

Are You Wide-Open for a Product Liability Lawsuit?

Protecting your company from potential lawsuits should be a priority for all levels and departments, from design and engineering to sales and marketing.

By Randall L. Goodden

The United States is the most litigious nation in the world. Everyone sues everyone here; it's part of the classic "get rich quick" plan. Jury awards continue to set new records, going from the hundreds of millions, to several billions of dollars in some cases. Juries have become desensitized to the amount of money they're awarding. The dollar amounts seem to have become meaningless, as if its not real money anymore, except to the companies sued.

Product liability statistics continue to change, but in the wrong direction. Awards grew dramatically from a

median of \$500,300 in 1993 to \$1.8 million in 1999, representing the fastest growth in two decades. Bills are introduced in Congress in an effort to bring some sort of sanity and control to this epidemic, but are immediately fought by the plaintiff's bar because of the lucrative nature of the whole issue. Sometimes the victims themselves collect less than half the judgment; attorneys get the rest.

A product liability lawsuit can result in personal injury or property damages worth a specific amount, as an example, say \$19,000 in compensatory damages. However, once the plaintiff's attorney proves the manufacturer was in any way negligent (e.g. lack of any

design review, inadequate testing, inadequate warnings or instructions, failure to react to known problems in the field, marketing defects, etc.), punitive damage awards against the manufacturer can rocket into the tens of millions or higher. And, to the manufacturer's further surprise, many aren't aware of the fact that their insurance might not cover the punitive damage award. Sometimes the courts won't even allow it. So for those who are thinking they're well covered by insurance, that's another bombshell waiting to drop.

With so much potential risk riding on every product launched into the marketplace, whether a commercial or



consumer product, it's alarming how ill-prepared many manufacturers can be in the area of *product liability prevention*. Not that any manufacturer could totally prevent a potential product liability case from surfacing, but surely with the best efforts in place the chances could be substantially minimized and the manufacturer also would be better positioned to make a winning case in court.

Size Doesn't Matter

The size of the company is no indication of the level of knowledge or expertise within the company. My surveys of engineering and the management teams of large fortune 500 companies as recently as 2002 show high percentages of employees with a significant lack of knowledge in this area, making them no different than many smaller companies. In numerous audiences comprised of many well-known corporations, as well as in-house seminars at the same, more than half of the attendees had no idea of what the Z535 ANSI standard was (which is the state-of-the-art standard for developing a warning label). Many couldn't differentiate between the terms "hazard" and "risk" and had no idea what "indemnification" meant; nor did they even know who a "plaintiff" is (for those of you wondering the same, the "plaintiff" is the person who's going to sue you. You could be the "defendant"). That's just for openers. There's a lot more to be learned.

In some cases, CEOs might have a false sense of security because their companies have extremely comprehensive quality programs in place and might even be certified to the ISO or QS standard. One of the largest recalls and product liability disasters in recent years happened to a company that was both QS & ISO 9002 certified. Such programs offer little protection in this area, and in fact can become a liability themselves.

CEOs might feel they have a talented team of design engineers, yet in one recent study of more than 300 certified engineers, 80 percent had never taken a product safety or liability related course in college. Seventy percent of the engineers had never attended a product safety or liability prevention seminar. It's quite common to find that many engineers and management personnel, especially as they get older and feel more comfortable in their positions, never attend seminars or seek to further their knowledge in any given field. The company itself now begins to fall victim to a lack of state-of-the-art product safety and liability prevention knowledge, continuously increasing its own exposure to risk. These are the people the CEOs are banking on with their future.

Everyone Needs to be Involved

Exposure to product liability doesn't rest with the engineering group. Actions, or lack of appropriate actions, by most all of the management team up through the executive ranks can subject the company to product liability lawsuits. So when a company only sends its design engineers to a seminar on the subject, the engineers likely become smarter in areas they control, but the rest of the organization won't gain any of the knowledge they need to have.

To understand why all the members of management need to gain such an insight, we need to understand the full realm of product liability. The following is a list of areas on which the management team needs to focus:

- **Contracts/Agreements** – Does the company have sound contracts and agreements in place to help limit its potential exposure to product liability? These could be between the company and its suppliers, dealers, manufacturing reps, service companies – even customers. Remember, a

supplier of a faulty component part could get you into trouble if there aren't certain safeguards in place to help shield your company from others' negligence.

- **Product Design Reviews** – The design review is the first critical step in a product's lifecycle, and the least expensive time to recognize a potential problem and make changes. Do you maintain design review teams and product safety teams to review all your new products to ensure quality, reliability, and the ability to be manufactured consistently? Do they assess and ensure the product will be dependable, safe and reliable not only for its intended use and application, but also in cases of foreseeable misuse? Do these teams generate meeting minutes? Design defects are far more devastating than manufacturing defects.
- **Marketing/Advertising Concerns** – Defective products aren't alone in leading to trouble; things you say to promote a product, actions you show in promotional videos, print in brochures and on packaging could lead to a product liability lawsuit. It's amazing how advertising and commercials can get a manufacturer in trouble. Sales and marketing often have a tendency to push the envelope a little too far when promoting a product, overstating its features, benefits or capabilities. Do you know what such liabilities are and what words and actions to avoid?
- **Reliability Testing** – Does your company routinely test new products to ensure they'll be safe and reliable? Some major recent cases were lost because of inadequate testing. Even with such testing, do your people know what to do if the testing produces unfavorable results?
- **Warning Labels & Instructions** – As stated previously, there are international standards for warning label design. Are your engineers familiar

with them? Are the labels you're using in compliance with these known standards?

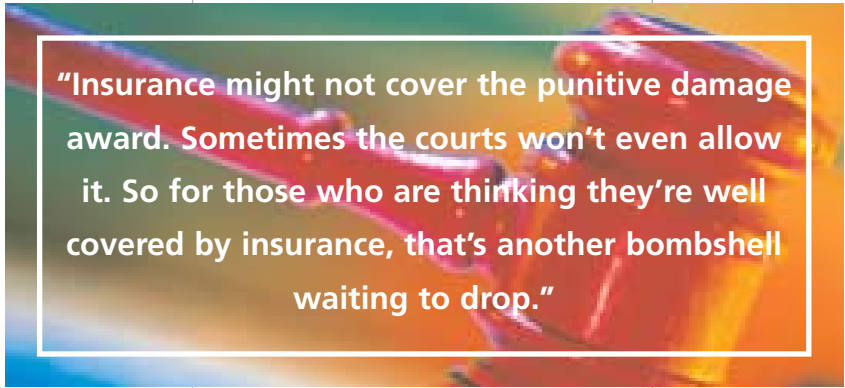
- **Records Retention Programs** – Records will become a key issue in your defense. In a product liability lawsuit numerous types of records will be demanded by the court, and within a short timeframe. Do you have a sound Records Retention program in place?

- **Document Control** – Once you produce the required records demanded by the court, what would these documents say? It's reported that 70 percent of product liability cases are lost and punitive damages awarded because

the plaintiff can prove through the companies own records that they had prior knowledge of a problem or defective condition and failed to react in a responsible manner. What do your records say? Do you and your employees understand what could constitute a "Dangerous Document"?

- **Supplier Selection & Control** – Component suppliers can get you into as much trouble as you can do yourself. Without the proper safeguards, both companies will be sued, even though it might have been the supplied component that was really defective. Keep in mind from a legal perspective, the more companies you can name and sue in a lawsuit, the merrier, especially when your company has the deepest pockets. Do you have adequate indemnification clauses in place? Do some of your smaller suppliers and subcontractors even carry liability insurance? Does anyone in your purchasing group even ask?

- **Warranties** – All products come with some sort of warranty, but does your sales and management team know the difference between full and limited warranties, express and implied warranties? That nicely printed warranty form might not be the only warranty you're going to be bound to, and your sales and management teams probably don't even know it.



- **Recall Procedures** – Never wait for a disaster to determine how to initiate a recall. There are numerous ways of handling a potential recall, or a field problem. And if you're producing consumer products, there are other reporting requirements you must follow, or you could face substantial fines. Do you have procedures in place for your management team to follow? Do you know who would be in control? Does that individual know the ways and means of conducting a recall, or the outside resources available?

- **Accident Reporting & Investigation** – Most product liability cases don't start out that way, they start out as an incident being reported, and grow to become lawsuits. If you handle it right from the start you could be successful in not only preventing a lawsuit, but also getting the other party to drop the issue altogether. If you have a tendency to simply forward everything reported to your insurance company for them to handle, it's almost guaranteed you're

going to take a loss. Do your employees know how to handle such a notification of an incident?

Product liability involves more than just warning labels and design issues, and is more than just an engineering concern. It involves many aspects of the business, and many, if not all the levels of management. In order to effectively limit the possibilities, everyone needs to understand the potential causes.

It's Time to Take Action

Some company presidents are on the leading edge of this focus, and have pursued in-house seminars on *Product Liability Prevention* for their entire

management team. This helps make everyone instantly aware of potential issues and gets everyone on the same page. Each member of management begins to understand their specific role in helping to prevent the possibilities of the company being hit by a product liability lawsuit. Even for companies with little to no product liability problems, the incorporation of these safeguards and operating practices into your current operating procedures will be effective in reducing, quality costs, field warranty problems, scrap & rework, and basically help to build a more reliable product, and eliminate bad practices.

Randall L. Goodden is recognized worldwide as a leading authority on *Product Liability Prevention*. He is the author of "Product Liability Prevention – A Strategic Guide" and "Preventing & Handling Product Liability". He is a Keynote Speaker at some of the largest conferences worldwide, and teaches public seminars as well as in-house seminars on the subject. He can be reached at randygoodden@yahoo.com ☞