Product Liability Defense

Seven strategies for minimizing your risk

Lawrence M. Kohn

It's every gear manufacturer's nightmare. Your company has been named as a defendant in a product liability suit - one involving serious injuries and death. You're facing endless court appearances, monumental legal fees, and, possibly, seven-figure settlements out of your coffers. The very existence of your business could be on the line. The question is, how do you prevent this nightmare from becoming a painful reality.

Recently *Gear Technology* talked to Elliott Olson, a partner in the Los Angeles firm of Haight, Brown & Bonesteel, lawyers specializing in product liability defense, about protecting your firm from ruinous product liability suits. He recommends the following seven strategies: Indemnification, Compliance, Detachment, Commitment, Control, Warning, and Defense.

Indemnification. First try to get a contract with the final product manufacturer to indemnify you in any lawsuits that involve your product. If you have indemnification, he is responsible for the defense in the event of a suit. At the same time, that defense can be somewhat simplified; and the more complicated a suit is, the more protracted - and expensive - it will be.

The risk of such indemnification to the final product manufacturer is small, especially if you are a long-time supplier. It has its own inspection procedures and presumably knows your product as well as its own. The costs of adding your defense to its insurance is probably not significant, and may also enable the manufacturer to buy components at a lower price, since you will not have to add the cost of additional insurance to your price.

If such a deal can be arranged, the wording of the contract needs to be very specific. Olson warns, "It is a slight trick to properly draw up such a contract. The best way to do it is to get the final manufacturer to 'indemnify, defend, and insure against all claims, liability, etc., including those arising from the sole negligence or defect of the product manufactured by the gear company.'"

But what if you do not have or cannot get such a contract? Then how do you protect yourself?

Compliance. Make sure your product complies with all government regulations covering it and with any applicable voluntary standards, such as those of ANSI, SAE, or AGMA. This provides an external, objective indication of quality. A well-run quality control department is also an important defense. Olson says, "Obviously, the proper quality control is essential." Failure to comply with your own criteria can be fatal.

Detachment. A third defense is to establish an appropriate distance between your company and the final product manufacturer. You should be aware of the final product application and whether the it goes beyond the limits of its design criteria. Olson explains, "If the tractor or whatever was designed to pull a plow, and it's now being used as a battering ram, and the gear manufacturer knows that his gear is not adequate for that use, he should take steps to protect himself, either by warning the manufacturer or final user not to use it for that application, or by beefing up the gear."

However, since the likelihood of this prior knowledge is slim, you should include in the contract of sale a statement that the gear use should be limited to the specific purpose intended. "The gear manufacturer should at least have some specifications to which it is manufacturing the gear and make sure that the component is designed beyond the endurance limit of those specifications," says Olson.

MANAGEMENT MATTERS

Managing a business today is hard work. Let "Management Matters" lend a hand. Tell us what management matters interest you. Write to us at P.O. Box 1426, Elk Grove, IL, 60009, or call our staff at (708) 437-6604.

Lawrence M. Kohn

is a Los Angeles-based marking consultant, writer, and media personality. He specializes in business-related subjects and was the host of KIEV Radio's "It's Your Business". Among the subjects of his interviews has been former president, Ronald Reagan.

MANAGEMENT MATTERS

On the other hand, be wary of becoming too closely involved in the design of the final product. According to Olson, the danger is this: "Each entity in the stream of commerce of a product is liable if the product is defective. If the tractor has a characteristic which causes it to lose steering, yet the gears provided are adequate, the tractor manufacturer and all entities down the line, including the distributor and the dealer, would be liable, but the gear manufacturer would not be, as long as the gear didn't fail or break, or unless the gear manufacturer participates in the enterprise in some way, such as recommending how the gears should be used, how the tractor should be used, or making recommendations as to the owners' manual, etc."

Commitment. Commitment to safety is the fourth defense. No one sets out to deliberately make a product that will kill or injure someone, but sometimes safety concerns are lost sight of or overridden by other considerations. Management must instill an overall sense of commitment to safety in all departments. Simply put, a balance has to be struck between putting out a product that's too expensive and one that will cost more in the long run because of some catastrophic failure in the field that will cost life and limb. Olson says, "One of the most expensive things you can do is kill somebody or make someone a quadriplegic." Investment in safety should come at the design stage, not later in the courtroom.

Control. A fifth strategy is to maintain careful control of documentation. Sloppily worded documents can be financial time bombs. Be wary of the wording of justifications for design changes. Phrases like, "change made to avoid field failures," or "change made in order to prevent lawsuits," are deadly. Either don't document the reason at all or give other valid reasons, such as cost cutting, maintenance simplification, or performance improvement. Don't admit to safety problems that don't exist.

Every company needs a realistic document retention program so that useless or potentially damaging papers are not kept around for long periods of time. One such document is what Olson calls the "God-help-us-if-something-goes-wrong" memo. Such documents, usually created in the heat of discussions over a projected change, are also potential disasters. Of them Olson says, "There is no need to create such a document or to keep it."

This is not meant to discourage discussion of safety questions, and unsafe products should never go to market. Where the problem arises is in the careless use of language. Olson recommends that all employees be made aware of the potential danger of the kinds of things they write. A careful program of education of employees in proper documentation can

save a lot of headaches.

Warning. A sixth strategy is to be very careful about the wording of any product warnings, installation and operating instructions, etc. Don't fall into the trap of thinking that warning against every conceivable danger will protect you from suits. You cannot possibly warn against all the possible dangers, and overwarning degrades the value of the notice.

Warnings should cover the unexpected. Says Olson, "Don't warn against obvious things. Don't warn drivers not to run into people while driving. On the other hand, if you have a clear, odorless liquid that is a deadly acid, the bottle should contain some kind of warning."

Depending on the product, having it reviewed by a product liability lawyer, preferably one with product liability trial experience, an engineer with product liability experience, and, perhaps, a human factors engineer may be a wise move. Olson says, "Sometimes defects can be easily corrected if discovered by such a review."

Defend. Suppose you have taken all these precautions and still find yourself confronted with a product liability suit. Olson's advice in this case is to be prepared to aggressively defend yourself and preferably take control of the defense. Don't just turn the defense over to your insurance company, thinking, well, we pay a lot of money for this policy, so let them worry about it.

Many times insurance companies are tempted to take the safe way out, settle the case, and then later raise your rates or drop your coverage entirely. This could be unfair to you in a number of ways. Chances are, nothing is wrong with your product. Its design is based on sound engineering practice. It meets all the standards, codes, and regulations, and there's nothing wrong with it, except someone has misused it. Accepting a settlement in such a case can cost you money you shouldn't have to pay and can hurt your company's reputation.

The decision to launch an aggressive defense should be made long before the possibility of a law suit arises. It should be discussed when you are negotiating your liability insurance coverage. "That's the time to negotiate the right to identify your own counsel," says Olson.

Once you've made the decision to aggressively defend yourself in such suits, you must also be prepared to present witnesses and company personnel to assist in the preparation and defense of cases. But this investment may be well worth it in terms of a final settlement.

Protecting your company from product liability suits is a complex, ongoing process. It requires forethought, careful planning, and a long-term commitment, but ultimately, that extra planning will pay off in added protection when the worst happens. ■

For answers to questions about this article, circle Reader Service No. 79.