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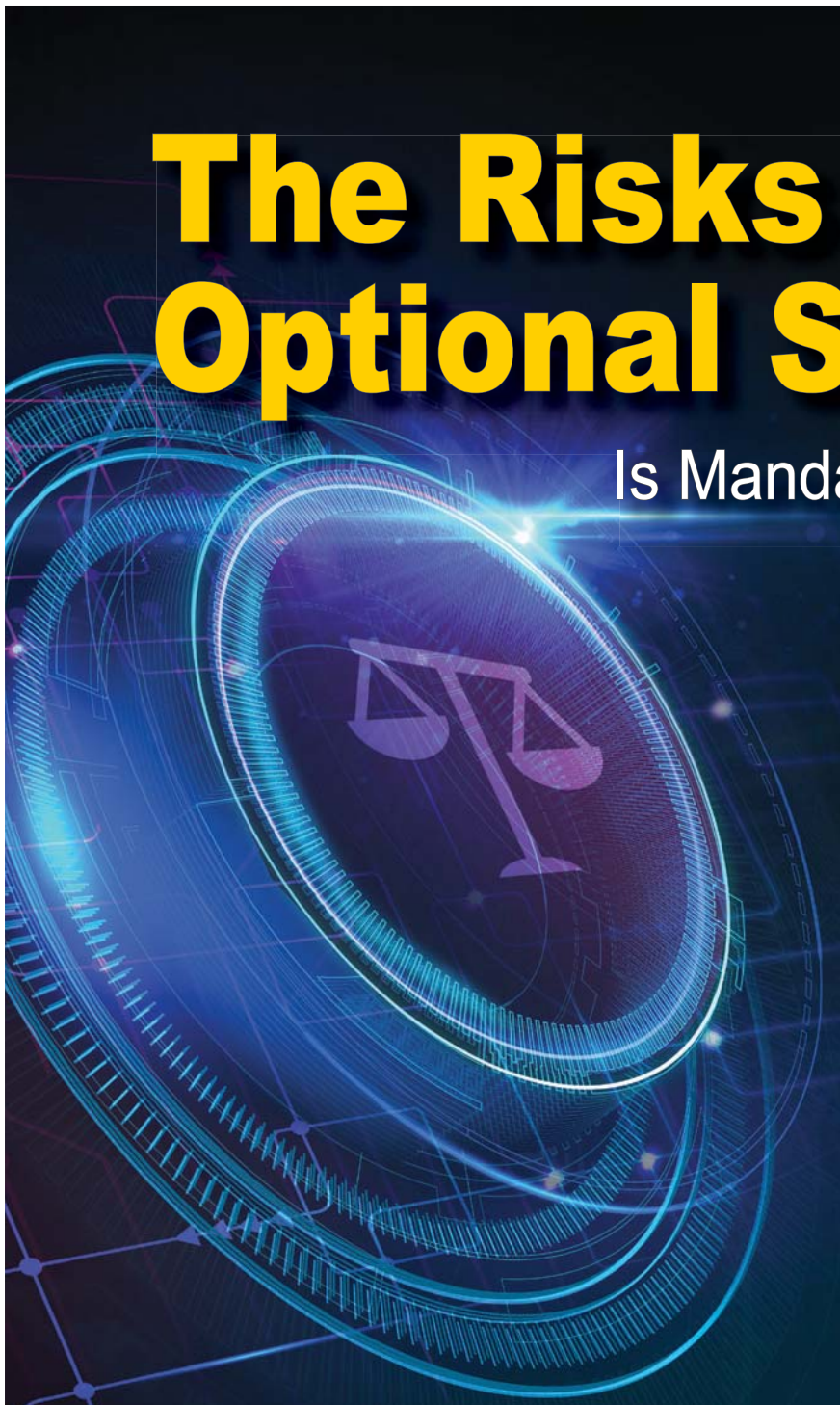

The Risks of Optional Safety

Is Mandatory Safety Better?

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THE RISKS OF OPTIONAL SAFETY

Is Mandatory Safety Better?

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By Kenneth Ross

We all remember when Sears sold products as "good," "better," and "best." Many times, the more expensive products had better quality and, sometimes, better safety. When airbags were first sold on U.S. automobiles, they were optional. They didn't become mandatory until the U.S. government required it. And even today, you can buy a car with two airbags or some with in excess of ten airbags. It is a rational assumption that the more airbags your car has, the safer it is.

Some reasons for differences in the safety of products include multi-functional uses of the product where some safety devices are not necessary, different price points, requests by customers, adoption of safety improvements, and inconsistent regulations and standards between the U.S. and foreign countries.

The issue of the level of safety to which your products must be designed is intertwined with the two issues that will be discussed in this article. First, is it permissible to sell similar products with different levels of safety? Second, if you do, how do you minimize risk and is it permissible to sell one product with optional safety features? Both issues have generated quite different answers from the courts, making it difficult to decide what to do.

LAW OF DESIGN DEFECTS

The *Restatement Third, Torts: Products Liability (1998) (*hereinafter "Restatement"), which is a good general description of product liability law in the U.S., said that "[t]he emphasis is on creating incentives for manufacturers to achieve optimal levels of safety in designing and marketing products." However, it also said 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 that their omission rendered the product not reasonably safe.

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 big 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. Sometimes the answer is based on how much risk the manufacturer is willing to assume.

SELLING PRODUCTS WITH DIFFERENT LEVELS OF SAFETY

In general, many manufacturers and even 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. In fact, the

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safer cars are sometimes marketed as being safer. Considering the general law, isn't this risky?

If these small automobiles 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.

However, 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 sold 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, so instead, they 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, are unwilling or unable to pay for them, or if the safety features are not always required or make the product less usable.

OPTIONAL SAFETY

Taking this one step further, is it ever acceptable for a manufacturer to have a safer alternative design and to 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 to purchase it. There are many well-known examples of such products:

- Chainsaws with an optional chain brake
- Table saws with an optional lower blade guard
- A motorcycle with highway bars
- Vehicles with back up alarms
- Vehicles with rollover protective structures
- Safety devices that protect against crane contact with power lines

And the issue could even arise when the consumer can purchase safety accessories made by other manufacturers. Should the manufacturer of the main product be required to include safety accessories such as 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, the retailer, the consumer, or the user? When should the option be mandatory? And how far do these entities have to go to inform the purchaser when it is advisable to purchase the option or feature?

The cases arise when the customer is offered, either directly or indirectly, the optional safety device and

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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 that its omission rendered the product defective and 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 a manufacturer decides on whether to make a device mandatory or optional.

According to the case law, the main rationale to allow a safety feature to be sold as an option is that it only provides safety in certain uses or environments. 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 they don'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. An example is a crane that is not used near power lines and, therefore, does not need an insulated device to protect against power line contact.

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.

CASE LAW

Unfortunately, the law is "muddled and quite sparse." 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, was 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 that you cannot delegate to the purchaser the responsibility to make the product safe. However, the court would allow a safety device to be optional where the device made "the machine unusable for its intended purpose." A number of courts followed this doctrine.

In 1978, two cases were decided, allowing the manufacturer to offer safety devices as options and placing the burden on the purchaser to determine whether the device was necessary for their use. 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 relied on the expertise of the purchaser in deciding whether the optional devices should have been purchased.

Despite the different conclusions, *Biss*, *Verge* and *Bexiga* held that a safety device can be optional on "multi-functional products if there is no standard

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safety feature that will allow each function to operate unimpeded." Over the years, the courts have 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.

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:

- The buyer is thoroughly knowledgeable about the product and its use;

- The buyer is aware of the availability of the safety device;
- In some normal uses, the product is not unreasonably dangerous without the safety device; and
- The buyer can balance the benefits and risks of not having the safety device during 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.

The New York Court of Appeals addressed this issue 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 the plaintiff in the case was injured.

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 had a roadmap for dealing with optional safety devices before sale.

PRACTICAL CONSIDERATIONS

Since one tenet of product liability prevention is to try and prevent an accident from happening 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. The decision should be based mostly on safety, commercial considerations, customer relations, and other non-legal rationales. However, some of the criteria cited in the cases above can help shape a legal rationale for the decision.

First, the manufacturer needs to employ all necessary safety analytical tools before deciding on the original design and warnings and instructions. The base product, without any potentially optional equipment or safer design, must be arguably 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 equipment and provide a way to remove it or move it out of the way during some aspect of operation. And then, clearly describe in the manual when the safety equipment should be used.

An example of this is passenger-side airbags with on/off switches so that the airbag can be switched off if, for example, you place a child in a car seat in the passenger seat.

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 place to start 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.

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 can make an educated, rational decision as to whether it should be purchased. To help 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 to use it.

CONCLUSION

Optional safety devices can be tricky. Purchasers don't want to spend money on a device that they don't need in most 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 also look at when and how such options are handled in applicable standards or by competitors within your industry. Finally, it is imperative that you document the facts and criteria you used to make a final design decision so that it confirms that you considered the ultimate safety of the product during normal intended uses and reasonably foreseeable misuses.