Defending Against Product Liability Claims and Lawsuits

What a Manufacturer Should Do

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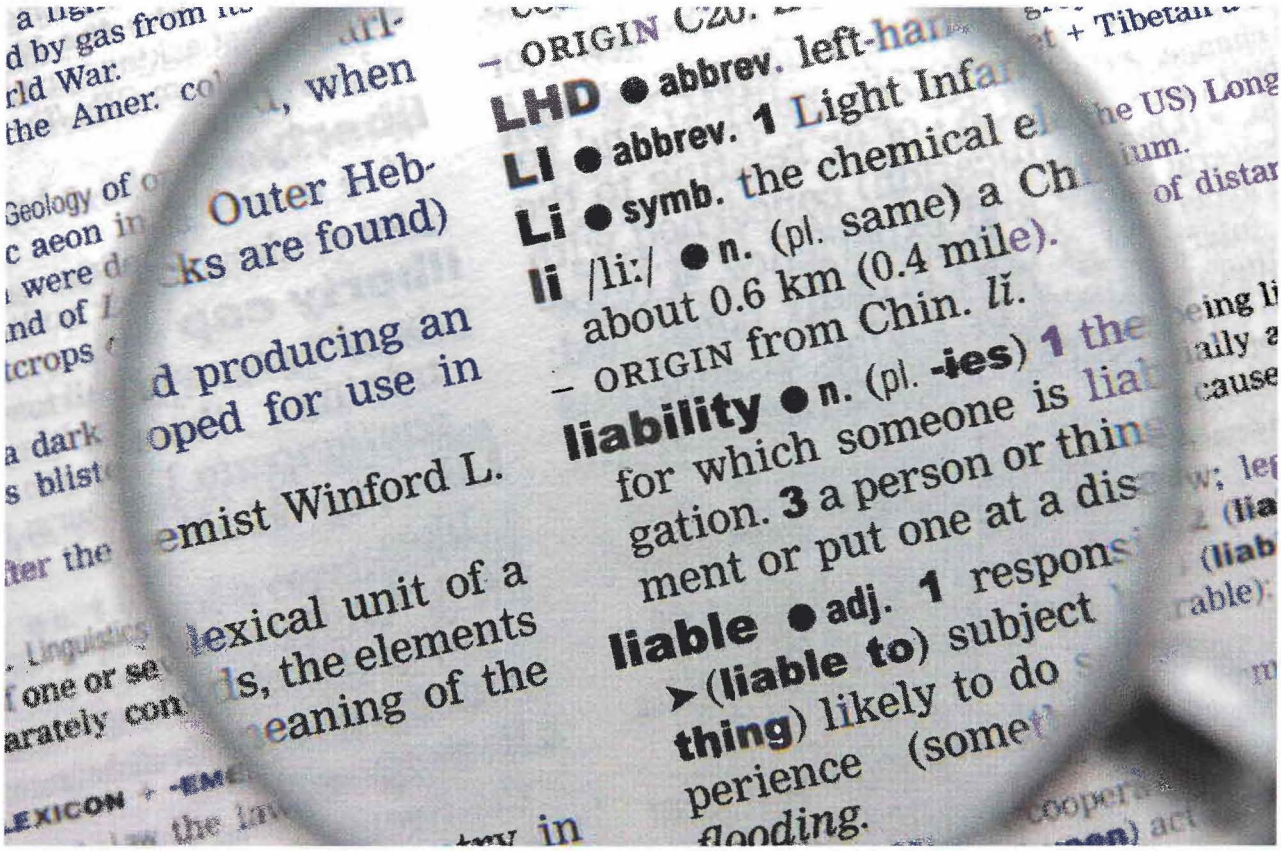

The first four articles in this five-part series were devoted primarily to steps that recreational boat and equipment manufacturers should take to minimize the risks of product liability claims and lawsuits. But as discussed in the first article, the occurrence of product liability claims and lawsuits in today's legal environment is highly probable, especially when a product is widely distributed and used over a long period of time. When a potential claim or actual lawsuit arises, manufacturers must act quickly, prudently and decisively. Thus, the focus of this article is to educate manufacturers about what they can expect if a claim or lawsuit is asserted against them and to provide them with practical advice about what they should do to protect themselves.

Responding to and handling pre-suit claims and incidents

When a manufacturer's product is involved in an incident that causes personal injuries or property damage, the prospect of a claim or lawsuit is never far behind. Often, the manufacturer will become aware of a prospective lawsuit before it ripens into one. When this occurs, the manufacturer should take immediate steps to address the impending litigation. As a general rule, the manufacturer's goal is to avoid the litigation if doing so is otherwise in its best interest. If that's not possible or practical, the manufacturer will want to place itself in the best possible position to defend or ultimately resolve the lawsuit after it is filed. The same proactive approach to avoiding product defects and claims in the first place should be used to avoid litigation when it arises.

Notice of a personal injury incident involving a manufacturer's product (which for purposes of this article includes incidents involving death and property damage) can take many forms. The manufacturer may learn of an incident through news articles or media reports, especially if the incident results in severe injuries or death. Occasionally, the manufacturer might be contacted directly by a reporter and asked to comment on the incident involving its product. Sometimes a federal or state agency investigating the incident might contact the manufacturer for certain information about the product, including operational instructions, warnings or design features. And, of course, it is not uncommon for a manufacturer to be contacted directly by a person injured in an incident or by his or her attorney. The communication may also come from the boat owner, who may or may not be the injured party. Finally, attorneys who defend boat manufacturers often learn of incidents from various industry and media sources and communicate this information to the potentially affected manufacturers or their insurers.

When a manufacturer receives notice of an incident involving its product, there are several reasons why it would want to promptly investigate the matter. First, it will be interested in knowing how its product performed in the incident and in determining whether the incident could have occurred as a result of a design manufacturing or warning defect. As discussed in the first article of this series, the product's field performance can be a valuable source of information that the manufacturer can use in its product safety program. Additionally, if the manufacturer receives actual notice that the injured party intends to assert a claim, advance notice allows the manufacturer to explore the prospects of resolving the claim before it results in litigation. Finally, notice of a potential claim or lawsuit allows the manufacturer to investigate the incident to better protect or defend itself if a lawsuit is subsequently filed. Specifically, when an incident occurs there is often critical information that is available that might assist the manufacturer in defending itself against a claim or lawsuit. Over time, this information could be lost, forgotten or otherwise made unavailable. Since most states allow an injured party to bring a lawsuit two or more years after the incident, the ability to identify and preserve this information can be critical to the manufacturer's defense of the subsequently filed action.

The information that should be preserved can take many forms and will vary greatly depending on the facts and circumstances of the particular incident. Typically, however, the manufacturer will want to preserve the post-incident condition of the product involved in the incident. It will also want to preserve or document (e.g., photograph, videotape, etc.) the location of the incident or any structures or other tangible things that were involved in the incident (e.g., a dock, buoy or other vessel). The information might also include the identity of persons who witnessed events leading up to or occurring during or after the incident. In addition to identifying these potential witnesses, there is often a need to preserve their recollection of these events by documenting it in some manner, such as a written or recorded statement. The manufacturer's notice of the incident may also give rise to its need to preserve certain information that is already in its possession, such as warranty and repair records for the product, prior communication with the product's owner and design and testing documents relating to the product.

When a manufacturer receives notice of an incident that might give rise to a claim or lawsuit, it should immediately contact its insurer. Indeed, most third-party liability policies require the insured manufacturer to give the insurer prompt notice of any third-party claim. Failure to do so could be grounds for the insurer to deny coverage. More important, however, notice to the insurer gives the insurer the opportunity to assist the manufacturer in investigating the potential claim. And because liability policies typically provide a "no voluntary payment" clause, investigation expenses incurred by the manufacturer will usually not be covered under the policy. Depending on the nature of the incident, the insurer may retain a private investigator or assign one from its own staff to assist in the investigation. The insurer might also retain outside counsel to help coordinate the investigation efforts and assist in the evaluation of the potential claim.

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The manufacturer should also promptly notify its own personal counsel. By doing so, the manufacturer or seller can increase the chances of having a well-coordinated investigation team that protects the rights of all parties concerned. In addition to assisting the manufacturer in investigating the incident, its counsel can also assist it in dealing with federal and state agencies that might be investigating the incident or the media that is reporting on the incident. Independent

counsel can also help monitor the investigation to make sure that it proceeds at a profile level that it is in the manufacturer's best interest.

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During the investigation of a pre-lawsuit incident, the investigation team should obtain as much information about the incident as reasonably possible or practical. Depending on the nature of the incident, this might include reports prepared by investigating agencies, information gathered by agencies whose property might be affected, news articles, media reports or reports of publicly available information such as water conditions and weather. The investigation team will also want to quickly determine what products or tangible things were involved in the incident and ensure that they are being preserved in an appropriate manner by a reliable source. This often requires a member of the investigation team to notify the potential claimant, another involved party or a third party of the need to preserve relevant evidence. Sometimes, it may require the investigation team to acquire or otherwise obtain the evidence itself, document its condition upon receipt and preserve it in a safe manner. If evidence has been altered, whether by the investigating agency or others, the investigation team may need to take steps to determine why and how it was altered in order to determine the condition of the evidence before the alteration occurred.

The investigation team should also attempt to obtain some general information about the nature and extent of the injuries or damages arising out of the incident. This can often predict the likelihood that a claim will be asserted or a lawsuit filed. As a general rule, the greater the severity of the injury or amount of damages, the greater the possibility that someone will attempt to assert a product liability or personal injury claim. Finally, the investigation team should attempt to identify potential witnesses and determine whether and, if so, how their observations of the incident should be preserved.

As information about the incident is gathered, the manufacturer may need to take affirmative steps to protect the integrity of information in its own possession. For example, the manufacturer or seller may need to review design, manufacturing or testing documents and make sure that they are properly preserved for future litigation. Under new federal rules, a potential litigant may have an affirmative duty to preserve documentary and electronic information, including e-mails, which might otherwise be disposed of in the ordinary course of business under the company's document and electronic storage-retention policies. Further, the manufacturer may need to notify vendors or dealers of the incident so that they do not inadvertently destroy relevant information and can place their own insurers on notice of a prospective claim.

While personal injury claims are not commonly resolved before a lawsuit is filed, the opportunity for the manufacturer, working through its insurer, should never be overlooked. If sufficient information exists to evaluate the claim, the use of mediation or other alternative dispute-resolution mechanisms may help both parties resolve what might otherwise be a costly and mutually unsatisfactory lawsuit. The rules applicable in most jurisdictions allow the parties to pursue alternative dispute-resolution methods, including mediation, without prejudicing their rights in a subsequently filed lawsuit.

Responding to and handling lawsuits

Once a lawsuit is filed against the manufacturer, the same proactive approach to defending and resolving the matter should be diligently and promptly pursued. A lawsuit, however, usually imposes procedural rules and deadlines that the manufacturer, through counsel, needs to comply with. Thus, there is also a reactive element in the manner in which the litigation is handled. While it is important for the manufacturer to have competent representation in the lawsuit, the manufacturer should keep abreast of all case developments and remain actively involved in the defense of the case.

As a general rule, as soon as the manufacturer or seller is served with a summons and complaint (sometimes referred to as a "petition"), certain deadlines are triggered that may vary from jurisdiction to jurisdiction. In all federal and state courts, the defendant will have a prescribed period of time to file a responsive pleading, which can take different forms (e.g., an answer denying or admitting allegations in the complaint or a motion attacking the complaint on various legal grounds). The right to raise certain affirmative defenses or attack certain allegations in the complaint may be waived if the appropriate responsive pleading is not timely filed. The filing of the complaint can also trigger deadlines for the defendant to remove the action from one jurisdiction to another jurisdiction (e.g., from state court to federal court or from one state court to

another state court), or transfer the action from one court to another court within the same jurisdiction (i.e., a change of venue). The failure to remove an action to a different jurisdiction or venue can sometimes be highly prejudicial to the defendant, but the right to do so will be waived if not properly and timely asserted.

For these reasons, it is critical that the manufacturer promptly notify its insurer and personal counsel of its receipt of a summons and complaint. As mentioned above, notice to the insurer is a condition of its obligation to defend and indemnify the insured from the alleged loss. Under most third-party policies, the insurer will also have the right to control the defense of the case, including whether to settle it within the limits of its policy. Nevertheless, the manufacturer should remain actively engaged in the defense of the case and stay abreast of all developments.

waterways under maritime law. And certain types of incidents occurring on navigable waterways can invoke the court's admiralty jurisdiction and require that it follow different rules or statutes than those alleged in the complaint. Under those circumstances, the insurer should select counsel who is experienced in maritime and admiralty law. If it doesn't, the manufacturer should bring it to the insurer's attention and ask for the case to be reassigned.

Notwithstanding the insurer's selection of defense counsel, the manufacturer, in an appropriate case, may wish to have its own counsel monitor and assist it in handling the litigation. While this is usually done at an expense that is not covered under the policy, it can ensure the manufacturer that the litigation proceeds and is being handled in the manufacturer's best interest.

Most third-party liability policies require the insured manufacturer to give the insurer prompt notice of any third-party claim. Failure to do so could be grounds for the insurer to deny coverage.

It should also understand its risk of exposure beyond the coverage of its insurance policy. This might take the form of liability within the policy's deductible or self-insured retention or exposure beyond the limits of the policy or any excess policies. The manufacturer should also analyze and evaluate whether other insurance coverage might cover it for the alleged loss, such as the policy of a vendor who provided an allegedly defective component or a dealer who installed or inspected the component before the product was delivered to the consumer.

Under the typical third-party liability policy, the insurer will be responsible for selecting counsel to defend its insured. While most policies do not afford the manufacturer the opportunity to participate in the selection process, the manufacturer should still carefully evaluate the attorney selected by its insurer and inform the insurer of any concerns that it might have. This is particularly important for boat manufacturers, who have claims that may differ significantly from the type of litigation that the attorney selected by the insurer typically handles. Among other things, the manufacturer should seek to determine whether the assigned counsel has prior experience or specialized knowledge in defending the subject matter of the claim. For example, if the claim involves the design and manufacture of a particular type of boat or its operation, the manufacturer ought to have an attorney who understands or is capable of understanding the relevant technical and operational issues.

Furthermore, recreational boating accidents can often implicate a body of law other than the state law in which the complaint is filed. For example, several inland or landlocked bodies of water are nevertheless considered federal navigable

Under a third-party insurance policy, the insured manufacturer generally has a duty to cooperate with the insurer in the defense of the action. Beyond this contractual obligation, however, the manufacturer has a vital interest in assisting defense counsel regardless of whether it has any personal exposure. After all, in a product liability lawsuit, especially one that raises a design defect, the manufacturer's entire product line is usually being assailed or criticized. If the allegations are not justified, the manufacturer will want to make sure that the design of its product is fully vindicated and that its sales are not stigmatized by the meritless allegations raised in the action. Consequently, it is always in the manufacturer's best interest to fully cooperate with defense counsel at all stages of the litigation regardless of any contractual obligations to do so under the insurance policy.

The assistance that the manufacturer provides to defense counsel will usually take many different forms. At the outset of the case, defense counsel, and sometimes its expert consultants, will need to become intimately familiar with the design characteristics and operational features of the manufacturer's product. Accordingly, defense counsel may need to obtain extensive information about the product, including its design, development, manufacturing processes, quality control, testing, field performance, warnings, instructions and advertising and promotion. Therefore, counsel will usually request documentation about these subjects and will follow up with the manufacturer's representative, including its engineers, managers and sales personnel, to make sure that they have a firm understanding of the technical issues relating to the product and the alleged defect claim.

During the course of litigation, defense counsel will need to work extensively with the manufacturer's representatives in preparing and responding to the discovery needs of the case. While this can sometimes pose a burden on the manufacturer, it should understand that this is a necessary and critical component of litigation. Competent defense counsel, will in turn seek to protect its manufacturing client from overly broad and intrusive discovery. Defense counsel will also seek to protect the confidentiality and proprietary nature of documents that may need to be produced to the plaintiff in response to discovery. With respect to depositions, defense counsel will need the utmost cooperation from the manufacturer in identifying the appropriate witnesses and adequately preparing them to testify in the case. Since the manufacturer's employees are usually not familiar with the deposition process, counsel has an important responsibility to ensure that they are fully prepared to give testimony. Indeed, even experienced witnesses can give unintended and damaging testimony if they are not properly and thoroughly prepared in advance of their deposition. The manufacturer and seller should facilitate this process and ensure that its employees understand the importance of cooperating with the defense counsel.

While it is important for the manufacturer to have competent representation in the lawsuit, the manufacturer should keep abreast of all case developments and remain actively involved in the defense of the case.

During the course of litigation, the parties will likely explore the prospects of settling the claim. Indeed, given the congested backlog of cases in most courts, most jurisdictions have rules that are designed to facilitate the use of alternative dispute-resolution procedures and promote early settlement of claims. It is important for the manufacturer to understand the ramifications of settling or not settling a particular claim. While the insured manufacturer may have little control over the insurance company's decision to settle a lawsuit within the limits of its policy, these concerns should be made known to the insurer and defense counsel. Since the settlement of an unmeritorious claim could potentially lead to more unmeritorious claims, both the insured and insurer may have an interest in defending the claim even if the cost of doing so exceeds the proposed settlement. Conversely, where the insurer declines a proposed settlement within the limits of the policy that leads to personal exposure to the manufacturer, the manufacturer will want to make sure that its interests are not being subordinated to those of the insurer.

Although the vast majority of civil litigation is settled before trial, the manufacturer and its counsel should never overlook the possibility that a particular claim will be tried. Indeed, the manufacturer's ability to present a compelling and well-prepared defense at trial is what typically motivates the plaintiff to settle or abandon his or her claim. The manufacturer should realize that during trial both the product and the company, including its representatives and employees, are being carefully scrutinized by the judge or jury. Consequently, their utmost assistance and cooperation with counsel is required.

Finally, the prudent manufacturer will take the opportunity to use what it learned from its involvement in litigation to better prepare itself to avoid or handle claims and lawsuits in the future. For example, at all stages of the litigation, the manufacturer should critically evaluate its product and warnings in light of the allegations that are being made. Depending on the nature of the defect claims, the manufacturer may want to consider design or manufacturing changes or additional or different warnings and instructions. The manufacturer should also consider, in light of the litigation in which it is involved, whether it is appropriately and adequately insured for the types of exposures that it faces. Working through its insurance broker, the manufacturer might want to consider different coverages that might afford it more control over the defense of future litigation or reduce its cost of defending claims and lawsuits.

In addition, the manufacturer should take the opportunity to review its claims and litigation-handling procedures to determine if there is a better and more efficient way of handling these claims and lawsuits. For example, the manufacturer may want to explore new ways of gathering and storing important information so that it will be more accessible in the event of future claims. While no manufacturer wants to endure the burdens, inconvenience and cost of litigation, those who learn from it are far better off in avoiding or successfully dealing with it in the future.

About the Author: Randy Moore is a partner in the Orange County, Calif., office of Snell & Wilmer LLP and a member of its product liability and commercial litigation groups. He is also a member of the ABYC. His trial practice is concentrated on the defense of manufacturers of marine, recreational and industrial products and matters involving admiralty and maritime law. For more information or answers to questions on product liability or warranty law, please contact Randy at (714) 427-7007 (rmoore@swlaw.com).