A Lawyer's Role in Product Liability Prevention

By Kenneth Ross

As in many areas of the law, manufacturers come to lawyers after they have problems. In the product liability area, manufacturers think *Why do I need a lawyer to help me design a product?* However, manufacturers do not raise this question once they are sued. In that case, the manufacturer must hire a lawyer to resolve the case.

Before the accident or the filing of a lawsuit, a lawyer has a significant but underused role in prevention. The goal of any prevention program is twofold: First, minimize the potential of an incident from occurring; second, provide a good defense if the incident occurs. Because much of preventive counseling is planning for litigation, it is most appropriate that lawyers are involved before the problem arises.

Also, a lawyer's skill in gathering and analyzing facts can be very useful when assisting manufacturers in deciding on a final product design and in analyzing postsale problems.

What Role Should Corporate and Outside Counsel Play?

Despite the great increase in the number of in-house counsel, many of them are generalists and have little familiarity with product liability, product safety, or liability prevention techniques. In addition, of those in-house counsel who are involved in product liability, most of them are involved in litigation management.

Because litigation is ongoing and requires management, assisting with preventive counseling generally only occurs in the lawyer's spare time. The result may be a gap in the services provided in this area, from a lawyer's lack of either expertise or time.

The solution to this gap is the use of both inside and outside counsel in the prevention area. Inside counsel has an in-depth knowledge of the product seller, its organization, and its product, while experienced outside prevention counsel has a greater knowledge of the law, the effect of litigation on the design and product development process, and how other companies have dealt with similar problems. Also, outside counsel is able to devote more time to prevention than is inside counsel, who must remain available to respond to the demands of clients. Last, outside counsel is more likely able to maintain attorney-client privilege over their conversations and writings and not have their advice considered business related.

While most in-house counsel expect to offer preventive advice, many outside counsel are reluctant to get involved, especially in proactive aspects, because it is too speculative. We learn in law school how to analyze the law after an event has taken place. We have an event or a transaction, a place, a time, and known parties. The proactive part of preventive lawyering usually means that the event has not taken place and, therefore, we have an unknown time, place, and parties. How do we practice law with the lack of facts?

In addition, clients who seek such help are interested in complying with the law and preventing liability in all states and countries where their products are sold and for as long as they will be in customer's hands.

Predicting future legal problems involves legal risk assessment and is a key ingredient to the successful practice of preventive law and to being helpful to clients. Yet how do you assess the probability of something happening that has never happened before? You cannot just assume the worst-case scenario. If you did, your client would have to do many things that probably are not necessary.

Lawyers are well-known for proposing unrealistic solutions to potential problems. Manufacturers should find realistic outside counsel who can assist in the development of achievable solutions that are appropriate for the level of risk.

However, outside counsel are many times the wrong people to give preventive advice. First, because they see the worst in everything, their advice tends to be very conservative. They may be reluctant to advise manufacturers to undertake safety analyses and document the results on the fear that this document may be harmful in the event of litigation.

Some aspects of product liability prevention can be harmful if the manufacturer made the wrong decision and documented its decision. A preventive counselor weighs the pluses and minuses of engaging in proactive analysis, and undertaking any of these prevention techniques can be somewhat risky.

Creating an effective team of in-house and experienced outside preventive counsel can help make the process well thought out and successful.

Elements of Product Liability Prevention

Basically, product liability prevention techniques inject into the design, manufacturing, and marketing process safety procedures to be used by company personnel who are familiar with product liability and the ways to minimize or reduce the potential for such liability. The idea is to anticipate future challenges to the product and future safety problems and resolve them in the beginning, or at least provide a defense in the case that they are challenged.

Types of Defects and Other Theories of Liability

The easiest type of defect to prove is that which occurs in the manufacturing process. Manufacturing defects or construction defects usually result when the product is different in some way from what the manufacturer intended.

If the resultant product that caused the injury or damage is different from all other products manufactured at or around the same time, and this difference caused the injury or damage, a

manufacturing defect will most likely be presumed. If the resultant product or product line does not meet the manufacturer's specifications, and this difference caused the injury or damage, an award will most likely be made.

Design defects can occur when the product is dangerous to an extent beyond the contemplation of the ordinary consumer who purchases the product. This consumer expectations test has recently been joined with a risk-benefit balancing test that provides the trier of fact with guidelines to determine whether the design is safe enough.

For this balancing test, on the one side is the risk from the product, which considers the likelihood of harm and the seriousness of that harm if it occurs. On the other side is the burden on the manufacturer to design a product that would have prevented those harms. If the risks outweigh the burden on the manufacturer, the product can be deemed defective and unreasonably dangerous. In other words, a product may be defective if it contains easily preventable risks.

Another area of potential liability involves the duty to warn and instruct. Failure to warn about hazards that remain in the product can result in liability if that failure caused injury, damage, or loss.

A related area is postsale duty to warn. Liability can arise after the sale of the product when the manufacturer or product supplier discovers a hazard and fails to exercise reasonable care in warning the product's users of the safety problem. In addition, the manufacturer may need to recall or retrofit its product, and failure to do so can result in liability to those who have been injured or damaged.

The last significant area of liability is in the contractual and marketing areas. Manufacturers can be held liable for statements in their advertising and catalogs, and for breaching warranties or contracts.

Prevention Techniques

The first step in a prevention program is to perform a legal and safety risk assessment. Identifying and analyzing problems that have occurred and could occur will help focus the program toward solving real problems, not make-believe problems that may never occur.

To prevent manufacturing defects, manufacturers need to ensure that their product has been manufactured and assembled according to their design and manufacturing specifications. They also need to ensure that each product sold is the same as all other similar products.

In addition, manufacturers must perform various quality control inspections and tests throughout the production process and create documents to show that the product was adequately tested before its sale and that it met specifications. Also, it is necessary to inspect the product before it is packaged.

Lawyers are particularly helpful in the documentation area. Anticipating what kinds of documents are necessary to prove to a plaintiff or a jury that the manufacturer complied with the specifications is useful. Lawyers can help create these compliance documents and advise the manufacturer on how long to retain them and in what form.

For example, manufacturers need to retain documents describing the quality control and inspection procedures in place at any given time. Many cases have been lost because a manufacturer has been unable to prove that the product, when it left its control, was in compliance with all manufacturing and design specifications.

While engineers may have a hard time understanding how a lawyer can help design a product, because prevention involves planning for litigation, lawyers can be involved in anticipating how a jury will react to a certain design. Therefore, during the preparation of design specifications, lawyers can help the designers consider the kinds of factors that a jury can use in determining whether a product has been defectively designed.

Lawyers should make sure that manufacturers engage in a rigorous, well-documented design process that injects legal and safety considerations into selection of the final design. In effect, the manufacturer should engage in a risk-benefit balancing test, similar to what the jury may do at trial. In this fashion, the manufacturer will be prepared to present to the jury evidence of its concern for safety and evidence that matches the factors that the jury will consider in making its decision.

Some of the factors that the jury will consider are the technological and practical feasibility of a more safely designed product, the effect of a proposed alternative design on the usefulness of the product, comparative costs of the alternative design, and the additional harms that might result from the alternative design.

Lawyers can help manufacturers quantify these various factors and help them make a decision as to which final design should be selected. Lawyers can also help the manufacturer document the process and create evidence of good faith and concern about product safety that might be used to minimize liability and to defeat allegations of punitive damages.

Manufacturers need to establish warning label guidelines to allow them to create what might be considered legally adequate warnings.

During the design process, all hazards need to be identified and designed out if possible. For those hazards that remain, there might be a duty to warn. Lawsuits brought on the basis of failure-to-warn allegations are prevalent today. Manufacturers need to establish warning label guidelines to allow them to create what might be considered legally adequate warnings.

Lawyers can be helpful in analyzing which of the many standards and systems are appropriate and how to comply with those programs. In addition, lawyers can be helpful in analyzing the risks that remain in the product and in effectively communicating what is legally required in that label. Also, as in the other areas, lawyers can be helpful in documenting the analysis that went into

creating various warning labels attached to the product.

An important consideration in this area is whether to offer new and improved warning labels to current customers. If safety improvements are made and not offered to prior customers, plaintiffs may argue that the improvement is evidence that the earlier product was defective and that the manufacturer should have offered the safety improvement to prior customers.

Lawyers must be involved in deciding whether the manufacturer should offer this type of safety improvement to prior customers and, if so, how this offer should take place. This is a critical area and one that can create significant problems if not handled properly.

Lawyers need to be involved in the entire marketing process to ensure that potential liability is not created or increased.

Adequate instructions need to be interrelated with labels attached to a particular product. There are many ways to improve the effectiveness of safety communications, and such techniques should be considered and incorporated where appropriate.

Lawyers can also recommend how far manufacturers should go to communicate safety information to product users. Of course, lawyers are helpful in the writing and organizing of such safety information.

Another aspect of the marketing process involves advertisements, sales literature, and other marketing procedures. Lawyers need to be involved in the entire marketing process to ensure that potential liability is not created or increased.

In addition, contracts for sale and purchase should be reviewed to determine whether they provide the protection that the manufacturer desires in the market. Most important, provisions pertaining to consequential damages, implied warranties, remedies for breach of contract and breach of warranty, and limitations of liability should be reviewed. Lawyers also need to advise manufacturers on how to be sure that their contractual terms and conditions govern any particular purchase or sale.

In many jurisdictions, product suppliers have a duty to warn product users of hazards discovered in their products after sale. Therefore, product suppliers must establish an appropriate feedback system to obtain information from individuals such as customers, distributors, service personnel, or sales personnel and to ensure that postsale problems are discovered.

Once a problem is discovered, it must be analyzed and an appropriate response or remedial action taken. Because postsale problems may involve reports to governmental agencies and the defense of claims or lawsuits, lawyers must be involved in analyzing this information and in providing a legal opinion on an appropriate remedial action. The basis for the decision must be documented in the event that there is a need to substantiate it later.

This is an important decision in that punitive damages can result from a postsale program that a jury deems inadequate. More recently, fines have been significantly increased for failure to take appropriate actions such as filing timely reports with relevant government agencies. Lawyers must be involved in the decision as to what is legally required in this area.

Manufacturers should establish a management program that confirms their concern about the design, manufacture, and sale of a safe product. This is helpful in encouraging employees to be serious about prevention and provides evidence that might be presented to a jury proving this concern. Techniques and personnel in this area involve a product safety policy, a product safety committee, a product safety audit, and a product safety manager.

Lawyers need to be involved in determining the appropriateness and content of a written product safety policy. If a product safety committee is created, a lawyer should be represented on that group. Certainly, lawyers should be involved in establishing product safety guidelines for personnel as well as in establishing and performing product safety audits. Both the lawyers and management must determine the appropriate level of involvement of lawyers in all these processes.

Because prevention is, in part, planning for litigation, anticipating how a jury will react to a safety management organization is a very important consideration before accidents occur. The documents created to implement this management program are critical in the event that they are necessary in the defense of litigation.

Conclusion

Product liability prevention is underused in general, and especially the use of lawyers. First, manufacturers believe that engineers, not lawyers, should design products. Second, many manufacturers believe that their insurance company will protect them from any product liability problems. Third, manufacturers do not normally use lawyers before product liability problems occur. Fourth, many lawyers are uncomfortable with providing the type of necessary advice in the product liability prevention area because they are unfamiliar with what is necessary.

Experienced prevention lawyers can provide much help to manufacturers in these areas. Lawyers involved in this area should become familiar with prevention techniques and with the effect of prevention on litigation to help clients anticipate how future juries and claimants will perceive current actions.

Manufacturers must understand that product liability is not inevitable. While not all problems can be prevented, the implementation of comprehensive product liability prevention programs can reduce the chance of accidents or problems and create a more defensible product and company should problems occur. ■

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