

# Product liability

## How to protect your business in a global economy

INTERVIEWED BY ROGER VOZAR

A global economy means product manufacturers should take a broader perspective when addressing issues related to product liability.

“They have always had to worry about warnings and product defect issues, but now with a global economy and the Internet, they need to be worried about not only federal and state laws and regulations but also international concerns in countries where their products may be advertised and purchased,” says Lawrence Borys, a partner at Ropers Majeski Kohn & Bentley PC.

“The changing world has expanded the concerns of businesses. Whereas previously manufacturers worried about design and quality control, warranty issues, or their warnings or labels, they often did so from a more provincial perspective. They now need to look at things from a much more global point of view,” Borys says.

*Smart Business* spoke with Borys about product liability and how businesses can protect themselves from legal judgments.

### How has the Internet changed the product liability landscape?

Typically, product liability cases involved whether the product had a design or manufacturing defect, or the nature of the warning label or instructions on how to use the product. Because so much information is available on the Internet, manufacturers and sellers need to be careful about what representations are made online. Online sales raise a concern for manufacturers that simply didn't exist 30 years ago. There needs to be a balance between marketing and selling a product versus the representations being made. The Internet is so prevalent that in many product liability cases there is an allegation or contention that raises an issue about what was represented online.

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### How can companies limit product liability?

Whether in product design, manufacturing, marketing or sales, work closely with your staff, experienced counsel and risk management professionals, including insurance representatives. No matter how careful you are, almost by definition success will lead to a greater probability of a product liability lawsuit with more products on the market. Working with strategic advisers reduces the likelihood that an isolated case will impact a successful business.

### What types of insurance are available?

Traditionally, businesses get general liability insurance and some type of product liability coverage, but there are newer, advanced products such as patent infringement coverage and cyber liability to protect against hacking. Product recalls, once rare, have become more common, so there also is product recall insurance.

### Does documenting the development process help when defending a lawsuit?

Record keeping and documenting how you addressed concerns is important when defending a product. California has separate product liability areas — there is a negligence aspect, which is focused on whether you acted as a reasonable manufacturer. Records of what was done to make the product safe are critical in the

analysis of whether you acted reasonably in the process or recklessly in putting a product out into the marketplace. The other area of product liability, whether the product contains a defect, usually focuses on if the product functions the way most consumers think it would. Again, good record keeping is essential to show you considered foreseeable and anticipated uses.

It's been said that you can manufacture the most effective mousetrap in the world, but that's just a start. You have to determine whether your product may have violated patent or other forms of intellectual property protection, here and abroad; how to ensure every subsequent mousetrap gets built the same way as that first one; how you're going to market and sell it; what your website will say; and how you want to label it with warnings provided on how to use the mousetrap. And you need to do all of that remembering that you may have to defend your product in a much broader geographic area than anticipated. Good documentation will help in every jurisdiction.

Also, if you're going to sell your product online, either directly or through an intermediary, you have the same concerns, as well as ones related to the specifics of many jurisdictions. Working with your in-house team and legal and insurance consultants, you might not be able to stop product liability exposure, but you can help limit it. ●