



## Information Management for Product Safety and Product Liability

BY KENNETH ROSS

Information is key to any design engineer. And with new technology, it is even more important today since it is easier to create, keep, find, receive, transfer and destroy information. All of this information is important to show why your product turned out the way it did and why it is reasonably safe. It can also show that the manufacturer did not do enough to consider safety and product liability during the development of the product or can confirm that the product is unsafe and could have been made safer.

While employees come and go and change jobs within an organization, the design plans, engineering drawings, production procedures, safety memoranda, and

marketing strategies that they have created represent a historical record of the safety that a manufacturer included in the product. These records can significantly help or hurt a manufacturer or product seller, especially in the event of product liability litigation.

Unfortunately, no one knows whether this information will help or hurt until a lawsuit is brought and the manufacturer has to respond to discovery and produce information asked for by the plaintiffs. In addition, there may be information that could be helpful, but which was written in a way that could possibly benefit the plaintiffs. And, perhaps even more frustrating, there may also be records reflecting safety activities that were created but then destroyed before litigation arose.

The pervasiveness of electronic records has changed how manufacturers create, store, and destroy all types of records, electronic

and otherwise. In addition, the growth in popularity of the Internet and social networking media has created more opportunities for the dissemination of potentially harmful information to the government, and to potential plaintiffs and their attorneys. Retailers and standards groups have started demanding that manufacturers employ state-of-the-art safety processes and provide evidence of that compliance. And product liability and product safety laws have proliferated around the world, making it necessary for a manufacturer to keep track of and record everything that is going on with its products and all of its components inside and outside the U.S.

Bottom line, a manufacturer must create records, electronic or hard copy, to confirm its efforts to make safe products and to possibly fix unsafe products that have been sold. In doing so, a manufacturer should create records that will accurately and completely describe these efforts and

think about how it might need to tell its story to a jury, customers, plaintiffs' attorneys, or the government.

**Importance of Information for Product Safety and Liability**

During the design, manufacturing, and marketing phases, a manufacturer's goal is to make a product that reasonably balances the risk of injury from use of the product against the product's functionality, utility, durability, price and other attributes. If accidents do occur and product liability claims and litigation result, a manufacturer will hopefully have evidence that it undertook sufficient measures to make a product that is reasonably safe. Thus, a manufacturer should have created and retained information that evidences its interest in safety and regulatory compliance, and which describes the procedures that were used to evaluate a product's safety.

However, many lawyers feel that records that identify and quantify risk and describe design, production, and marketing processes can only hurt manufacturers and rarely help their client's case. So, they may discourage manufacturers from creating or retaining such information, especially those that deal with safety. Invariably, those lawyers view such information as potentially harmful and difficult to explain. Those lawyers do have a point, especially when engineers challenge and question safety during a product's development phase.

Despite that, each manufacturer must decide how to balance the risk of creating and retaining information that hopefully will help but could, in the wrong hands, be misconstrued, taken out of context, and used against the manufacturer in a product liability lawsuit. The goal is to create truthful and complete information concerning product safety and product liability

that will hopefully be helpful. There is no choice – documentation will more likely help than hurt a manufacturer.

**Information That Can Hurt**

Instances where manufacturers have suffered substantial losses because of "bad documents" are well-known. For example, juries sometimes react angrily toward manufacturers that consider the value of lives during design. What juries apparently don't like is that the records do more than consider cost and safety and instead associate product cost with the value of human life and the value of settling cases for presumed future incidents.

The lesson that can be drawn from such cases is not that manufacturers should avoid creating or retaining such information concerning design and manufacturing processes and procedures. Rather, the lesson is that they need to train employees on how to write truthfully and defensively, as will be discussed in a subsequent article, and how to respond to someone who raises safety concerns. Manufacturers should do this not only for litigation purposes, but also to clearly and accurately record the rationale for their design and manufacturing decisions.

**A Lack of Information Can Also Hurt**

In addition to having information that cause problems, a lack of information can also hurt the defense of a case. For example, even if an engineer can remember doing safety testing, a jury may not believe that a manufacturer performed the tests if the manufacturer did not create or keep records about those tests. In addition, in many cases, there may be no one available who remembers the reasoning behind certain decisions. Testimony about tests that an engineer remembers conducting years ago may not sway a jury if there are no records

supporting the testimony.

In addition, one of the most significant defenses against a product liability claim is that there were no prior, similar accidents involving a product or earlier versions of that product. Without good records supporting the lack of similar accidents, an opponent can defeat efforts to present this defense. Therefore, getting rid of records describing prior accidents or the lack of accidents can be harmful to the defense.

**Information That Can Help**

In addition to a systematic record of prior accidents or lack of accidents, records evidencing a concern for safety and "trying to do the right thing" will go a long way toward at least defusing any thoughts by plaintiffs of seeking punitive damages. Records proving compliance with mandatory or voluntary safety standards are particularly important. And post-sale, records evidencing efforts to investigate accidents and incidents, and to consider appropriate post-sale activities such as a product safety repair program or a recall can be crucial in defending the adequacy of the corrective program, especially when it can be proven that the plaintiff received a recall notice before the accident.

The reality is that if your company doesn't have any safety programs in place, has safety programs but failed to create good records, or has thrown away the records that were created, the plaintiff may believe that they can convince a jury that the manufacturer didn't care about safety. On the other hand, if your company has safety programs and has the records to prove it, the plaintiff will likely obtain them and then will have to decide if that evidence could make the manufacturer look responsible. As an attorney, I'd rather defend the adequacy of a comprehensive and documented safety program any day.

## Post-Sale Records

The potential liability of a manufacturer or product seller for negligence after sale of a product is well-known. In addition, current U.S. regulatory and common law requirements apply to information that was obtained or should reasonably have been obtained that identify an unsafe condition. The potential liability for violations of regulatory laws is growing as more foreign governments implement consumer product safety legislation. These laws contain a duty to report to the government if certain threshold safety events occur. This enhanced focus makes it even more important for a manufacturer to gather, analyze, and document safety information received from anywhere in the world.

Anything less than a “reasonable” effort to obtain and analyze post-sale information, wherever in the world it comes from, may be considered negligent by a U.S. jury in determining whether a manufacturer should have known about the problem before an accident occurred or by a government agency in deciding whether the manufacturer should have reported the safety issue to the government.

The growth of the Internet and social networking media have made it even easier to find post-sale information and easier for manufacturers to receive this information from those who want to communicate with them about it. Many of these records and reports will be unverified, overstated, inaccurate, and incomplete. Consequently, manufacturers must decide when to follow up and investigate such reports to determine the facts and to minimize avoidable problems that these reports could cause.

Being aware of all information—good and bad, true and untrue, complete and incomplete—can be

helpful if a company can identify the truthful information, adequately evaluate and document it, and take any warranted corrective actions.

## Conclusion

In the history of product liability litigation, information has proven both helpful and harmful to plaintiffs and defendants. Even though some records may ultimately turn out to be harmful, a manufacturer must proactively establish a record management system that ensures compliance with legal requirements and results in the creation of a story of the development and life of a product. The system should also include procedures, education and training that will minimize the creation of misleading and unnecessarily harmful

information. These subjects will be covered in part 2 of this article. ●



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