



REUTERS/Babu (INDIA)

Preempting and Mitigating Product Liability Claims

November 6, 2014

Presenters:

Jeffrey A. Soble, Partner, *Foley & Lardner LLP* (Presenter)

Lisa Temple, Editor, *Practical Law Commercial* (Moderator)

Agenda

- What is product liability?
- Who is after you?
- Why avoid product liability claims?
- Developing a corporate product safety program
- Manage your risks in advance
- Diffuse issues before they are claims

What is Product Liability?

Product Liability is Broad

- The routine:
 - Manufacturing defects
 - Design defects
 - Failure to warn
- Definitely PL, but rarely considered:
 - Warranty claims (express or implied)
 - Repairs or service failures

The Routine PL Claims

- Manufacturing defects
 - Failure in the manufacturing process
 - Unique to an individual product...
 - Or group of products: “manufacturing spill”
- Design defects
 - Common for any product with that design
 - Exists at the design stage
 - Common to all designed products
- Failure to warn
 - Foreseeable uses and misuses
 - Warn of potential harms

PL, but Rarely Called PL

- Warranty
 - Express warranty
 - Implied warranty
- Repair or service failures
 - Defect in service provided
 - Defect with aftermarket part
 - Fit
 - Integration
 - Manufacturing/ Design defect

Who is After You?

Types of Plaintiffs

- Everyone!
 - Consumers
 - Distributors
 - Resellers
 - Customers
 - Suppliers
 - Any end user of the product

Types of Lawsuits

- How will they come after you?
 - Single plaintiffs
 - Class actions
 - Mass actions/MDL
 - Third-party claims

Benefits of Avoiding Product Liability Claims

Legally Required

- Subject to Legal Liability
- Regulatory Requirements
 - CPSC (consumer products)
 - NHTSA (automotive)
 - FDA (medical devices)

The Right Thing To Do

- Ethics!
 - Subjective
 - Voluntary
 - Not legally required
 - May be facially inconsistent with maximizing profit/revenue/shareholder value
 - In the short term

Competitive Advantages

- Reputation, brand & corporate advantages
 - Brand, culture, corporate identity protected
 - Corporate goodwill
 - Corporate loyalty
 - Employee morale & commitment
- Cost savings
 - Defending claims is expensive
 - Insurance premiums are expensive

Corporate Product Safety Program

Product Safety Policy

- Increases odds of limiting claims
- Establish a culture of product safety
 - Mission statement
 - Empower every employee to raise safety/ defect issues
 - Widely disseminated
 - Online – internet, intranet, extranet
 - Company publications
 - Training programs
 - Employee handbooks
 - Push downstream to suppliers

Product Safety Policy – To Be Effective:

- Consider regulatory requirements
- Organization
 - Accountability
 - Structure
 - Resources
- Goals
 - Measurable
 - Attainable

Product Safety Committee - Setup

- Diverse representation
 - Engineering
 - Legal
 - Compliance
 - Service
 - Risk Management
 - Sales
 - Operations

Product Safety Committee - Charge

- Establish:
 - Criteria
 - Best practices
 - Procedures
 - Enforcement
- Learn from past experience - evolve
- Guidelines/criteria for product warnings/ advertising
- Regulatory reporting procedures

Product Safety Manager

- Chairs PSC
- Reports to management, not a department
- Departments implicated in product safety are indirect reports to Product Safety Manager
- Works with every department

Safety Audits

- Manufacturing
 - Process
 - Policies
 - Procedures
- Warranty
 - Big data – tons of information
 - Be aware of problems before potential claimants
- Benefits
 - Reinforces culture of safety
 - Identifies risks
 - Stops product defects from becoming product claims

Product Safety Committee - Privileges

- PSC work *may* be privileged for pre-claim work
- Protect attorney-client and attorney work product privileges:
 - In-house counsel on PSC
 - Specific legal purpose for investigations
 - Legal purpose clear to PSC members
 - Restrict distribution of legal comments/advice

Managing Risks in Advance

Manage Supplier Risks

- Cost is not everything
- Due diligence on suppliers
 - Reputation/references
 - Quality
 - Warranty rates
 - Disputes
 - Financial condition

Manage Customer Risk

- Price is not everything
- Due diligence on customers
 - Reputation/ references
 - Quality
 - Warranty rates
 - Disputes
 - Financial condition

Mitigate Contract Risks

- Indemnification
- Insurance
- Credit support
- Product warranties

Reduce Risk via Warranties and Remedies

- Limited warranties
- Warranty disclaimers
- Limit remedies
- Comprehensive warnings

An Ounce of Prevention

Assess Issues *Before* They Become Claims

- Frequently assess risk – look for potential claims
- Warnings prove inadequate, supplement with post-sale warnings
- Self-report to regulators, especially if corrective action in place
- Document part, design or manufacturing changes

Tell Your Insurer Now

- Many potential types of applicable insurance:
 - CGL
 - Product liability
 - Recall
 - Excess
 - Umbrella
- Inadequate or untimely notice can defeat coverage or reduce the amount of coverage

Retain Experts Early

- They don't have to do anything
- Corporate and independent
- Avoid conflict issues
- Avoid missing best experts available
- Kinds of experts:
 - Technical
 - Public relations
 - Call centers
 - Counsel
 - Document preservation/collection/review

Investigate and Inspect the Product and Scene

- Assemble a team to inspect
 - PSC Member
 - Technical experts
 - Insurer
 - Counsel
 - Other interested parties
- Inspect and perform technical analysis of the product and surrounding scene
 - Take objective notes
 - Obtain available documents or ESI
 - Photos
 - Witnesses

Preserve Everything

- All physical items
 - Product
 - Any item in vicinity or related to alleged failure or loss
- Document retention
 - Corporate document retention policy
 - Cease automatic destruction
 - Gather key documentation
 - Warranty
 - Warranty history
 - Design drawings
 - Manufacturing records
 - Quality control records

Conduct Initial Assessment

- Is it your product?
- Is the product properly:
 - Installed?
 - Used/ applied?
 - Maintained?
 - Modified/ altered?
- Product meet specifications
- Product comply with design
- Product meet quality control/ assurance standards
- Defective? Resolve early.

Relevant Practical Law Resource

- Sale of Goods Agreements: Avoiding Common Pitfalls
- Product Liability Claims, Defenses and Remedies
- Product Labeling
- Product Labeling Checklist
- General Contract Clauses: Product Warranty and Disclaimers

This relevant resource is available with a free, no-obligation trial to Practical Law. Visit Practicallaw.com and request your free trial today.

Questions

CLE Credit

- 1 hour of CLE credit is pending in CA and NY.
- If you are interested in receiving credit, download the Attorney Affidavit form from under the Event Resources tab on the left of your screen. Complete the form and be sure to include the CLE code on the form.

Please scan and e-mail the completed Attorney Affidavit to:

webinars.practicallaw@thomsonreuters.com

by Friday, November 7, 2014.

- **Please also respond to the Event Evaluation pop-up survey upon your exit of this event.**
- Once your participation has been verified and certificate prepared, you will receive the CLE certificate via email.
- Please send any questions to:
webinars.practicallaw@thomsonreuters.com.