

Can Social Media Help Satisfy the Manufacturer's Pre-sale and Post-sale Duty to Warn?

Kenneth Ross

Bowman and Brooke LLP

447 Fairway Drive
Midway, UT 84049
(952) 210-2212
kenrossesq@gmail.com

KENNETH ROSS is a former partner and now Of Counsel in the Minneapolis, Minnesota office of Bowman and Brooke LLP where he provides legal and practical advice to manufacturers and other product sellers in the areas of product safety, product liability prevention, and regulatory compliance. He has provided practical and legal advice in these areas for over 30 years. In addition, Mr. Ross has served as an expert witness in litigation on government reporting and recall adequacy issues.

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I. Introduction

Manufacturers and product sellers are continually criticized by plaintiff's lawyers and plaintiff's experts in every aspect of making and selling products and dealing with post-sale issues. They argue that the company could have done better and should have done better and if they had done so, this accident would have been prevented.

Social media and the internet in general have given manufacturers a much greater ability to communicate with its consumers and learn more about the way in which their products are being used and misused and learn about post-sale issues that have occurred and that can cause or have caused injury, damage, or loss.

Manufacturers must be aware of and consider technological advancements that allow them to do a better job in either anticipating safety issues before sale or identifying safety issues after sale so that they can deal adequately with them.

II. Internet and Social Media

Let's examine some of the forms of electronic media that are available and some of the benefits of each as they pertain to pre-sale and post-sale duties.

A. Websites

Websites offer virtually unlimited space to display text, pictures and symbols. Much of this information would not easily fit on printed material. Information in multiple languages would be easier to provide and make accessible at a click of a mouse. There is no printing expense and, unlike printed material, this information does not weather or decay.

The information on websites can be updated regularly and users will not misplace the instructional material on the website as long as they have internet access.

Warnings and instructions on websites can contain hyperlinks to other material on the internet or within the website itself. Websites can also directly link consumers to customer service to provide answers or references or to online forums.

Websites can also contain links to videos on YouTube or elsewhere which can provide instructional information in a much more understandable way. In addition, the website can contain online training programs that record the person who took the course and the score they achieved in any testing that is part of the program.

When it comes to post-sale duties, websites are typically used to post recall notices, allow for consumers to register for an announced recall or to ask questions about the recall process. In addition, they can be effective in investigating post-sale safety issues and trying to determine patterns which indicate that such field action is necessary.

B. Email and Text Messages

Many people now use generic email addresses such as gmail or outlook.com. As a result, they never have to change their email address when they move and change email providers. Therefore, once they have registered their email with the manufacturer, it will follow them anywhere they go and never get out of date.

So, when a consumer registers their email address with a manufacturer or product seller, most of these consumers should be able to be contacted electronically about a safety issue or a recall if needed.

These emails can also provide links to more comprehensive information on the company's website which deal with safety.

Text messages utilize the consumer's phone number. Similar to email addresses, a consumer's cell phone number can stay with them wherever they live. Therefore, if that number is registered with a manufacturer, it will probably stay current for a long time.

Text messaging is immediate, the consumer doesn't have to open up an email, and there usually is some sound alert resulting in quick attention by the consumer. This is probably the most efficient way to signal a recall that is available by any means.

C. Social Media

This takes many forms such as blogs, business networks, enterprise social networks, forums, microblogs, products/services review, social bookmarking, social networks, video sharing, and virtual worlds. And it includes sites such as Twitter, Pinterest, Facebook, LinkedIn, Tumblr and many dozens of other sites.

The interaction between people and companies is almost unlimited. This interaction allows companies to send information to consumers, consumers to send information to companies, and consumers to send information to other consumers. And it allows companies and consumers to communicate with any government agency in the world that deals with safety.

This interaction can be very useful pre-sale as companies try to determine who uses their products, how they use them, how they misuse them, and problems they are having with them. It is also useful post-sale in getting safety issues identified and dealt with.

One area that creates distress within corporate ranks are videos on YouTube of people misusing their products or using them unsafely. Is this now reasonably foreseeable misuse? Is there a way to tell people not to do this or to get these videos taken down? Or is the company agreeing with this use because they didn't comment or object?

III. Legal Basis of Liability

Of course, manufacturers are sued under the theories of negligence and strict liability for selling a defective product that caused harm. The argument in most states is that before sale, the manufacturer could have done a better job of identifying and quantifying risk and taking steps to reduce risk to a lower level.

After sale, only the theory of negligence is available and also focuses on the argument that the manufacturer or product seller could have done a better job of identifying risk with product users and undertaken some corrective action program, such as a retrofit or recall, and more effectively communicated the message to the actual consumer rather than just to the public in general.

I suspect, but can't confirm, that there are a lot of lawsuits where the plaintiff argues, in part, that the manufacturer was negligent or strictly liable because of their failure to adequately employ social media to obtain or transmit information. However, with one exception, I have been unable to find case law discussing whether or not juries or judges specifically agree with this argument.

There is one case that was pending in U.S. District Court for the Northern District of California but was recently dismissed by the plaintiffs. Their argument was that the defendant retailer, Safeway, was negligent in not employing its loyalty program to communicate a recall message. The plaintiffs were able to defeat

Safeway's motion for summary judgment but apparently dismissed the case because none of the plaintiffs actually purchased the recalled products and therefore arguably didn't have standing to sue. See *Dee Hensley-Maclean et al. v. Safeway Inc.*, case number 3:11cv01230.

Despite the lack of reported cases or jury verdicts discussing the use of social media before or after sale of the product, it could become a powerful argument as more and more people become tied into various social media outlets and access websites, email and social media through smartphones and smartwatches as well as computers at home.

IV. Use of Social Media

Whether or not there is case law creating liability for not employing social media, manufacturers and others in the supply chain should consider improving how they use this technology to make reasonably safe products that are defensible if there is an accident and be better able to learn about and deal with post-sale problems in the most efficient way.

Ten years ago, a client of mine was able to send out a recall notice at the press of a button to 3 million consumers. They sold computers and therefore all consumers registered their products online and utilized email. Consumers could register for the recall online and the company could send a replacement part to their mailing address.

While this still was a costly recall, it was less costly and more efficient because of the company's ability to more easily communicate with consumers. The cost of mailing 3 million recall notices would have been enormous. And these days, I think that people more quickly look at text messages and emails than they do at envelopes which always look like junk mail.

V. Conclusion

We, as lawyers, should encourage our clients to think very hard about how they can use social media and the internet to enhance a product's safety and increase their product's defensibility in case there is an accident and lawsuit. We should assist our clients in deciding what to do and how to document the information that they find and analyze.

In 5-10 years, internet access and smartphone usage will be very close to 100 percent of persons 10 years and older. Keeping up with the technological advances will be helpful in improving safety while doing so in a cost-effective manner.