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PRODUCT LIABILITY RISK MANAGEMENT FOR PRODUCTS EXPORTED TO THE UNITED STATES AND CANADA

(La gerencia de los riesgos derivadas de responsabilidad civil de productos exportados a Estados Unidos y Canada)

Presented by

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Donación de AGERS al Centro de Documentación de FUNDACIÓN MAPFRE

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CONTENTS

1. LEGAL PRINCIPLES OF PRODUCT LIABILITY IN THE U.S.
1.1. Civil Liability
1.1.1. Negligence
1.1.2. Warranty
1.1.3. Strict Liability
1.1.4. Market-share Liability
1.1.5. Concerted-action Liability
1.2. Criminal Liability
1.3. Federal Legislation
1.3.1. Consumer Safety
1.3.2. Workers' Safety

2. JURISDICTION OF AMERICAN COURTS
2.1. Court Systems
2.2. Jurisdiction (general)
2.3. Jurisdiction over Foreign Corporations

3. DAMAGES AWARDED BY AMERICAN COURTS
3.1. Compensatory Damages
3.2. Punitive Damages
3.3. Out-of-court Settlements

4. PRODUCT LIABILITY IN CANADA

5. PRODUCT LIABILITY RISK MANAGEMENT
5.1. Risk Assessment
5.2. Risk Control
5.2.1. Loss Avoidance
5.2.2. Loss Prevention
5.2.3. Loss Reduction
5.3. Risk Financing
5.3.1. Retention
5.3.2. Insurance
5.3.3. Hold Harmless Agreements

6. THINGS TO CONSIDER WHEN EXPORTING TO THE U.S.

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PRODUCT LIABILITY RISK MANAGEMENT FOR PRODUCTS EXPORTED TO THE UNITED STATES AND CANADA

1. LEGAL PRINCIPLES OF PRODUCT LIABILITY IN THE U.S.

1.1. CIVIL LIABILITY

1.1.1. Negligence

A supplier of a product who is negligent in designing or manufacturing or supplying that product is liable for harm caused by the negligence. A determination of negligence can be based upon improper design, fabrication, packaging, application or warnings.

In legal actions based on the negligence concept, the burden of proof is entirely on the plaintiff. In most cases it is not easy for a plaintiff to prove, for example, that a manufacturer was negligent during the manufacturing process.

Some courts have tried to overcome this disadvantage by the doctrine of "Res ipsa loquitur," which means: "the thing speaks for itself." Under this doctrine it is said that when a product is made or processed for a recognized use and someone who uses the product for such use is injured, without fault or negligence on his or her part, then the mishap speaks negligence.

Under the "Res ipsa loquitur" rule, the burden of proof is on the defendant, who must show himself free from negligence, unless there is evidence that the product was improperly handled after it left his control.
This rule has played a prominent role in many product liability cases and has been applied in many states in cases of exploding bottles or containers and cases of foreign substances in bottles or in canned-food products.
A plaintiff is ordinarily not permitted to rely on the "Res ipsa loquitur" doctrine to establish negligence in cases where equipment, appliances and the like, have caused injury, because the defendant no longer had control or management of the product.

The theory of negligence is a traditional common-law tort. Tort is a wrongful act for which a civil action can be brought, except one involving a breach of contract.

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1.1.2. <u>Warranty</u>

This legal concept is of a contractual nature and the rules are established in the"Uniform Commercial Code" All states, except Louisiana, have adopted this commercial code.

A warranty may be defined as a representation having reference to the character or quality of the article sold. Liability in warranty arises when damage is caused by failure of a product to measure up to such representation made on the part of the manufacturer or other supplier.

A warranty can be either express or implied.

* Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and any description of the goods creates an <u>express warranty</u> that the goods shall conform to the fact,promise or description. Also, any sample or model which is made part of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

  Statements made in advertisements and sales literature (brochures, catalogs, etc.) have been held by courts to create warranties. Liability for damages has been imposed upon advertisers where products did not measure up to explicitly stated claims of quality or safety.

* <u>Implied warranties</u> are warranties that accompany a sale just because it is a sale. There are two types of implied warranties:

  - The "warranty of merchantability" is a warranty that the goods are reasonably fit for the general purpose for which such goods are sold. This includes the expectation of reasonable safety.

  - The "warranty of fitness for a particular use" is usually implied when a buyer can establish that he or she has relied on the judgement of a seller who knows the purpose for which the product is purchased. Breach of warranty could be imposed if the seller recommended the wrong product for the buyer's application.

The express and implied warranties are significant to product liability because they allow court actions to take place without the need for a plaintiff to prove either negligence or the existence of a defect (as is necessary under the strict liability concept).

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1.1.3. Strict Liability.

Strict liability is an amalgamation of the negligence and the implied-warranty theories. The term "Strict Liability" should not be confused with the concept of "absolute liability."

Strict liability is imposed, regardless of fault, for injury or harm traceable to a product defect that originated while the product was under the control of the manufacturer or seller.
Absolute liability would be liability imposed without the need to prove the existence of a defect.

The principle of strict liability was laid down in 1963 by the Supreme Court of California, and has been adopted by most courts in the U.S. since 1965.

An important aspect of the original strict liability concept is that it requires that the product is "... in a defective condition unreasonably dangerous to the user or consumer."

There is no legal definition of "defective condition" but the term generally includes three possibilities: (1) Failure to warn; (2) Faulty design; (3) Manufacturing fault.

The requirement that the defect must make the product "unreasonably dangerous" has been, and still is, controversial.
Most courts follow the standard that "...the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics."
Many jurisdictions, however, follow a 1972 decision made by a California appellate court, and have since ruled that requiring proof that a product is "unreasonably dangerous" is the application of a negligence standard and that, therefore, such proof is no longer required in cases based upon strict liability.

A product is not considered defective or unreasonably dangerous simply because it can hurt people. Certain products in and of themselves are dangerous and cannot be made safe without losing their effectiveness as to their intended and ordinary use.
Examples of unavoidably-unsafe products are knives, saws, dynamite, rat poison, drugs and chemicals. The law does generally not impose liability for such products provided that they are properly prepared and marketed and that proper warning is given when the situation calls for it.

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The theory of strict liability has been extended far beyond liability to the ultimate purchaser, to include everyone who comes in contact with the product. For example, in a case in the state of Michigan, a hunter, who was described as a bystander, could invoke the strict liability doctrine to recover for injuries sustained when his companion's shotgun shattered, allegedly because of a defective shell.

The main elements which a plaintiff must prove in a case involving strict liability are:

(1) The defective (and unreasonably-dangerous) condition of the product;
(2) The causal connection between such condition and the injuries or damages; and
(3) The defendant's connection with the product that caused the injury.

In order to prove a defect, the plaintiff is not required to eliminate with certainty all the possible causes of an accident. It is sufficient if the evidence reasonably eliminates improper handling or misuse of the product by someone other than the manufacturer.

1.1.4. Market-share Liability

Under the strict liability concept, the plaintiff must show that a particular defendant manufactured or sold the product that caused him or her harm. In some cases it is virtually impossible for a plaintiff to identify, with certainty, one particular manufacturer. Inventive as American lawyers are, they came up with a new theory: "market-share liability." This theory was first applied in 1980 by the California Supreme Court in a case involving the drug DES.

DES (Diethylstilbestrol) is a synthetic estrogen that prevents miscarriages and alleviates morning sickness for pregnant women. It was prescribed between 1941, when the Food and Drug Administration (FDA) approved DES and 1971 when the FDA banned use of the drug. It had been manufactured by some 300 companies. In the late 1960s, the drug was linked to cancer in the adult daughters of women who had taken the drug when they were pregnant. In the 1980s DES was also suspected of causing genetic damage in the children of these daughters.

Thousands of suits have been filed. In the majority of cases, however, it was extremely difficult for a plaintiff to prove that twenty or more years ago, her mother had taken DES that was manufactured by one

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specific producer. Therefore, lawsuits were filed against all DES manufacturers.
In 1980, the California Supreme Court ruled that "... it was reasonable to measure the likelihood that any of the defendants supplied the product that caused the damage, by the percentage which the DES sold by each of them bears to the entire production of the drug sold by all..."

This concept is since known as "market-share liability" and besides in California, has since been adopted in four other states: Florida, Hawaii, New York and Washington.

Market-share liability has been limited to cases involving DES. Many attempts have been made to have this theory also applied to other products, but this has, thus far, been rejected by the courts.

1.1.5. Concerted-action Liability

"Concert of action" is a theory which is well established in many states. Under this theory, one person may be held liable for the conduct of another if both are engaged in a tortuous act in concert, or pursuant to a common design with the other person, or giving substantial assistance or encouragement to the other person, with the knowledge that the other's conduct constitutes a breach of duty.

Courts apply this theory, for example, when two people are drag racing cars and one car strikes a pedestrian Both drivers could be liable for damages because both drivers were acting together in breaking the law.

Until 1991, "concert of action" had never been applied to a product liability case. In May 1991, however, a New York appellate court refused to dismiss two truck tire and rim manufacturers from a product liability suit even though neither company manufactured the rim that exploded and killed a truck driver while inflating a tire.

The case involves a multipiece-type tire rim, which was last manufactured in 1974, although it is estimated that more than 3 million are still in use today.

The rim that exploded was manufactured by Firestone and Kelsey-Hayes, but the plaintiff alleged that all multipiece-rim manufacturers knew about the dangers of the product and conspired to keep it secret from consumers and the government.

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The tire on the exploded rim was made by Goodyear, and the plaintiff alleged that Goodyear was aware of the inherent dangers of multipiece rims because it made a tire exclusively for installation on such rims. Goodyear argued that, as a manufacturer of a tire for the rim, it has no duty to warn consumers about the rim because its own product (the tire) was not defective. But the court rejected Goodyear's argument and ruled that Goodyear had "..a duty to bring to the knowledge of those who are to use its product, such directions as would make it reasonably safe for the use for which its was declared suitable..."

The plaintiff also alleged that multipiece rim manufacturers may have acted together to block governmental action that may have resulted in a mandatory recall of all rims of that particular type.

The court ruled that all parties, named by the plaintiff, could be liable under the concerted-action theory if evidence shows they conspired to hide the product's dangers. The court further decided that all parties must remain as defendants in the case to determine whether there is enough evidence to prove the plaintiff's allegations.
The case has not gone to trial yet.

1.2. CRIMINAL LIABILITY

The state of California invented the strict liability and market-share liability concepts. It is now also the first (and thus far only) state to impose criminal liability in product liability cases.

The "California Corporate Criminal Liability Act of 1989" (effective September 30, 1990) holds any corporation or person, who is a manager, guilty of a public offense, if that corporation or manager has actual knowledge of a serious concealed danger associated with a product or component of that product and knowingly fails to inform the authorities and warn its affected employees or consumers.

The offense is punishable by imprisonment of maximum three years, or by a fine not exceeding $25,000 for individuals and $1 million for corporations, or both that fine and imprisonment.

1.3. FEDERAL LEGISLATION

Although product liability is essentially a state matter, there are several federal statutes that are important with respect to product liability. These

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statutes deal mainly with consumers' and workers' safety.

1.3.1. Consumer Safety

The objective of the federal statutes concerning consumer safety is mainly to compel full disclosure to the purchaser of a product, but they also lay down safety standards. Some of these federal statutes in connection with consumer goods are listed below.

* The Consumer Product Safety Act of 1972 applies to any article or component thereof that is produced or distributed for a nonbusiness use.
  This includes products for personal use, household products and products used in a residence, school or in recreation.
  It does not include tobacco, motor vehicles, economic poisons, aircraft, boats, drugs, cosmetics, food and firearms. (These products are regulated by separate agencies.)

  The Act seeks to protect the consumer by establishing a regulatory commission, the Consumer Product Safety Commission (CPSC).
  The Act and the safety standards developed by the commission apply to products distributed within the United States, including imported products. The U.S. Treasury is required to obtain, free of charge, samples of consumer products to be imported and to deliver these samples to the commission.

* The Consumer Product Safety Improvement Act of 1990 requires manufacturers to report to the Consumer Product Safety Commission if they lose or settle three product liability suits that allege the same product caused death or "grievous bodily injury" within a two-year period. The law provides that the information provided by the manufacturers will be available only to the commission and to certain members of Congress.

  Manufacturers are subject to a $1.25 million fine for failing to report products liability settlements or court decisions.

* The Motor Vehicle Information and Cost Savings Act deals with bumper standards, consumer information, diagnostic inspection and odometer requirements.

* The National Traffic and Motor Vehicle Safety Act deals with motor vehicle safety standards, tire safety and research and test facilities.

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* Some of the other federal acts applicable to consumer goods include: Federal Hazardous Substances Act; Fair Packaging and Labeling Act; Flammable Fabrics Act; Federal Caustic Poison Act; Refrigerator Safety Act; Magnuson-Moss Warranty Act; and so on.

1.3.2. Workers' Safety

It is estimated that 80-85 percent of all product liability suits in the United States involve industrial goods rather than consumer items.

In all states, the Workers' Compensation system is the exclusive remedy for injuries suffered by employees in the workplace. This means that an employee, who is injured on the job, cannot sue his or her employer to recover more compensation than that provided by the Workers' Compensation system.
The employee can, however, sue the manufacturer of the machinery, equipment, tool or chemical that was directly or indirectly related to the accident.
A workplace accident thus turns into a product liability suit.

Failure to comply with safety rules, in general, and the federal Occupational Safety and Health Administration (OSHA) standards, in particular, can be very damaging to the defense of a product liability suit.

Two of the more common errors which I encounter in my dealings with European exporters to the United States involve warnings and material safety data sheets.

* OSHA regulations often require --more than comparable safety regulations in Europe-- warnings on machinery and equipment. The regulations are very specific and prescribe where such warnings need to be posted, the wording of the warnings and usually even the size of the letters.

  Product liability cases have been lost by manufacturers for lack of mandatory warnings.

* OSHA regulations require that purchasers of chemical materials be provided a Material Safety Data Sheet (MSDS). The MSDS must be in English and must contain the information specified by OSHA.
  A common error made by European manufacturers is to translate into English the safety data sheet which is made in accordance with the regulations or standards in their country. However, these European data sheets require far less information than is required to comply with OSHA's specific regulations.

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The information provided--or lack of information--in the MSDS is playing an increasingly important role in product liability cases.

2. JURISDICTION OF AMERICAN COURTS

2.1. COURT SYSTEMS

The United States has two fully organized and functioning court systems: state courts and federal courts (see slide).

2.2. JURISDICTION (general)

Product liability is essentially a matter of state law, and jurisdiction is usually no problem when both plaintiff and defendant are residents of the same state. It is the appropriate state court which decides the case, based on the law of that state.

When a case is heard in a federal court (for example, because of diversity of citizenship), state law will be applied. To decide the applicable state law, there is a body of rules known as the "Law of the Conflicts of Laws." However, this law is in itself state law--so there are fifty versions!

Generally, the law to be applied is the law of the place of injury in actions based upon negligence or strict liability. When the complaint is based upon breach of warranty, the place of sales determines the applicable law--not the place of injury. In most instances the term "place of sale" means the place of delivery.

Some states have conflict-of-law rules that provide that the law of the state with the most significant contacts with the event applies. In other states a "governmental interest" is required if the law of that state is to be applied. A "governmental interest" could be the interest of a state in the proper compensation for its residents.

2.3. JURISDICTION OVER FOREIGN CORPORATIONS

The matter of jurisdiction must be dealt with on a case basis. This is particularly true when it comes to jurisdiction of American courts over foreign manufacturers. The following basic principles are given as a guideline only, and may not apply in every state or in every case.

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* Where a foreign corporation maintains employees and offices within an area over which a court has territorial jurisdiction, and conducts business there on a regular basis, then it is subject to the power of that court.

* Where a foreign corporation does not maintain an office within a state, but regularly solicits business from that state, ships goods into that state, engages in advertising within the state, maintains bank accounts within the state and visits the state on a regular basis for business purposes, then it may be subject to the jurisdiction of the courts of that state.

  The key criterion appears to be "sufficient contact" with the state, in other words, sufficient business activity to be deemed to be doing business in that state.
  For example, a manufacturer, who has never done business within a state, decides to solicit business from within such state, resulting in the shipment of (and payment for) a particular product to that state. He will be most likely subject to the jurisdiction of that state when that product causes injury to a resident of that state.
  On the other hand, a resident of, for example, Texas, who buys a product in Spain while visiting there, and is injured by that product while using it in Texas, would probably not be able to obtain jurisdiction over the Spanish manufacturer in Texas.

The aforementioned principles are not always followed by the courts. In a landmark decision, the Supreme Court of the state of Washington ruled in 1977 that the courts in that state had jurisdiction over a German car manufacturer, not only over its distribution subsidiary (located in the state of New Jersey) but also over its parent company in Germany. The plaintiff (a resident of Washington state) had been injured in California when she was a passenger in a micro bus The vehicle was owned by residents of California and had been ordered in California for delivery in Germany. After touring Europe in the micro bus the owners then shipped the vehicle to California.

A decision with possible significant implications for foreign companies was made by the U.S. Supreme Court in February 1987. The court ruled that a Japanese valve manufacturer, with no contacts in the state of California other than the knowledge that its valves would be sold there as a component of a finished product, is not subject to court jurisdiction in that state.

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The case stems from a 1978 motorcycle accident in California, in which a passenger was killed and the driver severely injured, allegedly because a sudden loss of air and an explosion in the motorcycle's rear tire caused the driver to lose control. The driver brought a product liability action in a California Superior Court against the Taiwanese manufacturer of the tire tube and the California retailer who sold the tire. The case was ultimately settled out of court for $300,000, with each paying $150,000.

The Taiwanese manufacturer of the tube had filed a cross-complaint in the same court, seeking indemnity from the Japanese manufacturer of the tube's valve. The Japanese firm had done business with the Taiwanese manufacturer for about ten years, with all sales occurring in Taiwan. The Japanese firm had neither offices nor property or agents in California, solicited no business there and made no direct sales there, although it knew that some valve assemblies, sold to the Taiwanese company, would be incorporated into tubes sold in California.

Initially, the Japanese firm made a motion to the court contesting the court's jurisdiction. The court denied the motion and confirmed its jurisdiction. A state appellate court reversed this decision and ruled that the state court had no jurisdiction. The Taiwanese company then made a petition to the California Supreme Court, which in 1985 ruled that the Japanese firm had sufficient contacts with California to establish jurisdiction because it was aware that a substantial number of its products would be sold in the state. Jurisdiction also was "fair and reasonable," the court said.

The Japanese firm then sought review from the U.S. Supreme Court, which agreed to hear the case.
In February 1987 the court ruled unanimously that it was "unfair and unreasonable" for the Japanese manufacturer to face a product liability suit in California brought by a Taiwanese manufacturer. The Justice who wrote the opinion noted that the burden on the Japanese company is severe because it would have to travel between Japan and California, and because it would have to submit to a foreign judicial system. In addition, the Justice noted, the Taiwanese firm had not demonstrated that it is more convenient to litigate its indemnification against the Japanese firm in California rather than in Taiwan or Japan. It was further noted that, because the Taiwanese firm is not a California resident, California's interest in the dispute is slight.

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However, the Supreme Court split 4-4 on the broader issue of whether the Japanese firm's knowledge that the components would be sold in California was sufficient to be considered "minimum contact."
Four Justices found that this awareness by itself was not sufficient contact with the state to subject it to jurisdiction.
Four Justices disagreed, and were of the opinion that "as long as participant in this process is aware that the final product is being marketed in the forum state, the possibility of a lawsuit there cannot come as a surprise."

The unanimous decision of the court to deny jurisdiction in California is solely based on the "unreasonable and unfair" argument. The tie vote on the contacts issue, however, makes the implications of the decision uncertain.

3. DAMAGES AWARDED BY AMERICAN COURTS

3.1. COMPENSATORY DAMAGES are pecuniary and non-pecuniary damages that are awarded to make the injured party whole for the loss sustained. They include medical expenses and other special damages, compensation for any future loss of earning capacity, and damages to compensate for "pain and suffering."

3.2. PUNITIVE DAMAGES or exemplary damages can be awarded to the plaintiff over and above the compensatory damages. The United States is the only country where punitive damages are awarded in product liability cases.

Punitive damages usually exceed by far the amount of compensatory damages. They are generally justified as punishment of the wrongdoer for outrageous conduct or as a deterrent to the wrongdoer and to others, so as to cause them to refrain from committing similar offenses.

Although punitive damages are highly publicized, and even though plaintiffs are increasingly adding claims for punitive damages, it is generally recognized that punitive damages are only awarded in a minority of cases.
Adding a punitive damage demand is usually intended by the plaintiff to exert additional pressure upon a defendant to seek an out-of-court settlement of the claim.

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Probably the best known product liability case involving punitive damages is the Ford Pinto case.
The plaintiff had been severely injured when the gas tank of his Ford Motor Pinto car ruptured in a crash with another car and set the car on fire.
In 1978, a California jury awarded the plaintiff the unprecedented amount of $125 million in punitive damages. (The compensatory damages were $3 million.)
This verdict received worldwide publicity, but less attention was paid to the fact that the $125 million award was later reduced by the court to $8 million.
The jury justified the huge punitive damages based on their findings that Ford had been aware of the dangerous location of the gas tank at the rear of the car, but failed to change the design or to built in a fire-proof wall between the gas tank and the passenger compartment, which would have costed an additional $10 per vehicle.

Four states do not allow punitive damages: Louisiana, Nebraska, Washington and Massachusetts
Insuring against punitive damages is not permitted in seven states: California, Colorado, Connecticut, Kansas, Minnesota, New York and North Carolina.
In the District of Columbia(Washington D.C.) punitive damages are allowed but not insurable.

When punitive damages are awarded, they are generally supported by rather clear findings of at least a significant intentional disregard of substantial dangers by the management level of a manufacturer, who are aware of the dangers but are unwilling to take reasonable and proper steps for their elimination.

3.3. OUT-OF-COURT SETTLEMENTS

It is estimated that less than five percent of all product liability claims in the United States go all the way to a court verdict. The overwhelming majority are voluntarily settled, either with no suit filed or, when suit has been filed, prior to the actual trial or during trial before a court verdict.

Huge defense costs may be one of the reasons why many defendants seek out-of-court settlements. Other considerations might be the fear of the "deep pocket" theory (joint and several liability) or the fear of possible punitive damages.

Elements to be considered are also the liberality of the jurisdiction where the trial is to be held, whether the injury had any other effects on the plaintiff (for example, did the spouse of the injured per-

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son who was permanently disabled, seek a divorce as a result of the disability?), and so on.
Each claim will present its own unique elements of consideration.

Courts award damages in a lump sum. Settlements made out of court can be either as a lump sum or can be "structured." Structured or annuity settlements have been gaining increased acceptance in recent years.

4. PRODUCT LIABILITY IN CANADA

For some mysterious reason, Canada is always grouped together with the United States when it comes to liability, particularly by insurers (not only in Europe but also in the U.S.). For example, primary product liability insurance policies written in Europe usually exclude--or have much higher rates for--exports to the United States and Canada. Insurance policies written in the United States always include Canada but usually exclude the rest of the world.

The product liability situation in Canada is, however, entirely different than in the United States. Some of the major differences are listed below.

* Canada is a far less litigious society than its southern neighbors.

* Unlike in the United States, there is no constitutional right to request a jury trial in product liability cases or other tort cases in Canada.

* Because there is no jury trial, the courts are far more predictable than in the United States.

* Pain and suffering damages in Canada are capped at $200,000 Canadian. In the United States those type of damages account for one of the largest portions of many compensatory damage awards.

* There are no punitive damage awards in Canada.

* Class actions are not easily put together in Canada because there is no method to pre-fund the case. In the United States, lawyers pre-fund the case knowing that there is a huge contingency payoff at the end if they win or extract a settlement.

From a product liability point of view, exporting products to Canada is much like exporting to the United Kingdom. The legal and judicial systems in both countries are quite similar.

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5. PRODUCT LIABILITY RISK MANAGEMENT

Product liability risk management involves more than having a quality control program or an insurance policy.
Quality control, by itself, does not necessarily produce a safe product. And, even though quality control is an imortant function, it usually does not get involved in such areas as design, labeling, advertising or recalls.
Insurance can be important because it provides financial protection, but the negative publicity, damaged reputation, and possible loss of market share cannot be insured.

The task of risk management is: (1) to identify the risks and to evaluate their possible consequences; (2) to devise a stategy for eliminating them where possible or controlling them to some point where they are no longer a major threat;and (3) to provide means to finance possible losses.

5.1. RISK ASSESSMENT

Assessment of the product liability risk requires an understanding and in-depth review of two questions:

1. How is liability imposed?
2. How and where does liability arise?

How liability is imposed in the U.S. and Canada was briefly discussed in the first part of this presentation. This is a legal matter, mostly beyond the control of a company.

How and where liability arises is a factual matter and is almost completely under the control of the company.

Liability for a product can arise from more than just the physical product itself. Integral parts of the product also include:containers and packing material; labels and warnings; instructions for use and user maintenance; service; advertisements; catalog descriptions and sales brochures; spare parts;and so on.

The hazards created by all these elements must be identified and evaluated.This can best be accomplished by a product liability audit. The audit is a planned and scheduled management-directed examination of all areas where liability for the product may arise.

Donación de AGERS al Centro de Documentación de FUNDACIÓN MAPFRE

* Design

The only proper design of any product is one that does not offer unreasonable hazards. The designer must take into account the performance of the product and the seriousness of the potential hazard. If the risk of a significant hazard cannot be eliminated, it is equally the designer's responsibility to ensure that the product carries proper warnings.

* Manufacturing & Assembly

Production personnel must understand what elements of the design are particularly open to production error, from a product liability point of view. Other important elements in the production process are: logging of incoming materials; separation of similar-looking parts; safety-critical parts; processes requiring heat or cold, special adhesives, pressure, etc.; reworked components or finished products; and rejected products.

* Outside Suppliers

Problems imported from the outside are at the root of many product liability suits. Supplier control is vital, particularly because of the joint and several liability concept (deep pocket)

* Packaging & Shipping

The box or container, package material or any other object used to hold, contain or enclose the product is considered an integral part of that product in a liability action.
Much like other outside suppliers, outside shipping companies must also be evaluated.

* Instructions - Manuals - Warning - Labels

The manufacturer has a duty to provide the user with whatever information he or she needs to evaluate the item's suitability and to understand how to use the product safely.

Labels have a mission of much greater significance than merely to promote the product trade name and company image. Product liability cases have been won and lost strictly through what was or was not printed on a product label.

Warnings should meet five criteria, as follows:

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1. State the level of hazard
   (Example: Danger! - Warning! - Caution!)
2. State the hazard (show and tell)
   (Example: "Extremely Flammable" plus pictograph)
3. Describe the consequences
   (Example: May be fatal if swallowed)
4. Instruct how to avoid
   (Example:Disconnect electrical power supply before opening)
5. Visible and legible
   (Clear, nontechnical and nonscientific language)

Warnings should not be regarded as substitute for eliminating dangerous features that can be eliminated.

* Advertising & Sales Literature

The three main requirements that manufacturers and suppliers of products should strive to fulfill in advertisements and sales promotion materials are:

1. Correct facts
   (Example:
   NOT: "...insulation prevents noise..."
   BUT: "...insulation reduces considerably the noise level..."
2. Limit usage of superlatives
   (Example:
   NOT: "..equipped with failsafe brake system.."
   BUT: "..equipped with a carefully tested brake system.."
3. Exercise care in making promises
   (Example:
   NOT: "..reduces your maintenance costs.."
   BUT: "..can reduce your maintenance cost"

Do not let advertising companies have a free hand in formulating copy for your advertisements.Check their copy carefully. Does the product fulfill all the promises in the ads? What will happen if it does not?

* Sales - Service & Parts

Spare parts are a "product" and can cause the same liability problems as the product for which they are intended.

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Sales personnel should be given guidelines for making verbal assertions regarding the product and its use. Unsupported and exaggerated statements could be interpreted as warranties. Many product liability suits have been won by farmers and wine growers against manufacturers of fertilizers or pesticides after their crop had been destroyed following the application of products recommended by careless or uninformed salesmen.

Many manufacturers have a tendency to concern themselves only with the manufacture of the product and then to neglect it once it has been shipped. Such an approach deprives these manufacturers of valuable feedback on customer satisfaction, possible misuse of the product, and product accidents. Consideration of products after the sale should be a key element in a company's product liability risk management program. A field monitoring program is particularly critical for new or significantly modified products. Because of their close contacts with the customer, the sales and service people are best placed to provide this feedback.

A product liability audit is carried out in a similar manner as a financial audit. But, while the latter looks at what has happened, the product liability audit looks to future vulnerability and provides important information on how to control the liability risk.

5.2. RISK CONTROL

5.2.1. The only way to avoid completely a product liability loss is by neither manufacturing nor selling the product.

5.2.2. Loss prevention seeks to reduce the chance of loss. The chance of a product liability loss can be reduced by careful design, tightening the quality control limits, carefully choosing distributors, checking on statements made by salespersons or in advertising, voluntary recalling the product after a defect has been discovered but before an accident occurs, and other measures that become apparent from the product liability audit.

5.2.3. Loss reduction aims to reduce the severity of those losses that do occur. The size of a product liability loss may be reduced by design features, product recall, prompt attention and follow-up of customers' complaints, proper loss investigation, out-of-court settlements (to avoid punitive damages), and so on.

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5.3. RISK FINANCING

The financial consequences of a product liability loss may include:

* Amount of court verdict or settlement.
* Legal expenses, including investigations, legal defense costs, and court costs.
* Expenditures to comply with an order (e.g., product recall).
* Loss of market share.

The funds for paying losses can generate either from within the organization (risk retention) or from a source outside the organization (risk transfer).

5.3.1. Retention

Risk retention decisions are generally affected by three key characteristics:

1. Legality of retention
2. Pay-out pattern of losses
3. Frequency and severity of losses

Product liability insurance is not compulsory in the U.S. or Canada. Retention would, therefore, be perfectly legal.
Product liability claims are "long-tail" claims and are generally paid several years after a loss has occurred.
The frequency of product liability losses is generally low, but the severity may reach catastrophic levels particularly when punitive damages are involved.

Therefore, product liability risks are less suitable to retention, at least not completely.
However, risk retention is also very much a function of the company's specific exposures (products). Excess insurance over a substantial retention may, therefore, be the best solution for many companies.

5.3.2. Insurance

Insurance is an important means of financial protection against low-frequency/high-severity losses, such as those associated with product liability.

If you have a product liability insurance policy for export to the U.S., it is important that you fully understand what is covered by the policy and where, what is excluded, what additional costs can be expected in case of a claim, and how and by whom the claim will be handled.

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For example, insurance policies, written in Europe, covering export to the U.S. typically exclude punitive damages and liability assumed under a hold harmless agreement.

5.3.3. Hold Harmless Agreement

A hold harmless agreement is a contractual agreement between two parties defining an obligation or duty resting on one party to make good the liability loss that the other party has incurred or may incur.

An often overlooked fact is that a hold harmless agreement is no more than a pure financial transfer--not a transfer of the ultimate legal responsibility. Further, such agreement between two parties will not shield either party from being sued by a third party because the contractual agreement does not affect the rights of that third party.

Hold harmless agreements deserve much more attention and scrutiny than is common in many companies.

6. THINGS TO CONSIDER WHEN EXPORTING TO THE U.S.

* Common Law
* Liability based upon state law (50 states)
* Jury trial
* Litigious society
* Attorneys' contingency fee system (30-50%)
* Joint and several liability
* Very broad pretrial discovery by attorneys
* Punitive damages
* Class actions
* No limit on age of product
* Be prepared to deal with the media
* Comply with mandatory and voluntary U.S. standards
* Use of correct (American-)English
* Record keeping
* Check insurance policy for limits and exclusions

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* Safe products and good risk management

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The United States can be a lucrative market, but there is also the product liability threat. Avoiding this vast market because of an obsessive fear of liability suits will deprive you of the revenues that could be generated. Yet, ignorance and lack of an effective product liability risk management program can lead to a life plagued with lawsuits and the threat of financial disaster.

Jacques Kusters

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