
Product Liability And The Rep

The continued importance of product liability to independent manufacturers' representatives was seen at a Chicago MANA networking chapter meeting earlier this year when an attorney and insurance broker discussed the issue for the 37 attendees.

In an opening presentation, attorney Daniel E. Beederman, Schoenberg, Fisher, Newman & Rosenberg, Ltd., Chicago, Illinois, advised reps to look beyond the immediate financial terms of their relationships with manufacturers and instead focus on protecting themselves and their businesses.

Beederman urged his audience to "look beyond how much you are going to be paid for representing a manufacturer. Don't become enamored with how much you're going to make. Instead, consider how you are going to protect what you could possibly lose" in the event of a product liability suit. He continued that if "a rep doesn't have or doesn't want to get insurance, he should be sure to protect himself by asking his principals to add him to their insurance policies. Take the step to have that agreement placed in your rep-principal agreement. Go into the relationship with your eyes wide open and be sure that you've completed a full analysis of risks."

Beederman began his presentation with an explanation of what a product liability claim is



Left to right: Jim Schmidt, supervisor, P&C new business dept., JTL Services Corp.; Joel Pedigo, program and report chair of the Chicago MANA networking chapter and Dan Beederman, attorney with Schoenberg, Fisher, Newman & Rosenberg, Ltd.

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and how it usually involves negligence, conduct or breach of warranty. Where problems develop for the rep, he said, was usually when someone gets hurt during the use of a product. As a result, someone is required to pay for that injury. “The law wants to provide a remedy for that injured person and product liability can provide such a remedy.”

At such times, he continued, the typical rep response is, “Why am I involved? I never touched the product. I didn’t make it, install or stock it. I’m just a salesman, why am I involved?”

The rep is involved, he explained, because “every entity that has any contact with the product should expect to be named in a lawsuit. The plaintiff’s lawyer will cite everyone who has touched the product.”

Counting the Fingerprints

Since that’s the case, Beederman maintained it’s important for the rep to determine how many of his fingerprints can be found on the product. Was the rep involved in the sale, the spec, delivery or stocking? Did he take title? Was he a value-added seller? “The more fingerprints that can be found, the greater the potential for more liability.”

The question remains, how does the rep protect himself? The

goal here is to pass the risk on to someone else’s pocket. There is an expense with this, however, and the rep must determine how much of that cost of passing on the liability he can absorb.

Beederman, who also spoke on the subject of product liability during AIM/R’s Annual Conference in April, focused on what steps reps should take to gain that level of protection. “I advise following the three ‘I’s,’” he said. “By that, I mean Indemnification, Insurance and Incorporation.”

- Indemnification — “Try to obtain an indemnification provision in the rep-principal agreement. In the event there is a claim, this indemnifies the rep and holds him harmless. Such provisions also cover the rep’s legal fees expended in defense. This latter point is important because what good is it to win the war (the lawsuit), but lose all the battles (legal costs)? If you spend \$100,000 or more to win a case, what have you won in the long term?”

- Insurance — The difficulties and cost attached to obtaining product liability were discussed and the follow-up presentation by the insurance broker provided more detailed information.

- Incorporation — “Many reps make the mistake of thinking because they are small operations, and work out of their homes, that they are not at risk. In fact, they can lose everything, including their homes. The law provides ways to protect your assets in the form of LLCs and incorporation.

What it all comes down to is that we live in a very litigious society and people want to be compensated when they feel they’ve incurred a loss. You, as the rep, want to make sure someone other than yourself pays.”

The Insurance Picture

Once armed with basic legal information, chapter meeting attendees then heard a presentation on the importance and the availability of product liability insurance. Jim Schmidt, team leader for the product, property and casualty department of JLT Services, Chicago, Illinois, covered many of the challenges that insurance companies face when it comes to providing liability insurance.

For more than 65 years, JLT Services Corporation has acted as a broker and administrator of insurance products and services. The company delivers customized administration services, underwriting resources, and strategic marketing for a wide range of benefit products, in addition to acting as a broker of insurance products for its clients.

“Since 9/11, growing problems with exposure to asbestos and the decline of the stock market have forced insurance companies to go back to underwriting for profit,” Schmidt explained. “Since insurance carriers were paying out more in claims than they were taking in, they had to change the

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way they were operating. Hence, the cost and difficulty in obtaining product liability insurance.”

Schmidt agreed with Beederman when he said that although the rep may not touch or take title to a product, “he can still be sued by the end user because of a defect.” He explained that “what we at JLT Services do is actively solicit insurance carriers to entertain the rep’s business. We’ve had some success and have made some forward progress, but certainly not to the level that we need.” He added that what can aid the rep in obtaining product liability is the “hold harmless,” or

indemnification, agreement that Beederman spoke about. “This agreement means that the rep and the principal agree to hold each other harmless in case of a suit.”

In terms of progress that JLT, the endorsed carrier for MANA, has achieved, Schmidt said they have located two carriers that would consider product liability coverage “owing to the volume of business that JLT generates.”

As far as what reps should do regarding product liability insurance, Schmidt urged reps to get in touch with JLT [phone: (800) 544-2672; www.jltservices.com]. “We work closely with reps and

stay in touch with them. There are definitely some companies that will entertain product liability quotes — but it will cost. We are here to help MANA members, and part of the service that we provide them is to guide them along the path and point them in the right direction.”

He concluded that the situation with product liability insurance is better today than it’s been in the recent past. “We’ve made significant progress. As a result of our consistent communication and our education of what a sales rep is, underwriters are beginning to finally understand what reps do.” □