

Loss

Control



FARMERS

Information Bulletin

NUMBER 9

PRODUCT LIABILITY LEGAL REVIEW

The singular intent of this bulletin is to convey this—products can and do fail. For you to assume otherwise would be naive. If you accept the fact that the most common causes of product failure can be prevented, then, perhaps, in addition to all of the “before” and “during” steps you have taken in the design, manufacture, distribution, installation and/or service of your product, you might also gain some insight from some of the “after” steps, when the losses occur.

THEORIES OF PRODUCT LIABILITY

In order to better understand the “who, what, when, where, how and why” of product losses, you will have to understand the three most commonly held theories of liability—breach of warranty, negligence and strict liability.

BREACH OF WARRANTY

The oldest and, perhaps, most widely recognized theory is breach of warranty for which there are two types of claims. One is expressed, the other implied.

An expressed warranty makes certain performance claims often found in a number of different sources— your sales and promotional materials, a sales contract, other published data, even in oral representations. At one time, an expressed warranty extended protection only to the original purchaser of your product. Other innocent victims that might have been injured or suffered property damage could not normally recover under this theory. However, today, the final customer may also bring action against you, claiming that they relied upon your representations and performance claims when making their decision to purchase your product.

Avoid the temptation to overstate or exaggerate the characteristics of your product. It is understandable that you are proud of your efforts and wish to tell your customers just how good it really is. But unfounded or as yet unproven claims of this sort can be very costly to your organization.

Then, too, there are claims of implied warranty which differ from an expressed warranty. If you market your product to be both “fit for a particular purpose” as well as “merchantable,” you may have “implied” that a warranty exists between both parties. In many jurisdictions, an actual contractual type relationship may be identified between you and your customer.

NEGLIGENCE

The next theory is simply known as negligence. In order for you to be found “negligent” in the design, manufacture and/or distribution of your product, the following must occur.

- First, it must be shown that you had a “duty owed” to another party. Simply marketing your product to a customer is generally all that is needed to demonstrate that duty.
- Second, there must be a breach of that duty. Your customer may assert that you did not act in a reasonable manner by marketing your product without prior testing, that its production did not meet your own quality control standards and so on.
- Finally, there must be a causal connection between your breach of duty and the injury/damage suffered by your customer.

No one expects you to be perfect. But you are expected to act in a reasonable manner: Negligence is most often avoided through good product design, thorough testing and evaluation, sound manufacturing practices, etc. Once you have established your own production and quality control standards, be sure you consistently adhere to them. Don’t let your good intentions go to waste. They may come back to haunt you in the hands of a plaintiff’s attorney.

STRICT LIABILITY

The third most common and, potentially, most formidable theory is that of strict liability. There are essentially three ways in which you, as defendant in a legal action, can be found to be

strictly liable for your product. They are:

- Improper design – A plaintiff must show that the design of your product was not “reasonably safe” and that design was a proximate cause of the plaintiff’s injury. Your liability extends to any person(s) injured, regardless of their legal interests, just so long as your product was a substantial factor in bringing about their injury.

Strict liability differs from negligence in that the plaintiff is not required to prove that you acted unreasonably when you designed your product. One court has defined a “defectively designed product” as one which, at the time it leaves your hands, is in a condition not reasonably safe for its intended or unintended but reasonably foreseeable purpose.

- Manufacturing defect – A plaintiff must prove that your product did not perform as intended. Your liability hinges on the existence of a flaw at the time of its manufacture, again, regardless of your conduct. A defect generally occurs when an individual unit differs from your own internal quality standards. The fact that it has fallen below your own standards is strong evidence that your product is not “reasonably safe.”
- A duty to warn – You are required to give reasonable and adequate warnings of the dangers associated with using your product. These warnings must clearly alert the average user to avoid certain unsafe uses which might otherwise appear to be normal and reasonable.

However, your duty to warn may not extend to those instances wherein the user should be aware of the dangers through common knowledge, e.g., a knife cutting one’s hand, “For Professional Use Only”, or when the dangers are open and obvious, is considered knowledgeable.

WHAT ARE SOME AVAILABLE DEFENSES?

Two common defenses which may be available to you are statute of limitations and causation and contributory negligence.

STATUTE OF LIMITATIONS

What does “statute of limitations” mean? Perhaps this question can best be answered through the use of an example. Say you manufactured a product today and it enters the stream of commerce immediately. For some reason, after six years of nearly flawless operation, your customer is injured through its use. At that very point in time, depending upon your jurisdiction, the “clock starts ticking.” Your customer will then have a specified period, usually expressed in years, within which he/she will be allowed to bring a legal action against you for injuries sustained as a result of the use of your product. If they fail to do so, they will not be permitted to seek any future damages for the injuries which were alleged to have occurred.

In some cases, where the injuries are not all that apparent, there may also be what is known as “discovery period” within which

to seek redress. If you are not sure about your jurisdiction, check with your legal counsel.

How does this affect you? What this all means is that an injured plaintiff can bring a cause of action against you at virtually any time, no matter how old your product is. It could be new, five or even fifty years old. The truth is, however, its age is immaterial, which means your exposure to this type of action will depend largely upon your product’s lifespan, time in the market and other similar factors. Your design and engineering staff are likely the best judges of these factors.

CAUSATION AND CONTRIBUTORY NEGLIGENCE

The other defense is causation and contributory negligence. To the extent that your customer may have participated, shared in and/or, in some way, contributed to his/her own injuries through the use of your product each party, you and the plaintiff, can be assigned a portion of the negligence which allegedly contributed to those injuries. You can seek partial relief under this policy.

For example, your product. Improper installation is contributory negligence. To the extent your customer hires an independent contractor to service your product, it is causation by a third-party defense.

CONSIDER:

At the outset, you read a statement that said most common causes of product failure can be prevented. See how many of the following statements apply to your product:

- “My product and its warnings were designed only after thorough research, development and extensive testing of prototypes, pre-and post-production models.”
- “My product conforms with the design of similar products and is considered ‘state-of-the-art’.”
- “My product is based on field follow-up information and there have been no demonstrated needs for subsequent design changes.”
- “All foreseeable uses and/or applications including abuse and/or misuse of my product have been reasonably anticipated.
- “Warnings on my product are adequate, its hazards are obvious, open and well-known and my customer is a knowledgeable user.” Contact your legal counsel for additional information on these and other liability issues facing your business.

This bulletin is intended only as a reminder and is offered solely as a guide to assist management in its responsibility of providing a safer working environment. This bulletin is not intended to cover all possible hazardous conditions or unsafe acts that may exist. Other unsafe acts or hazardous conditions should also be noted and corrective action taken.