
Product Liability Protection For Reps — By The Numbers

The probability of a manufacturers' representative being named in a product liability lawsuit is small.

The probability of a judgment being rendered against a manufacturers' representative in a product liability lawsuit is even smaller.

In a non-scientific survey done by MANA, less than eight percent of the respondents said they had ever been named in a product liability lawsuit, and less than half of those said they had been carried all the way through the suit. The survey was sent to all MANA regular members, so it is likely that the respondents were mainly those who had some concern about the issue. It is also likely that those that did not respond, for the most part, had never been named.

However, without proper planning, just being named in a lawsuit can be painfully expensive, and receiving a judgment can be financially disastrous. Many members have reported that they spent \$5,000–\$6,000 on attorney fees just to get to the point in the discovery process where it became clear that they were not responsible for damages and were dismissed from the suit.

So what should you do to protect your business and yourself? MANA is obviously not in a position to give direct legal advice, but we have summarized below the recommendations we have received over time from attorneys, insurance providers, accountants, other professionals, and members who have been involved in product liability lawsuits. Take a look at these, and then make your own informed decision after consulting with your legal advisor.

1. Indemnification

Insist that the contract include a “hold harmless” clause (see Paragraph 9 of MANA Sales Agency/Principal Agreement Guidelines). 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.

2. 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. Over one-third of MANA members now have this coverage from 100 percent of their principals and another large percentage has been co-insured by some of their principals.

3. 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

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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 U.S., 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.

4. Insurance

- **Purchase Product Liability Insurance** — 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. Contact MANA's endorsed insurance broker JLT Services for more information, (800) 552-9858.

- **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 indemnified 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 on conditions). The physical assets of most manufactur-

ers' representative firms are limited to a few computers, fax machines, phones and office furniture.

5. 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 up 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 very 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 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.