

August 21, 2000

Mr. Hugh Pratt  
Load Monitor, Ltd.  
Commercial Road  
Bristol BS1 6TG England

Dear Mr. Pratt:

Per your recent inquiry, the following opinion includes the general rules of law regarding the possible liability of a manufacturer or seller of a safety device and the application of those general rules to the specific situation of the Load Insulator.

Manufacturer of safety device's liability

The general rule regarding the liability of the manufacturer or seller of a safety device is that a manufacturer or seller may not be held liable for an injury allegedly caused by a product unless the product in question was defective when it left the manufacturer/seller's possession or control and the injury was proximately caused by the product. This rule applies in all actions brought under theories of negligence, breach of warranty, and strict liability in tort. In addition, misuse of the product is a bar to recovery in a products liability case based on strict liability in tort. See "Products Liability: Protective Clothing and Equipment." 27 ALR 4th 815 (1984). Misuse of the product is also a defense to an action based on breach of warranty, but contributory negligence is not. *Vincent v. Allen Bradley Co.*, 291 N.W.2d 66 (Mich. App. 1980) citing *Barefield v. LaSalle Coca-Cola Bottling Co.*, 120 N.W.2d 786 (Mich. 1963). Applying this rule, it is likely that a seller or manufacturer of the Load Insulator would only be held liable for a worker's injury if the Load Insulator was defective and injured the worker despite the worker's proper use of the product.

A case that supports this general rule is *Sigman v. General Electric Company*, 602 N.E.2d 711 (Ohio App. 1991). In this case, the court held that the defendant manufacturer of a safety device cannot use the defenses of assumption of the risk or contributory negligence for strict liability and negligence claims where the safety device is defective and fails in its service. *Id.* at 713. In *Sigman*, a safety fuse had malfunctioned permitting the electric power line to re-energize and electrocute the power line worker. *Id.* at 712. The court reasoned that the defective safety device may have increased the risk of danger to the worker. Despite evidence suggesting that the worker had not

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taken all safety precautions, the court concluded that the increased risk caused by the defective safety device rendered the defenses of assumption of the risk and contributory negligence inapplicable. *Id.* at 713. Even though the worker in *Sigman* had not taken all safety precautions, he had used the safety device properly. He was electrocuted only because the product malfunctioned. In regard to the Load Insulator, neither the seller nor the manufacturer of the product should be held liable unless it is defective and the worker is injured despite proper use of the product.

Another case supporting this rule is *Tulkku v. Mackworth Rees, Division of Avis Industrees, Inc.*, 257 N.W.2d 128 (1977). Here, the court held that there was no cause of action against the manufacturer of the safety device. The safety device, a palm button assembly, had malfunctioned because of a broken switch. The court reasoned that the plaintiff worker had failed to properly utilize other available safety devices, so the court concluded that it could not place the entire responsibility for the injury upon the manufacturer of the safety device. *Id.* at 132.

This case could be analogous to a possible scenario involving Load Monitor, Ltd. Even when using the Load Insulator or a similar device, crane operators must still comply with all of the safety regulations of the *Code of Federal Regulations*, 29 CFR 1926. A court may be willing to equate the failure to comply with safety regulations with the failure to utilize available safety equipment. In that case, if a worker fails to comply with these safety measures and an injury results, the court should not place the entire responsibility for the injury on the manufacturer or the seller of the safety device.

Specifically, you have posed the following questions:

1. If a crane manufacturer recommended or endorse the use of the Load Insulator would they be liable for the possibility that it would encourage an operator to work closer to the powerlines - or lulled into a false sense of security resulting in hitting a powerline when the law requires a minimum safety distance?

According to the *Code of Federal Regulations*, "Cage-type boom guards, insulating links, or proximity warning devices may be used on cranes, but the use of such devices shall not alter the requirements of any other regulation of this part even if such device is required by law or regulation." 29 CFR 1926.550 (15)(v). Even when using the Load Insulator, the law still requires workers to operate cranes a safe distance from power lines. If the court equates the failure to comply with these safety measures with the failure to utilize available safety equipment, it is unlikely that the court would hold the crane manufacturer liable when a worker fails to comply with the safety measures.

A case that illustrates the distinction between contributory negligence (not a defense for breach of implied warranty) and misuse (a defense for breach of implied warranty) is *Vincent v. Allen Bradley Co.*, 291 N.W.2d 66 (Mich. App. 1980). The court held that the plaintiff worker did have a cause of action against the manufacturer of an inadequate safety device despite the fact that the worker had negligently placed her hand into the machinery. *Id.* at 69. The court reasoned that "A cause of action for breach of implied warranty is established upon proof of injury caused by a defect in the product that made it not reasonably fit for its intended or reasonably foreseeable use." *Id.* citing *Elsasser v. American Motors Corp.*, 265 N.W.2d 339 (Mich. App. 1978).

In *Vincent*, the court concluded that the manufacturer had designed the safety device to prevent injury from the exact negligent action of the plaintiff. The plaintiff, although negligent, had not misused the product. Since contributory negligence is not a defense in an action for breach of warranty, the court allowed the plaintiff's cause of action. *Id.* According to the holding in this case, Load Monitor, Ltd. could possibly be held liable under for breach of warranty if a defect in the load monitor causes an injury, despite any contributory negligence on the part of the worker. The main question would be whether the worker had misused the product by operating the crane too close to overhead live wires. Since the load monitor is designed to prevent injury from this negligent action, a court might hold Load Monitor, Ltd. liable if the Load Insulator fails to prevent the injury.

However, it is likely that the manufacturer or seller of the Load Insulator would only be held liable if the product was defective when it left the manufacturer or seller's possession and control.

You have also posed the following question:

2. Imagine the scenario when a Load Insulator is not returned for service, the reminder letters are ignored, the battery alarms for 1 year then goes dead, (the alarms are data logged and cannot be lost). After all this would there be any liability on the crane manufacturer if the product failed several years later?

In this scenario, the product has obviously left the manufacturer/seller's possession and control. The injured party would have to show that the Load Insulator had been defective when it left the manufacturer/seller's control to recover from the manufacturer/seller. The Load Insulator's "black box" records any of the consumer's failure to maintain the Load Insulator in its proper working condition. If this record shows that the Load Insulator worked properly when it left the manufacturer/seller's control, and only became defective after the consumer failed to respond to the service alarm, it is likely that the injured party would not be able to prove otherwise. Therefore, it is likely that neither the manufacturer nor the seller would be liable for any subsequent injuries due to the consumer's failure to maintain the product.

#### Cases specific to "insulated link" devices

Several cases directly discuss the use of an "insulated link" device for cranes that appears very similar to Load Monitor, Ltd.'s Load Insulator. All of these cases deal with construction accidents involving cranes that had no safety devices. The issue is whether the crane manufacturers and employers were negligent because of their failure to utilize any crane safety devices.

The first case dealing with this issue is *FMC Corp. v. Brown*, 551 N.E.2d 444 (Ind.1990). In rejecting the crane manufacturer's argument that the crane would have been more dangerous with an insulated link, the court affirmed the judgment for the plaintiff, the deceased worker's wife. The court reasoned that testimony demonstrated the effectiveness of the insulated link in preventing electrocution, and held that the crane was unreasonably dangerous without a safety device. *Id.* at 446.

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On the other hand, courts have held that safety devices like insulating links are too unreliable to require manufacturers to incorporate them into the design of their products. *See Braxton v. Georgia-Pacific Corp.*, 419 So.2d 125 (La. App. 2d Cir. 1982). In *Braxton*, the court agreed with expert testimony describing the limitations of the insulating link. It only protects against energizing contact by the boom and the load line and not the body of the crane. Also, it is easily contaminated by mud, water, and other conducting materials. *Id.* at 129. Load Monitor, Ltd. has overcome these limitations in the Load Insulator. The Load Insulator is also conspicuously marked with instructions and warnings that detail its limitations.

Despite the expert testimony that describes the limitations of the "insulated link," I have been unable to find any cases that deal with a worker injured by a crane equipped with one of these safety devices. According to the appellate decision of *FMC* in 1988, there were approximately five hundred crane/power line accidents each year that resulted in injury or death. At that time, only about five percent of the cranes in use in the United States were equipped with an insulated link safety device. None of the witnesses in this case knew of any accidents involving a crane equipped with an insulated link that resulted in serious injury or death. *FMC Corp. v. Brown*, 526 N.E.2d 719, 726 (Ind. App. 1988).

A manufacturer or seller of a safety device may be liable for injury caused by the product only when the product was defective when it left the manufacturer/seller's possession or control. If a consumer misuses the product, the manufacturer/seller may not be held liable for his injuries. *See 27 ALR 4th 815*. Here, it is likely that Load Monitor, Ltd. or a seller of the Load Insulator would only be liable for a worker's injuries if the Load Insulator fails to perform its intended purpose because it was defective when it left the control or possession of the manufacturer or seller. Since Load Monitor, Ltd. has eliminated the limitations present in similar products, the Load Insulator is sufficiently reliable to consistently perform its intended duty, and it contains adequate warnings and instructions to inform the consumer of its proper use and limitations, it is likely that any injury would be the result of misuse of the product. If an injury results from misuse of the Load Insulator, it is likely that neither the manufacturer nor the seller would be held liable.

The opinions expressed in this letter are consistent with the case law cited in this letter. There may exist other unreported cases which may have adopted a position contrary to or in contrast with those cited above. However, the cases cited in this opinion are representative of the vast majority of cases in both State and Federal Courts throughout the United States.

If you have any further questions or would like any further expansion upon the answers provided herein please feel free to contact me.

Very truly yours,

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John E. Redeker

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