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Strictly Speaking

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Effect of OSHA and Worker's Compensation Laws on Product Liability Counseling and Defense

by Kenneth Ross

One of the most intractable problems facing lawyers when defending product liability cases and providing preventive advice to manufacturers is where the product is used in a workplace environment. The practical limitations of the employer not being a party to the lawsuit as a result of worker's compensation exclusivity and having to deal with issues of OSHA compliance or noncompliance can make these cases very difficult to defend. And, when giving preventive advice, it can be challenging and sometimes impossible to achieve both the manufacturer's and employer's objectives.

This article will briefly discuss the interrelationship between product liability and workplace safety laws and some of the conundrums that counselors face in dealing with these issues.

Basic Law

Worker's compensation laws, which were created in the early 1900s, were based on absolute liability against the employer without the need to prove negligence. In exchange for this absolute liability, the laws provided a fairly low financial recovery for injuries or death from workplace incidents. However, the law also provided generally that employers could not be sued either directly by the injured party or by the manufacturer as a third party defendant. This exclusivity was meant to protect the employer from paying more than the amount they would owe under the applicable worker's compensation laws.

And, the manufacturer, in most jurisdictions, could not even blame the employer for the accident by showing that they were negligent and violated OSHA regulations. This put manufacturers at a huge disadvantage in that they couldn't blame the main culprit and had to, instead, try to blame the employee who many times was coerced into using the product unsafely.

Manufacturers, of course, did not have the protection of worker's compensation laws. And, in fact, one of the reasons for the significant rise in product liability litigation was that worker's compensation insurance carriers were bringing lawsuits in the name of the employee to recover the money they paid that employee for worker's compensation benefits. Therefore, the insurance industry prompted some of the large increases in product liability litigation that occurred many decades ago.

In 1980, after Ronald Reagan was elected President and the Republicans gained control of the U.S. Senate, the business community thought about encouraging the passage of proposed legislation that would, in part, try to reform the relationship between worker's compensation and product liability. Some of these laws would have allowed a manufacturer or a plaintiff to sue the employer in some situations or to allow a jury to assess a percentage of liability against the employer which would reduce the manufacturer's liability.

Interestingly, the business community decided not to pursue this federal legislation, in part, because they were employers as well as manufacturers and were concerned that they might suffer significantly more liability if they, as employers, could be sued for full damages for injuries involving their employees rather than being protected under the limited recoveries allowed under worker's compensation laws.

In addition to worker's compensation laws, laws and regulations promulgated by OSHA also had an effect on product liability despite the fact that OSHA cannot make a manufacturer design a product that is compliant with OSHA. And, when considering the interrelationship of OSHA and worker's compensation, OSHA laws say:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment. 29 U.S. Code §653(b)(4).

This division of liability between product liability, OSHA and worker's compensation creates an awkward interplay between employers and manufacturers. This interplay is exacerbated by the worker's compensation exclusivity rules and the belief of some employers that if they do not comply with OSHA, they may receive a fairly small fine for that noncompliance. Further, some employers may believe that if an employee were injured, they or their worker's compensation carrier could be reimbursed by bringing a subrogation lawsuit

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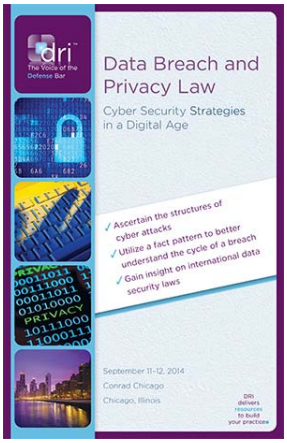

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against that manufacturer. These considerations may not encourage some employers to act in the best interest of workplace safety.

For example, many years ago, as an in-house lawyer, I met with a customer of my client and told them that our products were now going to be shipped with new warning labels. The customer, to my amazement, told us that they would refuse products that had these warning labels. The reason: the company did not want its employees to understand how dangerous the equipment was that they were working on because they would ask for higher pay. Or they might even refuse to work on this equipment.

I explained that these warning labels were required by product liability laws and that if they refuse such labels, depending on the state and its evidentiary rules, we would try to blame them when defending ourselves. For most states, this threat was hollow in that most courts will not allow testimony blaming the employer as a defense in a product liability case. So I had little leverage to convince them to take the warning labels. And my client wasn't going to refuse to sell the product to a customer who refused to take the labels.

Another example of the difficulty that manufacturers face in connection with workplace products is when the employee removes safety devices that were attached to the product when it left the control of the manufacturer. If the safety guards are removed and an employee is injured, whose fault is it? The manufacturer or the employer? Did the fact that the guards could be removed violate OSHA requirements and is there anything that the manufacturer could have done to prevent their removal?

I have dealt with this question many times as I gave preventive advice and it is always difficult to know exactly what to do. The customer/employer might be removing those guards for valid operational reasons. For example, the guards might make it difficult to operate or maintain the equipment efficiently. In that case, the removal arguably becomes reasonably foreseeable and difficult to use as a defense even if we can put into evidence conduct by the employer or employee. And the sales department is not real keen on coming down hard on its customers for modifying the equipment even if it makes that equipment hazardous and the manufacturer subject to potential liability.

The law is not consistent as to whether evidence of OSHA standards and compliance or noncompliance is admissible in a product liability case. Some states have allowed OSHA regulations to be admitted to argue that the product was not defective. However, most states do not allow evidence of OSHA standards to be admitted for such purpose.

On the other hand, manufacturers can frequently use compliance with OSHA regulations to help show that the product is not defective and that the product is not unreasonably dangerous. However, some courts hold that evidence of OSHA safety standards is inadmissible because such evidence could be confusing and misleading.

For those familiar with OSHA standards, some of them are vague and broad and subject to interpretation by an individual OSHA inspector. In addition, it is certainly possible to comply with OSHA standards and still have a defective product since such standards could be considered minimum requirements. Therefore, its relevance in a particular case may be very fact specific and subject to the whim of a judge to decide whether or not to allow that evidence.

In addition, violations of OSHA standards can occur without a product being defective or unreasonably dangerous. Therefore, the fact that an employer or even an employer's worker's compensation carrier believes that the product violates OSHA does not mean that the manufacturer needs to do anything about it. Since the manufacturer cannot generally be fined for violating OSHA, they may have no liability to OSHA if they did nothing.

However, if the carrier or the employer demands that the manufacturer make changes in the product, especially if they have received an OSHA violation, this has to be handled very carefully by the manufacturer to be sure that doing so is not an admission that its other products in the field are unsafe and have to be upgraded or retrofitted.

For example, let's say that a worker's compensation or premises liability insurance carrier or OSHA believes that a particular machine violates OSHA. In that case, either the employer is fined by OSHA or the carrier requests that the employer make changes in the safety of the product. The employer comes to the manufacturer and demands that the manufacturer make these changes. If the manufacturer makes the changes, have they created a duty to upgrade or modify all the equipment they have sold in the United States or elsewhere? Would the failure to do so be considered negligence in the event of an accident? This is a real potential problem and one that needs be dealt with very carefully.

Satisfying the unfounded desires of an OSHA inspector or a carrier's loss control person can result in significant post-sale problems for similar products made by the manufacturer in the event of future accidents.

Preventive Advice

Given the above, what should a good preventive counselor do when dealing with these kinds of problems? Below are a few thoughts:

1. Manufacturers should consider OSHA requirements when designing and manufacturing their product. However, they should not fully rely on these requirements as a defense in the event of a future accident. They should consider exceeding the requirements in order to provide a reasonably safe product. For example, providing a Safety Data Sheet ("SDS") that

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complies with the OSHA Hazard Communication Standard may not be considered an adequate warning and liability certainly would not be preempted by this regulation.

2. Manufacturers should encourage the employer to follow OSHA requirements and create good documentation to prove this compliance. They should provide enough information to the employer on what OSHA requires in the equipment's design and during operation and maintenance but not be so specific as to safety procedures on the job so as to allow the employer to believe that they can rely on the manufacturer's advice to be sure they comply.
3. Manufacturers should carefully deal with requests for safety improvements or upgrades as a result of OSHA or insurance carrier activities and try to convince OSHA or the carrier that the product was reasonably safe when it was sold and that any safety problem was created by the employer or employee. The requests and the manufacturer's response must be carefully documented in case there is a future accident.
4. If the manufacturer becomes aware of an employee removing safety devices or otherwise using the machine unsafely, it should communicate in writing to the employer pointing out the problem and requesting that the safety hazard be rectified. In an extreme situation, the manufacturer can submit an anonymous report to OSHA suggesting that they investigate a possible safety violation at the employer's site or even tell the worker's compensation carrier.
5. Manufacturers should not warrant in its contracts that their machinery complies with OSHA. Given the vague nature of most OSHA requirements, they could be responsible for a warranty claim for a violation when none really exists. In addition, the manufacturer's marketing literature should not promote the product as OSHA compliant for the same reason and also because OSHA does not want anyone using alleged compliance with OSHA requirements for marketing the sale of products.

Conclusion

Manufacturers cannot ignore OSHA requirements when designing and manufacturing products.However, manufacturers should not assume duties that they do not have.They should try to help their customer protect themselves and their employees as well as protect themselves as manufacturers in the event of an accident.Given the division of legal liability between manufacturers and employers, this can be very difficult to do.

Analyzing potential liability for both themselves and the employer can be helpful in protecting everyone involved.Preventing accidents is the only sure way to prevent liability.The last thing you want to do is have an accident and be in conflict with an employer who is also your customer as this can not only result in liability for the manufacturer, but also impair your relationship with this customer and past and future customers.

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