

## Product Liability

The world of product liability in the United States is interesting, convoluted and just plain difficult to understand. We are going to tackle some of the basic issues that are involved in providing insurance for products liability.

The term product liability refers to the liability of any or all parties along the chain of manufacture of any product for damage caused by that product. This includes the manufacturer of component parts, an assembling manufacturer, the wholesaler, warehouseman and the retail store. A product containing inherent defects that cause harm to a consumer of the product, or someone to whom the product was loaned, given, etc. are the subjects of products liability suits.

### **A Little History**

Since 1963, after the Greenman case (*Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897(1963)), the courts imposition of legal liability upon manufacturers and sellers of products in the US expanded from negligence to strict liability. What does this mean to your client? Their exposure to suits increased significantly.

Imposition of liability due to negligence requires that a duty is owed, the duty is breached and that action is the proximate cause of loss or injury. Strict liability uses very different standards. A manufacturer is strictly liable when an article manufactured and provided to consumers, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury or damage. Strict liability was developed as a means of social policy and focused on the protection of the public. There are three main areas of defects: design, manufacture and warnings or instructions.

### **Design Defect**

A manufacturer is required to take reasonable care to ensure that a product is designed to perform in a safe manner. Failure to do so can impose negligence as well as strict liability upon the manufacturer. A manufacturer must make sure that the product is safe to be used, even if being used by consumers in an unintended, but foreseeable, manner. The consumer must be given warnings of inherent danger.

## **Manufacturing Defect**

The manufacturer is required to make the product according to its design. If it fails to meet the design specifications due to a flaw in manufacturing the manufacturer can be held liable for injuries caused by that defect.

## **Defective Warnings / Instructions**

A manufacturer is required to provide adequate warnings of danger and instructions of use. Failure to do so can impose liability upon the manufacturer. Inherently dangerous items need not have a warning applied, such as a sharp knife, but warnings must be provided for situations that could be considered abnormal use of the product, such as using an electrical appliance around water.

Many states have individual product safety statutes regarding pre-sale and post-sale duties regarding product safety.

While a defense cannot be based upon degree of carefulness by defendant, defense of a product liability suit can include abnormal use by plaintiff, modification of product by plaintiff or other party, notice of breach of warranty provided to plaintiff and strict compliance with regulations.

## **Insurance Issues**

Your manufacturing clients, wholesalers (particularly those that sell goods imported from China or Taiwan) as well as the retail clients are all exposed to these serious suits involving the products that they make and/or sell. These suits can easily become class action suits when brought to the attention of legal counsel.

## **Timing is Everything**

Courts have taken a variety of positions regarding the appropriate policy or policies that are triggered due to the timing of injury or damage that may take place over several policy periods. Some of the courts have reasoned through the policy language to arrive at a continuous injury trigger, meaning that all policies in effect from the time of the first exposure through the time that legal liability has been imposed upon the responsible party while other courts have decided along the manifestation trigger (when the injury or damage first becomes known) or injury-in-fact that triggers coverage from first exposure through manifestation. The majority of courts in the US arise during a covered policy period.

Therefore, it is largely irrelevant which policy was in effect when the product was made or sold, but rather a critical issue when the injury or damage actually happens, whether during one policy period or more. If your insured sells their business or closes their doors, you must offer discontinued products liability coverage or help your client negotiate with the buyer to have the selling party included in the ongoing liability insurance policy. Since most sellers are selling the customer list, brand name, product line, equipment, etc. and most courts look at the buying party as a continuation of the original business and because of those facts, many courts will

impose liability upon the buyer, whether or not the buyer has assumed liabilities as well as the assets.

Providing proper insurance can be very challenging but also rewarding.