
About the Authors



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Mitigating Litigation Risk Of Inherently Dangerous Products: Tips For Manufacturers

This past June, Blitz USA, a manufacturer of gasoline containers, announced that it would cease operations after an unsuccessful attempt to reorganize through Chapter 11 bankruptcy. Blitz representatives attributed its demise, in large part, to soaring litigation costs associated with product liability lawsuits brought by plaintiffs alleging personal injury associated with the use of the gasoline containers.

According to the company, these suits typically involved injuries resulting from practices expressly warned against in the safety guidelines imprinted on the outside of every gas container. The majority of the suits involved adults who used gasoline to start or accelerate a fire. The company spent \$30 million defending product-liability suits and owes \$3.5 million in lawyer fees.

On July 31, 2012, the company closed, putting 117 employees out of work.

"We appreciate the support of our employees and their families in our efforts to reorganize and develop a viable business plan.

Unfortunately, we were not able to address the costs of the increased litigation associated with our fuel-containment products," said Rocky Flick, president of the Miami-based manufacturer.

There is nothing unique about a company going out of business, and any company engaged in the manufacture and marketing of products that will be used by consumers has experience defending itself against personal injury lawsuits. What does appear to set the Blitz USA story apart is the industry trade group's assertion that despite several requests to do so, the Consumer Product Safety Commission, the regulatory body tasked with overseeing this industry, has refused to issue mandated standards for these products.

Industry is often accused of resisting efforts by regulatory bodies to issue additional standards to improve the safe and effective use of products. Yet, in 2008, Public Citizen, the non-profit watchdog group, issued a report titled "Hazardous Waits," accusing the CPSC of

unreasonable delays in providing the public with information about dangerous products after the manufacturer has reported an issue.

In the case of gasoline containers, the industry has been pushing for regulation, but it would appear that the CPSC has decided that since user error rather than inherent product danger is the cause of these injuries, there is no need to issue standards. The CPSC may have also rationalized that no matter how many ways you seek to warn people about the appropriate use of inherently dangerous but useful products, there will inevitably be people who fail to follow instructions and suffer for it.

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In fact, there is no way to completely prevent consumers from injuring themselves by misusing products. And as companies are all too aware, defending against even a frivolous lawsuit requires the investment of financial resources before there is dismissal, summary judgment or victory at trial.

Nevertheless, there are certain possibilities a company should evaluate as defenses against litigation, particularly with products whose level of danger appears to be obvious:

*** *Informed Consent.*** This means products are accompanied by warnings that adequately disclose risks. Taking the additional step of requiring an acknowledgment that the warnings have been received, while not forcing people to use their common sense, does make them acknowledge that they have been advised of the proper way to use the product.

Consumers have the right to decide for themselves whether the benefit of using a particular product is worth assuming the risks. A company is entitled to the protection conferred by providing consumers with sufficient information to make their decision.

If the product is available through a retail seller or other third party, the manufacturers would have to rely on the sellers to implement this process. That creates more headaches, but it would be worth the aggravation if it ultimately limited a company's exposure.

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*** *Restricting Access.*** There are restrictions as to where and under what conditions most inherently dangerous products can be sold. Gasoline containers present the dilemma of what to do when a product is not dangerous unless combined with something that is inherently dangerous. Gasoline is highly regulated. In certain states, for example New Jersey, it can be dispensed only by a service station employee who has been trained, and for whom the station maintains a certificate signed by both the attendant and the station operator.

The perceived benefit associated with restricting access to the product would have to be weighed against the logistics of doing so, and the impact on sales, but it's worth evaluating. Limiting consumer access and requiring informed consent reduces the size of the user population, but it can also help weed out lazy or incompetent users.

* ***Advisory Opinions from Regulators.*** Depending on the industry and the circumstances, seeking an advisory opinion may be useful, not to prevent litigation but to aid the company in defending itself and dispensing with a claim as quickly and cost-effectively as possible. Judges and juries expect that most products in this country, dangerous or not, are governed by regulatory agencies tasked with protecting the public. Manufacturers are expected to follow the existing rules. But plaintiffs often don't argue that the rules were broken, but rather that more should have been done to protect against injury.

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A manufacturer facing an increasing number of claims might consider seeking an advisory opinion on a proposed course of action to address the issue. While this will not prevent litigation, it can serve to bolster the defendant's argument that the company acted reasonably.

While it may seem appealing to blame the CPSC for Blitz USA's plight, there is no way to know whether mandatory guidelines would have saved the company. Preventing litigation may be the goal, but the more likely benefit would be equipping the company to mount a defense, making it less palatable to plaintiff lawyers, who hopefully will bypass the hassle and expense in favor of easier pickings.