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IS SAFETY OPTIONAL IN THE AGE OF THE REPTILE THEORY?

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IS SAFETY OPTIONAL IN THE AGE OF THE REPTILE THEORY?

- A product manufacturer's decision to provide a safety device as standard equipment or to make it an option to purchase can be complicated.
- Defending optional safety device claims can be challenging, particularly in an era of reptile theory tactics where juries believe "safety is number one" and not an "option".
- **Don't get bit!**

Examples of Products with the Potential for Making Optional Safety Devices Standard

Kitchen appliance (range/cooktop senses cookware)	Tractor (ROPS)	Refrigeration truck (three step/bumper)
Press brake (point of operation guard)	Motorcycle (crash bar)	Heater (non-resettable fusible link)
Saw (clamps, safety switch, safe stop)	Static roller (ROPS)	Automobile (side curtain airbags)
Crane w/ bucket (two-blocking)	Lawn tractor (ROPS)	Reach truck (forklift) (rear operator guard)
Bus and/or tractor trailer (back up alarm)	Flatbed trailer (bulkhead)	Tractor loader (rollbar or ROPS)
Loader (roll overprotective structure "ROPS")	Train horn (horn covers)	Conveyor belt (fall-out safety protection)
Outboard motor (lanyard-activated kill switch)	Automobile (back up alarm)	Concrete mixer truck (guardrail)
Truck (PTO driveline guard)	Fryer (disposal unit arm)	Baggage tractor (steel cab, center hood latch)
Forklift (backup alarm, flashing lights, rearview mirror)	Forklift jack (jack stand)	Automobile (airbag)
Printing press (safety interlocks)	Hose reel (guide master)	Gas cans (flame arrestor)
Tractor w/ backhoe (roll guard)	Lawnmower (ROPS)	

Overview: The Problem

- [T]here are two lines of conflicting authority on the optional safety device issue: one holding that a manufacturer cannot delegate important safety decisions to consumers and another holding that a manufacturer has no duty to equip its products with . . . safety features if consumers are informed of the availability of such devices as optional equipment.
- Owen & Davis on Prod. Liab. § 8:23 (4th ed.)



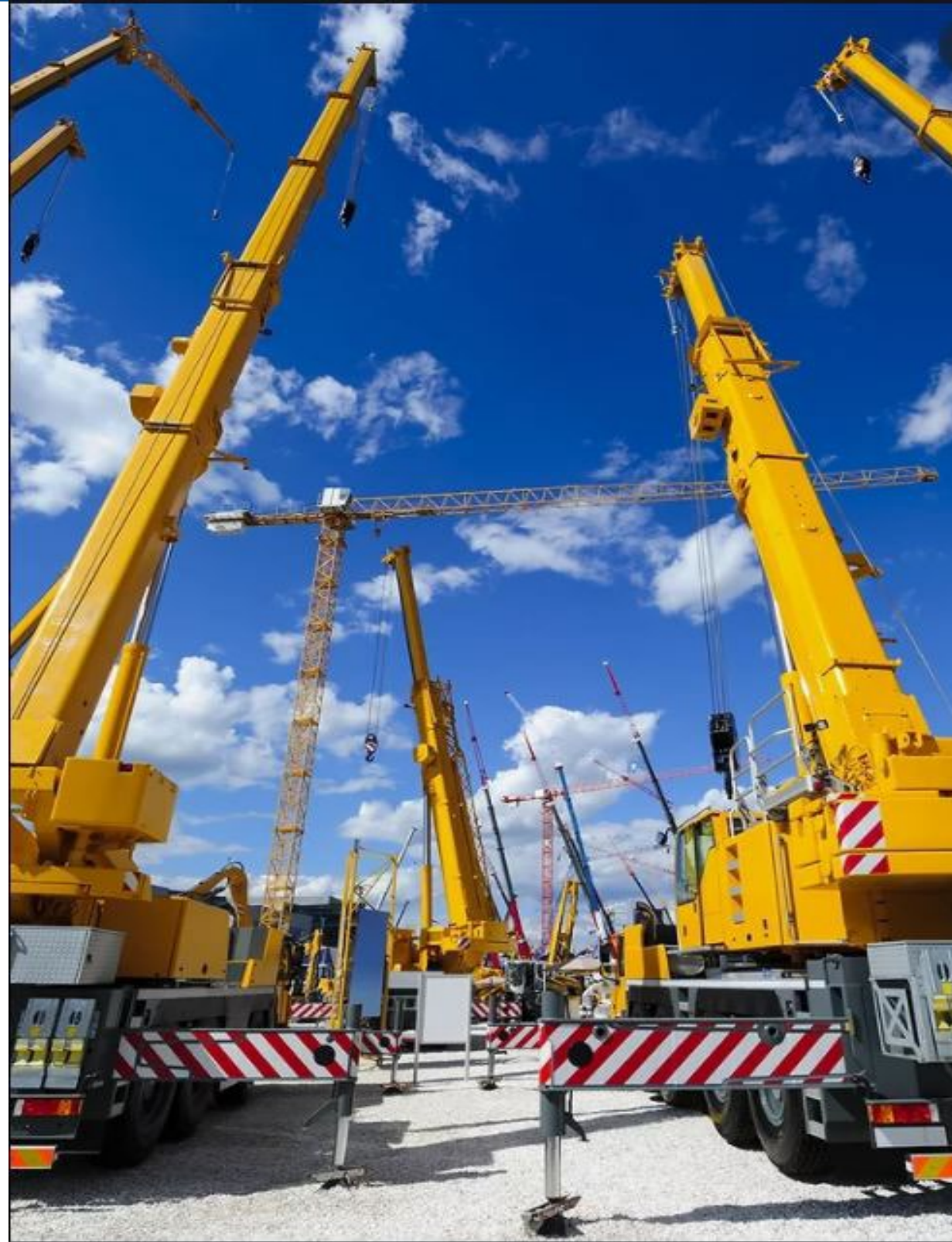
*Marchant v.
Mitchell Distributing Co.*

- Crane two-block accident
- Anti two-block optimized safety device available
- Crane not defective without device
- Distributor MSJ granted

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The New York Standard

- Was the buyer thoroughly knowledgeable regarding the product, its use and the available safety device or feature?
- Does there exist normal circumstances in which the product is not unreasonably dangerous without the available safety device or feature?
- Was the buyer in a position, given the product's range of uses, to balance the benefits and risks of the optional safety device or feature in consideration of the buyer's specific uses?

Disclaimer

- Neither Ray nor I represent the manufacturer of the lawn mower depicted (in case you recognize it)
- We are unaware of any active claims or similar incidents involving the lawn mower shown on the prior slide
- Image is so you all are familiar with the type of lawn mower involved in our hypothetical

Hypothetical



Assume the riding lawn mower was sold without a roll over protection system

No big deal ... right?

Hypothetical Cont.

- The plaintiff owns and operates a landscaping business and has been familiar with riding mowers for years
- Plaintiff's mower is aging and so he goes to his favorite BIG BOX store (hint it starts with L) and purchases a new rider
- There is no point-of-sale placard detailing the pros and cons of roll over protection
- There is nothing on the box indicating whether the rider does, or does not, come with roll over protection
- Plaintiff purchases that red riding mower we saw two slides ago
- Later that day, the plaintiff rolls sustaining injuries to his left side and neck
- The plaintiff was not using a roll over protection system at the time of his injury

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Additional Fact: Operator Manual Excerpts

Roll Over Protection System

A roll over protection system (ROPS) is a structure intended to protect the operator from injuries caused by lawn mower overturns or rollovers. A ROPS consists of a bar attached to the frame of the riding lawn mower to maintain a space for the operator in the event of an overturn or rollover.

⚠ CAUTION: *Always* use a roll over protection system to maintain control and reduce risk of personal injury.

More Excerpts

If the mower a worker will be using does not have a ROPS, look for unused bolt holes or brackets near the seat or frame to see if the mower should be equipped with a ROPS. In many cases, retrofit kits are available. Contact the manufacturer to see if there is a kit for the mower you will be using.

⚠ CAUTION: To reduce the risk of personal injury, *DO NOT* operate any riding lawn mower that can be equipped with a ROPS without its ROPS in place.

The Reptile Theory

- The reptile theory attempts to convince jurors to find for plaintiffs, not based upon the facts and the law, but instead to protect the community and in so doing protect themselves.
- In practice, plaintiffs attempt to create fear in juries by establishing with the defendant's representative safety rules, which plaintiffs argue were violated if a defendant does not act in the **safest** way.



1 Q. Your company would agree that it's
2 foreseeable that its customers would use their
3 machines without the guards in place, right?

4 A. It's possible.

5 Q. Well, I'm not asking if your machine is
6 safe, sir. I'm asking you if your company
7 agrees that it has a responsibility to provide as
8 safe a machine as possible to its customers.

9 A. I think we have a responsibility,
10 and I think we meet it.

11 Q. Well, your company wants to provide
12 its customers with as safe product -- a reasonably
13 safe product as they can, correct?

14 A. Yes.

15 Q. And based on that, your company
16 would agree that it has the responsibility to
17 provide as reasonably safe a product as they can?

18 A. Yes.

19 Q. And is there technology available that
20 would not allow those machines to run if the guards
21 were not in place?

22 A. I'm sure. I mean, we have got our safer
23 option, and we have a different system now.

24 Q. And what's that system?

25 A. It's got an interlock on it, but it's a

1 completely different design as far as cover.

2 Q. Explain to me what that interlock does.

3 A. It basically is a point that if it's
4 broken, there is no circuit there, so that it
5 doesn't allow the machine belt to run.

6 Q. In layman's terms, if the guards aren't
7 there, the machine can't run?

8 A. That's correct.

9 Q. And your company has a responsibility
10 to make sure that they provide as safe a product as
11 possible to the end consumer. Your company has a
12 responsibility to fix any of those problems and do
13 anything within your company's power to prevent
14 that from happening.

15 Your company knows that users of the machine
16 had the ability and do from time to time use the
17 Machine without the guards in place?

18 A. It's possible.

19 Q. And you know that there is a design
20 feature that would eliminate that?

21 A. Yes.

22 Q. And that's a safer design?

23 A. I'm sorry. Is that a question?

24 Q. Yeah, it is. It's a safer design having
25 an interlock device, correct?

A. Sure. Yes.

Industry Standards: US & International Regulations



Handling Competing US & International Standards

- Foreign regulatory standards are generally inadmissible
- Be prepared to file a motion in limine to preclude the conflicting international standard if more stringent and not controlling where case is venued.

Pasante, 12 NY3d 372

- In closing, the dissent notes, “[t]he predictability that was offered until today to manufacturers and distributors of equipment in this state is gone, and the result can only be an increase in cost – in the cost of liability insurance, and in the cost of safety features that buyers will no longer have the option to refuse.”

Key Takeaways



CLE POP-UP QUESTION

- Will the Buffalo Bills win the Super Bowl in the 2022-23 season?
 - a) Yes
 - b) No
 - c) I have no idea
 - d) Rob sure hopes so



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THANK YOU! If you have any questions, please contact one of the presenters



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