Is there anything optional about safety?

By Kenneth Ross*

As manufacturers design new products and update the design of old products, many times they sell and offer for sale different designs with differing levels of safety and quality. There are many reasons for the differences including multi-functional uses of the product, different price points (e.g. good, better, and best), requests by customers, adoption of safety improvements, and inconsistent regulations and standards between the U.S. and foreign countries.

This article will explore the legal and practical risks in selling products with these differences and what manufacturers can do to minimize the risk.

Law of Design Defects

The *Restatement Third, Torts: Products Liability (1998) (*hereinafter "Restatement"), in §2, comment *a*, said that "[t]he emphasis is on creating incentives for manufacturers to achieve optimal levels of safety in designing and marketing products." However, comment *a* went on to say that "[s]ociety does not benefit from products that are excessively safe****any more than it benefits from products that are too risky. Society benefits most when the right, or optimal, amount of product safety is achieved."

The Restatement then sets forth tests that apply to defects in design and warnings and instructions. The focus is on a "reasonable alternative design" or "reasonable alternative warnings and instructions" that were available at the time of sale or distribution at a reasonable cost and their omission rendered the product not reasonably safe. Restatement, §2, comment *d.*

Since the focus is on a "reasonable alternative," the fact that the manufacturer has or is contemplating selling its products with different levels of safety raises huge questions for the manufacturer to ponder.

What is the right or optimal level of safety? Can I sell safer products within the U.S.? Can I sell safer products in foreign countries because foreign standards require it and sell a less safe product in the U.S.? Can I offer safety devices as options, either in the U.S. or in foreign countries? These are all difficult questions to answer. And, as with many legal questions, there is no clear answer in most situations.

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Selling products with different levels of safety

In general, many manufacturers or entire industries sell products with different levels of safety. The automotive industry is the first one that comes to mind.

Small automobiles with the minimum number of required air bags are not as safe as bigger, stronger cars that have many more air bags. I don't think anyone disputes this. In fact, the safer cars are sometimes marketed as being safer. In light of the general law, isn't this risky?

If these small cars comply with all applicable governmental safety regulations, then the manufacturer can argue that the product is reasonably safe. The fact that this manufacturer or other manufacturers can and do make safer products does not diminish the argument.

Despite compliance with government regulations, a plaintiff can still argue that mere compliance (or in the case of other products, industry standards) did not result in a reasonably safe product and that it should have been made safer. And proof of the feasibility of the safer design is based on the fact that this manufacturer or another manufacturer did sell a safer product in the U.S. or elsewhere.

Any manufacturer needs to anticipate this argument and be prepared to prove that its product was reasonably safe even though there were safer products being offered in the marketplace. Some manufacturers don't want to run the risk of having to defend the adequacy of the less safe product and they, instead, sell the safest version of their product in every market where they do business. This can be difficult if customers do not like the additional safety features or are unwilling or unable to pay for it.

Optional safety

Taking this one step further, is it ever acceptable for a manufacturer to have a "reasonable alternative design" and offer it to the customer as an option? In a sense, the scenario outlined above involving selling different levels of safety is analogous to an option. With safety options, the consumer is confronted with products that have different safety features and gets to pick which one it wants, needs, and can afford.

But in the relevant cases in this area, the facts are a little different. The manufacturer offers a safety device as an option and puts the burden on the customer to decide whether or not to purchase it. There are many well known examples of such products:

- A motorcycle with highway bars
- Vehicles with back-up alarms
- Vehicles with rollover or falling object protective structures
- Safety devices that protect against crane contact with power lines

And the issue could even arise when the consumer walks into the retailer and can purchase safety accessories made by other manufacturers. This includes a bell and light for a bicycle, goggles for a power tool, and a variety of helmets for motorcycles, bicycles, ATVs, skis, etc.

Who has the responsibility to provide a reasonably safe product – the accessory or product manufacturer, retailer, consumer, or user? When should the option be mandatory? And, how far do these entities have to go to inform the purchaser about the appropriateness of purchasing the option or feature?

The cases arise when the customer is offered, either directly or indirectly, the optional safety device and rejects it. An accident occurs and the argument is that the injury would have been prevented if the safety device had been sold with the product and its omission rendered the product not reasonably safe.

The case law has been fairly fact specific, but some of the decisions do offer a basis for analyzing the facts after an incident occurs and before sale when making a decision on whether to make a device mandatory or optional.

According to the case law, the main rationale to allow a safety feature to be optional is that it only provides safety in certain uses or environments. And so some purchasers should be able to decide if the option is necessary for their intended use. Making it optional also prevents the purchaser from paying for safety that it doesn't need and to allow the purchaser to use the product in more situations than it can be used with an option that is mandatory.

Another way for the manufacturer to deal with the situation is to make the safety device mandatory, but removable. The problem with doing this arises when purchasers/users are likely to remove it and never replace it. Then the injured party could argue that there was a defective design and that the guard should have been permanent or at least difficult to remove. This becomes "reasonably foreseeable misuse."

<u>Case law</u>

Unfortunately, the law is "muddled and quite sparse" according to Professor David Owen in his products liability hornbook. There are cases on both sides – safety devices can be optional and safety devices should be mandatory – but they provide some useful insights.

An early case on this subject is *Bexiga v. Havir Mfg. Corp.*, 290 A.2d 281 (N.J. 1972) involving a punch press. The New Jersey Supreme Court ruled that the manufacturer was in the best position to install available safety devices on industrial machinery and that these decisions should not be left to purchasers. Therefore, this case has stood for the proposition that manufacturers may not delegate design decisions relating to safety to purchasers.

The key issue in this case is that the court believed that the safety device, a two-button on/off switch, was necessary for safety and was feasible and did not make the machine unusable for its intended function. While this switch was not offered as an option, this case started the doctrine that safety is mandatory and you cannot delegate responsibility to provide a safe product to the purchaser. However the court would allow a safety device to be optional where it made "the machine unusable for its intended purpose." *Id.* A number of courts followed this doctrine.

In 1978, two cases came down with a different conclusion. See *Biss v.Tenneco, Inc.*, 409 N.Y.S.2d 874 (App. Div.1978) (garbage truck without a back-up alarm) and *Verge v. Ford Motor Co.*, 581 F.2d 384 (3d Cir.1978) (V.I. law) (rollover protective structure for a loader). Both cases hinged on the expertise of the purchaser in deciding whether the optional devices should have been purchased for their uses.

Despite the different conclusions, *Biss*, *Verge* and *Bexiga* all held that a safety device can be optional on "multi-functional products if there is no standard safety feature that will allow each function to operate unimpeded." Owen, *Products Liability 2d Edition*, page 564. Over the years, courts enunciated additional factors such as whether the purchaser could install the safety device, whether the hazard was obvious, whether the cost of the safety feature was high, and whether other manufacturers provided the feature as an option. *Id.*

In 1999, the New York Court of Appeals decided *Scarangella v. Thomas Built Buses*, 717 N.E. 2d 679. The court held that a product that does not incorporate available safety devices is not defective as a matter of law if:

- Buyer is thoroughly knowledgeable about the product and its use
- Buyer is aware of the availability of the safety device
- In some normal uses, the product is not unreasonably dangerous without the safety device
- Buyer can balance the benefits and risks of not having the safety device in its intended use

In effect, it is the buyer, not the manufacturer, who is performing the risk assessment that should be performed when designing a product. See *"Risk Assessment and Product Liability,"* (with Bruce Main), For the Defense, Defense Research Institute, Inc., April 2001.

The New York Court of Appeals addressed this issue again recently and considered the *Scarangella* factors in *Passante v. Agway Consumer Products, Inc.*, 2009 NY Slip Op. 03588 (May 5, 2009). *Passante* dealt with an optional device that attached a tractor-trailer to a loading dock and provided a warning indicating when it was safe to enter the trailer and when the truck could be safely driven away. The purchaser refused to buy this option and plaintiff was hurt.

The Court of Appeals ruled 4-3 that the *Scarangella* factors had not been met and that summary judgment was not appropriate. The dissenting judges said that the majority was basically overruling *Scarangella* without specifically saying so and that this would have economic consequences for manufacturers selling into New York who now no longer have a roadmap for how to deal with optional safety devices before sale.

For more discussion on the litigation and warnings issues, see Mike Hoenig's excellent analysis in the May 11, 2009 New York Law Journal entitled *"Optional Safety Equipment and the Savvy Purchaser."*

Practical considerations

Since one tenet of product liability prevention is to try and prevent the accident in the first place, let's see if we can come up with some good practices when dealing with additional safety devices and whether they should be mandatory or optional.

As discussed above, the manufacturer needs to employ all necessary safety analytical procedures before deciding on the original design and warnings and instructions. The base product, without any potentially optional equipment or safer design, must be reasonably safe for its intended use. If there is additional safety equipment that would be operable in most foreseeable uses, then it is probably better to provide it as mandatory and provide a way to remove it or move it out of the way during some aspect of operation. And then, be sure to clearly describe when it should be used in the manual.

When considering making safety devices optional, the manufacturer must consider, in part, industry standards and what other manufacturers of similar products do. Therefore, if all other manufacturers sell a certain safety feature as standard, it would be very hard to justify offering it as an option. And if all offer it as an option, the manufacturer should consider how these other manufacturers are providing information to the purchaser on when it is appropriate to purchase and use the option.

While this may not be the last word on this issue – other manufacturers may not be doing an adequate job of describing the option and when it is to be used – it should be a good start for the analysis. Another good rule of thumb is to do better than your competitor in providing information about the option and when it is to be used. In that way, if the competitor is not doing enough, at least you can say that you tried to do better.

Ultimately, if the device is going to be optional, the manufacturer wants to be able to point to the factors in *Scarangella* and other cases in establishing a basis for arguing that the purchaser is sophisticated, knowledgeable about the option and the uses of the product, and is able to make a decision as to whether it should be purchased. To better prove that the typical purchaser is sufficiently sophisticated, it might be a good idea to do a random survey of some purchasers to see if they understand the information you have provided and that they have made the "correct" decision on whether to purchase the option and when it should be used.

Conclusion

Optional safety devices can be tricky. Purchasers don't want to spend money on a device that they don't need in most of the situations in which they will use the product. And you don't want to make your product cost more than your competitor's product by making the option mandatory out of an overly conservative calculation of potential risk and liability.

Given the sparseness of the case law, it is imperative that you consider the leading cases and what guidance they provide and look to how options are handled in the standards, if at all, and within your industry.