Information Defects in the Age of Information: When More is Less

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Information Defects in the Age of Information: When More is Less

By Edward Combs, Jr.

“Making consumers account mentally for trivia or guard against risks that are not likely to occur imposes a very real societal cost.”¹

- Michigan Appeals Court

I. Introduction

A person sits at his or her office desk, holding the day’s mail in one hand and a letter opener in the other. Not an uncommon scene, yet this individual is terrified. Our character’s fear isn’t from any ominous news that may be lurking in the unopened mail, but rather from the warning on the letter opener that reads “Caution: Safety Goggles Recommended.”² This scenario is being played out in almost every facet of our society. Consumers are bombarded with warnings, restrictions, and other forms of safety information to the point that the warning itself becomes less effective and, thus, a safety concern in and of itself.

Warning labels from product manufacturers serve both as a shield to the consumer from physical injury and as a safeguard to the manufacturer from civil liability.³ A question then arises whether these two distinct interests, that of the manufacturer and of the consumer, are equally protected by our current products liability jurisprudence. Another way to approach this question is by asking when is a product deemed “safe”? Is it determined by an assessment of the

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totality of injuries associated with its use or do we arrive at the premise that a product is “safe” when a court finds no liability on the part of the manufacturer?

This article will attempt to examine how modern society and the judicial system have shaped the current state of products liability with respect to the excessive warning labels and the vast informational materials that manufacturers produce. It will also try to answer the question of whether the judiciary and legislatures have created a system that is safe for the manufacturer, but not to the consumer.

II. **Background**

The vast majority of our current products liability jurisprudence developed at common law, with its roots based on traditional notions of negligence.\(^4\) That is to say that a manufacturer had an affirmative duty to protect consumers from unreasonably dangerous products that might cause harm. In the realm of products liability, three main types of product defects arose through our current system: 1) manufacturing defects, 2) design defects, and 3) warning or information defects.\(^5\)

Today, there is delineation between negligence and strict liability within the arena of products liability.\(^6\) Negligence in products liability cases still looks for some fault in the manufacturers and/or distributors of products that harm the consumer, where strict liability cases continue to not consider the conduct of the manufacturer/distributor, much less consider whether or not there was some fault. This distinction has blurred somewhat in the present day as the

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\(^4\)DAN DOBBS & PAUL HAYDEN, TORTS AND COMPENSATION, PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 695 (5th ed. 2005).

\(^5\) Id. at 706.

\(^6\) See generally RESTATEMENT (SECOND) OF TORTS § 402A (1977); See also William E. Westerbeke, The Sources of Controversy in the New Restatement of Products Liability: Strict Liability Versus Products Liability, 8 KAN. J.L. & PUB. POL’Y 1, 8 (1998) ("By adopting a negligence standard for design defects and warning defects, the new Restatement shifts away from a rigid ‘strict liability’ view of section 402A [of the Restatement (Second)] and more toward the ‘products liability’ view.").
pertinent focus in both types of liability lies in the defect of the product. In order for a plaintiff to prevail in either instance, he or she will have the burden of proving that some aspect of the product was in fact defective.\(^7\) Whether or not the defect was due to some negligent act on the part of the manufacturer or came into being despite the reasonable care afforded by the same is of little importance today. As such, manufacturers and commercial distributors of the manufacturers’ products are placed in the dubious position of attempting to prevent harm to the consumer, not by greater care, but by more warnings. In cases dealing with product warnings or information pertaining to the use of products, we have seen a shift in the manufacturers’ attempt to adhere to notions of adequacy by increasing the information available to the consumer. Unfortunately, at least for the manufacturer, this shift in informational dissemination has not been followed in kind by a lesser degree of liability.

In today’s fast moving internet based society, manufacturers are reaching out to consumers in new cost effective ways.\(^8\) The application of traditional concepts of liability for inadequate warnings and other safety information can become mottled in a culture in which the expectations of the average consumer are drastically different from those of the consumer who existed in the formation of early products liability law. Yet, that is not to say that courts still do not make the effort to constrain an ever growing consumer market to the “old way” in regards to products liability.\(^9\)

\(^7\) See supra note 3.
\(^8\) One survey found that two thirds of Americans have purchased products online. See John B. Horrigan, Associate Director, Pew Internet & American Life Project, Online Shopping (Feb 13, 2008) (hereinafter, “Horrigan”), available at http://www.pewinternet.org/press_release.asp?r=299.
\(^9\) See, e.g., Strong v. U-Haul Co., 2007 U.S. Dist. LEXIS 7818 (Defendant liable for failing to provide any warning as to the dangers of a tow truck).
The judicial system in our country has long held the manufacturer liable for the injuries caused to consumers where there was no adequate warning given of the potential danger.\textsuperscript{10} This liability arguably has served as an impetus to the manufacturer to overcompensate in the area of informational dissemination. And though the courts have alluded to the fact that the excessive use of warnings may themselves cause a product to be unreasonably dangerous, the courts have yet to reign in the manufacturers from this practice of informational deluge. What has occurred is the judicial creation of a separate argument that may relieve the unscrupulous manufacturer of any liability.

III. Traditional Notions of Adequacy

In information defect cases, whether rooted in negligence or strict liability, a plaintiff must show by a preponderance of the evidence that the product was defective with respect to, among other things, its instructions for safe use or warnings against improper use and known dangers.\textsuperscript{11} It is rarely the case that a manufacturer places a product into the stream of commerce that is totally void of any type of informative supplement for the consumer. Liability then turns on whether or not the manufacturers’ proffered information was adequate. Adequacy with respect to a product’s information and/or safety warning is a question for the trier of fact.\textsuperscript{12} This is not to say that there are no general guidelines for the manufacturer to follow. Texas courts use a two step approach to determine the adequacy of warning labels. First, the warning “must be in such form that it could reasonably be expected to catch the attention of the reasonably prudent

\textsuperscript{10} See, e.g., Victory Sparkler & Specialty Co. v. Latimer, 53 F.2d 3, 4 (8th Cir. 1931) (Fireworks manufacturer liable for not warning of dangers when consumed)

\textsuperscript{11} See \textsc{Restatement (Second) of Torts} § 402A (1977); compare \textsc{Restatement (Third) of Torts} § 2C cmt. i (1998).

man in the circumstances of its use”; and secondly, “the content of the warning must be of such a nature as to be comprehensible to the average user and to convey a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person.”

A. No Warning

In early defective information cases, the premise of liability was mainly based on the manufacturers’ total failure to inform the consumer of some unreasonably dangerous aspect of the product’s foreseeable use or misuse. Following the Restatement of Torts, Second, manufacturers and distributors concerned themselves with moving away from the minimal or absent warning labels that accompanied his or her products. It was the lack of information or warning that caused the product to be defective. Manufacturers are continually held liable to the injured plaintiff that acted or failed to act due to the deficient information provided by the manufacturer.

Early courts found it easy to determine whether a notice or warning of a product’s potential dangers was adequate when the product itself offered no such warning or notice. Case law handed down by the courts arguably pushed the manufacturers and distributors to incorporate basic instructions and warnings to the consumer in order to adequately inform them of foreseeable hazards. The definition given to the term “adequate” then became the turning point on whether or not to hold a manufacturer liable for the injuries caused by his or her product.

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14 See, e.g., Victory Sparkler, supra note 8.
15 See, e.g., Peaslee-Gaulbert Co. v. McMath's Adm'r, 148 Ky. 265, 271 (1912) (holding that an inherently dangerous paint dryer was totally devoid of any warning label to apprise the user of danger). See also McCully v. Fuller Brush Co., 68 Wn.2d 675 (Wash. 1966) (holding that there was no warning to consumer of danger of mixing chemical with other products).
16 See, e.g., Richter v. Limax Int'l, Inc., 45 F3d 1464 (10th Cir. 1995) (finding that a trampoline that gave no warning of injury from repetitive use was defective).
17 Id.
when the product purportedly warned the consumer of its dangers. Some guidance may come from the Restatement of Torts, Third.

“[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.”\textsuperscript{18}

Yet, by utilizing the “reasonableness” standard, this definition alone arguably places the manufacturer in no better position to determine the adequacy of his or her warning as the definition of what is reasonable now comes into question. Again, courts have developed methods to determine what is and is not adequate.\textsuperscript{19}

B. Insufficient Warning

Unlike cases in which no warning at all was given by the manufacturer of the dangerous aspects of a product, cases that involve warning or information defects where the manufacturer did in fact give a warning in some form require the courts evaluate the warning or information given. In a 1931 federal negligence case, the 7th Circuit Court of Appeals found a manufacturer liable for failing to supply an adequate warning.\textsuperscript{20} The Court found that the product, while supplied with warning labels and instruction guidelines, lacked adequate warnings about the dangers of the products “misuse.”\textsuperscript{21} Manufacturers were forced to determine, by utilizing decisional law, how much information he or she had to provide the consumer and how detailed a warning there had to be in order to avoid potential civil liability. This determination did not exist

\textsuperscript{18} \textsc{Restatement (Third) of Torts, § 2(a) cmt i (1998).}
\textsuperscript{19} \textit{Supra} note 11.
\textsuperscript{20} Nat’l Pressure Cooker Co. v. Stroeter, 50 F.2d 642 (7th Cir. 1931).
\textsuperscript{21} \textit{Id.} at 644.
in a vacuum though. The manufacturer also had to account for its own economic viability in a potentially costly environment that required such notices.

Today, with the advent of the internet and other electronic media, manufacturers are better able to provide safety information about his or her products at a relatively lower cost than previous methods of notification. Manufacturers and distributors alike can disseminate information more readily and efficiently. This has resulted in today’s consumer being inundated, if not overwhelmed, by the sheer vastness of information on a given product. Oddly enough, the manufacturers once held liable for information/warning defects due to his or her de minimus nature are now being held liable for his or her de maximus character. The notion of adequacy seems to lie somewhere between these two extremes. The manufacturer that once was held liable for lack of information can find no shelter from the same liability in the over-dissemination of information. Adequacy is not so much determined on quantity, but rather on the reasonable consumer’s ability to digest and understand it.

IV. The 21st Century Consumer and His Expectations

At one end of the liability analysis some jurisdictions still adhere to the notion of the consumer expectation test.\(^{22}\) This allows for the fact finder in both a negligence and strict liability action to ask what reasonable expectations a reasonably prudent consumer anticipated with regards to the safety, or in this case adequacy, of the information provided about a given product. This “reasonable” analysis, traditionally equated with negligence law, survives in strict liability also.\(^ {23}\) Warnings serve as the first line of defense to consumers against injury from

\(^{22}\) See, e.g., Adams v. Synthes Spine Co., 298 F.3d 1114, 1119 (9th Cir. 2002) (holding that a physician, as a reasonable consumer, expected the warning on a spine device to make him aware of risk of fracture of the product).

\(^{23}\) See RESTATEMENT (THIRD) TORTS §2(a) (1998).
dangers associated with products.\textsuperscript{24} As stated previously, early cases involving warning or information defects dealt with the minimal information provided by the manufacturer. An early twentieth century consumer was near total dependency on the manufacturers’ ability to put out informative materials with respect to proper use and safety for a given product. Today, almost nine percent of the average American’s non-working, non-sleeping time is spent gathering information about the products that he or she intend to purchase.\textsuperscript{25} Manufacturers have noticed this upward trend and have adjusted accordingly with steep increases in media advertising and spending.\textsuperscript{26}

Today, the average consumer has nearly infinite methods with which to acquire information about a product.\textsuperscript{27} As such, the question of whether today’s consumer has the same expectations of a manufacturer when it pertains to the warnings or safety information of a product becomes very pertinent to the fact-finder in a products liability case. It can be said that today’s consumer relies less on paper print material accompanying a product than in pre-internet times.\textsuperscript{28} With this in mind, can a manufacturer abate liability by implementing an “electronic” based means of safety communication? And, more importantly, is this what today’s consumer would reasonably expect?

Today’s consumer has access to products and the information that accompanies them at the tips of his or her fingers. One survey found that two-thirds of Americans have purchased a

\textsuperscript{24} Id. at cmt. i.
\textsuperscript{25} See James H. Snider, Consumers in the Information Age, FUTURIST, Jan. 1993, at 15, 15.
\textsuperscript{26} As of 1993, spending attributed to media advertising was estimated to total $138.1 billion, with a projected increase of up to $146.8 billion in 1994. See Dick Marlowe, Advertising Industry Excels By Changing Shape to Fit the Medium, ORLANDO SENTINELE, Dec. 8, 1993, at C1.
\textsuperscript{28} Id. Another survey found that 71% of American adults use the internet. Pew Internet & American Life Project, February 2007 Tracking Survey (available at http://www.pewinternet.org/pdfs/PIAL%20Feb07%20Tracking%20FINAL%20Topline%20Excerpt.pdf).
American consumers increasingly purchase products via the internet. In 2006, internet retailers sold $130 billion (USD) worth of merchandise on the internet.\textsuperscript{30}

\textbf{A. The Making of a Society of Learned Intermediaries}

In regards to pharmaceuticals, the liability of the manufacturer for a warning defect is usually curbed by the learned intermediary doctrine. The learned intermediary doctrine holds that a manufacture of a drug or medical device need not direct its warnings or information for safe use to the ultimate consumer, but rather to the trained medical personnel that administers the drug or uses the device.\textsuperscript{31} In most jurisdictions that use the doctrine, consumers are at the mercy of his or her physician to apprise them of the dangers associated with a medical product and its safe uses. This doctrine has acted as a shield to the manufacturer against claims from the consumer, yet the warnings and information supplied to the doctor must still be adequate.

According to the FDA, there are approximately 200 online pharmacies.\textsuperscript{32} Consumers can enter in information from a prescription and purchase the requested medications without leaving his or her homes. A major concern is that some of the websites do not require a physical examination and only require the purchaser to complete an online questionnaire.\textsuperscript{33} In this instance, the only source of information that the consumer may possibly rely on is the information afforded to them by the manufacturer. Both the manufacturer and the FDA are aware that the average consumer is relying less on traditional means of acquiring his or her

\textsuperscript{29} See Horrigan, supra note 8.
\textsuperscript{31} See Larkin v. Pfizer, Inc., 153 S.W.3d 758, 760 (Ky. 2004) (holding that Learned intermediary rule relieved a manufacturer of its duty to warn a patient of risks associated with a prescription drug where the manufacturer provided an adequate warning to the prescribing physician.
\textsuperscript{33} Id.
medication information. As such, there has been a sharp increase in “direct to consumer” (DTC) advertising and the FDA closely regulates such advertisements.34

B. The Risk and The Utility

Not entirely separate from the consumer expectation is the oft recited risk-utility approach to products liability. The risk-utility test weighs the inherent risks of a product with the utility that that product has in society.35 The risk-utility test, though usually applied to design defect cases, can be applied to warning defects in products liability.

In contrast to manufacturing defects, design defects and defects based on inadequate instructions or warnings are predicated on a different concept of responsibility. In the first place, such defects cannot be determined by reference to the manufacturers’ own design or marketing standards because those standards are the very ones that plaintiffs attack as unreasonable. Some sort of independent assessment of advantages and disadvantages, to which some attach the label "risk-utility balancing," is necessary.36

In a “warning” situation, as opposed to a “design” case, we would presumably have to weigh the risk associated with giving a certain type of warning against the utility that that warning would have to the reasonable consumer. In order for a court to apply this analysis, he or she would need to determine the quality of the warnings necessary while not necessarily basing that determination on a consumer expectation analysis. Paul D. Reingold, a noted trial attorney has noted that “[e]ven though the risk-utility test has evolved as the leading judicial method to evaluate complex product design issues, it would not function as an effective tool in the warning area because it provides no guidelines for manufacturers on how to increase the quality of

36 RESTATEMENT (THIRD) TORTS § 2C cmt. a (1998).
warnings." The Restatement of Torts, Third, has contemplated the utilization of a risk-utility approach in warning defects cases.

[T]he various trade-offs need to be considered in determining whether accident costs are more fairly and efficiently borne by accident victims, on the one hand, or, on the other hand, by consumers generally through the mechanism of higher product prices attributable to liability costs imposed by courts on product sellers.

Yet, the risk associated with the cause, over-warning, seems easier alleviated by decreasing the amount of warnings given. The utility of manufacturers’ warnings is not synonymous with the reasons for over-warnings. In other words, it is not the warnings that must be considered in the utility analysis, but rather the degree that must be addressed.

V. Information Overload

In today’s modern age of information, there is an argument to be made that the vastness of obtainable material has produced a glut which the average person could hardly begin to digest. In fact, the phenomena known as information overload can have such drastic effects as to render the proffered information about a given subject nugatory. Information overload is that state in which such a large amount of information is given as to render an individual unable to make an informed decision or stay reasonably informed about the subject matter.

In product liability cases, this overproduction of information can leave a manufacturer exposed to civil liability if it is found that the safety information or warnings about the

38 Restatement (Third) of Torts § 2C cmt. a (1998).
39 Id.
40 See BARBARA STONE, DEALING WITH AN INFORMATION GLUT, Personal Webpage, available at http://www2.sims.berkeley.edu/courses/is206f97/GroupE/infoglut.html#Information%20Glut.
41 See DAVID OWEN ET AL., PRODUCTS LIABILITY AND SAFETY 309 (5th ed. 2007).
manufacturers’ product are strewn among a surplus of warnings and safety information.\textsuperscript{43} In an often cited case, \textit{Dunn v. Lederle Laboratories, Inc.}, the Michigan Court of Appeals argued that

\begin{quote}
\textbf{“[w]arnings, in order to be effective, must be selective. He or she must call the consumer's attention to a danger that has a real probability of occurring and whose impact will be significant. One must warn with discrimination since the consumer is being asked to discriminate and to react accordingly. The story of the boy who cried wolf is an analogy worth contemplating when considering the imposition of a warning in a case of rather marginal risk.”\textsuperscript{44}}
\end{quote}

Relating back to the notions of adequacy and consumer expectations, supplying an excess of information about a given product in regard to warnings and the like quite possibly leaves the consumer in a state of bewilderment as to what is relevant and what is not. A manufacturer that places at every turn what indeed may be vital and valuable information about the safety measures of a product may so concentrate the available information that the consumer is at a loss to \textit{take it all in}. Modern case law supports the contention that the manufacturer can incur liability for the injuries caused by the information where the defect lies in its inadequacy due to information overload.\textsuperscript{45}

In the area of drug manufacturing, drug warnings and product information have become increasingly available to the consumer without the intermediary of a trained physician. Dr. A. Mark Fendrick, has observed:

\begin{quote}
"As the health-care consumerism movement encourages more data on cost and quality, it is increasingly important to consider the source of information…This study confirms that direct-to-consumer advertising of drugs is here to stay and will
\end{quote}

\begin{footnotes}
\textsuperscript{45}\textit{Dunn, supra} note 37.
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contribute to the information overload confronted by the typical consumer. Patients, clinicians and payers should work together to implement measures to maximize the positive aspect of DTC advertising -- increased use of drugs in those most likely to benefit -- while minimizing the safety concerns and unnecessary expense of inappropriate use.\footnote{YourTotalHealth, \textit{Direct-to-Consumer Drug Ads Booming Despite Criticisms} (Aug. 16, 2007), available at http://yourtotalhealth.ivillage.com/directtoconsumer-drug-ads-booming-despite-criticisms.html (quoting A. Mark Fendrick, M.D., Professor, Internal Medicine, University of Michigan School of Medicine, Prepared Statement (Aug. 15, 2007)).}

Recently, many in academia have begun to question the apprehension that revolves around information overload in the general population. The main concern is that when the consumer makes decisions about what product to buy, he or she may have difficulty either in “acquiring all relevant information or in taking available information into account because of task complexity.” \footnote{Lars Noah, \textit{Medicine’s Epistemology: Mapping the Haphazard Diffusion of Knowledge in the Biomedical Community}, 44 \textit{ARIZ. L. REV.} 373, 403-04 (2002).} This brings us to the concept of “satisficing”. Simply stated, satisficing “means that he or she settle for less than optimal choices because of the excessive costs involved in acquiring and assimilating all of the available information.”\footnote{Id.} "People have a great deal of difficulty making proper decisions under conditions of uncertainty,...in part because he or she lack the cognitive capacity for combining the large amounts of information often involved in making decisions."\footnote{Baruch Fischhoff, \textit{Cognitive Liabilities and Product Liability}, 1 J. PROD. LIAB. 207, 207-08 (1977)} The obvious danger is that the consumer who is basing his or her decision with regard to which warnings to heed and which to ignore, may in fact choose incorrectly. Traditionally, the manufacturer was in the best position to warn a consumer of dangers of a product. Today, be it from a sense of hurry or a sense of anxiety when faced with tremendous amounts of information, many consumers feel that he or she must discern what information to take in and what to leave out.
VI. The Judicial Influence

“[C]ourts have held that where a plaintiff fails to read and/or follow clear instructions and where the accident would not have happened had the plaintiff followed the instructions, the plaintiff’s strict products liability and negligence claims will fail for lack of the requisite proximate cause.” 50 With this in mind, it is easy to see the influence that judicial decision-making can have in the arena of warning labels issued by manufacturers. Indeed, manufacturers can be presumed to use judicial decisional law as a guideline for avoiding future liability with regards to warnings that he or she place on his or her products. With so much influence, it becomes increasingly important to determine what direction the courts are pushing warning labels.

Early defective warnings decisions concentrated on the liability of manufacturers who failed to warn all together or somehow failed to meet some form of de minimus standards. 51 The obvious result was to effectuate an increase in the amount of warning that a manufacturer or even a seller placed on a product. This phenomenon arguably came into existence due to the consumer’s demand for more informative warnings, through litigation, and the court’s acquiescence. Yet, some courts see the potentiality of “information overload” in the line of decisional law. In Kelso v. Bayer Corp., a federal court refused to entertain the notion that a nasal spray product contained a defective warning. 52 The claimant in that case had used the nasal spray for a protracted period exceeding the indicated three days. 53 The product had a warning label that informed the consumer “do not use for more than three days”. 54 The claimant

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51 See e.g., Victory Sparkler, supra note 8.
52 Kelso v. Bayer Corp., 398 F.3d 640 (7th Cir. 2005).
53 Id. at 641.
54 Id.
suffered permanent nasal tissue damage that required multiple surgeries. The court determined that the clear and unambiguous language of the warning provided was adequate. The argument that the warning should have been even more inclusive or that the associated dangers in instances of misuse themselves should be all inclusive was rejected by the court. Cases such as this that seem to rein in the glut of information that the manufacturers feel he or she must disseminate may be an attempt of the judiciary to correct a situation that itself perpetuated.

In Spillane v. Georgia Pacific Corp., a federal court in Pennsylvania held that a warning on a particular roofing compound that read: “CAUTION, SLIPPERY WHEN WET” was inadequate to warn roofers on the slippery characteristics of the compound, thus denying defendant’s motion for summary judgment. The court reasoned that the warning on its face seemed to be clear and unambiguous, but in reality it failed to apprise the reasonable roofer of how slick the compound really was. The manufacturer who was faced with a litigious consumer and an ever ready court to find that the given warning was no warning at all seemingly had no choice but to overcompensate. As stated earlier, a product that is placed into the stream of commerce with an over abundance of instructions and/or warnings can be just as dangerous to the consumer as those products that have little or no warnings at all.

“A duty to warn actually consists of two duties: [o]ne is to give adequate instructions for the safe use, and the other is to give a warning as to dangers…” Instructions are useful devices that inform a consumer how to avoid dangers associated with a given product. Courts have

55 Id.
56 Id. at 642.
58 Spillane, supra note 50 at 10.
59 Kelso, supra note 45.
decided in this area, as he or she have in warning defects, that manufacturers must meet some minimum threshold to protect the consumer. In *Duford v. Sears, Roebuck & Co.*, a court found that a chimney may have been defective in the instructions for assembly. The plaintiff had installed a chimney pipe incorrectly and, as a result, caused his home to catch fire. The plaintiff sued the manufacturer on a products liability theory alleging that the instructions were inadequate in that the instructions failed to inform him of the proper method of installation. The chimney pipe in question, equipped with a label that purportedly would apprise the consumer of which side to fit where, was found by the trial court to be adequate and a directed verdict was issued in favor of the manufacturer. On appeal, the Circuit Court found that even though the pipe was accompanied by instructions, the instructions could be found defective by a reasonable jury. The court held that the small size of the instructions indicating which direction the pipe was to fit could constitute a defect. Quite possibly, a manufacturer would now have to inundate the consumer with directions instead of the traditional “this side up”.

We see that the courts have contributed to the phenomenon of an increase in the informational glut associated with products. Manufacturers have responded to previous findings of liability by increasing the amount of information/warnings that it disseminates. The desired effect is that products will not be deemed inadequate for a warning that is “below” the threshold of adequacy. Yet, with the increase of warnings and the like, are the products any safer? If manufacturers are protecting themselves from liability with increases in information placed with a product, does this translate into a safer product for the consumer? As stated earlier, product

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62 *Id.* at 408.
63 *Id.*
64 *Id.* at 409.
65 *Id.* at 412.
66 *Id.*
warnings and information can pose just as much of a danger when he or she are too many as when he or she are too few.\textsuperscript{67}

The next question is if we come to the realization that a product that is accompanied with too much warning or information can be a danger, are the courts doing anything to curtail that danger? As of today I have found no case in which a manufacturer was found liable for providing an inadequate warning because there was too much information given to the consumer. Yet, the courts have, on numerous occasions, described the potential dangers in requiring manufacturers to provide copious quantities of information that would protect against any danger, foreseeable or otherwise.\textsuperscript{68} We can see an example of this in \textit{Scott vs. Black and Decker, Inc.} A construction worker was using a Black and Decker drill near a natural gas ventilation pipe.\textsuperscript{69} The sparks that were emitted from the drill caused an explosion when he or she came into contact with the natural gas.\textsuperscript{70} The plaintiff argued that the manufacturers’ warning constituted an inadequate warning regarding the risk of explosion if used near combustible gases such as natural gas.\textsuperscript{71} Yet, the drill came with a label that instructed the user to refer to the owner's manual for safe operation of the drill.\textsuperscript{72} The owner’s manual had over 20 different warnings.\textsuperscript{73} One of the warnings specifically warned users that the drill should not be used near any gas that was combustible.\textsuperscript{74} Though the plaintiff argued that the warnings should have been placed on the drill itself and not in the owner’s manual, the court found that the idea “[t]o require

\textsuperscript{67} \textit{Kelso, supra} note 45.
\textsuperscript{68} \textit{Aetna Casualty, supra} at note 36.
\textsuperscript{69} \textit{Scott vs. Black & Decker, Inc.}, 717 F.2d 251, 254 (5th Cir. 1983).
\textsuperscript{70} \textit{Id.} at 253.
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.} at 252.
\textsuperscript{73} \textit{Id.} at 253.
\textsuperscript{74} \textit{Id.}
that one explicit warning be placed on the saw would be to require all twenty” was unreasonable.  

A. Information Overload: The Scapegoat

Though the case law is barren of situations in which the court has held a manufacturer liable for an over abundance of warnings and/or information, the courts’ reference to the idea that a product may be defective in regards to its over-warnings have given the manufacturer a plausible argument in traditional warning defect cases. In Stewart v. GMC, the Sixth Circuit heard an argument that the minimal warning placed on a product was an attempt to avoid “information overload”. In that case, a plaintiff argued that an air bag in the vehicle manufactured by the defendant had an inadequate warning of the potential physical injuries that one may incur even in the event that the air bag functions properly. The plaintiff claimed that the location and the language of the warning of the air bag hazards were defective. The court found that the National Highway Transportation Safety Agency regulated the warning labels for air bags. Yet, the interesting point that comes from the case is the reason proffered by the NHTSA regarding the warning itself. The NHTSA specifically limited the warning to its minimal threshold of adequacy as to not cause the consumer “information overload”.

This rationale by the NHTSA has potentially opened the door for manufacturers to argue information overload as a defense to warning defect allegations. In earlier cases where it was found that the manufacturer did not supply ample warning or instruction to the consumer, the

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75 Id. at 254.  
76 Stewart v. GMC, 102 Fed. Appx. 961 (6th Cir. 2004).  
77 Id. at 963.  
78 Id. at 965.  
79 Id.  
80 Id. (commenting on an earlier decision in Fisher v. Ford Motor Co., 224 F.3d 570, 574 (6th Cir. 2000)).
manufacturer had little protection from liability. Today, the manufacturer can make the case that any more warning than what was given would have caused the consumer to become overwhelmed, thus making the warning ineffective. It has been said that “[b]y imposing penalties for failure to warn but never for over-warning, it creates incentives for "information overload," which decreases the deterrence utility of all warnings.”\textsuperscript{81} Therefore, the judicial influence on manufacturer warnings have created an over abundance of warnings that have the potential to render the warnings themselves useless; and at the same time have created an argument for the manufacturer who maintains scarcely any warnings or information that it is the objective of avoiding consumer information overload that rationalizes the minimal amount of warnings.

\textbf{Conclusion}

Warning and information defects in product liability cases have changed over the span of the last century. Our jurisprudence has seen a shift from minimal information offered with regards to the safety of a product to a vast sea of unending media prescribing the safety measures of the very same product. Yet, both of these scenarios end in liability incurred by the manufacturer and/or distributor. The law cares very little about the quantum of information put out by the manufacturer and more about the adequacy of that production.

Unfortunately, the American judicial system has played a large role, not necessarily in making product warnings and “safe use” information safer for consumers, but in shifting the inadequacy of those warnings from one end of the scale to the other. By continuously finding manufacturers liable for the warnings that he or she place on his or her products due to minimal information in the warning, courts have encouraged the manufacturer to place copious and

superfluous warnings on his or her products. As stated earlier, the empty “lip service” paid to the notion that excessive warnings may indeed render a product defective has not been brought to pass by any decisional law. In fact, the only hint of information overload playing any major part in products liability litigation comes from would be defendants who recite the empty statements of the courts and point to information overload as a rationale for the *de minimus* state of his or her product warnings.

With the advent of online media and split second availability of a product’s informative material, manufacturers may be duped into the false sense of security that comes with the dissemination of a product’s safety information. This information overload phenomena should place the manufacturer in the position that the law has intended since the inception of products liability, both negligent and strict, and in any era, both past and present; that the manufacturer place into the stream of commerce products that are equipped to adequately apprise the consumer of the safety features and foreseeable failures of his or her product. Yet, as the courts have yet to do little more than pay lip service to problem of information overload, we can expect only a continued barrage of warning labels from manufacturers that the rest of us will ignore.