking to the foreseeability of the risk and the adequacy of the manufacturer's preventative measures) are governed by basic principles of tort law. As such, the legal standards are familiar and relatively easy to understand and apply.³³

However, in recent years, courts and commentators have begun to increase notably the attention paid to this doctrine.³⁴ This increase in attention can be attributed to the fact that failure to warn claims have become more common over time.³⁵ Some reasons that could explain the proliferation of these types of actions are the relative ease with which the plaintiffs can sustain their claims, the difficulty for the defendants to defend themselves against this type of suit, the apparent low cost of placing warnings on the products, and the general conception that practically all products that are potentially harmful could be safer if the consumer is warned effectively.³⁶ In addition, this type of suit is usually less technical and, therefore, less costly than those based on manufacturing or design defects.³⁷

III. NON-ENGLISH WARNING LABELING: FEDERAL AND STATE REGULATION

A. *Federal Regulation*

Occasionally, federal administrative agencies issue regulations and statements that approach the controversy over what language or languages should be used to communicate the risks and instructions of a product. Of the few statements that deal concretely with the issue at hand, most state that the manufacturers, at their complete discretion, can opt to include warnings or instructions in languages other than English.³⁸

A good example is a statement issued by the Food and Drug Administration (FDA) regarding the labels on products containing aspirin.³⁹ The

³² *Id.* at 122-23.

³³ Manufacturers may be held liable for providing inadequate warnings under both negligence and strict liability theories. For a discussion of the doctrine guidelines under one or another theory, see OWEN, ET AL., *supra* note 26, § 9.3; RICHARD A. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* 103-04 (1980).

³⁴ Jacobs, *supra* note 31, at 125.

³⁵ See JANE STAPLETON, *PRODUCT LIABILITY* 252 (1994); Douglas R. Richmond, *Products Liability: Corporate Successors and the Duty to Warn*, 45 *BAYLOR L. REV.* 535, 537 (1993); M. Stuart Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 89 *W. VA. L. REV.* 221, 222 (1987).

³⁶ See Douglas R. Richmond, *Renewed Look at the Duty to Warn and Affirmative Defenses*, 61 *DEF. COUNS. J.* 205, 205 (1994).

³⁷ *Id.*

³⁸ See Dillard, *supra* note 9, at 200-03.

³⁹ Labeling for Oral and Rectal Over-the-Counter Aspirin and Aspirin-Containing Drug Products; Reye Syndrome Warning, 53 *Fed. Reg.* 21,633, 21,636 (June 9, 1988).

agency determined that the fact that warnings must be in English does not mean that warnings cannot also be communicated in other languages.⁴⁰ At the same time, the FDA recognized the potential importance of considering the particular needs of non-English-speaking populations.⁴¹

This language by an administrative agency may encourage manufacturers to include multilingual warnings and make them aware of the need to protect non-English-speaking consumers.⁴² Nonetheless, the FDA's comment in the rule is only a nonbinding statement of principles.⁴³ In addition, the comment can be interpreted as a tacit rejection of the adoption of a general legal rule that requires warning labels in non-English languages.⁴⁴

Some agencies have adopted explicit regulations that require warnings to be in languages other than English. For example, the Environmental Protection Agency (EPA) has ruled that pesticides with high levels of toxicity must contain "signal words"⁴⁵ in Spanish.⁴⁶ However, this rule applies in very limited circumstances. Therefore, in most cases consumers are not entitled to this type of federal protection.⁴⁷

B. State Regulation

As the following four cases illustrate, the rules regarding the language in which warning labels must be printed have been developed primarily in light of the general principles of the American tort common law system.⁴⁸

1. *Hubbard-Hall Chemical Co. v. Silverman*⁴⁹ and *Campos v. Firestone Tire & Rubber Co.*⁵⁰

One of the earliest cases in the United States to address, albeit indirectly, the issue of foreign language warnings was *Hubbard-Hall*, the landmark foreseeability case in the duty to warn doctrine. In *Hubbard-Hall*,

⁴⁰ *Id.*

⁴¹ *Id.* ("FDA encourages the preparation of labeling to meet the needs of non-English speaking or special user populations so long as such labeling fully complies with agency regulations.").

⁴² See Dillard, *supra* note 9, at 201.

⁴³ *Id.*

⁴⁴ In *Ramirez v. Plough*, 863 P.2d 167, 173-74 (Cal. 1993), discussed *infra* p. [], the Supreme Court of California cited the aforementioned FDA statement issued to support the argument that the manufacturers of aspirin were not required to provide a warning in Spanish.

⁴⁵ A "signal word" is an indicator used to catch the attention of the consumer. See 40 C.F.R. 156.64 (2006). Some examples are "danger," "warning," and "caution." *Id.*

⁴⁶ See 40 C.F.R. 156.10(a)(3) (2006) ("[T]he Agency may require or the applicant may propose additional text in other languages as is considered necessary to protect the public."); *id.* § (j)(2)(ii) (requiring signal words to be used on all relevant labels).

⁴⁷ See Dillard, *supra* note 9, at 202-03.

⁴⁸ For a discussion of other cases that are tangentially related to the controversy, see Sealing, *supra* note 7.

⁴⁹ 340 F.2d 402 (1st Cir. 1965).

⁵⁰ *Firestone Tire & Rubber Co.*, 485 A.2d 305 (N.J. 1984).

an insecticide manufacturer sold his product to a farmer.⁵¹ The warnings that appeared on the package were printed in English only and contained no symbols or warning drawings. Two workers became seriously ill and died after they incorrectly used the insecticide during their workday.⁵² Both workers were Puerto Rican; one could not read English, and the other was able to read only a limited amount of English.⁵³

The administrators of the decedents' estates filed a suit against the insecticide manufacturer.⁵⁴ The jury found that the defendant had not exercised reasonable care because it had failed to adequately warn of the dangers of its product and because the defendant had not provided instructions for its use.⁵⁵ The First Circuit affirmed the judgement on appeal. The court determined that it was reasonable for the jury to conclude that it was foreseeable that people with little education or with limited reading ability would use the product.⁵⁶

Campos presented a new opportunity to consider the *Hubbard-Hall* rationale. Campos, who was Portuguese, worked as a pneumatic assembler for a truck-trailer manufacturer.⁵⁷ This task was so dangerous that the assembly process was performed inside a cage to avoid injuries that could be caused by a tire rim explosion.⁵⁸ Firestone, the tire manufacturer, was aware of this danger and as a result had provided Campos' employer with a sign to warn of the dangers and risks associated with the tire assembly process.⁵⁹ However, Campos could not read either English or Portuguese.⁶⁰ On one occasion when Campos approached the cage, a tire exploded, causing him serious injuries.⁶¹

Campos sued Firestone. The jury reached a verdict in favor of the plaintiff.⁶² On appeal, the Supreme Court of New Jersey agreed that Firestone had a duty to warn but remanded the decision for a new trial after finding fault with the jury instructions.⁶³

Neither *Hubbard-Hall* nor *Campos* are particularly helpful in determining when a manufacturer should include a bilingual warning label. However, the reasoning behind both decisions is that where a significant portion of the products' users do not read English, this condition can require a warning label drafted with that minority's specific linguistic needs in mind. Thus,

⁵¹ *Hubbard-Hall*, 340 F.2d at 403.

⁵² *Id.* at 404.

⁵³ *Id.* at 403.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 405.

⁵⁷ *Campos*, 485 A.2d at 307.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 308.

⁶³ *Id.* at 310-11. However, subsequent case law and the enactment of a New Jersey statute have overruled *Campos* at least with respect to the holding that a failure to warn claim can survive where the risk was obvious. See *Mathews v. University Loft Co.*, 903 A.2d 1120, 1128-29 (N.J. Super. Ct. 2006).

both cases showed that in certain circumstances a manufacturer may have the obligation to provide warnings or instructions in other languages, especially when it is foreseeable that its product will be used by certain cultural or ethnic populations.

2. *Stanley Industries, Inc. v. W.M. Barr & Co., Inc.*⁶⁴

Eight years after *Campos*, the U.S. District Court for the Southern District of Florida decided *Stanley Industries, Inc. v. W.M. Barr & Co.* Upon completing their workday, two Nicaraguan brothers stored some rags that contained linseed oil. The oil was manufactured by W.M. Barr & Co. and sold in Home Depot. The brothers did not follow the instructions that appeared on the label of the product. The incorrect use of the product caused an instantaneous combustion that turned into a fire that caused damage to the property owned by Stanley Industries, Inc.⁶⁵

Prior to the fire, the oil manufacturer and Home Depot had carried out a joint advertising campaign aimed at promoting the product in Miami, particularly among the Latino community.⁶⁶ However, the product label only included instructions in English. There were no graphics, symbols, or pictorial images warning the user of the potentially dangerous properties of the oil.⁶⁷ One of the brothers did not understand or read English; the other could read words in English, but “had difficulty understanding their meaning.”⁶⁸

Stanley filed a suit against the manufacturer and the retailer of the oil.⁶⁹ During the judicial proceeding, the Nicaraguan employees testified that, had the label contained warnings in Spanish concerning the flammability of the product, they would have sought more information regarding its proper use.⁷⁰

The court denied the defendant’s motion for summary judgment.⁷¹ It found that, given the facts of the case, a jury should consider whether the manufacturer could have foreseen that the product would be used by people who did not speak English.⁷² In addition, the court indicated that a reasonable jury could find that this foresight made the English-only warnings inadequate.⁷³ The court suggested that a jury would be reasonable in finding that the co-defendants could have reduced the risk of injuries among the potential Spanish-speaking customers by warning them in Spanish or by using symbols to convey the risk and dangers of using the product.⁷⁴

⁶⁴ 784 F. Supp. 1570 (S.D. Fla. 1992).

⁶⁵ *Id.* at 1572.

⁶⁶ *Id.* at 1573.

⁶⁷ *Id.* at 1572.

⁶⁸ *Id.* at 1573.

⁶⁹ *Id.*

⁷⁰ *Stanley Industries, Inc.*, 784 F. Supp. at 1573.

⁷¹ *Id.* at 1576.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

Thus, *Stanley* strongly suggested that when a manufacturer promotes a product in a foreign language in order to attract non-English speaking customers, the manufacturer is unable to claim that English-only warnings are adequate as a matter of law.

3. *Ramirez v. Plough, Inc.*⁷⁵

Ramirez is the most recent judicial decision that has considered whether warnings are inadequate if only given in English. The facts of the case, which was decided in 1993, are as follows: When Jorge Ramirez was three months old, his mother, without first consulting a doctor, gave him three St. Joseph Aspirin for Children brand aspirin, manufactured and distributed by Plough, Inc., to treat cold symptoms. She continued to do so after a doctor directed her to administer other non-aspirin medications instead. This caused the boy to contract Reye's syndrome, which caused him severe neurological damage, including cortical blindness, spastic quadriplegia, and mental retardation.⁷⁶

Ramirez's mother was born in Mexico and could read only Spanish.⁷⁷ The product label contained a warning in English stating that aspirin should be given to children under two years of age only "as directed by doctor."⁷⁸ The package and the package insert included an English-only display to alert consumers about the risk and consequences of contracting Reye's syndrome. The defendant had promoted and advertised its product, both in English and in Spanish, to the Latino community in California.⁷⁹

The mother of the child filed a suit against the manufacturer of the aspirin. The manufacturer filed a motion for summary judgment; it argued that there was no duty to warn in a foreign language.⁸⁰ The trial court granted the defendant's motion.⁸¹

The California Court of Appeals reversed the decision.⁸² The court ruled that the defendant presented evidence that showed that Plough had knowledge not only that Latinos comprise an important segment of the children's aspirin market, but also that it was common that Latinos maintain their first language. The court ruled that a jury should determine whether it was foreseeable that the product could be acquired by a non-English-speaking Latino, and whether it was reasonable not to provide a warning in Spanish.⁸³

⁷⁵ 863 P.2d 167 (Cal. 1993).

⁷⁶ *Id.* at 169.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 170.

⁸⁰ *Id.*

⁸¹ *Ramirez*, 863 P.2d at 170.

⁸² *Ramirez v. Plough, Inc.*, 12 Cal. Rptr. 2d 423 (Cal. Ct. App. 1992), *rev'd*, 863 P.2d 167 (Cal. 1993).

⁸³ *Id.* at 430.

The decision was appealed to the California Supreme Court, which reversed the lower court.⁸⁴ The court ruled that it was appropriate to adopt the existing legislative and administrative standard of care.⁸⁵ The court stated that in certain specified circumstances the California Legislature and the U.S. Food and Drug Administration expressly required Spanish warnings.⁸⁶ It reasoned that their silence with regard to over-the-counter drugs indicated a deliberate decision not to include a duty for drug manufacturers to warn in languages other than English.⁸⁷

The California Supreme Court's rationale in *Ramirez* ignores the fact that courts do not tend to favor statutory compliance as a defense to tort liability because it is understood that state laws and regulations only establish a minimum standard of care.⁸⁸ A reasonable person may be required to take additional steps beyond this "minimum."⁸⁹ The fact that a law or a regulation does not require manufacturers to include warnings in languages other than English should not preclude the imposition of civil liability in those instances in which warnings are communicated only in English.

In the unfortunate *Ramirez* decision, the court opted for the most restrictive interpretation possible in order to rule out the possibility of applying the classical tort law analysis of determining whether warnings are adequate before determining whether a warning in a language other than English is required. In that sense, *Ramirez* distanced itself from *Hubbard-Hall*, *Campos*, and *Stanley*. For example, the court did not apply the foreseeability test, even though through its marketing efforts, the manufacturer increased the probability that Spanish-speaking consumers would use the product. Therefore, the manufacturer should have taken additional measures to adequately warn this particular type of consumer.

Furthermore, the decision significantly limits the protection available to a group of vulnerable consumers. The case also allows manufacturers to directly advertise and promote the product in certain non-English languages while exempting these manufacturers from responsibility if they do not warn consumers of the inherent risk and danger of using the product in the same language used in the advertisements.

IV. THE CLASSIC CRITERIA APPLIED IN PRODUCTS LIABILITY CASES JUSTIFY BILINGUAL WARNINGS

The classic rules for determining civil liability in failure to warn cases justify, in most instances, the imposition of civil liability on a manufacturer that does not include warnings or instructions in Spanish.

⁸⁴ *Ramirez v. Plough, Inc.*, 863 P.2d 167, 178 (Cal. 1993).

⁸⁵ *Id.* at 176.

⁸⁶ *Id.* at 174.

⁸⁷ *Id.* at 175.

⁸⁸ See Dillard, *supra* note 9, at 208.

⁸⁹ See David G. Owen, *Special Defenses in Modern Products Liability Law*, 70 Mo. L. REV. 1, 12-23 (2005).

The duty to warn doctrine does not require the manufacturer to warn the consumer of each of the possible risks of using the product.⁹⁰ It only states that liability should be imposed when it is shown that a manufacturer knew or should have known of the danger or risk in question and did not provide a warning to guarantee the safest use of the product.⁹¹ Therefore, the analysis in this field revolves around two classic criteria of tort law: whether the risk was foreseeable and whether the warning was adequate.⁹² The adoption of a rule requiring that warnings and instructions for a product also be communicated in Spanish is compatible with this fundamental tort law analysis. As previously stated, in a duty to warn case, one of the basic considerations is whether the warning was adequate.⁹³ Ordinarily, this requires one to examine the warning to see whether: (i) it gets the attention of the consumer; (ii) it plainly communicates the magnitude of the risk of using the product; and (iii) it provides instructions about how to avoid or reduce the risk.⁹⁴

A warning should provide clear and direct information about the risks involved in using the product.⁹⁵ In order to determine whether this is communicated, it is necessary to examine the text of the warning, which at the same time necessarily requires one to consider the language in which it was posted.⁹⁶ If the warning is given in such a way that the consumer cannot understand it (i.e., in a foreign language), it is considered inadequate.⁹⁷

It is appropriate to emphasize that the body of legal principles that provides content to the duty to warn doctrine is inspired by a public policy to protect the consumer as well as the consumer's freedom of choice.⁹⁸ Adequate warnings provide the consumer with the opportunity to analyze the benefits and dangers of using a product, in order to decide if he or she will purchase it. Thus, information is essential for the consumer. Only if the risk is communicated clearly can the consumer adequately balance the pertinent factors when selecting a product.⁹⁹

If a manufacturer does not adequately communicate the risks and dangers associated with the use of a product, the manufacturer gains an unfair competitive advantage resulting from the omission of information that influences consumer decisionmaking, which might have had a negative impact on sales.¹⁰⁰

Foreseeability is the second criteria that governs products liability law. In order for a warning to be adequate, it must be formulated in such a way as

⁹⁰ See DOBBS, *supra* note 27, § 363.

⁹¹ *Id.*

⁹² OWEN, ET AL., *supra* note 26, § 9.1.

⁹³ Madden, *supra* note 35, at 222.

⁹⁴ See *id.* at 223.

⁹⁵ See *id.*

⁹⁶ Dillard, *supra* note 9, at 211.

⁹⁷ *Id.*

⁹⁸ OWEN, ET AL., *supra* note 26, § 9.1.

⁹⁹ Dillard, *supra* note 9, at 216.

¹⁰⁰ *Id.* at 217.

to be understandable by the foreseeable users of the product.¹⁰¹ Taking the demographic profile of the United States into account, as well as the number of Latinos and Spanish speakers living in the country, it is no longer plausible to state that it is unforeseeable that people whose primary language is Spanish will use the product.¹⁰²

Moreover, such a defense is weak when the manufacturer specifically focuses its announcements or advertisements to attract the attention of the non-English-speaking sectors of the market.¹⁰³ The fact that Latinos are concentrated in specific geographic areas makes these efforts—as well as Spanish labeling—easier and cost-effective.¹⁰⁴ Another crucial element is that it is likely that Latinos who cannot read or speak English are going to be concentrated in unskilled jobs. Many of these jobs tend to be highly dangerous (such as those in the *Hubbard-Hall* and *Stanley* cases).¹⁰⁵

One could argue that the adequacy of a warning needs only to be measured against the “average” consumer.¹⁰⁶ However, to exclude Spanish speakers from the definition of “average consumer” would be to ignore the significant and growing number of consumers who do not speak English but need the information to help them avoid risk or injury.¹⁰⁷

V. ADDITIONAL ARGUMENTS AND COUNTERARGUMENTS

This part outlines some of the arguments that might be used against a proposal requiring manufacturers to provide warnings in Spanish.¹⁰⁸

A. *English as an Official Language*

Between 1980 and 2000, the population of the United States grew twenty-five percent; however, the number of people who do not speak English in their homes doubled.¹⁰⁹ In the same period, different initiatives were developed with the purpose of promoting English as the official language of the nation.¹¹⁰ The purpose of some of these initiatives is to encourage immi-

¹⁰¹ *See id.*

¹⁰² *See, e.g., id.* at 211-13.

¹⁰³ This principle was applied in *Hubbard-Hall* and *Stanley*. However, it was not applied in *Ramirez*.

¹⁰⁴ *See Sealing, supra* note 7, at 170-72.

¹⁰⁵ *See id.* at 173-74.

¹⁰⁶ *See Madden, supra* note 35, at 311.

¹⁰⁷ *See Dillard, supra* note 9, at 211-13.

¹⁰⁸ It is worth mentioning that this discussion is a discrete and minuscule manifestation of a more ample debate regarding the role of the English language in American society and issues regarding assimilation, diversity, and cultural identity. *See* Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1465-68 (2004).

¹⁰⁹ SHIN & BRUNO, *supra* note 15, at 2.

¹¹⁰ *See* Audrey Daly, *How to Speak American: In Search of the Real Meaning of “Meaningful Access” to Government Services for Language Minorities*, 110 PENN ST. L. REV. 1005, 1011 (2006).

grants to learn English and recognize that the English language is an integral part of U.S. cultural identity.¹¹¹

Other initiatives claimed that there is an urgent need to declare English as an official language and abolish the use of other languages in the public sphere.¹¹² Some reasons that have been given in favor of this type of proposal are: (i) the need to promote the English language as an element of national unity;¹¹³ (ii) to save on public spending aimed at providing services to non-English-speaking people;¹¹⁴ and (iii) to provide incentives for immigrants to learn English.¹¹⁵

Today, almost thirty states have approved legislation or have amended their constitutions in order to declare English as the official language.¹¹⁶ The implications of these initiatives vary from state to state and can basically be placed into two categories. Some states can be categorized as only giving symbolic significance to the declaration of English as an official language, equivalent to the state bird or flag.¹¹⁷ Other states' measures try to give substantive legal content to the declaration through specific measures that prohibit or restrict, in one form or another, the use of foreign languages in governmental agencies and public affairs.¹¹⁸ However, these measures cannot override bilingual services that are mandated by the Constitution of the United States or by federal laws.¹¹⁹

Since at least the 1980s, the U.S. Congress has considered various legislative proposals to designate English as the official language of the nation.¹²⁰ Likewise, with the same goal, there have been several proposed amendments to the federal constitution.¹²¹ These efforts have not been successful.¹²² Despite this, they have not been abandoned. For example, in May 2007, several bills of this type were pending consideration in the U.S. House of Representatives.¹²³

¹¹¹ See Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 346 (1992).

¹¹² See Note, "Official English: Federal Limits on Efforts to Curtail Bilingual Services in the States," 100 HARV. L. REV. 1345, 1345 (1987).

¹¹³ Perea, *supra* note 111, at 346.

¹¹⁴ See U.S. English, Fact Sheets: Cost of Multilingualism, http://www.us-english.org/inc/official/fact_sheets/db_multiling.asp (last visited Feb. 10, 2008).

¹¹⁵ See *id.* (providing examples of how English-speaking Hispanics are better situated than non-English-speaking Hispanics).

¹¹⁶ For the list of states that have declared English as the official language, see U.S. English, Resource Room: States with Official English, <http://www.us-english.org/inc/official/states.asp> (last visited Feb. 10, 2008).

¹¹⁷ See Perea, *supra* note 108, at 1407 ("Language constitutes a primary symbol of cultural identification.").

¹¹⁸ *Id.*

¹¹⁹ See generally Note, *supra* note 112.

¹²⁰ For a list of the bills that have been introduced supporting English as the official language of the United States, see U.S. English, Legislative History: Legislation, <http://www.us-english.org/inc/legislation/history/legislation.asp> (last visited Feb. 20, 2008).

¹²¹ The most recent amendment proposal is H.J. Res. 19, 110th Cong. (2007).

¹²² See U.S. English, *supra* note 120.

¹²³ For a summary of the pending projects that propose that English be declared the official language, see JODY FEDER, CONG. RESEARCH SERV., ENGLISH AS THE OFFICIAL LANGUAGE

In response to these movements, other groups, such as *English Plus*, have organized with the goal of promoting more inclusive policies.¹²⁴ Some groups state that the English language is not under threat in the United States.¹²⁵ In addition, some consider that declaring English as the official language would damage the individual rights of the immigrants, especially if basic government services were required to be provided only in English.¹²⁶

Although a large majority of Americans favor the idea of a symbolic declaration of English as the official language of the United States, a much smaller percentage favors initiatives aimed to limit public services in favor of non-English-speaking people.¹²⁷

In the public sector, the declaration of English as the official language is limited by the need to provide government services to non-English-speaking people.¹²⁸ However, it is not clear if an English-only law can be applied in the private sector to justify the prohibition of warnings in other languages.¹²⁹ It could be argued that a judicial decision establishing that warnings should be communicated in a language other than English would contradict an express political policy of preserving the role of English in the state.¹³⁰

Nevertheless, even if the declaration of English as the official language is considered merely symbolic, there is the possibility that eventually it could influence substantive legal decisions. Despite the fact that, up to now, the courts have not realized the potential ramifications that a policy like this can have, there is no guarantee that they will not do so in the future.¹³¹ In the context of warnings, the declaration of English as the official language could discourage legislators, courts, and even manufacturers from taking into account linguistic differences and therefore discourage them from taking measures to transcend language barriers.¹³²

Even if one argues that adopting an official common language to promote a national identity is desirable, it is not justifiable to pursue such a policy at the cost of the health and safety of consumers.¹³³ The need to learn

OF THE UNITED STATES: LEGAL BACKGROUND AND ANALYSIS OF LEGISLATION IN THE 110TH CONGRESS 2-6 (2007), available at <http://www.ilw.com/immigdaily/news/2007,0515-crs.pdf>.

¹²⁴ This movement, which endorses the idea of a multilingual society, has resulted in the approval of non-binding resolutions in the states of New Mexico, Oregon, Washington, and Rhode Island. See James Crawford, Issues in Language Policy: English Plus, <http://ourworld.compuserve.com/homepages/JWCRAWFORD/engplus.htm> (last visited Feb. 10, 2008).

¹²⁵ Perea, *supra* note 111, at 347.

¹²⁶ See Crawford, *supra* note 124 (“English Plus would take a more systematic approach to providing essential services, due process, and access to government for those whose English remains limited.”).

¹²⁷ See James Crawford, Opinion Polls on Official English, <http://ourworld.compuserve.com/homepages/JWCRAWFORD/can-poll.htm> (last visited Feb. 10, 2008).

¹²⁸ Dillard, *supra* note 9, at 221-26.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Dillard, *supra* note 9, at 223.

¹³² *Id.* at 223-34.

¹³³ See *id.*

English is a reality that immigrants face every day, and a proclamation of English as an official language would not make this need more obvious.

Tort law is based upon the general principles of common law, and so it cannot be the sole protection for Spanish-speaking consumers because, over time, tort law evolves to reflect broader public policies.¹³⁴ Therefore, it is important to carry out affirmative efforts (in areas besides the common law of torts) that can have a potentially tangible impact in the area of consumer protection.¹³⁵

B. *Discrimination Against Other Languages*

A common counterargument to a proposal requiring manufacturers to communicate warnings and instructions for their products in Spanish is that this would have the effect of discriminating against other linguistic minorities.¹³⁶ This is an idea of “all or nothing.” It is implied in the argument that “nothing” is preferable because it would be virtually impossible and impractical to warn in the almost three hundred different languages¹³⁷ that are spoken in the United States. However, the idea that a manufacturer must warn only in English because to do so in Spanish would lead to the need to warn in Urdu or Gujarati is a smokescreen to avoid considering the problem.¹³⁸

Today, the Latino community in the United States faces a combination of unique circumstances that justify the demand that product warnings be in Spanish. Latinos comprise the largest minority group in the country, and they are highly concentrated in certain geographic areas. They are the focus of aggressive advertising and marketing initiatives that even transmit their messages in Spanish.¹³⁹

Additionally, it is worth pointing out that Spanish is the second-most spoken language in the United States.¹⁴⁰ Even more importantly, there is an enormous quantitative gap between the number of people who speak Spanish and those who speak other languages in the country.¹⁴¹ If the reason that English is considered the dominant language in the country is that more people speak it, the same threshold population criteria should be used to justify warning labels in Spanish. In addition, as we discussed earlier, the

¹³⁴ *Id.* at 232-33.

¹³⁵ Bender, *supra* note 8, at 1055 (“Legislation is the best vehicle to protect language minorities against the market’s failure to translate their bargains.”).

¹³⁶ See FERNANDO DE LA PENA, *DEMOCRACY OR BABEL: THE CASE FOR OFFICIAL ENGLISH* 62 (1991).

¹³⁷ See Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 *UCLA L. REV.* 999, 1012 n.28 (2007).

¹³⁸ See Sealing, *supra* note 7, at 175-76.

¹³⁹ See *supra*, Part I.

¹⁴⁰ SHIN & BRUNO, *supra* note 15, at 3.

¹⁴¹ It is estimated that in the United States more than twenty-eight million people speak Spanish. The third most common language after English and Spanish is Chinese, with two million speakers. See *id.*

adoption of a bilingual warning label would be consistent with the foreseeability criteria in the duty to warn.¹⁴²

C. Cost

Cost can be another argument against the idea of bilingual warnings. However, the cost of making a new label is minimal in comparison to the benefits it can provide, such as lowering the risk of injury.¹⁴³ Therefore, the argument that certain products or packaging are constructed in such a way that it is difficult to include warnings in more than one language does not seem persuasive enough.¹⁴⁴

It is also argued that a label that includes a lot of information is an ineffective means of communication, such that the true cost of including additional warnings must include the dilution of the warnings' effectiveness.¹⁴⁵ It is alleged that the consumer will become overwhelmed and simply choose a product without referring to the warnings.¹⁴⁶

It is not plausible to argue that the consumer who only understands English will lose the incentive to read the labels because they also appear in Spanish. It is very probable that the consumer will only be attracted to the portion of the warning that is written in his language. Thus, the warnings written in a language that the consumer does not understand will not comprise or constitute an "overload" of information, even if it takes up space on the product label or package.¹⁴⁷

CONCLUSION

The fundamental transformation the Latino community has experienced in the United States over the past several years justifies the adoption of a general law requiring manufacturers to communicate warnings in Spanish about the potential dangers of the manufacturers' products. Despite the notable increase of Spanish-speaking Latinos in the country, the idiomatic barriers in the context of the duty-to-warn doctrine have received little attention. Paraphrasing the quote from the well-known author Gabriel Garcia Marquez which was the introduction to this article, there is no doubt that the "defeated one should be silence."¹⁴⁸

¹⁴² See *supra*, Part I.

¹⁴³ See *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 545 (N.J. 1982).

¹⁴⁴ See *Richmond*, *supra* note 8, at 600.

¹⁴⁵ See *Jacobs*, *supra* note 31, at 153-54.

¹⁴⁶ *Id.*

¹⁴⁷ See *Dillard*, *supra* note 9, at 215.

¹⁴⁸ See *supra*, text accompanying note 3 ("el gran derrotado es el silencio").

