

Prepare for the Storm: Best Practices for Risk Management

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"So far, our risk management practices have done the job."



Culture of Prevention vs. Risk Management

- Safety-First corporate culture is key
 - A culture of prevention can be safe and productive
- “Risk Management” without a safety-focused corporate mission will not prevent or win lawsuit
 - The absence of accidents or lawsuits does not mean your culture and risk management practices are working.
 - Risk management is meant to support a healthy corporate culture where safety is a top priority.

Even safety-focused businesses can get sued. Risk management is the infrastructure supporting everyday business practices.

Lawsuit Risks-How Big of a Problem?

2020 State Data- 400,000+ civil tort suits filed (with only 35 states providing data)

(Source: www.courtstatistics.org/court-statistics)

Federal District Court-National Judicial Caseload Profile (Mar. '21-Mar. '22)

2022 Civil Case and Criminal Felony Defendant Filings by Nature of Suit and Offense			
Total Civil	309,102	Total Criminal ¹	66,894
A-Social Security	13,912	A-Marijuana	914
B-Personal Injury/Product Liability	98,459	B-All Other Drugs	19,629
C-Prisoner Petitions	45,155	C-Immigration	18,303
D-Forfeitures and Penalties	1,091	D-Firearms and Explosives	11,193
E-Real Property	3,456	E-Fraud	6,210
F-Labor Suits	13,171	F-Violent Offenses	2,620
G-Contracts	25,993	G-Sex Offenses	3,255
H-Torts (other than Personal Injury/Product Liability)	21,315	H-Forgery and Counterfeiting	162
Intellectual Property Rights	12,242	I-Larceny and Theft	921
J-Civil Rights	40,907	J-Justice System Offenses	824
K-Antitrust	471	K-Regulatory Offenses	894
L-All Other Civil	32,930	L-All Other Criminal	1,969

Legal liability risks for companies

4 broad categories: The 4 P's

Products—Your products (or services) sold

People—Your employees, reps, agents, shareholders/owners

Property—Your premises, equipment and data (also cyber attacks)

Promises—Your contracts, representations and warranties

Today's focus: Managing liability risks surrounding your **products**

Your Product: Areas of Risk

Injuries to users/bystanders/members of public

- Strict product liability and Negligence
- Regulated product: violations of state and federal laws as independent claims or evidence of negligence

Damage to property

- Typically, warranty claims and breach of contract.

Labeling, warning and advertising

- Federal (EPA, FTC) and state agencies and regs (CA's Prop 65 and new PFAS regs) and laws against deceptive advertising

How to protect from a litigation storm? Get a big umbrella.



- Contracts
- Internal Policies
- Product Labeling, Warnings and Advertising
- Notice of Accident/Injury and Other Product Failures

Contracts: Insurance

- Audit current insurance for product exposure--examples include:
 - Commercial General Liability (CGL)
 - Product Liability
 - Recall
 - Excess Liability
 - Umbrella
- Map out areas of exposure (which go beyond your products, to include premises, autos, workers comp, cybersecurity etc.)
- Work with insurance broker and counsel

Contracts: Third Party & Shifting Risk

- Contracts with Third Parties:

Who

- Raw Material providers
- Manufacturers
- Distributors
- Resellers
- Sales Reps
- Logistic Providers
- Customer Service Providers
- Consumers and other End Users

What

- Managing Risk & Assigning Responsibility
- Indemnification/ Hold Harmless Agreements
- Recall
- Additional Insured



- Contracts
- **Internal Policies**
- Product Labeling, Warnings and Advertising
- Notice of Accident/Injury and Other Product Failures

Internal Policies: 4 Areas to Address

- (1) Document Retention
- (2) Email and other communications
- (3) Product Born and Made: Design and Manufacturing
- (4) Product Out in the Wild: Feedback, complaints, and claims

Internal Policies: Document Retention



Internal Policies: Document Retention

- Put record retention policies in writing
- Define categories of documents clearly
- Emphasize employee's responsibility to comply
- Define policy that is custom to your business needs
 - Different times for different types of documents
 - Bills of lading vs. safety tests during design phase
 - Keep for useful life of product (may be in perpetuity)
- State and Federal legal retention laws and regulations
- Litigation Holds-Severe Sanctions

Internal Policies: Email/text/messaging

"Delete After Reading"

- Dumb
- Stupid
- Huge mistake
- Big mistake
- Can't believe
- Cannot believe
- Serious trouble
- Big trouble
- Shocked
- Speechless
- Too
- Uncomfortable
- I don't think we should
- Very sensitive
- Highly sensitive
- Very confidential
- Highly confidential
- Do not share this
- Don't share this
- Between you and me
- Just between us
- Delete after reading

Internal Policies: Product Created & Made

Product Design and Manufacturing

- Product design and manufacturing records often a key defense

Written product safety policies

- Establish a culture of safety, informed by legal requirements, corporate values and market/industry norms.
- Don't keep it in a drawer: Widely disseminate

Internal Policies: After the product is in use

Consumer/customer databases & notice of product failure

- Complaints and/or Warranty Claims
- Injuries or Property Damage

Notice of Product Misuses

- TikTok Challenge?

Recall policies



- Contracts
- Internal Policies
- **Product Labeling, Warnings and Advertising**
- Notice of Accident/Injury and Other Product Failures

Product Labeling & Other Writings

Labeling: Federal and State Laws--product types and/or ingredients

- Examples: Consumer products; food & packaging; cosmetics; drugs; medical devices; alcohol beverages/tobacco; imported; products containing cancer-causing chemicals; etc.

Product Warnings (on product, manual, website, YouTube videos ...)

- Development and frequently audit

In a product liability warnings claim: **What you say will be used against you. What you don't say will be used against you.**

Product Labeling & Other Writings (cont.)

Advertising & Other Marketing Claims

- Ad/Marketing Campaigns can create additional risks
- Example: FTC regulates certain deceptive advertising

Other sources of product information

- Influencers, PR Events, Conventions, Website (yours and others)

Internal training or sales materials



- Contracts
- Internal Policies
- Product Labeling, Warnings and Advertising
- Notice of Accident/Injury and Other Product Failures

Notice of Accident and/or Product Failure

- Serious product failures are potential claims
- Initiate Investigation (*Hint-Use your counsel to lead the investigation for privilege)
 - Nature and scope of issue
- Test Products
 - Consider outside expert or other technical advisor
 - Document changes to design and manufacturing processes
- Comply with regulatory requirements & self report
- Recall or other duty to warn
- Public Relations/Crisis Management

You want to do better than umbrella protection ... you want a sturdy roof.

- Risk management is like getting a new roof.
- Big investment and not “fun”
- But keeps you safe and dry when it starts to storm



You might make it to your destination, but...

Risk management is often balancing risks against other needs of the business.

With a **safety-first culture**, the balance can achieve both limiting risk and enhancing the business objectives.



Questions?

Thank You!

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