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CAN SOCIAL MEDIA HELP SATISFY THE MANUFACTURER'S PRE- AND POST-SALE DUTIES?

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By Kenneth Ross

Manufacturers and product sellers are continually criticized by plaintiffs' lawyers and plaintiffs' experts on every aspect of making and selling products and dealing with post-sale issues. The lawyers argue that the company could have done better and should have done better and, that if they had done so, this accident would have been prevented.

Social media and the internet in general have given manufacturers a much greater ability to communicate with their consumers on a regular and frequent basis. Using these tools, manufacturers can learn more about the way in which their products are being used and misused by consumers, as well as identify the incidence of post-sale issues that can cause, or have caused, injury, damage or loss.

Manufacturers must be aware of and consider the technological advancements that allow them to do a better job of either anticipating safety issues before sale, or identifying safety issues after sale so that they can deal adequately with them.

INTERNET AND SOCIAL MEDIA

Let's examine some of the forms of electronic media that are available to manufacturers, and some of the benefits of each as they pertain to pre-sale and post-sale duties.

Websites

Websites offer virtually unlimited space to display text, pictures and symbols and offer a much more flexible form of media than printed materials. Information in multiple languages is easier to provide and can be made available at a click of a mouse. There are no printing-related expenses (at least on the part of the manufacturer) and, unlike printed material, this information does not weather or decay.

The information on websites can also be updated regularly, and users cannot misplace the instructional material on the website as long as they have internet access.

Warnings and instructions in websites can contain hyperlinks to other material on the internet or within the website itself. Websites can also directly link consumers to customer service personnel to answer questions or provide additional references, or to online forums.

Websites can also contain links to online videos that can provide instructional information in a much more understandable way. In addition, the website can contain online training programs that document the person who took the course and the score they achieved in any testing that is part of the program.

When it comes to post-sale duties, websites are typically used to post recall notices, allow consumers to register for an announced recall or to ask questions about the recall process. In addition, they can be effective in investigating post-sale safety issues and trying to determine patterns which indicate that field action may be necessary.

Email and Text Messages

Many consumers now use generic email addresses such as Gmail.com or Outlook.com. As a result, they never have to change their email address when they move and change employers or email providers. Therefore, once they have registered a generic email address with a manufacturer, it almost never becomes out of date. This enables a manufacturer or product seller to more easily contact consumers regarding a safety issue or recall related to a product that they have purchased.

These emails can also provide links to more comprehensive information on safety-related issues posted on the company's website.

Text messaging utilizes a consumer's phone number. Similar to generic email addresses, a consumer's cell phone number typically remains unchanged for long periods of time, even when a consumer moves to a new location. Again, this trait greatly facilitates a manufacturer's or reseller's ability to stay in touch with their customers. And, text messaging has an immediacy that email doesn't have since it usually arrives on a consumer's smart phone or other device with some kind of sound alert. That makes text messaging a highly efficient method to communicate with consumers about a potential product risk or a product recall.

Social Media

Social media today takes many forms, including blogs, business networks, enterprise social networks, forums, microblogs, products/services review, social bookmarking, social networks, video sharing, and virtual worlds. And it includes sites such as Twitter, Pinterest, Facebook, LinkedIn, Tumblr, Instagram and Snapchat, as well as dozens of others.

The potential for interaction between people and companies using social media tools is almost unlimited. This interaction allows companies to send information to consumers, consumers to send information to companies, and consumers to send information to other consumers. And it allows companies and consumers to easily communicate with any government agency in the world that deals with safety.

This level of interaction can be extremely useful as a pre-sale tool as companies try to determine who uses their products, how they use them, how they misuse them, and the problems they are having with them. It is also a useful post-sale tool that can get potential safety issues in front of consumers quickly, so that they can be addressed in a timely manner.

LEGAL BASIS OF LIABILITY

In practice, manufacturers are sued under the theories of negligence and strict liability for selling a defective product that caused harm. The argument in most states is that, before a sale takes place, the manufacturer could have done a better job of identifying and quantifying risk and taken the steps

necessary to reduce risk, and that the failure to do so represents a form of negligence. Under strict liability law, the argument is that the manufacturer's product was defective and unreasonably dangerous when it was placed on the market, and that this defect resulted in injury.

After a product has been sold, the theory of negligence is based on the argument that a manufacturer or product seller could have done a better job of identifying a potential safety risk with their product and undertaken some corrective action, such as a retrofit or recall, as well as effectively communicating information about the potential risk to an actual consumer rather than just the public in general.

Although I can't confirm it, I suspect that there are a lot of product liability lawsuits in which the plaintiff argues, in part, that the manufacturer was negligent or strictly liable because of their failure to adequately employ social media to obtain or transmit information before or after a sale.

In one recent case in the U.S. District Court for the Northern District of California, the plaintiffs argued that the defendant retailer was negligent in not employing its loyalty program to communicate a product recall message to consumers. The case was dismissed because none of the plaintiffs had actually purchased the recalled product and therefore did not have the standing to sue. However, there have been other cases in which a manufacturer has been criticized for not making more effective use of available social media to publicize a recall or retrofit program.

Despite the lack of reported cases or jury verdicts based on the use or misuse of social media before or after the sale of a product, it could become a powerful argument as consumers increasingly become tied into various social media outlets and access websites, email and social media through smartphones, smartwatches and tablets, as well as computers at home.

USE OF SOCIAL MEDIA

Whether or not there is case law creating liability for failing to employ social media, manufacturers and others in the supply chain should consider improving

their use of this technology as part of their overall effort to provide consumers with reasonably safe products that minimize the risk of harm, to more effectively discover and address post-sale issues, and to support a legal defense in cases where an unsafe product caused an accident or injury.

Let's examine some techniques for incorporating social media into a product safety program. As you are designing a product, you need to consider reasonably foreseeable use and misuse. One way to help determine this is to view videos on the internet that show how your products, as well as those of your competitors, are being used in the real world.

The question is whether these videos represent examples of reasonably foreseeable misuse? And, does the failure by a company to comment on or object to the misuse depicted in these videos inadvertently signal the company's approval of such misuse, along with the attendant risk? Although online videos that document your product being misused don't necessarily make a risk "foreseeable" as a legal matter, they are still worth viewing since they may support your efforts to prevent such misuse in the future, or to minimize the potential risk from such misuse.

The manufacturers should consider posting a comment wherever such videos are posted online, noting that the depicted use represents unacceptable use, and poses a danger to consumers.

Once the product's design, warnings and instructions are complete, you should consider whether there would be a benefit in creating a video to be posted online that describes safe use, or that illustrates safe and acceptable use versus unsafe and unacceptable use. Visual communications are more interesting and more likely to be viewed and, in many cases, more likely to be understood. Showing a jury a video posted to your website that shows safe and unsafe use could go a long way to convince them that you took every reasonable step to warn consumers about how not to use your product.

If you do place such information on your website, you should also place a label on the product that refers a consumer to the printed instructions as well as the visual information available on your website.

After the sale, other various social media outlets can be useful. This is where you can attempt to communicate with actual consumers after they purchase your product. But, how do you get them to sign up to receive such messages? This is a conundrum for all manufacturers. Most messages sent by manufacturers post-sale are for marketing and sales generation purposes. How do you convince the consumer that you may need to contact them about an important safety issue such as a recall, and that doing so electronically is the quickest and most effective way to do so? After all, the more you talk about potential risks, the more they may wonder about the product's safety.

Another post-sale element is that consumers can communicate with you about product problems, safety-related or not. Manufacturers need to encourage such communications and need to monitor sites where consumers try to communicate, either directly or indirectly, with them. For example, if your product is sold through Amazon, check the Amazon comments on your product as well as those posted for similar products from competitors. Amazon has millions of comments on its website; therefore, it is more likely that consumers will simply post a comment on Amazon than make an effort to contact a manufacturer directly.

Finally, I previously mentioned the ability to connect with your customers directly, either via email, text, or otherwise, and to send them a recall or retrofit notice or some other safety-related message. Obtaining and recording individual consumer's mailing addresses and sending letters when required represents a huge investment of time and money. Using electronic media is fast and cost-effective, not to mention more likely to grab the recipient's attention.

To illustrate, ten years ago, a client of mine sent out a recall notice to three million consumers by simply pressing a button. The company sold computers and therefore virtually all consumers registered their products online and utilized email. If their computer was included in the recall, consumers could register for the recall online and the company could send a replacement part to their mailing address. While this still was a costly recall, it was less costly and more efficient because of the company's ability to communicate more easily with consumers. The cost of

mailing three million recall notices would have been enormous. And these days, I believe that people look more quickly at text messages and emails than they do at envelopes which always look like junk mail.

Unfortunately, most membership retail stores send out recall letters on products they have sold because they don't have email addresses for all of the consumers that have purchased their products. At least they have contact information for all of the customers of a product that is being recalled. But, without email addresses, a letter must be sent at enormous cost. This is not a problem for online retailers who, by definition, have the email address for every customer.

Manufacturers should work with retailers on how electronic contact information can best be obtained for the vast majority of customers. With the significant increase in online shipping, this has become less of a problem. For in-store sales, retailers that are not membership stores need to do a better job of tracking sales by specific customers, especially in cases where the credit card used in the store is one branded by that retailer.

CONCLUSION

Manufacturers and retailers should be encouraged to think hard about how they can use social media and the internet to enhance a product's safety and increase their product's defensibility in case there is an accident and lawsuit. In five to 10 years, internet access and smartphone usage will likely approach 100 percent of consumers 10 years and older. Keeping up with technological advances will be instrumental in improving consumer safety in a cost-effective manner. ◖Ν