

Not just paperwork

Know how to handle regulatory citations, the implications for litigation

Marketers are no strangers to governmental oversight.

The codes and regulations governing the propane industry from pipeline through trans-



GUEST COLUMNIST
CHARLENE WRIGHT

port, storage and transfer to consumers are rigorously enforced by various state and local agencies. Registration, permitting, inspections and regulatory enforcement

have become an increasing part of the propane businesses.

Consequently, many marketers treat a notice of violation and subsequent citation as routine. Too often, the notice gets tossed in a drawer by busy field personnel or simply gets paid. Neither is the best option. The fine is only part of the potential cost. Ultimately, regulatory violations could cost millions of dollars when they are introduced in future lawsuits.

Handling citations

Paying a fine after a notice of violation or citation is an admission. It carries significant legal implications beyond that one system, one plant or one fine. Yet, marketers frequently obtain no legal advice about handling citations and, as a result, create bad evidence that is just waiting to be discovered.

No one is surprised when a notice of violation that was issued after an accident is later introduced as evidence in a case arising from that incident. But many marketers don't realize that prior unrelated violations can also be used as evidence to justify high-dollar verdicts. While "prior bad acts"

are generally not admissible to prove a propensity or disposition to engage in conduct on a specified occasion, the evidence may be admissible to prove some fact other than disposition, such as intent, method of operation or absence of mistake or accident.

Plaintiffs' attorneys will seek to introduce evidence of prior code violations to show that a company is more blameworthy and deserves a large judgment to deter continued or repeated unsafe business practices. This is particularly true in jurisdictions that permit punitive or exemplary damage awards. They are looking for the smoking gun, the litany of bad deeds – in short, evidence of corporate knowledge of safety problems justifying punitive damages.

In addition to scorched earth discovery requests to the marketer, it has become commonplace for plaintiffs' attorneys to submit Freedom of Information Act (FOIA) requests to the LP regulatory agencies in every state the defendant company does business. The FOIA requests will ask for all prior citations, written warnings and all compliance issues.

Defense counsel should zealously oppose admission of this evidence, and it likely will prevail for the liability phase of trial. Courts recognize the risk of jury passion and undue prejudice if this kind of evidence is introduced prior to a determination of liability for an accident. This evidence is likely to be admitted for the damages phase of trial.

Extending the blame

Marketers need to be aware that litigation goes far beyond the specific employee whose conduct is alleged to have caused an accident. Safety violations have been admitted as proof of "reckless disregard" for the rights

of others or corporate indifference to justify punitive damages, and these decisions are being upheld on appeal.

The Kentucky Supreme Court allowed management's prior dealings with a regulatory agency to be a factor implicating the company as a whole in a charge of reckless disregard for the safety of others justifying punitive damages. The court found that the cumulative conduct of employees demonstrated corporate recklessness.

The New Mexico Supreme Court held that a propane company's negligent installation together with its consistent violation of safety regulations amounted to corporate indifference and reckless conduct to cross the threshold for punitive damages.

An Illinois court allowed a history of violations to be admitted to justify punitive damages against a company that should have been aware of the regulatory violations but failed to employ an effective procedure to monitor and prevent these issues over a number of years. Similar rulings have been made throughout the country.

Steps to take

What should marketers do? There are three important steps: Prevent written notices of violation, promptly correct all violations found during inspection and follow reporting requirements and appropriately challenge regulatory notices and citations.

The best way to prevent a written notice of violation is to develop a positive relationship with inspectors. Being responsive and promptly addressing problems will result in an inspector picking up the phone instead of his pen. Regulators are not hiding the ball; inspection checklists are available on most agency Web sites or at their offices. Routinely reviewing

Continued on page 24

Continued from page 23
those items between inspections can educate field staff about an inspector's hot-button issues and help the company avoid a bad inspection.

If code violations are found by an inspector and not promptly resolved, a written notice to abate will follow. Typically, by the time a notice of violation is issued, the amount of the fine

will have already compounded – not from the date the citation was written but rather from the first inspection and multiplied by length of time out of compliance. Each day of noncompliance is a separate violation. Failure to correct a problem and document it before the next inspection can result in thousands of dollars in fines that often could have been avoided. Repeated

incidents of noncompliance are the primary factor for heftier fines, and they can create evidence that plaintiffs will claim equates to a company's hazardous safety or poor training.

Failing to promptly report an incident involving a fire or explosion where significant property damage or injury has occurred is a mistake that will create tension with the agency investigating the incident, and it will be discovered in subsequent litigation.

However, while cooperation with the agency is important, it also presents that danger of creating bad evidence. After an incident, it is not advisable to provide testimony, admissions and evidence without representation and preparation by counsel, even if the investigative agency has no authority to issue a fine.

If a citation is issued, marketers should get advice about their right to challenge. Often, agencies will dispose of a challenged citation for less than the amount of the original fine. The settlement process provides the opportunity to avoid erroneous, bad evidence such as an admission of a safety violation where only a technical violation has occurred. Not every challenge requires an administrative hearing. An attorney who routinely handles these matters will develop a rapport with the agency that will streamline the process and protect the client's interests.

Walking into a courtroom as a corporate defendant carries a heavier burden than defending the company's conduct in one case. The whole company is on trial. Plaintiffs' attorneys will look for any piece of evidence to paint a picture for the judge and jury of a big, bad, profit-driven, unsafe corporation. By properly handling regulatory citations, marketers can avoid leaving plaintiffs a trail of breadcrumbs to high-dollar verdicts. **LPG**

Charlene Wright is an energy and pipeline attorney for Lathrop & Gage LLP. E-mail her at cwright@lathropgage.com.

NEW!

Y-Flange™

2 Inch Valve



The Most User Friendly Valve on the Market!

ANOTHER INNOVATIVE SOLUTION FROM SQUIBB-TAYLOR

NPT, Socket Weld or Custom Flanges!




HIGHEST FLOW IN THE INDUSTRY

226 GPM LP @ 10 PSI Differential
434 GPM LP @ 35 PSI Differential

FEWEST TURNS TO OPEN

ONLY 5 Turns Full Close to Full Open - 50% Less Than Typical

USER CONFIGURABLE INLET & OUTLET FLANGES

2" or 1-1/4" NPT - Either End
2" or 1-1/4" Socket Weld - Either End
Or Custom Flanges Upon Request



MANUFACTURED BY PGI INTERNATIONAL

See the Y-Flange at the Southeast, Midwest and Western Trade Shows!

214.357.4591 • 800.345.8105

www.squibbtaylor.com

Patent Pending
UL Pending