

PLP: Even More Important in Tough Economic Times

By Kenneth Ross*

Introduction

Tough economic times are hard on everyone. All too often, companies try to cut costs by eliminating or reducing personnel who are involved in product liability prevention (PLP) activities such as product safety, regulatory compliance, and quality. These companies do not want to compromise safety; they simply believe that they can save money short-term without long-term cost.

In many cases, this is not a good idea. Cutting corners in the short-term can cause long-term problems. In addition, engaging in PLP activities can result in significant short-term and long-term cost savings. These include:

- fewer accidents, claims, and lawsuits;
- reduced warranty costs;
- lower likelihood of recalls;
- reduced chance of punitive damage awards;
- lower settlement values;
- more defense verdicts;
- lower insurance premiums; and
- increased sales resulting from an enhanced reputation for safety and quality.

Any of these results can offset the cost of a PLP program. PLP successes over many years should make it an easy decision to establish and maintain some PLP efforts even in hard times. The only question is how much.

This article will discuss how to staff and implement PLP efforts at a reasonable cost and how using experienced PLP counsel can significantly contribute to the program's benefits.

PLP Personnel

There is a saying that product safety is everyone's job. From that saying, some people infer that a PLP manager or director is unnecessary. That can be true. However, depending on a company's size and the complexity of its legal and regulatory issues, hiring trained PLP personnel can be very helpful.

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PLP does not have to be a full-time job. For example, the safety function can be vested in personnel who otherwise investigate accidents and help defend cases. In addition to these personnel, those employees who design, test, and market products can man the front lines of PLP activities.

Training all relevant personnel in product liability, regulatory law, and product safety can help integrate PLP activities into everyone's job. Even if not directly involved in PLP, all employees can benefit from a basic knowledge of product liability and regulatory law and the PLP practices and policies of their employer and other companies so they can recognize when to raise issues and consult with others.

Widespread training also makes it less necessary to devote large numbers of inside people to PLP and encourages other personnel to take ownership and responsibility for PLP matters within their organizations. In this model, inside PLP personnel basically function as a resource to answer questions or obtain answers from outside resources.

For a company with a greater risk or desire for a more comprehensive audit function and safety management system, see "*Establishing an Effective Product Safety Management Program*," For the Defense, January 2003.

A Lawyer's Role in PLP

Lawyers play a significant role in helping manufacturers and other product sellers defend product liability claims and lawsuits. However, they can also play a crucial role in helping to identify and minimize such incidents from occurring in the first place. The key is to involve the lawyer at the beginning of the product development process, before mistakes become part of the product or its warnings and instructions.

As in many areas of the law, manufacturers consult with lawyers only after problems arise. This is because many manufacturers don't understand that valuable input can be provided by lawyers during product development.

The reason for "preventive counseling" is threefold: (1) to minimize the potential for product-related incidents; (2) to comply with the common law and government regulations; and (3) to provide a good defense if an incident or non-compliance occurs.

Because "preventive counseling" can minimize product-related incidents, enhance legal compliance, and improve defensibility, it is imperative to involve lawyers throughout the product development process before the product is sold and problems arise.

Unfortunately, a great deal of preventive counseling is not being provided. Despite the growing number of in-house lawyers, many have little

familiarity with product liability, product safety, or liability prevention techniques used by other companies. In addition, even among in-house litigators knowledgeable about product liability, most must devote full-time to litigation management and have no time or aptitude for preventive counseling. The result is a large gap in providing in-house counseling services.

The solution might be to use both inside and outside lawyers in the prevention area. The inside lawyer can provide in-depth knowledge of the product seller, its organization, and its product. The outside PLP lawyer can supply a more specialized knowledge of the law and its effect on the design and product development process and how to advise on PLP matters. Also, the outside lawyer can devote more time to prevention than the inside lawyer who must remain available to respond to the demands of clients.

Experienced PLP lawyers should be able to give advice quickly and without much, if any, legal research. If the facts are gathered, organized and presented to a PLP lawyer, advice can usually be given in minutes, not hours. An experienced lawyer, after understanding the facts and the issues, should be able to respond without much research or discussion.

PLP Techniques

Basically, PLP injects into the design, manufacturing and marketing process a set of safety procedures to minimize the potential for product liability. The goal is to anticipate and resolve future safety problems during the developmental process or at least to provide a defense against future challenges.

- **Getting Started**

The first step in a prevention program could be to perform a legal and safety risk assessment. Identifying and analyzing problems that have occurred or could reasonably occur will help focus the program on real problems, not make-believe problems that may never occur or result in any significant potential liability.

How do you predict the probability of something happening in the future, especially if it hasn't happened before? It is hard to do and requires judgment. But at a minimum, a PLP lawyer can research claims and litigation involving similar products or against similar manufacturers to identify and quantify likely risks.

Documenting the risk assessment process is critical because it represents the manufacturer's thinking as to potential problems. Not all risks have to be minimized or prevented. Where to draw the line is a legal, technical, business, and ethical question. What is most important is that the PLP lawyer help the manufacturer identify, gather, evaluate and synthesize all

of the relevant information, make a rational decision, and properly document it.

- Manufacturing Defects

To prevent manufacturing defects, manufacturers need to insure that their products have been manufactured and assembled according to all design and manufacturing specifications. Each product sold must be the same as all other similar products sold. Various quality control inspections and tests must be performed throughout the production process. Lastly, proper documentation of design and quality control testing must be kept.

Decisions about where to buy products or product components, U.S. or offshore, are also important. If offshore, quality procedures need to be implemented or modified for potential quality problems that have occurred with products from certain foreign countries.

Anticipating what kinds of documents will be necessary to prove to a plaintiff or a jury that the product complied with all specifications is critical. For consumer products, moreover, new conformity compliance documents may need to be created by someone in the chain of production. Lawyers can help to create these compliance documents and advise the manufacturer on how long and in what form they should be retained.

- Design Defects

Design defects are the main theory of liability in most product liability cases. If a product's design is deemed defective by a jury, then all products with that design are potentially defective. Therefore, incorporating PLP techniques into the design process is critical.

One of the main ways companies design reasonably safe products is to engage in a full-blown risk assessment. See "*Risk Assessment and Product Liability*," For the Defense, April 2001. This process can be expensive in terms of time spent by personnel and the cost of outside facilitators or risk assessment personnel. To help keep the cost down, there is software and checklists that can be used by company engineers to do what will probably be a sufficient risk assessment.

But a formal risk assessment may not be necessary for several reasons. First, a risk assessment done for one product could be used for other products within the same family of products or similarly designed products.

Second, reliance on industry standards and product designs of responsible competitors may be enough to create a reasonably safe design. Groups that create industry standards in effect engage in a form of risk assessment in deciding on the final standards. And even though the standards may be

considered minimum requirements, compliance with relevant standards may be adequate in many instances.

Third, analysis of accidents and lawsuits involving similar products made by other companies can be useful in helping to quantify future risk and the likelihood of accidents and adverse verdicts with certain designs. Lawyers can certainly help obtain and analyze this information.

No matter what type of risk assessment is selected, PLP lawyers can help the manufacturer confirm that it considered all of the necessary factors, documented the process properly, and created the evidence of good faith and product safety consciousness necessary to minimize liability and defend against punitive damage claims.

- Warnings, Instructions and Marketing

During the design process, all significant hazards need to be identified and designed out, if possible. For those hazards which remain, a duty to warn might arise. Lawsuits alleging failure-to-warn are prevalent today. Manufacturers need to establish warning label guidelines that will allow for the creation of legally adequate warnings.

Lawyers can be helpful in identifying and analyzing how to comply with the many warning standards. In addition, lawyers can be helpful in analyzing what risks remain in the product and how to communicate risks effectively on a warning label. Also, as with the other areas, lawyers can be helpful in documenting the analysis underlying the warning labels attached to the product.

Redoing warnings and instructions can be time consuming. However, it can reap many benefits. For example, it can force the manufacturer to rethink how the product should be used and maintained, resulting in design changes that make the product more user-friendly and safer. That is good for the manufacturer, seller, and user. And once done correctly, only minimal changes should be required in the future.

Whether to offer new and improved warnings and instructions to current customers is a difficult issue. If safety improvements are made and not offered to prior customers, plaintiffs may argue that the improvement is evidence that the original product was defective. But informing prior customers of every product improvement can be very costly, unless the manufacturer charges for the new warnings and instructions. So a rational and defensible decision needs to be made.

Lawyers should be involved in deciding whether this type of safety improvement should be offered to prior customers and, if so, how this offer should take place. This decision can create significant problems if not properly handled and documented.

Last, PLP lawyers can quickly review advertising, promotional literature, catalogs, websites, and other written marketing and sales material to be sure that unintended warranties and inappropriate marketing representations are not made which could create potential liability.

- Contracts

Contracts for sale and purchase should be reviewed by a lawyer to see if they provide the protection desired by that manufacturer or other entity in the production or distribution process. Provisions on consequential damages, implied warranties, remedies for breach of contract and breach of warranty, limitations of liability, and indemnification should especially be reviewed.

Lawyers also need to advise manufacturers on how to be sure their contractual terms and conditions govern the sale or purchase of the product. And, lawyers should advise on whether the contract should deal with recall or retrofit and who is responsible to pay for and implement the program.

It is hard to get manufacturers interested in contractual review for product liability and prevention concerns. Manufacturers either have never had a contractual problem or have been unable to get suppliers or retailers to accept their terms and conditions.

The goal is to make sure that there are no surprises. By analyzing contracts, a lawyer can help product manufacturers or sellers understand the risks that they are assuming by their actions. So, if something bad happens, at least that was factored into the sales price or the way the manufacturer chooses to protect itself.

- Post-Sale Duty to Warn

In many jurisdictions in the U.S., 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 product-performance information from customers, distributors, service personnel or sales personnel.

In addition, product manufacturers can do many things before sale to prepare for a recall if one is ever necessary. Doing these things will make the recall easier, cheaper, and more effective. See *Post-Sale Duties: A Minefield for Manufacturers*, In-house Defense Quarterly, Fall 2006 and *Product Recalls: Be Prepared*, Institute for Supply Management, December 2008.

Again, it is hard to get a manufacturer to prepare for a problem that has never or only infrequently occurred. However, given the cost of a recall and the dire consequences if people are injured as a result of the recalled

product, doing some pre-sale and pre-recall preparation is imperative for the future financial health of the company.

Once a problem is discovered, it must be analyzed and an appropriate response or remedial action taken. Because post-sale problems may require reports to governmental agencies or used to defend claims and lawsuits, lawyers must be involved in analyzing this information and 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.

These decisions are important because punitive damages can result from a post-sale program that a jury deems inadequate. Also, fines for failure to file timely reports with relevant government agencies have been significantly increased. Lawyers should be involved in the decision on what to report and how to properly document it.

Conclusion

PLP is underutilized and, in hard times, can be hard to sell. But manufacturers must understand that product liability need not be inevitable. While it cannot prevent all problems, thoughtful PLP programs can reduce the chance of accidents and create a more defensible product and company in the event that some problem occurs.

And, PLP programs do not have to cost a great deal of money or time. Preventing one accident, avoiding one recall, reducing one settlement, escaping one verdict, or dodging one punitive damage award can more than pay for years of PLP activities.

During this recession, companies should be careful not to decimate PLP programs that help ensure reasonably safe, quality products. Better products with fewer incidents, lower warranty costs, more satisfied customers, and a reputation for quality and safety can only enhance the manufacturer's ability to maintain or increase its market share during or after the recession.