What can you do when confronted with the age of consumerism?

The ins and outs of product liability may help you understand the need for relief from rising insurance costs and the shrinking supply of new policies

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If you have been facing rising costs for product liability insurance, have found it difficult to obtain this insurance at all, or have been hit with a product liability claim, then you know what a problem the whole area has become.

Product liability is a basic state-level problem, because it deals with tort laws and has traditionally been dealt with by state regulations. However, in 1976; the business community came to the Ford administration for the start of a task force to study the sharp increases in product liability insurance. They brought forth claims that up to a million product liability suits were being filed annually at a very high cost, and complained about the inability to obtain insurance against an atmosphere of rising consumer awareness. They wanted something done, and surprisingly, they wanted it done by the federal government.

President Ford responded by forming an inter-agency task force, on which I served. We studied the problems and issued a report on what we determined to be the three major areas of concern: uncertainty in the tort litigation system, insurance rate-making procedures and the fact that there are unsafe products in the marketplace.

When Ford left office, the Carter administration came in and quickly asked for an options paper on what could be done. We developed that paper, and the administration announced its program in July, 1978.

From that program, we developed the Uniform Product Liability Act, the Risk Retention Act, and we will shortly issue a report on insurance rate making in which we will recommend to the states things the insurance industry should do to make certain that the rates charged for product liability insurance premiums and completed operations insurance is commensurate with the risk against which you are insuring.

The Risk Retention Act is a self-insurance program that met the administration’s desires for the exploration of self-insurance. It is a federal bill exempting risk retention groups from state insurance laws. It
permits these groups to get together to cover all, or part, of their needs for product liability or completed operations insurance. It will provide a number of benefits, including the opportunity for smaller companies to benefit from their good records.

The bill is designed to reduce regulation, in that it will be regulated largely by the group. We also expect it to assist the group in setting up its own loss-control programs. Another benefit of the bill is that it will set up captive insurers within the United States, instead of having these captives set up outside the U.S., where they add to the dollar drain.

Many people, particularly in the insurance industry, have said this is not necessary at this time, because insurance is readily available, the market has stabilized and softened, but according to the insurance trade press and many insurers themselves, their underwriting profits are beginning to disappear and they’re getting back into a possible financial crunch like the one we had in 1973-74, which is when we saw the fantastic jump in rates. We see this happening again within the next year, and we think this bill should be in place to meet the problem should it materialize.

Without getting into too much detail, here is a basic explanation of the bill. It has two titles, the first providing for the risk retention groups. It permits them to self insure. These groups will be approved and regulated by the Department of Commerce. The groups will be limited to providing product liability and completed operations coverage.

Groups will be able to structure their own insurance policies to cover the specific amount of risk they desire. Obviously, the more risk that is assumed, the greater will be the need for assets. A trade association or virtually any group of companies can form a risk retention group. The only restriction in that is that the members of the group must be the owners of the individual companies. The group would have to set up the same kinds of things as any insurance company setting up a business. Since many of these groups won’t have a guarantee fund, the Commerce Dept. will oversee the requirement of solvency, but the bill is intended to be deregulative, and to a large degree, Commerce will depend upon the self-interest of the group to meet the solvency demands.

On the tax side, we believe that through a true spreading of risk, the groups would be setting aside reserves, etc. that would be treated by the IRS the same as they are for any insurance company; that is the premiums are deductible against the profits of the group for tax purposes.

Title two of the act permits the groups to get together to purchase a blanket policy from a commercial insurer. This is commonly done for life or health, but we found that there are laws in 40 states to prevent you from purchasing liability insurance on a group basis. Since this is a federal law, it would exempt the group from these restriction.

Probably the only group to oppose this bill is the commercial insurers. We believe their opposition is based on the fact the bill would allow you to take certain business away from them. The bill does not regulate these insurers in any way. It in fact allows them to do some things they can’t do now. We think it offers them a new way of doing business. If nothing else, it gives the insurer a means to see that his clients for other types of insurance can obtain and afford other forms of insurance that he as the insurer might not be willing to provide.

We have received a lot of support from all kinds of business groups: manufacturers, wholesalers, retailers. We’ve had strong support from consumers.

In summary, we think we have a
The bill that is deregulatory and is the market solution to a very large problem. We think the typical insurance company is not going to be affected by it, and we think it is something that is needed in today’s marketplace.

On March 10, the bill was accepted by the U.S. House of Representatives. The vote was 372-17, with one voting “present.” He was, by the way, an insurance agent. The bill was supported by the full political ideologies from both parties.

This is innovative legislation, and it is something we were told by the administration back in the beginning would take about three to five years to get any action on in either house of Congress. We have passage in one house, just about seven months later, which is extraordinary, but it points out the seriousness of the problem and it points out that Congress has heard from their constituencies and realized it would solve part of the product liability problem now.

I expect the bill to be tougher to pass in the Senate, but I do expect it to go.

The other side of the problem

I noted that the Risk Retention Act solves only part of the product liability problem. Let’s take a look at the other side, and at the Uniform Product Liability Act.

Obviously, it is difficult to write a bill to cover total uniformity in product liability. But we wrote this bill so it could be adopted by the states, which could make some adjustments they felt were necessary.

The bill is developed as the result of the interagency task force study of laws passed in several states and past model acts that had been developed.

The bill was published for comment a year ago, and we had about 1,600 pages of rather detailed comment on it. We published the final draft in October. It has now gone to several states for consideration, and it is important, we think, to get some of the larger industrial states to adopt this law or something like it.

The reason the bill is important is because of the nature of tort laws. Tort laws are court-made laws, they are based on rulings. And, if a court makes a decision, it can change the whole scope of the laws overnight. That makes it very difficult to know what your legal responsibilities are.

If the bill is accepted, then the rules that people will be following will be known. They will be laid out in statutes, and it will be much more difficult for the courts to change the rules. This would go a long way to clearing up the confusion that has existed with court-made laws that are constantly changing.

We believe the bill we have drafted is a balanced bill. There are others that have been drafted that are far more weighted to the manufacturers or sellers, which makes them very difficult to get through a state legislature. You can’t take away the rights of the consumers. We have tried to get a bill that will help the manufacturers and sellers, but won’t take away the rights of the consumers.

We have, of course, gotten criticisms from both sides. You know if you have ever tried to balance anything, how difficult that is. But the bill has become a focal point for this type of legislation.

The bill has several definitions. One that would apply to your industry is a provision that deals with exclusion of real estate. If you were to put a product into a building which becomes a part of the real estate, under the bill you would still have liability, but it would not be product liability.

The bill also provides standards of responsibility for manufacturers and sellers as separate entities. The seller who does not do anything to significantly alter a manufactured product
will have a different standard of responsibility.

The act is designed to preempt any other law dealing with product liability in a state, but if a law existed that was not covered by the new statute, the old law would remain in effect.

**What's the liability?**

Looking at the basic standard for the manufacturer, there are four basic areas in which he can be held liable: if the product is unreasonably unsafe in its construction, if it is unreasonably unsafe in its design, if it is unreasonably unsafe in the warnings that are provided, and finally, if the product does not conform to an expressed warranty.

It would be up to the court to determine, before a jury considers the matter, whether evidence has been shown in any of those four areas and that there is a direct causation between what happened and what the manufacturer did.

In the area of a construction defect, the court would have to find that when the product left the manufacturer’s hands, it deviated in some way from the standards or manufacturers’ specifications for how the product was to be built, his performance standards or if it can be shown the product was different in some material way from other products manufactured in the same line.

If the product is unreasonably unsafe in either warning or design, there will be negligence standards applied, and it will be up to the court to show that the manufacturer, in an economic sense, could have done more to prevent that harm from happening.

In the case of a warranty, if the manufacturer has said the product will or will not do something, and the statement is found to be untrue, he would be held strictly liable for a harm that was caused by the product.

The major difference from today’s laws is how the bill impacts the product seller. If he can show, early in the action, he had no reason to inspect and therefore know about the defect, then he’s going to be let out of the action. As long as he, in his actions, did nothing to cause the harm, he won’t be liable. There are exceptions, of course, as there have to be.

If the manufacturer of the product is not subject to service in the jurisdiction in which the proceeding is taking place, if he’s insolvent at the time of the action, or if it is highly probable the claimant would not be able to enforce the judgement, then it might be the product seller will be kept in the action. There have been about eight states, so far, that have included these seller exclusions in their laws.

The problem here has not been that sellers have had to pay damages, but that they have had to pay high legal fees, which has driven up the cost of their liability insurance. But the provisions to get them out of the action early is a direct way to reduce these costs, and hence to cut insurance costs.