2000

The Wave of the Future: Product Liability Prevention Programs for Manufacturers

Randall L. Goodden

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Recommended Citation
Available at: http://open.mitchellhamline.edu/wmlr/vol27/iss1/29
THE WAVE OF THE FUTURE: PRODUCT LIABILITY PREVENTION PROGRAMS FOR MANUFACTURERS

Randall Goodden†

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I. INTRODUCTION

Due to the ever growing impact of lawsuits and fear of exposure, manufacturing corporations around the country have gener-

† Randall Goodden is the author of PRODUCT LIABILITY PREVENTION – A STRATEGIC GUIDE (Quality Press, 2000) and PREVENTING & HANDLING PRODUCT LIABILITY (Marcel Dekker Publishers, 1995). He has had numerous articles published in leading corporate, professional and legal magazines and he is a frequent speaker at conferences and universities around the world. He can be reached at rgoodden@idcnet.com. References used for this essay include the above-cited sources, and KENNETH ROSS, WHY MANUFACTURERS NEED TO DOCUMENT THEIR DESIGN PROCESSES (1998) and Kenneth Ross, The Importance of a Proactive Document Management System, FOR THE DEFENSE (Oct. 1999).
ated a significant interest in the formal study of Product Liability Prevention (or "PLP") and its related systems and procedures. Not only has it become of major interest to manufacturers across the United States, but is of growing interest to manufacturing corporations around the rest of the world as well. Unlike the focus of the past, the study of PLP no longer merely centers on engineers geared toward product safety, but instead identifies roles and responsibilities for the entire management team in every area of the organization. These new responsibilities are typically then incorporated into the organization's operating or quality systems. One of the most unique aspects of the study of PLP is that it brings manufacturers together with the legal and insurance industries in a proactive and positive effort.

Most manufacturing companies in today's competitive industries have fairly good operating procedures in place. Most efforts in product design and engineering are also well intentioned. To maintain a high standing in the industry and gain the competitive edge, manufacturers must make every effort to continuously improve their products and processes, and pursue new areas of opportunity, or they are soon eliminated.

Total quality programs of leading companies are often certified to the "QS" or "ISO 9000" quality standard. In addition, leading companies may have even created their own test labs or built technology centers for designing and testing their new products and materials for tomorrow. And yet, with all of these quality and engineering programs in place, numerous manufacturers continue to be hit by major product liability lawsuits. Some are even put out of business.

While some manufacturers encounter steady streams of frivolous lawsuits, others may experience the periodic blockbuster lawsuit. Defense costs, out-of-court settlements, or high profile verdicts can have a major impact on the bottom line and drain the funds that would have otherwise gone into profit sharing, investment and growth. This unfortunate reality forces many manufacturers to pay ever-rising insurance premiums or face constant expenditures in self-insured programs.

The insurance industry claims it spends as much on defending corporate policyholders against product liability actions as it spends in negotiating settlements or paying plaintiffs' verdicts. In the view of many insurance companies, they are going to lose either way.
PREVENTION PROGRAMS

Thus, the objective is to simply to "get out" while suffering the least possible amount of damage. Therefore, insurance companies tend to focus efforts on controlling the costs of legal defense and pursuing early settlements, despite the possible lack of credibility surrounding the case.

These actions definitely disadvantage manufacturers, but have become so common-place to plaintiff and defense attorneys, that many, if not most, immediately plan for such moves and begin to negotiate settlements in the earliest phases of litigation. The weaker defense attorneys put such plays into motion by instilling in the insurance carrier fears of the mounting odds against the manufacturer, compounded by what they may characterize as unique laws and negative local court and jury attitudes toward corporations in this part of the country or state that will make a verdict for the defense nearly impossible. For this breed of attorney, negotiation is a much easier way of life. As it relates to defense counsel, it separates the "puke bucket" attorneys who seem to get sick at the thought of having to go to court, from the talented courtroom warriors who live for the challenge and are most interested in upholding the manufacturer's record and reputation.

The new focus on the study and implementation of PLP will hopefully be highly significant in reducing the chances of product liability exposure and helping to avoid the potential for lawsuits and litigation.

II. SPECIALIZING IN THE NEW FOCUS

Because of the growing demand and effectiveness of the new focus on the study and implementation of PLP, law firms and insurance companies are becoming more and more involved in the education field. Naturally, for the insurance companies such education of manufacturers leads to substantial reductions in exposure to risk and losses for the carrier. Although still in its infancy, this education program is one of the most credible to have pounded on the door of corporate America in the past fifteen years. It is also one of the few corporate improvement programs members of management can instantly recognize as being beneficial. And unlike any other manufacturing self-improvement programs, this one offers major incentives and opportunities for law firms and insurance carriers.

But for law firms to be successful consultants to manufacturers
in this field, they must first understand how the corporate world works. Firms must understand the roles various members of management play, how the manufacturing operating systems are created, and what they contain. Just being an experienced trial lawyer will be of limited value to manufacturers. Instead, law firms must fully understand things like quality control procedures, ISO systems, and how those programs are designed.

Although manufacturers focused for many years on product safety and hazards analysis programs, especially in engineering areas, the scope of PLP goes well beyond that narrow focus and deals with numerous other areas of management. This is the prime reason why the consultant or educator has to work with the entire management team, and not just target the engineering functions. Engineering departments normally have little to do with bringing about changes to the overall operating procedures of a company, but instead only tend to focus on their specific area of product design. Many of the aspects of PLP deal with other areas of the operation besides just the design of the product.

III. INITIATING THE CORPORATE EFFORT

The first step in helping a manufacturer develop a PLP program is to select the right internal candidate to champion the effort. As with most corporate programs, although everyone in management ends up being involved, one primary person who is the team leader should "head up" the program. Larger companies, especially multi-plant organizations, may want to create a "Corporate Product Liability Review Team" to deal with overall issues. These will also be the key people for the consultant to contact.

Once the primary players are in place, it is time to educate the company about PLP. This education is best handled via in-house seminars with the entire management team. Defense attorneys not well-versed in this area might want to consider bringing in an instructor for this initial presentation, and then functioning as the consultant to the company from that point forward.

IV. AREAS ADDRESSED

In the in-house seminar, the management team learns how PLP focuses on all of the following areas:
A. Contracts & Agreements

This means teaching the team (i) the importance of customer contract reviews, (ii) the wording to be contained in purchase orders with suppliers and subcontractors, and (iii) contractual considerations for shipping products overseas.

B. Product Design

This is the most critical first step in the product lifecycle and the least expensive time to recognize a potential problem and make a change. This step involves teaching the management team (i) how to hold effective design reviews, (ii) how to comprise the "Design Review Team," and (iii) how to comprise the "Product Safety Team." This also involves teaching the "Design Review Team" their roles and responsibilities for achieving effective design reviews, and teaching the "Safety Team" the elements of hazards analysis and risk assessment.

C. Marketing / Advertising

This aspect involves teaching the team about (i) potential problems with marketing and advertising campaigns, (ii) guarantees against potential hazards and issues that create exposure, and (iii) other promoted activities with the product that can lead to personal injury.

D. Reliability Testing

This phase involves (i) discussing the importance of performing adequate reliability tests on new products, and (ii) teaching the manufacturer how to document and deal with possible product problems and negative test results.

E. Document Control

This aspect involves (i) teaching the entire manufacturing organization about the importance of documents, (ii) helping people recognize the potential dangers in written materials (i.e. helping them recognize the proverbial "smoking gun"), and (iii) teaching them how to deal with delicate product issues and decisions.
F. Warranties

This area means explaining (i) breach of warranty, (ii) the issues of implied and expressed warranties, and (iii) how these issues can enter into a product liability lawsuit if they are not controlled properly.

G. Warning Labels & Instructions

The team should be educated to recognize (i) when the need exists for developing warning labels, (ii) how to design them, (iii) how labels should be placed, (iv) the standards that exist for warning label design, and (v) what concerns should be incorporated into warning labels versus operating instructions.

H. Records Retention

The management team should learn the importance of (i) proper records retention, (ii) immediate accessibility, and (iii) what types of records need to be maintained and for how long.

I. Supplier Selection

This means going beyond product, price and delivery capabilities and D&B ratings, and addressing issues related to product liability concerns such as (i) insurance requirements, (ii) indemnification agreements, (iii) review of purchase order disclosure requirements, and (iv) adequate protection against a supplier's or subcontractor's mistakes.

J. Recall Procedures

Companies need to know what the game plan will be should they ever need to conduct a product recall so they need not develop a game plan in that moment of crisis. Companies should know (i) the different options available, (ii) when to actually recall the product versus just sending out notices, and (iii) other organizations that may need to be contacted by law.

K. Liability Incidents & Investigation

This aspect involves teaching the newly created in-house expert and corporate team (i) how to recognize potential liability in-
cidents, (ii) how to properly handle initial notifications, (iii) how to investigate incidents when first reported, and (iv) how to gather facts and write reports.

L. Litigation

This phase involves teaching the in-house expert and corporate liability team the many stages of a product liability lawsuit and what to expect. They need to know (i) what will be demanded of them, (ii) the typical chain of events, (iii) how to work with the insurance representatives and assigned counsel on the case, and (iv) how to help answer questions, gather documents, and conduct tests. This is especially the case for those corporations that don’t have an in-house legal department.

V. IMPRESSIVE RESULTS

The end results of in-house seminars such as that outlined above are very impressive and the changes are highly noticeable as the entire management team begins to speak a whole new language. Management teams begin to understand the new concern and focus and, as a result, bring about substantial improvements to the safety and reliability of the products they create, as well as major improvements in many other areas of management practices.

VI. OPPORTUNITIES FOR A NEW ALLIANCE

The PLP program is a great opportunity for the manufacturer and the attorney/consultant to work together in a proactive effort that will result in a long-term relationship. The manufacturer will benefit by reducing its potential for future liabilities. It will also gain a consultant/team member to help with future PLP issues and handle future cases that might arise. Meanwhile, the defense attorney and law firm will benefit by the newly formed working relationship with the manufacturer.

VII. OPPORTUNITIES FOR INSURANCE CARRIERS

Because the PLP program will be significant in helping to bring about substantial improvements in product reliability and safety, as well as major reductions in risk exposure, it should also be heavily endorsed and supported by the insurance companies.
Much like paying for preventive medicine in order to reduce the risk of major illness and much larger medical bills, the same type of encouragement and financial support should happen here too.

Insurance companies should recognize the benefits of having their manufacturing clients under the guidance and care of a PLP consultant or adviser in order to help avoid a critical or fatal incident. Surely paying for an ounce of prevention is worth a pound of cure.