

1 **13-1417. Warning or directions; means of communication.**

2 To satisfy the duty [to warn] [to give directions for use], [a warning] [directions for use]
3 must be communicated by a means which can reasonably be expected to reach [persons using the
4 product] [and] [persons in the vicinity during the use of the product].

5 USE NOTES

6 This instruction is to be given where the adequacy of the means chosen by a supplier to
7 communicate a warning or directions for use is a submissible jury issue. Where inadequacy of the
8 manner of communication of a warning is not a theory of plaintiff's case or is not supported by
9 competent evidence, this instruction shall not be given. Specifically, this instruction shall not be
10 given if the plaintiff was a bystander under circumstances which would have made it impossible
11 for the supplier to communicate a warning by any reasonable means.

12 The appropriate bracketed language should be selected depending upon whether plaintiff
13 claims failure to warn of a risk of injury or failure to give directions for use of a product. In a few
14 cases both may apply, and the instruction will have to be modified to include both warnings and
15 directions. The proper bracketed material should be selected depending upon whether the injured
16 party was a user or a bystander.

17 **Committee commentary.** — More often than not, a product is used by someone other than its
18 purchaser. An issue frequently litigated in products liability cases is the sufficiency of the means
19 selected by the supplier for communicating a warning or directions for use. Restatement (Second)
20 of Torts 388, comment n (1965). Adequacy of the means selected depends upon the circumstances
21 of the case, and no definitive guidelines can be given. Many factors are to be considered: (1) the
22 purpose for which the product is supplied; (2) the seriousness and likelihood of harm if the user of
23 the product does not receive the warning; (3) the feasibility of communicating the warning directly

1 to the user instead of relying upon a third person to pass the warning on; (4) the nature and extent
2 of the burden and expense imposed upon the supplier by requiring that a warning be communicated
3 directly to the user and (5) the supplier's knowledge of the reliability of the person to whom the
4 warning is in fact given. *Cf. First Nat'l Bank v. Nor-Am ~~Agri.~~ Agric. Prods., Inc.*, 1975-NMCA-
5 052, 88 N.M. 74, 537 P.2d 682[~~(Ct. App. 1975)~~].

6 There are circumstances in which a supplier's communication of a warning to his immediate
7 vendee is sufficient as a matter of law or, as a matter of law, direct warning to the plaintiff is not
8 possible or feasible. In such cases, the issue framed by this instruction must be taken from the jury.
9 *Hines v. St. Joseph's Hosp.*, 1974-NMCA-110, 86 N.M. 763, 765, 527 P.2d 1075 [~~(Ct. App.)~~], cert.
10 denied, 87 N.M. 111, 529 P.2d 1232 (1974); *Perfetti v. McGhan Med.*[~~Medical~~], 1983-NMCA-
11 032, 99 N.M. 645, 662 P.2d 646[~~(Ct. App. 1983)~~]; *Jones v. ~~Minnesota~~ Minn. Mining & Mfg. Co.*,
12 1983-NMCA-106, 100 N.M. 268, 669 P.2d 744[~~(Ct. App. 1983)~~]. Where a supplier has neither
13 the right nor the means of controlling the format of final distribution and packaging of the product,
14 ~~he~~the supplier is entitled to rely upon ~~his~~the supplier's immediate vendee to communicate the
15 warning; and ~~he~~the supplier satisfies ~~his~~the supplier's duty by warning the vendee. *See First*
16 *Nat'l Bank v. Nor-Am Agri. Agric. Prods., Inc.*, 1975-NMCA-052, ¶¶ 63-68[, 88 N.M. 74, 85, 537
17 P.2d 682, 693 ~~(Ct. App. 1975)~~]. The most frequently cited examples of this limitation upon the
18 duty to warn are prescription drugs and products sold to others for further processing and
19 packaging. *Hill v. Wilmington Chem. Corp.*, 279 Minn. 336, 156 N.W.2d 898 (1968). However,
20 there are circumstances involving the distribution of drugs, where evidence exists of sufficient
21 retention of control by the supplier to justify submitting to the factfinder the adequacy of the means
22 of communication which the supplier utilized. *Davis v. Wyeth Labs., Inc.*, 399 F.2d 121 (9th Cir.
23 1968).

- 1 [Revised[~~effective November 1, 1991~~]; as amended by Supreme Court Order No. S-1-RCR-2025-
- 2 00126.]