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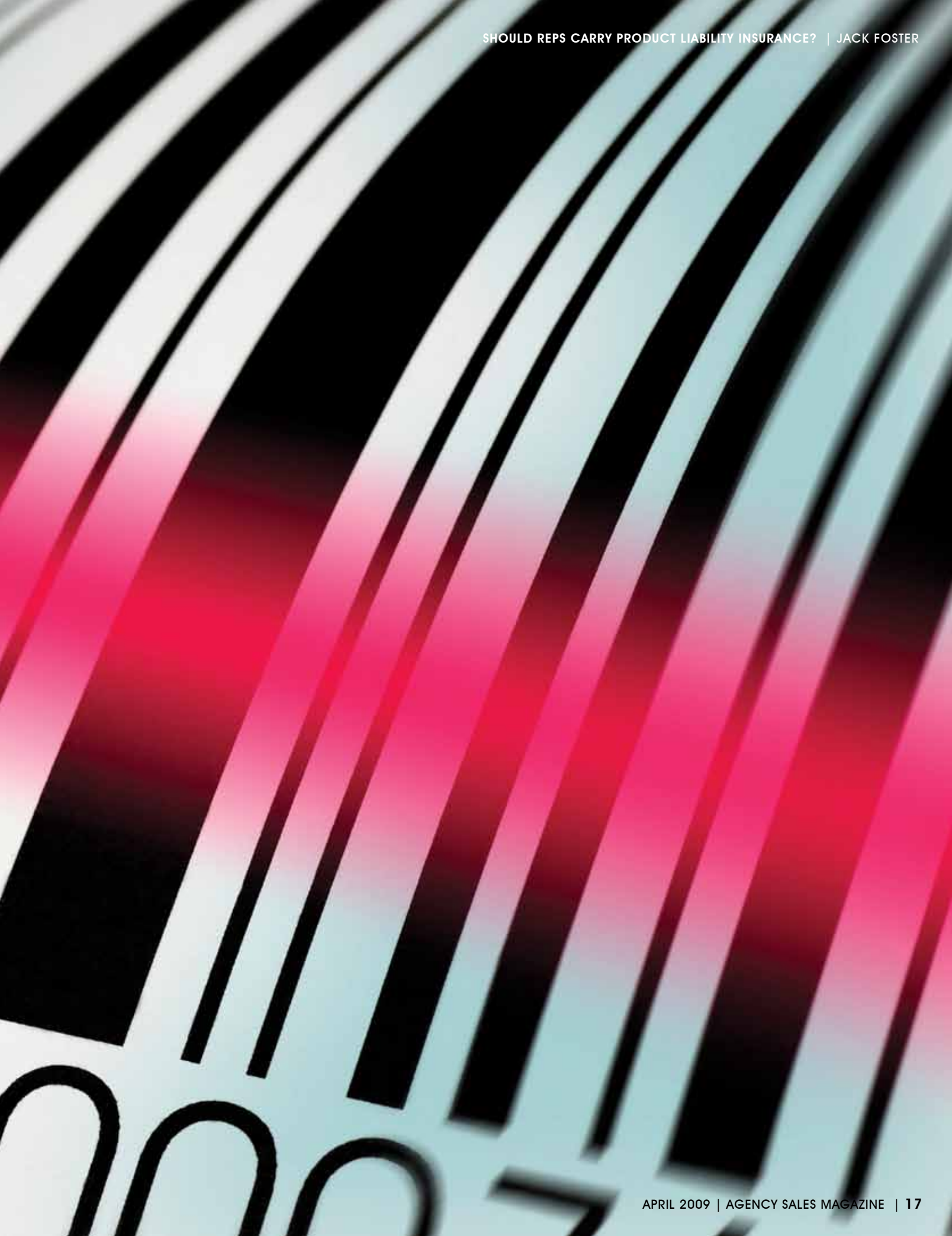
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**SHOULD REPS CARRY**

**PRODUCT  
LIABILITY ?  
INSURANCE**



A number of manufacturers' representatives are doing without product liability insurance. The reasons, among those who have spoken on the subject, can be grouped into the following:

- ❶ If the insurance is available at all, it's just too expensive.
- ❷ A majority of reps maintain they've never been named in a product liability case. As a result, given the expense, they've decided to move ahead without it.

Those reasons notwithstanding, MANA has long advocated that reps take steps to insure their personal and business interests in case they ever become party to such an action.

For instance, when **Dan Beederman**, an attorney with Schoenberg, Fisher, Newman & Rosenberg, Ltd., Chicago, spoke at one of AIM/R's annual conferences, he was adamant in advising reps to keep a close eye on "how you are going to protect what you could possibly lose in the event of a product liability suit."

Addressing reps who decide to proceed without insurance, he urged that reps be sure to take the step to protect themselves by asking their principals to add them to their insurance policies. "Take the step to have the agreement placed in your rep-principal agreement. Go into the relationship with your principal with your eyes wide open and be sure that you've completed a full analysis of any risks you may encounter."

All too often reps are surprised when they find themselves named in a product liability suit. According to the attorney, their first 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?"

A level of involvement is attached to the rep 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," he maintains.

The next step for the rep to take is to determine how many of his fingerprints can be found on the product. To do that, anticipating and answering the following questions can be useful:

- ❖ Was the rep involved in the sale, the spec, delivery or stocking?

- ❖ Did the rep take title of the product?
- ❖ Was the rep, in fact, a value-added seller of the product?

A positive answer to any or all of the questions can be evidence of the rep's fingerprints. If that's the case, what can the rep do to protect himself? Visitors to MANA's website ([MANAonline.org](http://MANAonline.org)) will learn some valuable steps, including the following:

### Indemnification

Insist that the contract include a "hold-harmless" clause. The inclusion of this provision in the contract usually insures that your defense will be conducted by the principal's attorney, along with his own defense, in case of a product liability lawsuit.

According to Beederman, "Such provisions also cover the rep's legal fees expended in defense. This point is important because what good it is 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?"

### Co-Insurance

Request that your principal name you as an additional insured in a Broad Form Vendor Endorsement on his product liability insurance policy. Also request that you receive an annual copy of your principal's insurance certificate to verify continuation of your inclusion as a co-insured. This procedure usually does not affect your principal's insurance rate, although it could affect the amount of insurance available to them. Co-insurance is not an option if the principal self-insures for product liability. More than one-third of MANA members now have this coverage from all of their principals and a large percentage has been co-insured by some of their principals.

“Many reps make the mistake of thinking because they are small and work out of their homes, they are not at risk. **In fact, they can lose everything, including their homes.**”

### Incorporation

**Pure Rep (Commission Sales Only).** Protect your personal assets by organizing, and judiciously operating, your company as a limited liability entity, a C Corporation, an S Corporation, or a Limited Liability Company (LLC). (There may be other reasons to be a sole proprietorship or a partnership, so check with your accountant.)

**Buy-Sell or Stocking Rep.** Consider establishing a second corporate identity for that portion of your business where you are involved in handling, modifying or packaging product, or servicing product, or training in its use. The probability of your company being dismissed from a product liability lawsuit is much lower under these conditions, or if you represent a foreign supplier with no assets in the United States, so be sure you have adequate insurance coverage on the new corporate entity as well. This may require that you purchase your own product liability insurance on the new entity.

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

### Insurance

**Purchase Product Liability Insurance.** As already mentioned, product liability insurance may be impossible to get or prohibitively expensive, depending on the nature of your business. However, rates and availability are improving. Some members are purchasing product liability insurance for their rep firms at reasonable prices, particularly if they represent products that have low potential for injury to the user.

**Self-Insure.** Consider the probability that you will be named in a product liability lawsuit and the expected result. Then compare those numbers with the cost of carrying product liability insurance. In the worst case, if you are not indemni-

fied by your principal, and you are not co-insured by your principal, and you have handled, modified, packaged or serviced the product or trained in its use, but you are incorporated and have judiciously operated your business as a corporation, your loss could be limited to the physical assets of your business and your attorney fees (although your exposure could be greater, depending upon conditions). The physical assets of most manufacturers' representative firms are limited to a few computers, fax machines, phones and office furniture.

### Accurate Representation

No professional salesperson, rep or direct, would intentionally misrepresent a product or service. But one should be careful to never make a claim for a product that cannot be backed by published data or written instructions from the supplier. Reps would also be well-served to be skeptical and question any performance recommendation that exceeds the supplier's published data, proposal statements or similar information. If it seems too good to be true, question it. As mentioned above, if you function as a professional engineer, product or technical expert, technical advisor, or trainer, in addition to a commissioned rep, be sure to consider appropriate additional insurance (e.g., Errors and Omissions) and a separate corporate entity for that function.

In the litigious society that we operate in today, everyone in the supply chain must be aware of the potential for a product liability lawsuit. When plaintiffs are injured and file suit, their attorneys often cast a wide net to be sure that every business involved in the transaction that may be even partially responsible is named. The straight-commission rep that solicits orders on behalf of a principal, and nothing more, may be dismissed from the suit once the discovery process proceeds to the point where it is clear the rep did not design, engineer, manufacture, handle or modify the product. But the facts may not always be clear, and the rep could be in for a long ride. Evaluating the information presented above and making an informed decision is a critical part of being a complete businessperson in today's business climate. ■