Product Liability For Product Stewards

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• Product Liability for Product Stewards
  – Appreciate how compliance or non-compliance with a product stewardship program can prevent, or give rise to, litigation.
  – Understand the legal theories underlying product liability claims.
  – Carry out the product steward’s role in taking actions that will prevent litigation.
What Is Product Stewardship?

• A process for:
  – identifying and managing health, safety, and environmental risks
  – throughout all stages of a product’s life,
  – while maximizing a company’s economic value*
  – And correspondingly reducing liability risks

Products Liability 101

- Professional Practices of Product Stewardship chapter
- Defective product, injury, causation, damages
- Negligence
  - Duty of care and breach of duty
- Strict Liability
  - Defective product
  - E.g. Risk/utility analysis
Products Liability: Asbestos

• The Magic Mineral
• Full regulatory compliance
• Developing knowledge of risks
• 40 years of litigation
• 100 corporate bankruptcies
• Current peripheral defendants
• Total costs: $250,000,000,000
Product Stewardship: Asbestos

• Johns-Manville Executive: In retrospect, if the company had responded to the risks of asbestos with
  – “extensive medical research,
  – assiduous communications,
  – insistent warnings,
  – and a rigorous dust reduction program,
• it could have saved lives and would probably have saved the stockholders, the industry, and, for that matter, the product.”
Product Liability Life Cycle Analysis

Evaluating product liability risk at each stage of product life:

- Design
- Manufacturing
- Labeling Instructions Advertising
- Marketing & Distribution
- Transport
- Disposal Re-use
Design Defects in Product Itself

• Product poses an unreasonable risk of harm
• Toxicological hazard
  – Hazardous material
  – Contaminated material
  – Exposure Risk
• Mechanical hazard
  – Fails during normal use
  – Fails during an unexpected but foreseeable circumstance (accident)
Product Development – Avoiding Design Defects

- Adequate testing of raw materials & final products
- Assessment of health risks of raw materials & final products
- Consideration of material substitutes
- Supplier codes of conduct, certifications, audits
- Anticipation of product use and misuse
- Development of adequate warnings
- Conformance with customer requirements
  - Communications with customers encouraging safe use
- Government/Industry standards compliance
- Monitoring the product in the field
- Documenting the process
Design Defect Cases

- **Messer v. Amway Corp.** 106 Fed. App’x. 678 (10th Cir. 2004)
  - Floor stripper used without dilution caused chemical burns
  - Failure to test allegation
  - Court granted summary judgment to supplier finding:
    - Supplier had conducted toxicological tests of product
    - Plaintiff failed to identify any other tests that would be more appropriate or effective in preventing injury

- **Zeigler v. CloWhite Co.,** 507 S.E.2d 182, 184 (Ga. App. 1999)
  - Lemon-scented bleach cleaning solution caused throat, respiratory, and skin injuries
  - Court denied SJ where evidence that:
    - Lemon-scented additive used in the product was incompatible with strong oxidizing agents, like the bleach
    - Thus product’s formulation was defective
Manufacturing Defect

- Product does not meet its manufacturing standards, specifications, or other quality criteria
  - Contaminated by chemicals used at a factory
  - Assembly line machine malfunction results in a product that differs in composition or physical properties than intended

- Apparent manufacturer liability
Avoiding Manufacturing Defects

- Supplier codes of conduct
- Manufacturing standards
- Quality control
- Health & safety compliance
- Post-sale monitoring
Warnings/Information Defects

• Failure to provide information that will allow safe use of product
  – Incomplete safety data sheets
  – Inadequate labeling fails to identify hazards
  – Lack of instructions for safe use
  – Advertising fails to convey warning information
  – Customer-specific communications
Avoiding Communication/Warnings Defects

- Start with product design
  - Avoid need for warning
- Testing to determine hazards of use
- Comply with regulations and standards
- Provide an adequate warning
- Warning recipients
  - Learned intermediary,
  Sophisticated user, bulk supplier
- Consider all foreseeable users
Warning adequacy & proximate cause

• Adequate warning
  – Warning “explains the risk which allegedly caused the plaintiff's injury”
  – Duty to give reasonable warning, not the best possible one
  – Manufacturer “need not warn of every mishap or source of injury that the mind can imagine flowing from the product”
  – Determine if benefits of more detailed warning outweigh costs of requiring change
  – Consider whether additional details will undermine the effectiveness of warnings: “Well-meaning attempts to warn of every possible accident lead over time to voluminous yet impenetrable labels – too prolix to read and too technical to understand.”

• Proximate Cause
  – Would warning have prevented injury?
  – Plaintiff would not have read it anyway
  – Plaintiff would not have changed conduct anyway

- Pyrotechnics ignited soundproofing foam
- Plaintiffs sued foam manufacturer:
  - Defendants had, and breached, a duty of product stewardship; that is, because of the extremely hazardous nature of the foam, Defendants had a duty to anticipate possible applications and misapplications of its use, and to take some precautions to ensure that the product was put to a safe use, even after it left Defendants’ hands.
- Defendant argued it was a “bulk supplier” not product manufacturer
- Court held that plaintiffs had sufficiently alleged that the foam was dangerous as sold, its use was foreseeable, and the manufacturers failed to warn about dangerous applications of the foam.
- Court also found sufficient design defect that claim foam “was extraordinarily flammable, yet was not treated with any flame-retardant chemicals. Moreover, it ignited too easily, burned too quickly and released highly toxic smoke and gases when burning.”
Negligent Marketing/Distribution

  - “The issue in the instant case is not whether slingshots should be manufactured, but the narrower question of whether marketing slingshots directly to children creates an unreasonable risk of harm.”

  - Gun makers and sellers negligently marketed AR-15s to civilians with knowledge that doing so posed unreasonable risk of injury
  - Protection of Lawful Commerce in Arms Act (2005)
  - Immunity, except negligent entrustment or negligence per se
  - Court held not jurisdictional, allowed discovery
Marketing: “Greenwashing”

• FTC Green Guides – “Environmentally Friendly”
• “Natural” products –
  – Vermont Act 120 (effective July 2016) prohibits calling GMO-containing products “natural”
  – Kane v. Chobani (9th Cir. Mar. 24, 2016) – deferring to FDA re “natural” on primary jurisdiction grounds
  – In re General Mills Kix Cereal (D.N.J. 2012) – argument that company has a First Amendment right to describe product as “natural”
Hazardous Materials Transport

- DOT regulations and industry standards
- Product steward role in advising company shipping departments
  - Nature of the materials and their potential hazards
  - Incompatibility, container, and storage requirements
  - Characteristics that give rise to appropriate labeling
  - International import, export, disclosure, and warning requirements
Post-Sale Product Stewardship

• Claims
  – Failure to warn about emerging safety issues
  – Failure to conduct a recall & negligent recalls
  – Failure to report defects to regulatory agencies

• Product stewardship post-sale monitoring and response
  – Written standards and policies with management support
  – Frequent communication with partners in the supply chain
  – Toll-free complaint numbers for consumers
  – Robust complaint handling, recording, processing, and reporting process
  – Documentation of the process

• Product disposal
  – Extended Producer Responsibility
Regulatory Compliance

• Failure to comply claim
  – Private right of action
  – Negligence per se
  – Evidence of negligence

• Compliance as a defense
  – Statutory presumption of no defect
  – Defense to punitive damages
Industry Standard Compliance

• Failure to comply as evidence of negligence

• Compliance as evidence of due care
Product Stewardship as a Standard of Care
Westley v. Ecolab, Inc.

- Restaurant worker burned by caustic floor cleaning liquid
- Claimed manufacturer (Ecolab) failed in its duty to adequately train and warn restaurant’s workers
- Plaintiff’s expert: “[p]roduct stewardship has been a well recognized and practiced safety tool” of the CMA for decades – Responsible Care® requires supplier to train customers on safe use of chemicals
- Ecolab: RC did not apply; no duty to train customer’s employees
- Expert allowed: “Since the concept of ‘product stewardship’ appears to be an accepted industry standard in the area of chemical safety,” expert’s testimony was relevant

- Chemical release to river, contaminating city’s water supply
- Plaintiffs: Chemical supplier failed to comply with PS standards
- Plaintiffs’ expert: Supplier failed to properly assess, disclose and mitigate risks in its product’s sale, citing Responsible Care®
- Motion to exclude: Unqualified, legal conclusions not expert opinions, and Responsible Care® did not provide industry standards
- Motion denied: Expert qualified, could testify about Responsible Care®, and objections went to weight and not admissibility
- Class certification granted: Liability for inadequate Product Stewardship program and negligent failure to warn constituted Rule 23(a)(2) common questions

- Plant owner sued chemical supplier to recover clean up costs for spills occurring during off-loading
- Plaintiff: Industry standards imposed an obligation on supplier to off-load the product in a safe manner, citing supplier’s adoption of Responsible Care® Program
- Court: “None of the evidence submitted by Robbins contained in the CMA material imposes a duty on Eastman to ensure that a particular method or technique is used to off-load Eastman product at a customer’s facility.”
- Court: Eastman not responsible for the spills
Curtis v. M&S Petroleum, Inc., 174 F.3d 661 (5th Cir. 1999)

- Refinery workers sued defendant who made benzene-containing product, alleging it caused injuries and defendant supplier failed to warn them
- Defendant relied on the “learned intermediary defense” arguing that it had provided sufficient information about the products’ hazards to the refinery operator, and thus had no duty to directly warn plaintiff workers
- Court granted SJ
  - Defendant “wrote that it would be providing product stewardship” before providing the product and attached a summary of the OSHA benzene standard and instructions on safe handling, and met with the operator.
In re MTBE Prod. Liab. Litig.

725 F.2d 65 (2d Cir. 2013)

- Failure to warn of product release environmental harm
- City of New York drinking water contamination claims
- Duty to warn water providers, gas station operators, and public about special dangers of MTBE-containing gasoline
- Jury found Defendant failed to comply with duty to warn in warning gas station operators only about general dangers of spilling gasoline
- Causation: Gas station operators would have acted differently, thereby reducing MTBE contamination, had they been warned specifically about the dangers of MTBE
NYC Expert: Defendant failed in its duty of product stewardship, because it knew of MTBE’s health risks, resisted regulation, delayed additional toxicology studies, and promulgated misleading communications.

Defendant moved to exclude expert: Offered only facts and legal conclusions, not appropriate subjects for expert testimony.

Court excluded testimony: All expert did is gather public corporate statements and she “applied neither scientific technique nor technical expertise in presenting them”.

Court, however, allowed testimony re availability of risk information and applicable regulations.
Product Stewardship – Attorney Role

• Structure product stewardship programs to reduce litigation risks
  – Achieve statutory/regulatory compliance
  – Avoid incidents that could give rise to litigation
  – Properly allocate responsibility among suppliers/customers
  – Protect confidentiality
  – Demonstrate the exercise of due care

• Outside counsel
  – Program design
  – Emerging issue review
  – Product/corporate changes
  – Training
  – Program compliance
  – Audits
Litigation & the Product Steward

- Document retention
- Careful communication
- Preserving Privileges
- Fact development
- Expert testimony
- Trial Testimony
Litigation: Too Careful Communication

- Law360, New York (March 15, 2016):
- As GM refrained from urgently investigating reports of failing ignition switches, engineers deep within the organization were effectively prevented from sounding alarms by a policy that forbade terms like “problem,” “bad” and “rolling sarcophagus,” a former automotive industry engineer testified in a bellwether trial.
- Terms engineers were directed to avoid included “safety,” “big time,” “good,” “defect,” “ghastly,” “Challenger,” “powder keg,” “deathtrap,” “widow-maker” and “Cobain.”
- Plaintiffs’ expert: “You’re limiting [engineers] from being as precise and accurate as they could be”
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