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Is Safety Optional in the Age of the Reptile Theory?

Robert J. Mullins, II
Moderator
GIBSON, MCASKILL & CROSBY, LLP
Buffalo, New York
rmullins@gmclaw.com

Jenna E. McDonnell
GIBSON, MCASKILL & CROSBY, LLP
Buffalo, New York
jmcdonnell@gmclaw.com

Ray Moore
MURPHY & GRANTLAND, P.A.
Columbia, South Carolina
emooreiii@murphygrantland.com

Introduction

A product manufacturer's decision whether 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 tactics where juries believe "safety is number one" and not an "option." Don't get bit. This article is intended to dissect the current law; explore real world examples; and provide key insights and takeaways on defending these optional safety device claims.

Products with Optional Safety Features or Devices

It is common practice for manufacturers to offer products with optional safety features. Think about going to the local retailer to shop for a kitchen appliance. You are going to find a whole host of options and features between the different models, some options involving aesthetics or convenience and some implicating optional safety features. For example, some ranges include cooktop features that detect and heat only to your cookware, but that is not a standard feature.

Here, we are discussing a similar situation where it might not necessarily be safety features in the suite of product offerings but a specific component or device that can be purchased as an option to a product which concerns safety. Should these options be standard or is it reasonable that they are optional? If they are optional, how do you handle the potential future litigation which may arise when it is alleged that the decision to offer the safety device as an option as opposed to supplying it standard caused and/or contributed to the injury? There are countless examples in the caselaw of actions alleging just that, some examples include:

- Tire changer with optional safety restraint arm (*Bausenwein v. Snap-On Incorporated, et al.*, 2021 WL 1167484 (N.D.N.Y. 2021));
- Tractor with backhoe and roll guard with optional taller roll guard (*Beemer v. Deere & Company*, 17 A.D.3d 1097 (4th Dept. 2005))/Tractor with optional roll over protection system (*Busby v. Deere and Company*, 2012 WL 13028647 (N.D.N.Y. 2012)); *Campbell v. International Truck and Engine Corporation, et al.*, 32 A.D.3d 1184 (4th Dept. 2006)); Riding mower with optional roll over protection system (*Parks v. Ariens Company*, 829 F.3d 655 (8th Cir. 2016));
- Outboard motor on boat with optional lanyard activated kill switch (*Brooks v. Outboard Marine Corporation*, 47 F.Supp.2d 380 (W.D.N.Y. 1999));
- Forklift with optional audible back up alarm, flashing lights and rearview mirror (*Campbell v. NACCO Materials Handling Group, Inc., et al.*, 2011 WL 5187930 (W.D.N.Y. 2011));
- Forklift jack with optional jack stand (*Donald v. Shinn Fu Co. of America, et al.*, 2002 WL 32068351(E.D.N.Y. 2002));
- Power reel in gas delivery trucks and optional guide master (*Fallon v. Clifford B. Hannay & Son, Inc.*, 153 A.D.2d 95 (3d Dept. 1989));
- Asphalt static roller and optional roll over protection system (*Jackson v. BOMAG GmbH, et al.*, 225 A.D.2d 879 (3d Dept. 1996))

- Power take off on truck with optional PTO driveline guard or hydraulic pumping system (*Lent v. Signature Truck Systems, Inc., et al. v. Ferellgas Partner, L.P.*, 2011 WL 4575312 (W.D.N.Y. 2011));
- Truck with optional back up alarm (*Mariani v. Guardian Fences of WNY, Inc., et al.*, 194 A.D.3d 1380 (4th Dept. 2021));
- Flatbed trailer bulkhead with optional steps and handholds (*Merritt v. Raven Company*, 271 A.D.2d 859 (3d Dept. 2000));
- Train horns with protective covers (*Nna, et al. v. American Standard, Inc.*, 630 F.Supp.2d 115 (D. Mass. 2009));
- Rental sport utility vehicle with optional side airbag curtains (*Noveck v. PV Holdings Corporation, et al.*, 742 F.Supp.2d 284 (E.D.N.Y. 2010));
- Electric heater with optional non-resettable fusible link (*Pacific Indemnity Company v. Therm-O-Disc, Inc., et al.*, 476 F.Supp.2d 1216 (D. N. Mex. 2006));
- Forklift with optional full or partial rear operator guard (*Parker v. The Raymond Corporation, et al.*, 27 Misc.3d 1224(A) (Sup. Ct. Orange Cty. 2010));
- Concrete mixer truck with optional guardrail (*Pigliavento v. Tyler Equipment Corporation, et al.*, 248 A.D.2d 840 (3d Dept. 1998));
- Printing press with optional retrofit interlock (*Quintanilla v. Komori America Corporation*, 2007 WL 1309539 (E.D.N.Y. 2007));
- Conveyer and bagging system with optional fall out safety protection (*Rogers v. Westfalia Associated Technologies, Incorporated, et al. v. Portec, Inc., et al. v. Mill Technology, Inc.*, 485 F.Supp.2d 121 (N.D.N.Y. 2007));
- Baggage tractor with optional steel cab and center hood latch (*Saladino v. Stewart & Stevenson Services, Inc., et al. v. American Airlines, Inc.*, 2007 WL 4285377 (E.D.N.Y. 2007));
- Fryer with optional shortening disposal unit (*Warlikowski v. Burger King Corporation, et al.*, 9 A.D.3d 360 (2d Dept. 2004)).

Regrettably, there is not one legal standard that is applied uniformly nationwide on this issue. The divide can best be summarized as follows:

> [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.). This makes it complicated for manufacturers and suppliers who distribute and sell products nationwide to decide how best to equip products. We will look at the basics of product liability under the Restatement, which many jurisdictions follow, and then look at some examples of the current law, using South Carolina and New York as examples.

Restatement of the Law of Torts

The best place to start in this analysis is with a brief overview on the basics of product liability law. While the Restatement is not codified law, it is a treatise by the American Law Institute, which provides an overlook of the well-established common law principles in the United States. Given its imprimatur, many jurisdictions follow the Restatement as the law of their state. Section 402A of the Restatement Second is one of the sections of the Restatement that has become highly recognized. The section covers the governing principles for strict liability for defective products. It provides as follows:

> *§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer*
>
> 1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>   a. the seller is engaged in the business of selling such a product, and
>   b. it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> 2. The rule stated in Subsection (1) applies although
>   a. the seller has exercised all possible care in the preparation and sale of his product, and
>   b. the user or consumer has not bought the product from or entered into any contractual relation with the seller.
>
> Caveat:
>
> The Institute expresses no opinion as to whether the rules stated in this Section may not apply
>
> 1. to harm to persons other than users or consumers;
> 2. to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or
> 3. to the seller of a component part of a product to be assembled.

Some courts have also looked to Restatement 2d of Torts § 388, which states:

> One who supplies directly or through a third person chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier:

a. Knows or has reason to know the chattel is or is likely to be dangerous for the use for which it is supplied, and
b. Has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
c. Fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

In discussing this section, the 4th Circuit has noted, "If the dangerous condition is open and obvious, then the requirement of subsection (b) will prevent a manufacturer from being subject to liability." *Austin v. Clark Equip. Co.,* 48 F.3d 833, 836 (4th Cir. 1995).

The Restatement Third of Torts was published later and supersedes section 402A of the Restatement Second. It provides clearer standards, breaking product liability law into three delineated sections, namely: manufacturing defects, design defects and warnings defects. These delineated sections are laid out below:

The Restatement 3d of Torts

A product "contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product."

A product "contains a design defect when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the reasonable alternative design renders the product not reasonably safe."

A product "is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution and the omission of the instructions or warnings renders the product not reasonably safe."

Unlike the Restatement Second, the Restatement Third puts the burden on plaintiff to demonstrate the existence of a reasonable alternative product design using a risk-benefit analysis. Under the Restatement Third "a product . . .is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of

the alternative design renders the product not reasonably safe." This section has been used in arguing that an optional safety feature is a "reasonable alternative design" and therefore liability should be applied, but the 8th Circuit Court of Appeals rejected this by stating that an optional safety feature can remain just that and not be standard if "the omission of the alterative design results in a product that is still reasonably safe for certain uses." *Parks v. Ariens Co.,* 829 F.3d 655, 659 (8th Cir. 2016).

Conflicting Decisions Within the Same Jurisdiction – A Look at South Carolina's Treatment

Marchant v. Mitchell Distributing Co. & Marchant v. Lorain Division of Koehring

Here we have a situation where we have different treatment coming out of the same Court, distinguishing between the supplier and the manufacturer. Both cases arise out of the same accident and concern a cable which broke during the operation of a crane. While the crane was lifting a bucket containing plaintiff and another workman, the cable snapped causing the bucket and the men to fall to the ground, *i.e.,* the crane two-blocked. The crane was an LRT series 15H Moto-bout self-propelled hydraulic crane which was manufactured by Lorain Division of Koehring and sold by Mitchell Distributing Company to the plaintiff's employer, Giant Portland Cement Company. A safety device known as an anti-locking device (or two-blocking) was available to purchase separately but was not purchased by plaintiff's employer. Plaintiff brought an action against both the manufacturer and the supplier (local dealer), but each were treated differently on summary judgment.

The first case to address is *Marchant v. Mitchell Distributing Co.,* 270 S.C.29 (1977). Plaintiff's complaint included several causes of action including breach of warranty and strict liability based on the theory that the absence of a safety device, here, the anti-blocking device (or two-blocking), the crane was unfit for its intended purposes and defective and unreasonably dangerous to the use. Mitchell was granted summary judgment on the ground that:

1. There was no actionable negligence on the part of the local dealer which was a proximate cause of the plaintiff's injuries;
2. There was no duty on the local dealer to equip or sell the crane with the optional safety device; and
3. The crane was not defective.

In upholding the trial court's decision granting summary judgment, the Supreme Court of South Carolina held that the fact that a product could have been safer with an optional device, does not necessarily render a product without such unreasonably dangerous.

The second case is *Marchant v. Lorain Division of Koehring,* 272 S.C. 243 (1979). Following the decision in *Mitchell,* Lorain (the manufacturer) likewise moved for and was granted summary judgment on all three theories of liability, namely, negligence, strict liability and breach of warranty. However, in this instance, the Supreme Court of South Carolina overturned the decision granting summary judgment, finding triable issues of fact. The Court began by noting its prior decision applied solely to the supplier, only. The Court held there was "ample authority" to support liability for a product manufacturer's

failure to include safety devices. While the record in *Mitchell* contained no evidence that the crane was unreasonably dangerous without the safety device, plaintiff in this instance submitted a design engineer affidavit which opined the crane was designed to make the two-blocking syndrome predictable, thereby providing sufficient evidence to create an issue for the jury.

The New York Standard

The seminal case in New York on optional safety features is *Scarangella v. Thomas Built Buses, Inc., et al.,* 93 N.Y.2d 655 (1999). In this case, the New York Court of Appeals (the highest Court in New York) laid out the three governing principles to determine whether a product without an optional safety device or feature is subject to a design defect claim. These factors include:

1. Was the buyer thoroughly knowledgeable regarding the product, its use, and the available safety device or feature?
2. Does there exist normal circumstances in which the product is not unreasonably dangerous without the available safety device or feature?
3. 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?

In setting these principles the Court relied on its prior decision set in *Biss v. Tenneco, Inc.,* 64 A.D.2d 204 (4th Dept. 1978), involving a loader with an optional roll over protection system, wherein the Court held, "[i]f knowledge of available safety options is brought home to the purchaser, the duty to exercise reasonable care in selecting those appropriate to the intended use rests upon him. He is the party in the best position *to exercise an intelligent judgment to make the trade-off between cost and function,* and it is he who should bear the responsibility if the decision on optional safety equipment presents an unreasonable risk to users." *See also Rainbow v. Elia Bldg. Co.,* 79 A.D.2d 287 (4th Dept. 1981) (holding, in case involving motorcycle with optional crash bars, buyer was in best position to exercise intelligent judgment in tradeoff between cost and function on necessity of optional safety device or feature).

The Court of Appeals revisited the *Scarangella* principles in *Passante v. Agway Consumer Products, Inc.,* 12 N.Y.3d 372 (2009). The case involved a mechanical deck leveler with an optional "Dok-Lok." The Court found that on summary judgment, the manufacturer and seller had the burden of showing the product "would normally be used" in circumstances in which the product is not unreasonably dangerous without the optional safety device or feature. The majority pointed to the manufacturer's brochure which noted the "pervasive risk" to dock leveler operators. The dissent in this decision argues that the majority opinion is tantamount to a reversal of *Scarangella,* based on their misapplication of the second *Scarangella* principle. The dissent argues the question is not whether the product "would normally be used" without unreasonable danger, but whether "there exist normal circumstances of use" where danger is not unreasonable. 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."

In a more recent case, *Fasola v. Bobcat of New York, Inc.,* 33 N.Y.3d 421 (2019), which involved a loader with 150 different attachments and an optional door kit, the Court put the *Scarangella* principles to the test to determine whether they are applicable to a situation where the manufacturer and seller knew the product would be used in a rental capacity. The crux of the analysis turned on the purchaser's knowledge and who is in the superior position to weigh the benefits and risks under the third *Scarangella* principle. The trial court had determined the *Scarangella* exception was "categorically unavailable" because the leasing company was "not at risk of personal harm" from the use of the product without the optional safety device or feature, but the Court of Appeals held there is no "risk of personal harm" requirement. However, the Court of Appeals did not go so far as to say the manufacturer was entitled to a directed verdict on the *Scarangella* exception, instead saying it was for the jury to be charged on and consider principles.

Riding Lawn Mower – Hypothetical[1]

Assume a riding lawn mower was sold without a roll over protection system. This seems like no big deal, right? It is common practice for anyone from experienced landscapers to homeowners to operate riding lawn mowers without the use of a roll over protection system in their everyday practical uses.

Now, assume there is a claim that a plaintiff struck a piece of landscape edging stone on an angled portion of a yard causing the riding lawn mower to roll over and plaintiff to become pinned and sustain leg injuries resulting in near amputation. No roll over protection system was being used at the time of his injury. Plaintiff testifies he was not aware that the riding lawn mower he purchased did not come equipped with a roll over protection system as a standard feature. He further testifies that he was not aware that a roll over protection system was available for purchase as an optional safety feature.

Now considering the treatment under *Scarangella,* plaintiff's testimony eliminates entitlement to the exception based on the first principle alone unless of course the defense can demonstrate circumstantially that plaintiff did have knowledge. Plaintiff testified he was not knowledgeable that a roll over protection system was not standard in the first instance and that it was instead available for purchase as an optional safety feature. Assuming the defense could establish knowledge, skipping ahead to the third factor, it

[1] *See https://www.google.com/url?sa=i&url=https%3A%2F%2Fwww.sportystoolshop.com%2Feasy-rider-lawn-mower-steeringknob.html&psig=AOvVaw2d1ezU5hRDMhKCLt7Fij6Q&ust=1628687552949000&source=images&cd=vfe&ved=0CAsQjRxqFwoTCLCdop_EpvICFQAAAAAdAAAAABAM.* Disclaimer: This image is used solely as an example and the hypothetical is not premised on the particular riding lawn mower depicted. We are unaware of any active claims or similar incident involving the riding lawn mower shown above. The image is provided for familiarity and visualization purposes only.

turns on the ultimate idea of who is in the best position to weigh the benefits and risks in consideration of the specific uses. If plaintiff is an ordinary consumer with no experience in the use of riding lawn mowers he may not be in the best position. In contrast, say plaintiff is an experienced landscaper who regularly uses the product, then plaintiff is arguably in the best position to weigh the benefits and risk based on their use and experience.

Finally, going back to the second factor, the reality is there exist many normal circumstances where the riding lawn mower can be used safely without the roll over protection system. Despite this reality, actually demonstrating the riding lawn mower is safe without supplying the roll over protection system as standard can become more difficult where the product manual states it is safer to "always" use a roll over protection system. Consider the following illustrative example:

> 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.
>
> ⚠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.

Does the excerpt (above) negate the reality that riding lawn mowers can be used safely without the roll over protection system? Can plaintiffs use excerpts like this to their advantage?

The Reptile Theory

As a refresher, you will recall the so-called "Reptile" theory commonly utilized by the plaintiff's bar attempts to shift the legal standard and burden of proof by focusing on "safety rules." This theory originates from the book, *Reptile: The 2009 Manual of the Plaintiff's Revolution* by David Ball and Don C. Keenan. Under this theory, the plaintiff's bar attempts to convince jurors to find for a plaintiff not based upon the facts of the case before it and the applicable legal standards, but instead based on appeals to personal interests, biases and a desire to protect the community. For example, they use the "Umbrella Rule" by using the widest general rule, arguing this over-generalized rule was violated, to ignore the legal duty and standard of care and instead posit that the issue is whether the defendant acted in the safest way. They act on a jury's instincts of fear for the safety of their community, rather than applying reason to the evidence and law on a particular set of facts.

Some traditional reptile questions that are applicable in the realm of optional safety devices, include, but are not limited to:

- You would agree safety is a top priority for a manufacturer?
- You would agree that a manufacturer should never needlessly endanger the public's safety?
- You would agree manufacturer must not sell a product in a manner that is unsafe for its intended use?
- You would agree that it is dangerous to distribute and sell a product that exposes consumers to an unnecessary risk?
- You would agree there is a duty to safeguard the consumer?

These are questions framed to elicit a simple agreement to lead into the argument concerning the alleged problems with the safety device or feature which is only an option. The following is an example of an exchange during a corporate representative deposition:

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

A: It's possible.

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

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

Q: Well, your company wants to provide its customers with as safe product – a reasonably safe product as they can, correct?

A: Yes.

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

A: Yes.

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

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

Q: And what's that system?

A: It's got an interlock on it, but it's a completely different design as far as cover.

Q: Explain to me what interlock does.

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

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

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

A: It's possible.

Q: And you know that there is a design feature that would eliminate that?

A: Yes.

Q: And that's a safer design?

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

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

A: Sure. Yes.

This testimony shows how a corporate representative may start strong in resisting merely agreeing with the foundational questions and can get backed into eventually agreeing with the reptile questions. In optional safety device or feature cases counsel and the corporate representative must remain vigilant in avoiding falling prey to the reptile tactics used by plaintiffs. It is easy to make the argument that a product can be safer with the optional safety device or feature, but that does not mean the product is not reasonably safe without that option.

Industry Standards

US Product Safety

Two organizations aimed at enhancing US product safety are the American National Standards Institute ("ANSI") and the Underwriters Laboratory ("UL"). These are both organizations which set voluntary safety guidelines or standards on a national level, but they are given a recognition as well-accepted and a goal for manufacturers and distributors to achieve and follow. Some basic information about these

organizations is included below as well as some information about the Occupational Safety and Health Administration ("OSHA") and how OSHA regulations contrast with ANSI and UL.

American National Standards Institute

The purpose of the American National Standards Institute can be gleaned right from its name. ANSI created voluntary standards concerning safety and product integrity. ANSI governs a multitude of industries, product types, companies and organizations. These companies, industries, organizations, government entities and other work hand-in-hand in developing American National Standards ("ANS") which are voluntary consensus standards.

Underwriters Laboratory

Part of the work of the Underwriters Laboratory is certifying products which are investigated and tested according to their standards in safety. UL has been in existence for over a century and with that history has come an established reputation and sense of trust. Products marked with the UL seal have been tested by the UL according to nationally recognized safety and sustainability standards. Manufacturers aim to have the UL insignia on their product(s) to help consumers feel more comfortable with a decision to purchase a particular product.

Occupational Safety and Health Administration

Beginning in 1970, Congress enacted the Occupational Safety and Health Act which formed the Occupational Safety and Health Administration ("OSHA"). This organization is designed to enact regulations aimed at creating safe working conditions for most private and public sector employees in the United States and its territories.[2] Because OSHA places responsibility for safety on employers, to the extent the end user of a product is also an employer, an employer in this context would arguably be in the best position to weigh the benefits and risks of purchasing optional safety equipment.

International Standards

There are comparable international organizations which are similarly aimed at protecting consumers and providing an international consensus. Similarly the European Union has a comparable OSHA entity, however the directive concerning machinery contrasts with OSHA here in the United States.

International Organization for Standardization

The International Organization for Standardization ("ISO") is an organization designed to develop and publish international standards. Today, it consists of 165 member countries with 797 technical committees.[3] Members bring together experts and develop voluntary, consensus based, market relevant

[2] *See* https://www.osha.gov/aboutosha.
[3] *See https://www.iso.org/about-us.html.*

standards to be applied internationally. They have published nearly 24,000 standards covering the range of technology and manufacturing. The ISO has a certification process, also known as a third party conformity assessment, by which an independent body provides a written assurance that the products meet the standards. Similar to the UL insignia, many companies aim to pass this certification to use as a benefit to show outsiders.

International Electrotechnical Commission

Similar to the ISO, the International Electrotechnical Commission ("IEC") adopts voluntary standards which reflect a global consensus based on the input of thousands of technical experts across the world. However, these standards are more limited to electrical and electronic devices and systems. Products can undergo a conformity assessment to ensure it satisfies the requirements and characteristics of applicable standards, which include those covering safety. Both large and small companies participate in the IEC and undergo conformity assessments to help their products in marketing on a global scale.

Machinery Directive 2006/42/EC

Similar to the OSHA here in the United States, the European Union ("EU") has their own OSHA body. This directive arises out of that entity and is aimed at the protection of both workers and consumers with certain machinery.[4] A CE marking designates the machinery conforms to the requirements of the directive after passing a conformity test. Manufacturers bear the responsibility for certifying conformity and engaging in a risk assessment prior to their machinery entering the market. EU member states are to impose penalties for violations of this directive. Unlike the US OSHA standards, under this directive, the responsibility is still on the manufacturers in ensuring the machinery meets certain health and safety requirements.

Handling Competing US and International Standards

Foreign regulatory standards commonly come up as comparable or for use as a model when they are more stringent. Courts throughout the country have consistently held the foreign regulatory standards are inadmissible and have no probative value on liability under United States law. *See Buzzell v. Bliss*, 358 N.W.2d 695 (Minn. Ct. App. 1984) (precluding evidence of English law, and holding that even if English law was probative to some degree, the trial court had discretion to exclude this evidence if its probative value was outweighed by its potential to confuse or mislead the jury); *Garmon v. Cincinnati, Inc.*, No. 02A01-9203-CV-00033, 1993 WL 190923, (Tenn. Ct. App. June 4, 1993) (holding "foreign regulatory rules and standards not having the force and effect of law were not admissible in a product liability case" concerning British standards on a press brake); *Deviner v. Electrolux Motor*, A.B., 844 F.2d 769 (11th Cir. 1988) (holding that Swedish law mandating chain brakes on chainsaws and statistics regarding a resulting reduction in Sweden of the number and severity of chainsaw injuries were excludable due to the

[4] *See* https://osha.europa.eu/en/legislation/directives/directive-2006-42-ec-of-the-european-parliament-and-of-the-council.

probability that such evidence would confuse the jury); *Hurt v. Coyne Cylinder Co.*, 956 F.2d 1319 (6th Cir. 1992)(holding foreign British standards regarding the use of a bursting device for acetylene cylinders were properly excluded); *Jones v. Lederle Labs.*, 785 F. Supp. 1123, 1127 (E.D.N.Y.), aff'd, 982 F.2d 63 (2d Cir. 1992) (finding Japanese regulations permitting marketing of vaccine were properly excluded); *Tews v. Husqvarna*, 390 N.W.2d 363, 367 (1986) (finding legal requirements in foreign jurisdictions for chain brakes were properly excluded).

There is near unanimity in precluding European and/or international standards, particularly when they are in conflict with U.S. Standards so if faced with a case potentially involving foreign standards be prepared to file a motion in limine to preclude the international standard, or for that matter any conflicting standard, which may be more stringent but is not controlling where the case is venued.

Conclusion

Considerations on optional safety devices and features are not a simple yes or no. They can be complex and complicated decisions weighing the costs associated therewith and the risks and benefits in the marketplace. The manufacturing and sales teams should work together with their legal teams in considering the form of the products they place in the stream of commerce.

The riding lawn motors and optional roll over protection system discussed is a great example of the intricacies in the evaluations. Moreover, just because a later safety standard is enacted which makes a certain feature standard, doesn't render the version without the optional safety device included as standard necessarily defective. A relevant example is motor vehicle safety standards. For years, the rearview assist cameras were optional features in your new car purchase but in the advent of new safety regulations it is now a standard safety feature on automobiles. However, just because that safety feature is now standard, that doesn't render all the cars on the road without such defective, nor is there a burden on car manufacturers to recall all earlier model vehicles which didn't include the rearview assist cameras.

There are so many issues and factors to weigh when considering optional safety devices or features. This article just scratches the surface on the considerations which must be made and whether that decision should lie with the manufacturer or with the consumer or employer. When faced with these cases, be aware, and be prepared to address the relevant standards in your jurisdiction and fight off plaintiffs reptile tactics.