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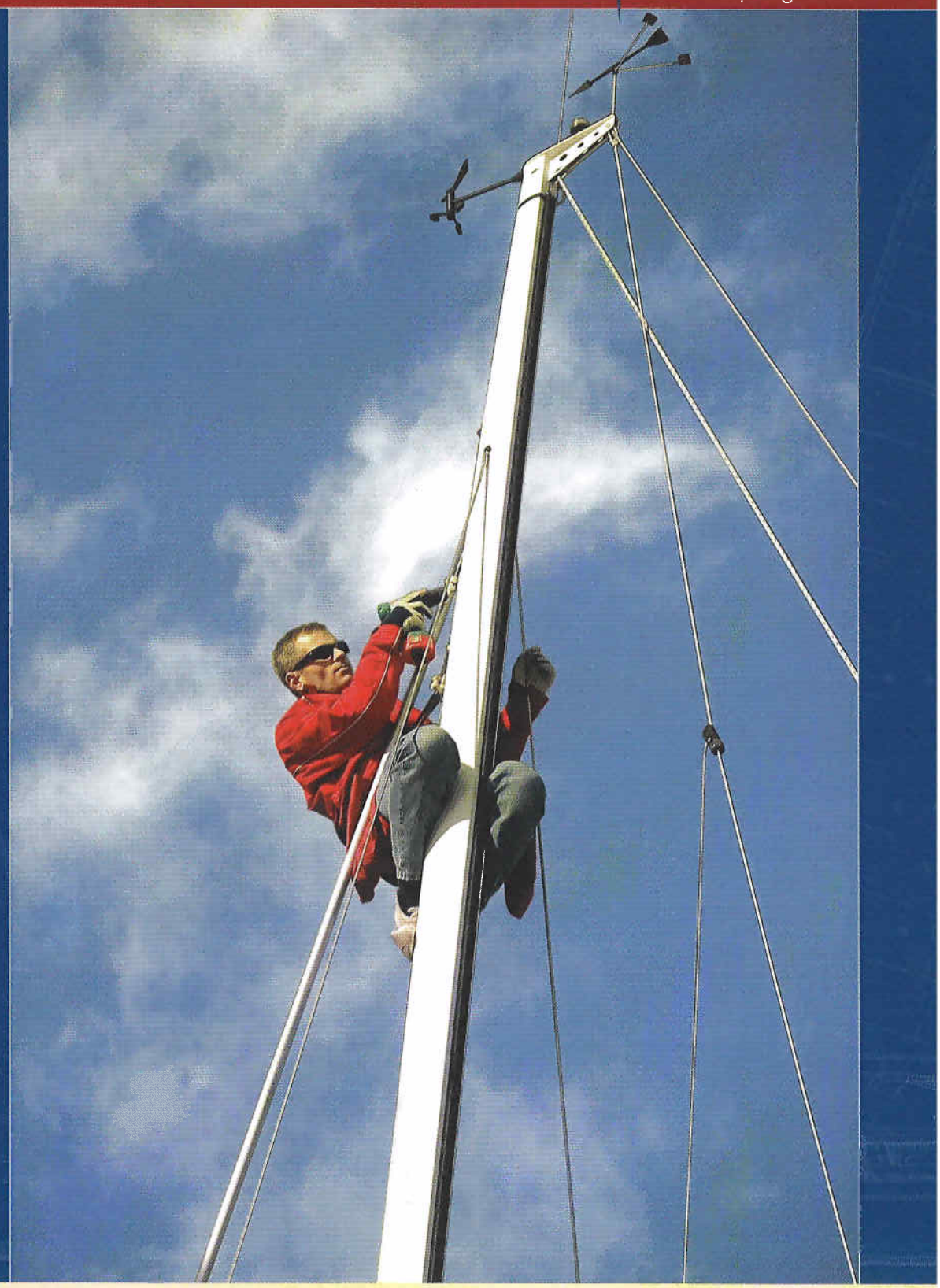

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Navigating the Unsettled Seas of Product Liability Law

By Randy T. Moore, Snell & Wilmer L.L.P.

Death and taxes may be the only certain things in life. But for those who are in the business of manufacturing and selling recreational pleasure boats, product liability litigation — in one form or another — is not far behind on the certainty continuum. With more than 12 million registered recreational boats in the U.S. involved in accidents resulting in approximately 700 fatalities and 3,500 injuries per year, there is no shortage of catastrophe to stir the litigation waters.[1] Given a civil tort system that varies greatly in its administration of justice from state to state and lowers the traditional hurdles that a litigant must clear to establish a manufacturer's liability, the risks of exposure to the recreational boat manufacturer are real and substantial. But litigation risks are like any business risk: they must be understood and managed.

This article, which is one in a series of four, is intended to provide marine manufacturers with a general understanding of the laws by which their products and conduct might be judged in a court of law, and some practical advice on how to minimize the potential liability exposure.

The focus of this article will be on the manufacturer's potential liability for design and manufacturing defects in its products. Subsequent articles will address: (1) the manufacturer's potential liability for inadequate warnings, including the manufacturer's so-called post-sale duty to warn; (2) the manufacturer's potential liability under federal and state consumer protection and warranty laws; and (3) practical steps that a manufacturer can and should take if it is faced with potential liability from a boating accident involving its product.

A. An Overview of Manufacturing and Design Defects

In-depth knowledge of the intricacies of product liability law is not necessary for a manufacturer to meet its legal responsibilities and manage the associat-

ed risks. For reasons discussed below, this probably would be impractical – if not impossible – given the various nuances that exist among the various jurisdictions in which the manufacturer might be sued for a product defect. A general understanding of product liability law, however, is essential to the manufacturer's ability to manage its exposure to liability risks. Indeed, without a working knowledge of product liability law, the manufacturer cannot see the entire risk picture and cannot take necessary steps to eliminate or minimize the risks.

1. Potential theories of recovery against manufacturers.

There are three general types of defects that form the basis of most product liability actions in the United States: 1) manufacturing defects; 2) design defects; and 3) warnings defects. In a given lawsuit, each of these defects can be asserted under either a strict liability or negligence theory.

Under a negligence theory, the plaintiff must generally prove: (a) that the defendant owed a duty of due care to the plaintiff; (b) that the duty of due care was breached; and (c) that the breach of the duty caused the plaintiff's injuries.[2] Under modern tort law, the manufacturer's duties are broad and extend to anyone who ought to be expected to use the product or anyone who might be injured by its use. A product manufacturer breaches its duty of due care if it fails to use the amount of care that a reasonably careful manufacturer would use in similar circumstances to avoid exposing others to a foreseeable risk of harm.[3] For example, if the plaintiff claims that the manufacturer was negligent because it did not include a particular safety device on the product it manufactured, the plaintiff must prove that a reasonably careful manufacturer would have included this safety device on its product. Under a negligence theory, the focus of the liability inquiry is on the defendant's conduct at the time it occurred and seeks to determine whether it was reasonable in light of the known or knowable foreseeable risks. Thus, the plaintiff must be able to show what the manufacturer knew or should have known, as well as what a reasonably careful manufacturer would have done under similar circumstances.

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Strict liability in tort evolved in the 1960s as a means of easing a plaintiff's burden of recovering damages against a manufacturer for a defective product. Under this theory, "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."[4] Thus, liability is not predicated on the defendant's fault, but rather its role in placing a defective product on the market. Indeed, this rule applies even if the manufacturer exercises all possible care in the preparation and sale of its product.[5] The central focus of inquiry is not on the manufacturer's conduct, but rather the product itself.

In addition to eliminating the plaintiff's burden of proving what the defendant knew and what a reasonable person would have done, strict liability also imposes liability on all persons or entities who are part of the business enterprise of bringing the defective product onto the market. Consequently, the plaintiff may sue any one or more of the people or entities in the product's "chain of distribution," which may include a component part manufacturer, the finished goods manufacturer, distributors, lessors and retailers.[6] And liability is imposed upon all parties who were responsible for placing the defective product on the market, subject only to their right to seek indemnity from those links in the chain who were responsible for the defect.[7]

The rationale for imposing strict liability on product manufacturers and sellers was essentially based on two public policy considerations. First, it was seen as a means of reducing the risks of defective products reaching the market based on the manufacturer's superior knowledge of the hazards of its products and its ability to guard against them. In essence, the imposition of liability was seen as an incentive to manufacture and market safer products. Second was the notion that product manufacturers and sellers were in a better position to absorb and spread the costs of injuries that occur through the use of their products, either by insuring against them or by distributing them to the public as a cost of doing business.[8]

2. So what is a manufacturing or design defect?

Under strict liability, the test for determining a manufacturing defect is relatively straightforward and applied uniformly among most states. As a general rule, "[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."[9] Unlike a design defect, which involves a product's consciously planned construction, a manufacturing defect results when something goes wrong during the production or distribution of a particular product, so that the product does not meet the quality of the other units in the product line as of the time it left the defendant's control. Essentially, the defective product is an aberration in the production line of an otherwise well-designed, properly labeled product.

Unlike manufacturing defects, the design defect concept is harder to grasp and the standards by which it is applied vary significantly among states. In states that have adopted a strict liability statute or common law precedent, several definitional tests have been used and applied in myriad ways.[10]

California, for example, has adopted two alternative tests for evaluating design defects: the consumer expectation test and the risk/benefit test. A design defect exists if the product failed to perform as safely as an ordinary consumer would expect when the product is used in an intended or reasonably foreseeable manner.[11] Alternatively, a design defect exists if the design of the product embodies excessive preventable dangers; that is, if the inherent risks of danger outweigh the benefits of the design.[12] Under the risk/benefit test, once a plaintiff makes a preliminary showing that his injury was caused by the product's design, the burden shifts to the defendant to prove that the benefits of the design outweigh the risks of the design based on the following factors: (1) the gravity of the potential harm resulting from the use of the product; (2) the likelihood that such harm would occur; (3) the feasibility of a safer alternative design; (4) the financial cost of an alternative design; and (5) the adverse consequences to the product and to the consumer that would result from an alternative design.[13]

Under California law, the consumer expectation test is reserved for cases in which "the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions and is thus defective regardless of expert opinion about the merits of the design."[14] Consequently, where the plaintiff's design defect theory is one of technical and mechanical detail that examines the behavior of components of the product under the complex circumstances of a particular accident, the court must use the risk/benefit test.[15]

In a case of strict products liability based on a design defect, a plaintiff in California does not have the burden of proving that a reasonable alternative design was feasible.[16] The plaintiff also does not bear the burden of showing, under the risk/benefit analysis, that the risks involved in the design outweighed the product's benefits.[17] Rather, it is up to the defendant to show that an alternative design would entail unreasonable costs, be uneconomical or impractical, interfere with the product's performance, or create other increased risks. Further, the fact that the product complied with government safety standards does not preclude liability for a design defect. And evidence of industry custom or usage is not permitted to establish that a product is not defective.[18]

In contrast to California's liberal definition and application of design defect principles, states using alternative definitions generally apply a more demanding standard. Under Section 2 of the Restatement of Torts (Third), which is used in one form or another in many states, "[A] product ... is defective in design when the foreseeable risk 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 by a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe."[19] Consequently, this standard not only rejects the consumer expectation test, but places the burden on the plaintiff to prove the existence of a reasonable alternative design. Furthermore, under this standard, compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risk sought to be reduced by the statute of regulation, but such compliance does not preclude as a matter of law the finding of a product defect. On the other hand, consistent with California law, a product's noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risk sought to be reduced by the statute or regulation.[20]

Manufacturers, of course, generally do not get to choose where they are sued for tort related claims. With most states adopting "long arm" statutes, which allow its courts to exercise personal jurisdiction over non-resident defendants who place products into the stream of commerce, most recreational boat manufacturers may be sued wherever their products may cause injury.[21] A prudent manufacturer, therefore, should be prepared to defend its product in any state in which it is sued and should adopt policies and practices that further this goal.

B. What Can A Manufacturer Do?

Implementing and adhering to a product safety and liability prevention program is a sound business practice for any company. This topic, however, is beyond the scope of this article. Nevertheless, the general product liability principles discussed above suggest prudent actions that a manufacturer should consider, if not implement. To the extent a manufacturer does not have an established product safety and liability prevention program, the following recommendations should serve as a first step towards such a program. For those manufacturers who already have a program, the following recommendations should be considered in light of the policies and procedures of their existing program.

1. Compliance with mandatory regulations and industry standards.

Federal statutes authorize the U.S. Coast Guard to regulate the manufacture and safety standards of recreational boats and boating related equipment. A manufacturer of recreational boats must comply with applicable construction and performance standards and certify its compliance. Its failure to do so not only exposes the manufacturer to civil penalties, but also dire consequences if its non-compliance is the cause of an accident or injury. Under such circum-

stances, the manufacturer would be considered negligent *per se* and the product would be deemed defective under any defect standard. Moreover, the manufacturer, who is deemed to know the law, would likely be exposed to a claim for punitive damages based upon its conscious disregard for safety.

It stands to reason that regulatory compliance can never be taken lightly and the manufacturer must have a well thought out and documented plan to ensure compliance. At a minimum, the plan must require the constant updating of applicable regulatory standards, adequately trained personnel who can ensure compliance with those standards, and adequate documentation of the compliance.

But the current state of product liability law will likely require more from the manufacturer. Indeed, if the industry consensus recognizes voluntary safety standards and recommended practices, such as those established by the ABYC, the manufacturer's failure to comply with them may result in a determination that the manufacturer did not act as a reasonably prudent boat manufacturer with respect to the design and manufacture of those systems covered by the standards and recommended practices. And the standard that was not complied with could provide the "reasonable alternative design" against which the manufacturer's design will be judged. Consequently, compliance with the ABYC's voluntary standards and recommended practices should be an integral part of any product safety program.

To comply with mandatory regulations and voluntary standards, the manufacturer will need to conduct an honest and accurate assessment of its own internal capabilities. If its personnel lack the requisite degree of professional expertise and training, then the manufacturer will either need to hire qualified personnel, train existing personnel, or consult with trained professionals who can ensure compliance with regulations and standards. Education programs offered by the ABYC, including its certification and standards accreditation courses, provide a comprehensive approach to meeting these needs.

Finally, while the manufacturer's well documented self-certification compliance program may provide adequate protection, an independently administered certification program, such as that offered by the National Marine Manufacturers Association ("NMMA"), provides an added measure of protection. By using the NMMA's Boat Certification Program, the manufacturer can ensure compliance with not only the minimum regulations promulgated by the U.S. Coast Guard, but also the more rigorous standards established by the ABYC. Furthermore, those manufacturers who certify their boats through the NMMA make a powerful statement about their commitment to safety and quality.

2. Use of qualified vendors and component part suppliers.

The safety of a product as a whole is only as safe as the sum of its parts. Consequently, to the extent the boat manufacturer looks to outside vendors to supply parts and components with which to construct its boats – which is the norm in the industry – the boat manufacturer must ensure that its vendors provide quality components that meet applicable regulations and voluntary safety standards. The boat manufacturer should deal only with reputable marine suppliers who have a proven track record. The boat manufacturer should require the component vendor to provide written assurance that its products meet the applicable regulations and safety standards, and that it has adequate quality control measures in place to ensure that each component meets the specifications to which it was designed. Those manufacturers who certify their boats through the NMMA can obtain these assurances and more by using NMMA's Component Type Accepted Program. Through this program, manufacturers can ensure that their vendors are providing components that meet the applicable ABYC standards and U.S. Coast Guard regulations.

Since strict liability principles make the boat manufacturer liable for a defect in a vendor-supplied part, the boat manufacturer should ensure that it is adequately protected in the event that the vendor-supplied part proves defective. The boat manufacturer may seek to be added to the vendor's liability insurance policy as an additional insured or seek to enter into a contractual indemnity agreement with the vendor. Without such recourse, the boat manufacturer may find itself in the position of having to incur costs to defend the integrity of the vendor's component and may ultimately be held liable if it proves to be defective.

3. Use of adequately trained and competent dealers.

Although the boat manufacturer's authorized dealer is typically an independently owned and operated entity, which will not subject the boat manufacturer to vicarious liability, certain acts or omissions by the dealer can expose the product manufacturer to liability under product liability law. In California, at least, the manufacturer's liability for the completed product may extend to responsibilities that are delegated to the manufacturer's authorized dealers, such as the installation of component parts and final inspections, corrections and adjustments as may be necessary to make the product ready for use.[22] Consequently, if the manufacturer relies on its dealer to install or inspect critical components, the dealer's failure to do so can expose the product manufacturer to liability. The product manufacturer's knowledge of the dealer's lack of competence in performing its dealer-related functions could serve as an additional basis for liability against the manufacturer under a negligence theory. Aside from the potential liability exposure, a dealer who can thoroughly and accurately perform a predelivery inspection of the boat before turning it over to the customer provides an additional measure of protection to

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the boat manufacturer that the boat is safe and sound.

Accordingly, the boat manufacturer should only deal with reputable dealers who have adequately trained and competent personnel. Further, the manufacturer should provide the necessary degree of training and product information to the dealer to ensure that it can provide the requisite technical support. In addition, it should provide the dealer with a detailed pre-delivery checklist so that the dealer can ensure that all systems are operating properly and the customer has received all accompanying operation manuals and safety literature.

As with vendors and suppliers, the boat manufacturer should seek to protect itself from the dealer's negligent acts or omissions by including a contractual indemnity provision in the dealership agreement and/or requesting that it be included on the dealer's insurance policy as an additional insured.

4. Securing adequate insurance.

Strict liability is imposed on manufacturers under the belief that they are capable of absorbing the cost of injuries caused by their products, and the cost of defending their products against unmeritorious claims, by insuring themselves against such contingencies. Whether the stated rationale is sound is irrelevant – strict liability applies in almost every jurisdiction in the United States. Accordingly, a prudent manufacturer must not only ensure that it is adequately insured against potential liability, but also that its insurance policy affords it the ability to vigorously defend itself against meritless claims.

For assistance on these matters, the manufacturer should look to a nationally recognized and reputable marine insurance broker. A professional in this field can provide valuable assistance to the manufacturer in determining the necessary lines of coverage, the adequacy of policy limits, and the need for excess or umbrella coverage. The manufacturer will want to ensure that the policy it purchases provides it access to qualified attorneys and experts who have proven experience in handling product liability matters involving marine products and related fields, such as admiralty and maritime law.

A qualified insurance broker can also assist the manufacturer in obtaining the lowest premium based on its adherence to safety regulations and a product safety program. Indeed, a manufacturer who certifies its boats through the NMMA should expect to pay a lower premium than a manufacturer that does not. Finally, the insurance broker can assist the boat manufacturer by providing access to outside risk management sources and professionals.

5. Advocating and promoting policies that protect the industry.

The marine industry, as a whole, benefits from the efforts of organizations such as the NMMA, which advocates and promotes sensible policies and regulations that affect recreational boaters and manufacturers of boats and related equipment. These benefits inure to all individual boat manufacturers. The interest of the manufacturer, however, is best served when it actively participates and supports the efforts of these organizations. By becoming a part of the collective voice that promotes sound legislation, such as the Recreational Marine Statute of Repose that is now before Congress, the manufacturer protects its legitimate business interests as well as those of the marine industry. ▩

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Footnotes

1 United States Coast Guard, Boating Statistics – 2005.
2 6 Witkin, Summary of Cal. Law (9th Ed. 1998 and Supp. 2004) Torts, § 732.
3 3d.
4 Restatement (Second) of Torts § 402A (1965).
5 Id.
6 Vandermark v Ford Motor Co. (1964) 61 C.2d 256, 262.
7 Id.
8 Greenman v. Yuba Power Products, Inc. (1963) 59 Cal.2d 57, 63-64; see also, Escola v. Coca Cola Bottling, Co. (1944) 24 Cal.2d 453, 461, concurring opinion.
9 Restatement (Third) of Torts; Product Liability § 2 (1998).
10 See generally, Morton F. Daller, Product Liability Desk Reference (2006 Ed.).
11 Barker v. Lull Engineering (1978) 20 Cal.3d 413, 429.
12 Id.
13 Id. at p. 431.
14 Soule v. General Motors Corp. (1994) 8 Cal.4th 548, 567.
15 Id.
16 Bernal v. Richard Wolf Medical Instruments Corp. (1990) 221 Cal.App.3d 1326, 1335.
17 Moreno v. Fey Manufacturing Corp. (1983) 149 Cal.App.3d 23, 27.
18 Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757
19 Restatement (Third) of Torts: Products Liability § 2 (1998).
20 Id. at §4.
21 World-Wide Volkswagen Corp. v. Woodson (1960) 444 U.S. 286, 297-298.
22 Vandermark v. Ford Motor Co., supra, 61 C.2d at p. 261.