

Corporate Exposure: Potential Products Risk

Harry P. Mirijanian

Product liability awards have doubled over the past decade, with million-dollar price tags now common occurrences. Although some recent cases have shown that juries have become more realistic in deciding damages, the exposure is nonetheless significant. In addition, the institution of punitive damages designed to punish both the manufacturer and the designer has greatly increased the potential products risk.

Eliminating the Risk

The first step toward reducing your potential products risk is to eliminate as many potential product defects and misuses as possible—and prepare to defend claims. These practices should begin at the initial development stage of the product. Many organizations have quality control programs in place to identify defects before a product is released into the marketplace.

Unfortunately, there have been cases in which the organization's quality control procedures were not followed. Having procedures and not implementing them is perhaps more dangerous than having no quality procedures at all. In effect, it means that you had knowledge of the potential exposure or risk; consequently, any product defects would indicate that you failed in your duty to follow those procedures. This is an invitation for punitive damage awards. But by not having any quality control procedures, your only defense is simply that none was deemed necessary. This defense has actually thwarted some punitive damages, but it is certainly not reliable.

Claims Control

Management must exercise caution when settling claims or losses; otherwise, unwanted precedents can be es-

tablished. The American Trial Lawyer Association (ALA) retains a host of information for plaintiff attorneys, some of which contain data on how quickly an organization settles a claim and for how much. Who should control the claim when filed? The unequivocal answer—you.

This is not necessarily a simple task, however—especially if an insurance policy is in force stipulating the insurance agency has the right to select legal counsel and settle the claim. These conditions must be discussed up front before the policy is in effect.

Not many organizations have been successful in getting the insurance carrier not to settle a claim without the client's permission, but it does happen. Most, however, have been successful in having the insurance company agree to accept legal representation from a list of attorneys supplied by the insured. Not all attorneys are versed in product defense matters—nor will they necessarily prove to be sufficiently adept at recognizing the engineering design idiosyncracies of your product. At the initial stage, identify attorneys and expert witnesses who can understand your product, and who would be available to assist in your defense. Do not wait for a loss to occur before attempting to secure such individuals.

Self-Insurance the Answer?

Can self-insurance solve your problems? Maybe. Unquestionably, self-insurance puts you in control, but many companies would nonetheless be better off staying away from this area. If you are adequately equipped to control these undertakings, it is better for you to take an active role than to sit on the sidelines. There is some evidence to suggest that juries are less inclined to find higher awards for those who are self-insured and who do not have the wherewithal to ante up. Conversely,

when a large insurance policy is in place, jurors may be more willing to go for policy limits.

Self-insurance may also make it easier for you to move the claim into mediation or arbitration, because you are in control and do not have to try to convince your carrier to take this action. Many insurance companies would rather avoid mediation and arbitration altogether and head straight for the courtroom.

Communication

It is essential to maintain good communication in products liability control measures. Considering the globalization process, are your warnings easily understood and translated where necessary? How is the product advertised? Do salespeople "oversell" the product? How do you maintain contact with customers? How do you reach the customer if a recall or warning letter must be issued? Do you have a system for reviewing customer complaints—or praise? Do you have a crisis communication program in force?

For Further Information

Although it is difficult to design and implement a failsafe program to eliminate all product liability claims—especially in today's litigious society—there is still plenty of room for improvement. Applied Risk offers a products liability indicator that is a self-administered test to identify certain deficiencies. For a free copy of this profile, write to Harry P. Mirijanian at Applied Risk, 100 Dutch Hill Road, Suite 214, Orangeburg, NY 10962 (FAX: 914-365-2494).

Harry P. Mirijanian is president of Applied Risk, an independent risk management services firm established to assist the business community in reducing its exposure to loss and insurance costs.

