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September 14, 2010 Volume 7 Issue 3

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Social Networking Discovery: Get Used To It

by Russell T. Burke

People will post almost anything. Plaintiffs post photos showing their physical prowess despite claiming permanent disabilities (*see, e.g., In re: Welding Fume Prods. Liab. Litig., Ernest Ray v. Lincoln Elec.*, No. 1:04-cv-18252, MDL 1535, No. 03-17000 (N.D.Ohio)). Threats are made on Facebook for all the world to see (*see., e.g.*, *Martinez v. Tufano*, 2010 WL 2471117 (Cal.Super.Ct., June 17, 2010)). Jurors even "friend" witnesses during trial (*People v. Rios*, 2010 WL 625221 (N.Y.Sup., February 23, 2010)) and make comments about trials on their status updates (*United States v. Fumo*, 2009 WL 1688482, E.D.Pa., June 17, 2009). Social networking profiles, posts, texts, or tweets on Facebook, MySpace, Plaxo, YouTube, LinkedIn, or Twitter contain personal information that would never have seen the light of day just a few years ago. But just this year alone there are over *sixty* reported decisions from state courts mentioning evidence obtained from Facebook or MySpace. The information from these sites need not be the smoking gun for impeachment at deposition or trial, but it could be important background information on clients, lay witnesses, experts, jurors, opposing counsel, or judges. The information from social networking sites is there for the taking, but lawyers need to know how to find it. If a juror can find out on Facebook that the plaintiff advocates using mushrooms and smoking pot, lawyers should be able to find that information as well (*Wilgus v. F/V Sirius*, 665 F.Supp.2d 23 (D. Maine 2009) (juror "friended" the plaintiff after trial and found incriminating photographs). And our clients need to be warned that what they think is "private" may in fact be just the opposite.

The Federal Rules of Civil Procedure, the Federal Rules of Evidence, and most analogous state rules do not specifically address the discovery and use at trial of evidence from social networking sites. That simply means that we have to do what we normally do: apply the facts to the law. Discovery and evidentiary rules and decisions on "typical" ESI issues – preservation, collection, discoverability, and admissibility –

everyone at the Annual Meeting.

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Product Liability Prevention

Crisis Prevention, Preparation and Management

by Kenneth Ross

The goal of any business risk management process is to identify and quantify risk, identify programs that can help minimize that risk, and then implement programs that minimize the risk to a level that is acceptable to the business entity. The core of what many call "product liability prevention" or "product liability risk management" is to implement such programs that prevent or minimize product liability risk and to help provide "defensibility" if there is an incident and resultant claim or problem with a government agency.
Over the years, while product liability risks have been potentially great, they apparently haven't been frequent enough or significant enough to get adequate attention from many companies. An additional reason may be that the risk is largely insured so the financial risk is perceived to be manageable. Despite that, you would think that the possibility, even if slight, of significant product liability litigation, a costly recall, some unpleasant entanglement with a government agency, and resulting bad publicity would be enough to encourage companies to be more proactive in trying to minimize such risks.

But the problem has been, as it is in other areas of risk, that the individual or business believes that the problem won't happen to them. It will happen to the "other guy." So, even if there are headlines about other companies suffering big problems, it may not be enough to get another company to act.

Recently, the problems, as evidenced by daily headlines, have become so significant that companies really need to take these potential problems more seriously. Product liability prevention has always been important, but now, for some companies, in some industries, the

process should be elevated to *crisis management*. But "management" is too narrow in that it implies that a crisis can't be prevented. The concept should more aptly be described as *Crisis Prevention, Preparation and Management* ("CPPM").

While the goal is to prevent the crisis in the first place, having a CPPM program in place will, when implemented, minimize the chance of business and legal problems occurring and help ease their effect if they happen. Now, of course, while these problems can occur in many areas – industrial accidents, criminal activity, loss of proprietary data, environmental accidents – the focus of this article will be on product liability related problems.

A CPPM program is similar to a product liability prevention program – it is just broader and involves more professions. It assumes that a crisis can result in much bigger problems than just product liability lawsuits and possibly a recall. For example, additional legal and business problems can arise with any significant product liability issue such as worldwide media coverage, multi-national government investigations, whistleblowers, shareholder lawsuits, consumer class actions, public disputes with suppliers, vendors, and customers, and backlash from customers and the public, including consumer boycotts.

These problems make the typical product liability issues pale in comparison. And this is especially true as the costs of dealing with most of these other problems are not insurable. The future viability of the company involved and even an industry can be put into jeopardy by one incident. The nuclear industry never fully recovered from Chernobyl and Three Mile Island. The oil drilling industry probably will not be the same as a result of the oil spill in the Gulf of Mexico. Exxon Valdez and Bhopal have special meaning with the public and their negative connotations can never be erased. And everyone knows what happened to the Challenger Space Shuttle and even the Titanic.

The above are single incidents of great magnitude and are not product liability cases. However, even in product liability, the following products and events elicit many feelings among the consuming public and resulted in huge liability and costs for their manufacturers: Audi 5000, Ford Pinto, Firestone 500 tires, Ford Explorer/Firestone tires, Vioxx, tobacco, asbestos, Mattel lead paint recall and the peanut recall. Many of these products and companies are by business school ethics professors to teach about what a company should NOT do.[1]

It seems that after each of these events or series of cases occurred, information comes out in the litigation, in the media and maybe in Congressional testimony about the company or governmental agency either not properly evaluating risk, not being prepared to take appropriate measures to deal with the risk if it happens, or not acting diligently once it occurs. And you wonder, what went wrong? None of these companies wanted these problems to occur. In the situations mentioned above, they certainly knew the consequences of product failures. So, did they improperly evaluate the probability of the risk occurring? Did they deem the risk low enough that it was an acceptable risk? Or did they underestimate the severity if it occurred? In some cases, companies cut corners to save money or time and hoped for the best. In other companies, the pressure to achieve short term profits colors all other actions. And those responsible get promoted, not fired, in effect outrunning their mistakes.

Risk assessment is the most difficult part of crisis prevention. How do I predict the possibility of something happening that hasn't happened yet or only happens infrequently? Will it happen to my company or my competitor or not at all? How bad will it be if it happens? How much time do I spend preparing myself for an event that may not happen?

Especially in these financial times, it is difficult to get companies to spend money preventing problems they've never had. However, if they seriously calculated the potential cost of a significant problem, both financial and reputational, they might be inclined to do more.

What more can they do and should they do? Do they need a full-blown CPPM program or something less? An initial analysis of the company and the risks they have experienced and could be subjected to can help answer those questions.

Crisis Audit

The first task in determining whether a program should be established and what form it should take is to undertake a product liability crisis audit. [2] This will help identify and quantify risks and distinguish normal product liability problems from much bigger problems that truly can rise to the level of a crisis. This analysis requires the business people to define what they believe to be a crisis for their company and shareholders and their industry in general. Different companies may come to a different conclusion about the same problem.

Given the sensitive nature of the audit, I suggest that an outside lawyer be involved directly in asking the questions. This will help to keep the answers privileged as they will eventually be used by the lawyer to make legal recommendations on what kind of program should be established. Use of in-house lawyers is probably not a good idea as the privilege may be subject to challenge and some of the questions might be sensitive and could impact future relations with fellow employees.

This lawyer will need to have sufficient general familiarity with the company and expertise in product liability wherever the product is sold. The lawyer will need to understand prior legal events involving the company and have an understanding of future potential legal risk. And the lawyer will need to be very familiar with the whole range of preventive techniques available to companies.

The lawyer may want to consult with a crisis management expert (there are CM experts, but it also may include public relations, insurance, regulatory, and recall management experts) before doing the audit to make sure all of the correct questions are asked. And the lawyer should try to identify other problems similar companies are experiencing. Anticipating future potential areas of legal risk is highly speculative, but very helpful. An example of one such area right now is nanotechnology (See http://www.nanotortlaw.com/nanoblog/blog.aspx).

When responding to these questions, in a sense, the business controls its destiny. It gets to decide how much risk it is willing to assume and how much of the risk they want to try and minimize. This will include an analysis of their ability or inability to identify the problem early before it turns into a crisis. And also whether the company has the ability to quickly contain the problem before or shortly after it turns into a crisis.

After obtaining the answers, outside counsel can turn again to the crisis management experts before making recommendations on what kind of program could be established. These recommendations can be presented orally to the in-house lawyers and key corporate personnel to get their reaction. The recommendations can then be modified to reflect the company's willingness to accept risk and spend money on these activities and then included in a final report to the General Counsel.

This process will help the company decide how prepared they need to be and what preparations need to be taken. The following are some questions related to product liability that need to

be answered by counsel and the company:

- Do they need a designated crisis management team? Who should be on it? Should there also be other groups, for example a product safety committee, which deal with similar problems of a lower magnitude?
- What kind of training does this team and others in the company need to have to help them identify a potential crisis and how to minimize it?
- What are the triggers to start the program? Does the team meet regularly to review potential problems or wait until a crisis hits? Do the other committees decide when to escalate a problem to the crisis committee?
- Does the company need to have a public relations company experienced in crisis management ready to jump in at a moment's notice to deal with the media and shareholders and customers? Should this person participate in the crisis committee's regular meetings to help determine the anticipated media reaction to certain potential events or actions?
- Does the company need experienced government relations experts on board to immediately deal with any local, state or federal issues that may arise? And should they be involved in regular deliberations of the crisis committee?
- Should the company have a recall management company on call in the event a recall needs to be quickly implemented?
- What involvement should lawyers have in the implementation of any program? Should they be involved in the regular meetings of the crisis committee or other related committees?
- What role do these committees have in approving company actions or inaction BEFORE the crisis if such actions or inaction can turn into crises in certain situations?

Analyzing and developing the need for such a program should be done under the supervision of outside counsel, but once the program is implemented, none of it is privileged. Documents describing the

program are created in the normal course of business. Despite that, counsel needs to be involved in their drafting as evidence of the program will be used against the company after a crisis arises.

The program shouldn't look like a crisis is inevitable, but is being instituted out of an abundance of caution. The program should also be generally described to those in the distribution chain so they understand their duties and responsibilities in implementing the program. There are risks in how it looks to have a stable of lawyers, PR experts, and recall management experts at the ready before you have problems. However, it should be portrayed as just another form of insurance that will be helpful in the event of a problem.

Pre-sale Preparedness

In product liability, many crises involve recalls. Therefore, recall preparedness is a critical component of any CPPM program and needs to be done before the product is sold. This helps the manufacturer to more easily and efficiently obtain information, analyze it, make decisions about appropriate post-sale remedial programs, and implement programs. Many of these procedures cannot be implemented after sale of the product.

Below are some of the things a manufacturer should consider doing before sale. Not all of them may be required for a typical recall. However, for a recall that could result in a crisis, these techniques could go a long way to prevent the situation from turning into a crisis.

a. Products should be designed and tested with post-sale programs in mind. For example, the product should be designed in modules so that components that prove to be defective can be replaced without having to replace the entire product.

b. Products should be manufactured using traceability and marking procedures that are utilized pre-manufacture, during manufacture, and during distribution. Products or components should be marked or coded so that anyone, including customers, can identify the product to be returned. RFID technology should be considered if appropriate.

c. The manufacturer should develop a post-sale exposure audit where the manufacturer summarizes worst-case scenarios and develops initial strategic action plans for each scenario. This would include a determination of safety critical parts and raw material and what can happen if they fail.

d. The manufacturer must develop an information-gathering network before sale so that appropriate information is identified and analyzed. This procedure is so important that it is discussed in more detail below.

e. The manufacturer's lawyers should help to analyze and create contracts and agreements with upstream and downstream entities which anticipate and deal with post-sale issues such as information that must be supplied, who has the responsibility or authority to report to a government agency, what approvals are necessary to undertake a remedial program, who pays for the remedial program, etc. Also to be considered are insurance and indemnity provisions.

f. The manufacturer, in cooperation with all entities in the distribution chain, should design and maintain an effective product and customer database so that different levels of customers in the chain of distribution can be identified quickly. These databases must be updated periodically.

g. Press releases, customer alerts, distributor bulletins, website postings, and questions and answers to be used by management could be drafted before sale or, at least, not too long after sale. Methods to communicate this information quickly and efficiently to the correct people or entities should be developed at this time. For example, a manufacturer should be able to almost instantly communicate (by broadcast fax or email) a message to distributors and retailers requesting that they embargo sales of a particular product. This will prevent sales of

unsafe products and minimize the number of products that have to be recalled. See CNN Money.

h. The manufacturer needs to develop criteria on the types of remedial programs that may need to be implemented and then develop procedures and processes to implement each of these programs. Recall is not always necessary. And, there are different levels of recall, depending on the level of risk and difficulty finding the products.

i. The manufacturer should consider record creation and retention procedures so that appropriate documents are created that prove the manufacturer's due diligence in identifying the problem and taking care of it. This will include determining the record-keeping requirements of all relevant government agencies or applicable standards or directives.

j. The manufacturer could consider creating procedures to reintroduce the product to the market. This involves an analysis of the worst case scenarios and how to test and modify the product quickly and design communications to restore and strengthen the product's reputation among the distributors, retailers, and customers.

k. The manufacturer should even consider internal recall training, drills, and full-scale mock exercises. When a crisis occurs, it will prove to be time and money well spent. See www.expertrecall.com for more information.

A manufacturer needs to be careful that this pre-sale planning does not appear to be an admission that the company expects critical safety problems with this product and is just planning for the inevitable recall. The planning needs to be routine and consistent with a product safety policy. It can also be justified to comply with U.S. and foreign laws and regulations or retailer safety standards that require a manufacturer to be better prepared to recall its product. And maybe it is also being done to convince the insurance company to lower premiums or the self-insured retention.

Post-sale Preparedness

One foundation of a CPPM program is establishment of an information network that will allow a company to determine how its product is performing in the U.S. and world marketplace. This information is necessary for the manufacturer to ultimately make decisions about what, if any, post?sale action might be necessary.

This network must encompass product safety information received anywhere in the world. The regulatory and common law requirements apply to information that the company obtained or should reasonably have obtained anywhere in the world that identifies an unsafe condition. Therefore, anything less than a "reasonable" effort at obtaining information may be considered inadequate by the jury or government agency or media.

Some laws and regulations and industry standards set forth post-sale monitoring requirements. These need to be considered in setting up such a program. These include the kinds of information that should be considered and the kinds of documentation that need to be kept. As I've previously written, many foreign governments have enacted or will be enacting legislation requiring manufacturers to report to their government even if the accident occurred outside of their country. Australia's new product safety law, effective January 1, 2011, does exactly that.

Outside counsel can play an especially useful role in assisting the company in setting up such a program. The program needs to comply with any applicable regulatory laws anywhere the product is sold. And, to the extent it is possible to anticipate, counsel should advise on what kind of program is likely to be defensible? The analysis that goes into establishing such a program and how it was implemented should be documented so that later, if necessary, someone can testify as to why the company did what it did or couldn't do what it didn't do. This is necessary since, with 20/20 hindsight, anyone can argue that the company should have done more.

Taking action

Once a manufacturer has obtained all relevant information, it must determine whether post?sale action is necessary. This includes reporting to a relevant government agency and undertaking some form of remedial plan.

Ideally, a corporate or divisional product safety committee or crisis team should analyze the information. This committee should be made up

of representatives from various areas of the company, including engineering, service, sales, marketing, and legal. It is also very important that the lawyer who is advising the committee be experienced in product liability and regulatory law of the countries where the affected product was sold. Last, additional outside resources such as public relations and government relations experts may need to participate in some aspect of the committee's deliberations.

If dealing with a crisis could result in litigation, a company lawyer could chair the crisis committee and keep the minutes so as to try and keep the deliberations privileged as work-product. Involving outside counsel who might help defend the company in such litigation at this point could be helpful in making decisions and developing documentation necessary to present a defense.

Analyzing the information and deciding what to do is the most critical phase of this process. Many manufacturers use or should use risk assessment prior to selling their product. After sale, the manufacturer, in effect, is plugging new numbers into this risk assessment. Post-sale incidents may indicate risks or consequences that were never imagined, or increase the estimated probability calculated before sale. Redoing the pre-sale risk assessment is a good way to formally recalculate the numbers and assumptions. Unfortunately, that doesn't really answer the question of what action is necessary.

Determining whether post?sale action is necessary under the U.S. common law requires applying the factors identified in the case law to the facts learned through the information-gathering network and the results of the redone risk assessment. It is a negligence-based balancing test. For products regulated by a government agency, the manufacturer needs to first identify the threshold for reporting and taking action and then work with the agency on whether a remedial plan is necessary and what that plan would entail.

Post-crisis audit

After a crisis or legal problem that could have turned into a crisis is over or mostly over, a post-crisis audit is appropriate. This audit will consider evaluating things such as what can be done to prevent a future similar crisis or identify it earlier, what worked and didn't work in handling this particular crisis, what can be improved, what additional personnel need to be involved, what personnel don't need to be involved, and what documentation needs to be improved.

As with the pre-crisis audit, this audit can be

undertaken under the direction of outside counsel so the lawyer can recommend improvements in the program and keep the audit results and those recommendations privileged.

Conclusion

With a 24-hour news cycle and resultant hungry investigative reporters and publications, aggressive plaintiff's lawyers looking for the next big series of product liability cases or shareholder derivative actions, and more retailer and customer awareness, the threat that a routine problem can turn into a crisis has increased. Most of the crises we read about in the press could probably have been prevented or, at least, handled better once they occurred.

The consequences of not doing an adequate job can be enormous. Some upfront investment of time in CPPM can result in the company taking less risk and being prepared if the risk occurs. This will benefit the company and its personnel and the company's suppliers, vendors, customers, and shareholders. It might even save problems for governments and society in general. It could actually turn out to be a good return on what can be a relatively modest investment.

Kenneth Ross is a former partner and now Of Counsel to Bowman and Brooke LLP in Minneapolis and co-chair of the Manufacturer's Risk Prevention SLG. Mr. Ross has helped companies develop and implement crisis management and product safety management programs for over 30 years. Portions of this article appeared in The Increased Duty to Take Post-sale Remedial Action, which was published in the April 2002 issue of For the Defense. For more readings in this area, see www.productliabilityprevention.com.

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[1] Some recalls are actually helpful for a company. Johnson and Johnson's 1982 Tylenol recall and McDonald's recent recall of Shrek glasses have been cited as examples of superior corporate responsibility.
[2] I will focus on product liability, but many other substantive legal areas could be included in any crisis audit.

Young Lawyer Column

Challenging Expert Opinions in Multi-Causation Cases

by Brendan Krasinski