

Conducting A Product Liability Risk Assessment

Law360, New York (June 08, 2012, 12:31 PM ET) -- From time to time, in-house counsel are asked for advice about the product liability risks that a particular product, existing or proposed, could present. Evaluating the legal risks of a product or a product line can be challenging. A product liability risk assessment can point the way.

It is important to note that a legal risk assessment is to be conducted by counsel under the protection of the attorney-client privilege. Assessment goals are to determine how likely the sale of a particular product will result in a product liability claim against the company, and to assess the likely economic impact of such a claim, such as defense costs.

The resulting legal assessment may then be used by the company to determine whether the product fits well with its business goals.

Before starting an assessment, gather information about the products at issue. Potential sources of information include:

- Existing product literature and material safety data sheets — for information on intended uses and product properties.
- Product designers and engineers — for information on intended uses and applications, potential misuses, product limitations and failure modes and mechanisms.
- Sales personnel — for information on customer end-uses and the company's ability to shift risk through indemnification clauses and other favorable contract terms.
- Experienced product liability counsel — for information on types and frequency of claims and factors contributing to the duration and expense of litigation involving the type of product at issue.

With that preparation, the following is a step-by-step approach to conducting a product liability risk assessment.

Step 1 – Identify Product Users

Identify the persons who will use or be exposed to the product. Do not focus solely on who will ultimately use the product. Consider all those in the supply chain and possible bystanders to the product's use. Examples of potential product users include:

- Assembly workers
- Bystanders
- Cleaning personnel
- Distributors

- Equipment operators
- Inspectors
- Maintenance technicians
- Mechanics
- Packagers
- Ultimate users

Consider how these different groups interact with the product and whether they are likely to wear protective gear, have access to instructions and warnings, be skilled or unskilled workers, be frequent or rare users of the product, and so on.

Understanding the types of users and how they interact with the product leads to an understanding of their likely awareness of conceivable risks, the likelihood of abuse or misuse, and their training and ability to follow instructions.

Consider also the use environment, whether the product is used in an uncontrolled residential setting or in a commercial/industrial setting where the product and its user are subject to greater oversight and control.

Step 2 – Identify Intended Uses and Potential Misuses

Identify the intended uses and applications for the product and any potential misuses and abuse it may be subjected to.

Examples of potential uses include assembling, loading/unloading, installing, repairing, performing maintenance on, cleaning and inspecting the product.

Potential misuses include modifications to the product, improper application, and failure to follow instructions.

Step 3 – Identify Risks and Failure Modes and Mechanisms

Building on the information being gathered, identify the product risks that may be encountered.

Also identify how the product could fail (failure modes) and what might cause a failure (failure mechanism). In this context, “failure” refers to both a material failure and a failure of the product to perform as intended for any reason.

Thus, consider the potential failures in ordinary and intended uses, such as anticipated wear and tear. Also consider potential failures due to improper installation, improper service or repair, improper uses and the product’s exposure to unintended environmental conditions.

Step 4 – Identify Consequences of a Product Risk

Considering the information above, identify the consequences of a product risk or failure. Specifically pinpoint personal injury and property damage risks. Factors to address include:

- Physical properties of the product relating to the risk of harm and likely impact on a user, e.g., unforgiving nip points, sharp edges.
- Proximity of the product to users, bystanders, or property.
- Physical properties of the product and its expected performance at the time of failure, e.g., product explodes and discharges projectiles.
- The product's relationship to other products, i.e., failure leads to another product's failure, or release of a harmful substance, with its own consequences to consider.
- If a product failure results in release of a harmful or toxic substance, consider what kinds of contact will result in injury — e.g., skin contact, inhalation, ingestion — and the frequency and duration required to result in personal injury or property damage.

Step 5 – Assign a Product Liability Risk Level

Based on information gathered, assess the overall product liability risk level — the likelihood it will result in a claim against the company.

To do this, consider the likelihood of a harmful occurrence and the gravity of harm likely to result. As a general rule, the risk level increases with the likelihood of an occurrence and the severity of resulting harm.

In addition, consider:

- The likely number of products that will be in the field.
- The likely number of users exposed to each product.
- The frequency and duration of their exposure.
- User sophistication.
- Protective measures employed by the users.
- The ability to mitigate against an occurrence through instructions or warnings.

Step 6 – Assess the Economic Impact

The final step is to assess the economic impact of the claim on the company. Difficult to predict, the economic impact will consist of two components: the cost to defend the claim and the cost to terminate the claim by settlement or judgment.

Cost of defense is driven by many factors, including:

- The defensibility of the action.
- The fact-intensive nature of the accident scenario.
- The number and type of expert witnesses involved.

- Whether the claim is likely to be resolved by motion or whether a jury trial will be required.
- The number of parties to the litigation.
- Many other unpredictable factors.

Cost to terminate the claim is driven by the nature of the injury and the defensibility of the action. It is influenced by the jurisdiction in which the action is filed and the availability of certain defenses related to apportionment of liability.

An effective legal risk analysis yields a conclusion about the product liability risk presented by the product and the potential economic impact of that risk.

For example, a legal analysis might conclude that the product presents a low risk of resulting in a product liability claim, but if such a claim were filed, the cost would be quite high due to the complexities in the accident scenario, such as the number of anticipated parties.

Reaching Practical Business Decisions

It is important to note again that the product liability risk assessment is to be conducted by counsel for the purpose of evaluating the legal risk of a particular product or product line.

All documents and emails related to the gathering of information for the analysis, and the analysis itself, should be presented by counsel, clearly labeled as subject to the attorney-client privilege.

The end result of a thorough legal product liability risk assessment is legal advice to assist the company in deciding whether a particular product fits well with its business plan.

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