QBE North America

Aerospace product liability management

Made possible QBE

Contents

Introduction:
Our expertise with managing risk makes your vision possible.

We all have legal duties to others. The law of product liability means that those who design, manufacture, repair, service, maintain, supply, or distribute products have legal responsibilities to the consumers of those products. In the aviation and aerospace industries, those products include completed aircraft, airframes, engines, parts, equipment, and other materials ranging from seat fabric, lavatory mirrors, wiring, and tires to manuals, navigational charts, and computer software.

This guide discusses product liability in the context of the aviation and aerospace industries. “Managing Your Product Liability Exposure” considers the potential to reduce your exposure by implementing straightforward risk management measures. Product liability insurance outlines the general types of coverage afforded by a standard product liability insurance policy.

Effective management of your product liability exposure has many potential benefits, helping ensure the best reputation for your company and your products or services, limiting the potential for disputes between you and your customers, and minimizing the number and size of claims. This in turn, may influence your insurance premium.

Your insurance policy is the last line of defense when other risk management measures have been unsuccessful. Despite your best preparations, unfortunate circumstances may arise which trigger claims that may need to be referred to your insurers.

As a lead insurer, we emphasize continuity and value long-standing relationships. We bring experience, professionalism, imagination, and enthusiasm to resolving claims and related issues. We understand your business, and we do our utmost to provide the protection and support that enhances it.

Always read your insurance policy carefully (which provides full details of the benefits, terms and conditions which will apply) to ensure you understand the extent of your coverage. Discuss any policy issues or questions with your insurance broker in the first instance.

This guide is intended as a basic guide only, and provides an overview of product liability and potential exposures. It is not exhaustive or definitive and should not be used as a substitute for specific legal advice. Please seek advice from specialists if you have any questions or require further information.

Why read this guide?

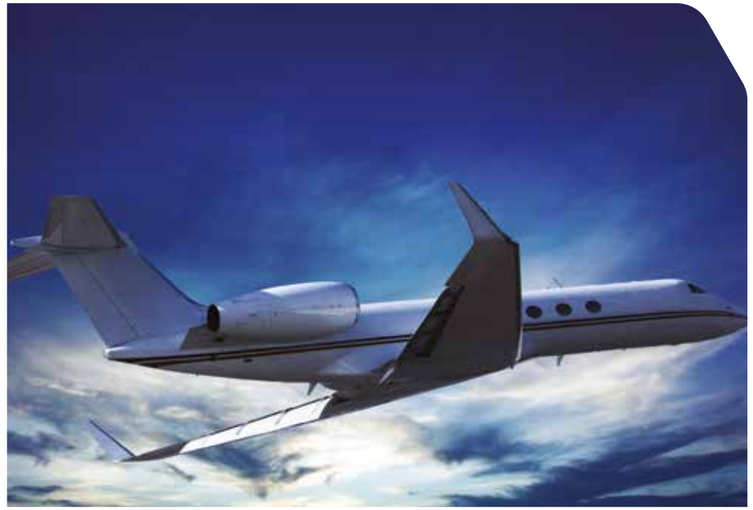
Your exposure to product liability claims begins every time a product you have designed, manufactured, assembled, modified, serviced, repaired, maintained, or simply supplied or distributed leaves your hands. If an incident or accident occurs, your company could receive unwanted attention from those seeking to fix blame and obtain financial recovery.

The judicial process may help you, but U.S. law often favors those harmed by products. For example, most American jurisdictions apply the concept of joint and several liability, which allows a claimant who prevails against several defendants in a product liability lawsuit to require only one of those defendants to pay all of the claimant's damages regardless of its share of liability. Thus, if you are found 1% at fault for an accident, the claimant could nevertheless recover 100% of its damages from you.

The judicial process is also complex and can shift blame to the poorly prepared or the poorly represented, even if without fault. At worst, a court may order you to pay substantial damages when you knew, but could not prove, that there was no defect in your product or services. At best, you may suffer the burden of wasted management time and legal defense costs in disproving claims. In either case, your reputation or the reputation of your products or services may be harmed.

This guide is not intended to help those at fault to win cases. When fault exists, lawsuits are best settled early and fairly. Instead, its purpose is to act as a guide to help you avoid undeserved outcomes and undeserved expenses in product liability lawsuits, and to assess your need to prepare for and protect yourself from the risks of litigation.

Our message is simple. Companies are often drawn into product liability lawsuits because their key employees do not know enough about the law and the judicial process to avoid the types of common errors that invite (and lose) lawsuits, and increase the amount of damages awarded. By learning a little about the law and the judicial process, you can understand and identify steps that can be taken now to help reduce your company's exposure to these risks.



What is product liability?

Each country has its own laws controlling liability for death, injury, property damage, and other losses resulting from defective products or services. This guide discusses the product liability laws of the United States of America. Other countries may have different liability schemes, but their overall impact will be similar.

In the U.S., state and federal law may impose financial liability when you design, manufacture, assemble, repair, service, maintain, supply or distribute a product that causes death, injury, property damage, and/or financial losses. The injured party can seek relief in several and sometimes overlapping ways.

Breach of contract

A contract is created whenever one person agrees to design, manufacture, assemble, modify, service, repair, maintain, supply, and/or distribute a product in return for a payment from another person, whether or not that agreement is in writing.

Liability will arise when the seller of a product or services breaches a promise in the contract about the nature or quality of the product or services for example, product specifications.

Contracts can include limitations and exclusions of liability, or a fixed amount of recoverable ("liquidated") damages. But law and public policy restrict the circumstances in which these clauses can be used; for example, in most states, a seller cannot limit its liability for death or injury that results from its gross negligence or willful misconduct, and limitations or exclusions of liability are generally not enforceable if they have no reasonable relationship to other terms of the agreement (notably, the sales price). In addition, many states will not enforce these clauses when the parties have unequal bargaining power and the party with superior power has, in effect, demanded the clause. So for instance, a court may not enforce limitations or exclusions of liability in a contract between a small company and a large company when there were no negotiations about the clause and the large company presented the contract on a take-it-or-leave-it basis on a standard pre-printed form.

Parties can also use their contract to apportion liability for claims brought by non-parties to the contract, by providing that one party will indemnify the other for those claims. Although such indemnity provisions will not prevent third parties from suing you directly, they can make the other party to the contract liable for those claims and for your defense against those claims.

Breach of express warranty

Express warranties are statements by the manufacturer or seller that a product or service will have specific characteristics or will suit specific uses; for example, "This light bulb will operate continuously for more than 80 hours." An express warranty arises out of an agreement between the seller and buyer, can be either written or oral or written and need not necessarily have been included in the sales contract. A breach occurs when the product or service fails to perform as represented in the manufacturer or seller's statements.

Breach of implied warranty

Liability may also exist without an overt statement under the theory of implied warranty. This theory, which originated in the Uniform Commercial Code, acknowledges that certain expectations about product quality are so common to all products that they need not be written or even spoken aloud. An example being, that a tire is not unreasonably dangerous when used for its proper purpose. The law holds that a manufacturer or seller of products by implication represents to the buyer (and, in some states, subsequent owners of the product) that the product is "merchantable" and fit for the particular purpose for which it was sold. These implied warranties exist in all sales transactions, unless specifically disclaimed by the manufacturer or seller.

Negligence

The law of every state imposes a legal duty on everyone to take reasonable care for the safety of persons who reasonably could be expected to be affected by their acts or omissions. Liability may arise when a product or service is defective or inadequate because of a failure to exercise the degree of care required by the law – typically, the level of care a reasonable person would exercise in the circumstances. Liability may also arise when there is a failure to provide reasonable warnings or provide adequate instructions about a product or service.

In most states, a negligence claim may be based on proof of (1) a duty of care; (2) a breach of that duty; and (3) a resulting injury. For example, an employer is responsible for negligence committed by an employee during the course of his or her work.

Negligence is imposed automatically in many states when there is proof that a manufacturer or seller's actions violated a law or regulation that establishes a standard of care. The concept of res ipsa loquitur allows a court or jury to infer negligence from the facts in certain situations.

Strict liability

In most states, the tort theory of strict liability imposes liability on the manufacturer or seller of a defective product that causes injury, regardless of fault, negligence, or breach of contract. Strict liability also extends to damages caused by a product that is not defective, but is unreasonably dangerous in the absence of adequate warnings or instructions about its use.

Most product liability suits focus on strict liability rather than negligence. This is because strict liability does not require the judge or jury to assess the behavior of the manufacturer or seller; instead the only issues are whether the product was defective and caused injury. Strict liability exists even if the manufacturer or seller was not negligent or otherwise at fault in creating a defect or failing to provide an adequate warning.

Other theories of recovery

Liability may also arise under any number of alternative legal theories, depending on the facts and circumstances of each case. Because state and federal courts require only notice pleading of claims – which allows plaintiffs to assert any potential claim without providing detailed factual support for that claim – most plaintiffs will allege other wide-ranging theories of recovery; from fraud and misrepresentation; to interference with contractual relations or business expectancies; to violation of state consumer protection and unfair competition laws.

Accident investigations

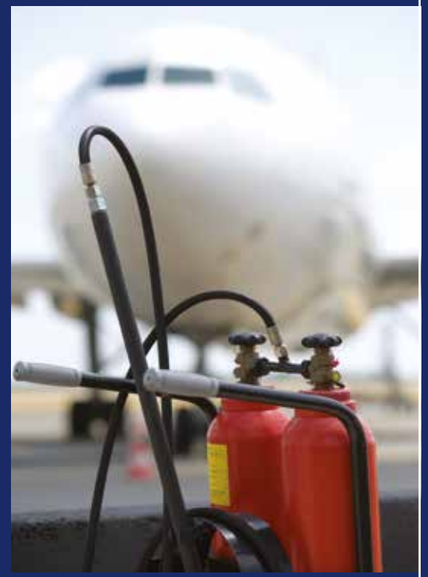
The National Transportation Safety Board ("NTSB") and/or the Federal Aviation Administration ("FAA") conduct official investigations of all accidents and many incidents involving aircraft that occur in the United States. International Civil Aviation Organization Annex 13 defines an aviation accident as an "occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked," in which (a) a person is fatally or seriously injured, (b) the aircraft sustains damage or structural failure, or (c) the aircraft is missing or inaccessible. An aviation incident is defined as an occurrence other than an accident that affects or could affect the safety of aircraft operations.

NTSB and FAA investigations can play a significant role in product liability litigation.

National Transportation Safety Board

The NTSB is an independent federal agency responsible for investigating commercial and civil accidents in the U.S. that involve aviation, railroads, highways, pipelines, and the maritime. Congress specifically authorized the NTSB to investigate every civil aviation accident in the U.S., as well as significant accidents and hazardous waste releases that occur in other modes of transportation. The NTSB may also investigate certain accidents that occur outside the U.S. and, if asked, will provide technical support and advice to investigative authorities in other countries.

The NTSB normally takes the lead in investigating accidents within its purview. The lead role can be shifted to other organizations – typically, the Federal Bureau of Investigation – if the matter may be linked to an intentional criminal act.



When an aviation accident occurs, an NTSB "Go Team" of government specialists is dispatched immediately to the site to begin the investigation. The NTSB designates other organizations, including the manufacturers of any products at issue, as parties to the investigation. Those parties provide information and assistance to the NTSB investigators, and often take a lead role in product performance related issues; for example, the NTSB typically asks an engine manufacturer to conduct, under the NTSB's supervision and oversight, the primary examination and tear down of an engine involved in an accident.

After completing its initial investigation, the NTSB may hold a public hearing on issues of interest. The NTSB then prepares a final report on the accident that includes findings of fact, the probable cause(s) of the accident, and (when appropriate) safety recommendations. The NTSB usually publishes its final report instance within 12 to 18 months of an accident.

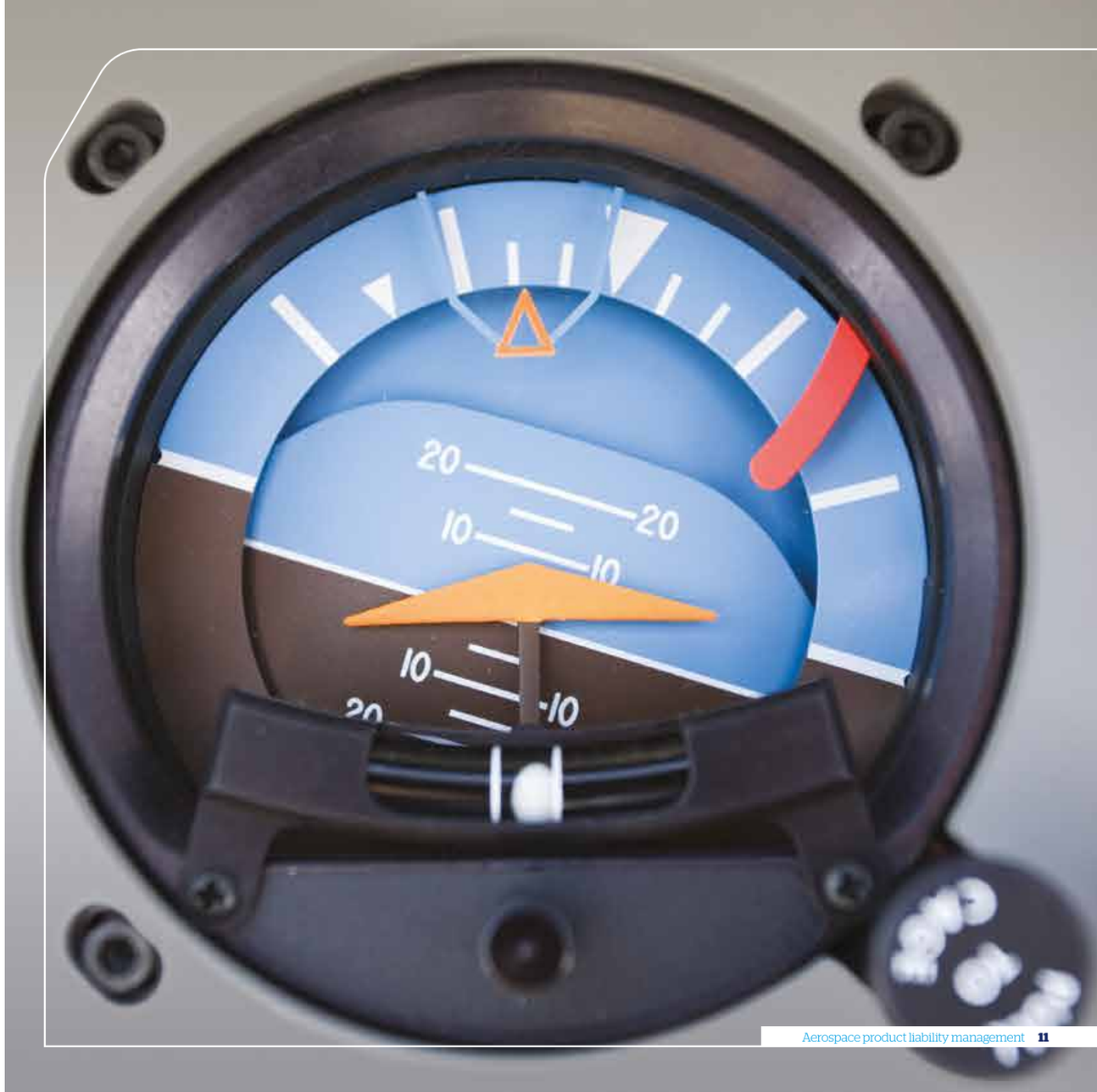
NTSB factual findings, for instance, fuel levels, the position of flight control surfaces, cockpit voice recorder transcripts, are generally admissible as evidence in civil lawsuits. However, federal law prohibits the use of the NTSB's finding of probable cause in civil trials.

The Federal Aviation Administration

The FAA is an agency of the U.S. Department of Transportation that oversees commercial and civil aviation in the U.S. Its many responsibilities include regulating commercial and civil aviation to promote safety; issuing and enforcing Federal Aviation Regulations (FARs) and other standards for manufacturing, operating, and maintaining aircraft; establishing and operating air traffic control and navigation systems; and assessing – and, if appropriate, implementing – NTSB safety recommendations. The FAA ordinarily participates in NTSB investigations of aviation accidents and incidents. It also has the authority to conduct independent investigations of matters involving aircraft incidents, maintenance improprieties, unapproved parts, and other potential violations of the Federal Aviation Regulations.

Criminal investigations

Since at least as early as the 1976 mid-air collision between an Inex-Adria DC-9 and a British Airways Trident 3B near Zagreb, Croatia, governments across the world have initiated criminal investigations of aviation accidents. In the U.S., criminal proceedings arising out of aviation accidents have occurred with increasing frequency. Examples include the 1983 accident during the filming of the Twilight Zone movie; the 1996 ValuJet Flight 592 crash in the Everglades; TWA Flight 800 in 1996; the 1997 Fine Air cargo crash in Miami; and the 2000 Alaska Airlines MD-83 crash. As a result, you should be aware of the potential for a criminal investigation and be prepared to respond to both federal and state inquiries and charges. You have certain rights and privileges during a criminal investigation of an aviation accident that will be waived if you do not carefully preserve them. In addition, a criminal proceeding arising out of an aviation accident can pose conflicts for your legal team and coverage issues for your insurers.



An overview of product liability litigation

Who can sue?

The answer depends on the type of claim presented.

Contracts and express warranties: in most jurisdictions, only a party to the contract or express warranty may sue for its breach, third parties deriving certain benefits from a contract may also sue.

Implied warranties: in some states, only a party to the contract may sue for breach of implied warranty. Other states allow subsequent owners of the product to sue.

Negligence, strict liability, and other torts: typically, only persons injured by the alleged tort who have state-defined "standing to sue" may bring these claims. The most common plaintiffs are those who have suffered personal injury or property damage, or the estates or beneficiaries of those who have died.

Where can we be sued?

The answer depends on whether you have a contract with the claimant.

If there is a contract, and the contract specifies the jurisdiction in which claims must be brought: the claimant will have to sue you in the jurisdiction specified by the contract.

If there is no contract or the contract is silent on jurisdiction: you may be subject to suit in any number of jurisdictions. This includes the jurisdiction in which you are incorporated, the jurisdiction in which you have your principal place of business, and the jurisdiction where the claimant resides. In cases involving an alleged breach of contract, you may also be subject to suit in the jurisdiction where the contract was entered and the jurisdiction where the alleged breach of contract occurred.

Is there a time limit for bringing a lawsuit?

Yes. Every U.S. jurisdiction has statutes of limitation, which restrict the period of time within which claims may be brought. They are usually based on when the claimant first knew, or reasonably should have known, of the injury. A handful of states and the federal government have statutes of repose that restrict the period of time within which certain claims may be brought, based on the length of time that the product was in service.

Statutes of limitation: although the statutes vary from state to state, typically suit must be brought within the following periods of time:

Breach of contract: three to six years from when the claimant first knew, or reasonably should have known, of the breach of contract.

Breach of express warranty: three years from the date when the product was delivered or the service was provided.

Breach of implied warranty: three years from the date when the claimant first knew, or reasonably should have known, of the breach of implied warranty or injury.

Negligence, strict liability, and other torts: one to four years from the date when the claimant first knew, or reasonably should have known of injury or other damage.

Statutes of repose: although these statutes also vary from state to state, typically a suit must be brought within eight to twenty years of the first sale of the particular product involved in the incident or accident. In addition, the U.S. General Aviation Revitalization Act of 1994 ("GARA") applies in every state to insulate manufacturers of general aviation aircraft, engines, parts, and components from liability, when the product causes injury more than eighteen years after its original date of delivery.

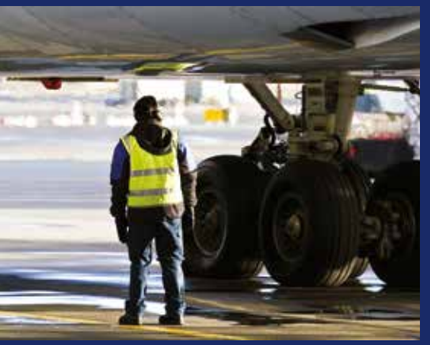
How is a defect proved?

Typically, the following evidence may be relevant:

- Facts of the incident or accident
- Factual findings contained in NTSB and other official accident investigation reports
- Opinions of expert witnesses
- Adverse information in your own records
- Evidence that the product/service was not in full compliance with government, original equipment manufacturer, and industry standards
- Evidence of other incidents with similar facts
- Changes made to products/procedures before and/or after the incident or accident

How do courts make decisions?

- The burden of proof lies with the claimant, who in most jurisdiction is required to prove the defect or other actionable conduct, causation, and the resulting damages.
- If one party requests a jury trial, then the case will be tried before a jury. Otherwise, civil cases can be tried by a judge alone. Past experience shows that juries have a strong tendency to be generous to claimants on questions of liability and the size of damages awards.
- In general, trials of civil actions are decided by the "preponderance of the evidence," which means that the evidence must weigh at least 51% in one party's favor. This is a far less stringent standard than "beyond a reasonable doubt," which is used in criminal cases.



What are the defenses to product liability claims?

A myriad of defenses may be available, depending on the facts and circumstances of the individual case and the jurisdiction in which the lawsuit is brought. In addition to statutes of limitation and repose, the most obvious defenses are the lack of a product defect or actionable conduct, and the lack of any causal relationship between the alleged defect or conduct and claimant's injuries. Other typical defenses may depend on the type of claim presented:

Breach of contract: a claimant typically cannot prevail on a breach of contract theory, unless it has properly performed its obligations under the contract.

Breach of express warranty, breach of implied warranty: these claims may require privity of contract between the claimant and the manufacturer or seller. They require a foreseeable use of the product covered by a warranty.

Negligence:

Contributory or comparative negligence: the claimant may be barred, in whole or in part, from recovery if the claimant's actions are negligent or unreasonable under the circumstances.

Open and obvious defect or dangers: the claimant may be barred from recovery if the claimant knew or reasonably should have known of defects or dangers in using a product or engaging in an activity.

"Sophisticated user" defense: in many states, the claimant may be barred from recovery if the claimant, or an intervening party, possesses special knowledge, sophistication, or expertise about the product or activity.

Product misuse/unforeseeable use: the claimant may be barred from recovery if the product was not used in a proper or foreseeable manner; there is also no duty to warn against a use that is not reasonably foreseeable.

Assumption of the risk: the claimant may be barred from recovery if the claimant voluntarily assumes a known risk that is unreasonably dangerous.

Strict liability:

Absence of defect at time of sale: the claimant cannot recover if the defect did not exist at the time the product was put into circulation.

Product alteration: the claimant cannot recover if the defect resulted from an alteration in the product after it left your hands.

Compliance with the law: in some states, the claimant may be barred from recovery if the manufacturer or supplier shows that the product complied with applicable laws and regulations, particularly if the defect resulted from compliance with laws or regulations.

State of the art: in some jurisdictions, the claimant cannot recover if the state of scientific and technical knowledge at the time the product was sold did not enable discovery of the defect.

Government contractor defense: manufacturers who supply products to the U.S. government that have been built to reasonably precise government specifications may be immune from liability.

If we are held liable, what is our exposure?

Product liability claimants typically seek to recover monetary damages. In rare breach of contract cases, other types of relief are possible. In jury trials, the jury determines the amount of recoverable damages.

The range of potential damages will depend on the nature of the claims. Although the full extent of exposure will vary from state to state, recoverable damages may include:

Actual loss: claimants can recover damages for direct and reasonably foreseeable financial losses, including compensation for physical damage to property; compensation for the loss of financial support caused by personal injury or death; medical, funeral, and other out of-pocket expenses; and, in breach of contract cases, economic loss.

Economic loss: claimants in breach of contract and breach of warranty cases can recover damages for economic loss including lost profits. The "Economic loss rule" bars tort claimants in most states from recovering for economic losses when the only injury is to the product itself, with no separate personal injury or damage to other property of the claimant. Thus, for example, an air carrier whose aircraft crashed as the result of another's negligence or strict liability can recover the value of the aircraft, but cannot recover the profits lost as a result of its inability to continue to use the airplane.

Intangible loss: claimants can also recover damages for direct and reasonably foreseeable intangible losses. This can include pain and suffering, loss of consortium, loss of parental guidance, and similar theories of recovery.

Punitive or exemplary damages: punitive or exemplary damages are awarded in excess of compensatory damages to punish a defendant for alleged malicious misconduct. These damages are generally available only for tort claims, not those based on breach of contract or breach of warranty. Although some states limit the amount of punitive damages based on the amount of compensatory damages, the size of punitive damages awards is generally unpredictable. Over thirty states allow some form of insurance for punitive damages; but punitive damages are not insurable in California, Florida, or New York on public policy grounds, and the ability to insure against punitive damages is undecided in Texas and the District of Columbia.

Attorney fees and costs: the prevailing party cannot recover its attorney fees unless authorized by a contract between the parties or an applicable statute. Most product liability statutes do not authorize the recovery of attorney fees. It is possible to recover certain court costs, but as a general rule, these costs are a small portion of the actual costs of prosecuting or defending a lawsuit.

Managing your product liability exposure

To obtain a quick overview of how prepared you are to reduce product liability exposure, consider the following questions:

Do you have a product liability prevention program?

A formal product liability prevention program will fulfill two essential priorities: (1) reducing the likelihood of product-related incidents and accidents; and (2) improving your ability to defend against investigations and claims involving your products or services.

Do you have a manager with specific responsibility to devise and implement product liability prevention procedures?

To be effective, a product liability prevention program requires active supervision by a product liability prevention manager or other senior manager. Although all personnel must embrace the program, an independent manager should be responsible for devising, implementing, and supervising proactive measures to prevent risk. This manager's responsibilities should include most, if not all, of the matters discussed below.

Large organizations should consider forming a multi-disciplinary product/services review committee to assist the product liability prevention manager in discharging these functions.

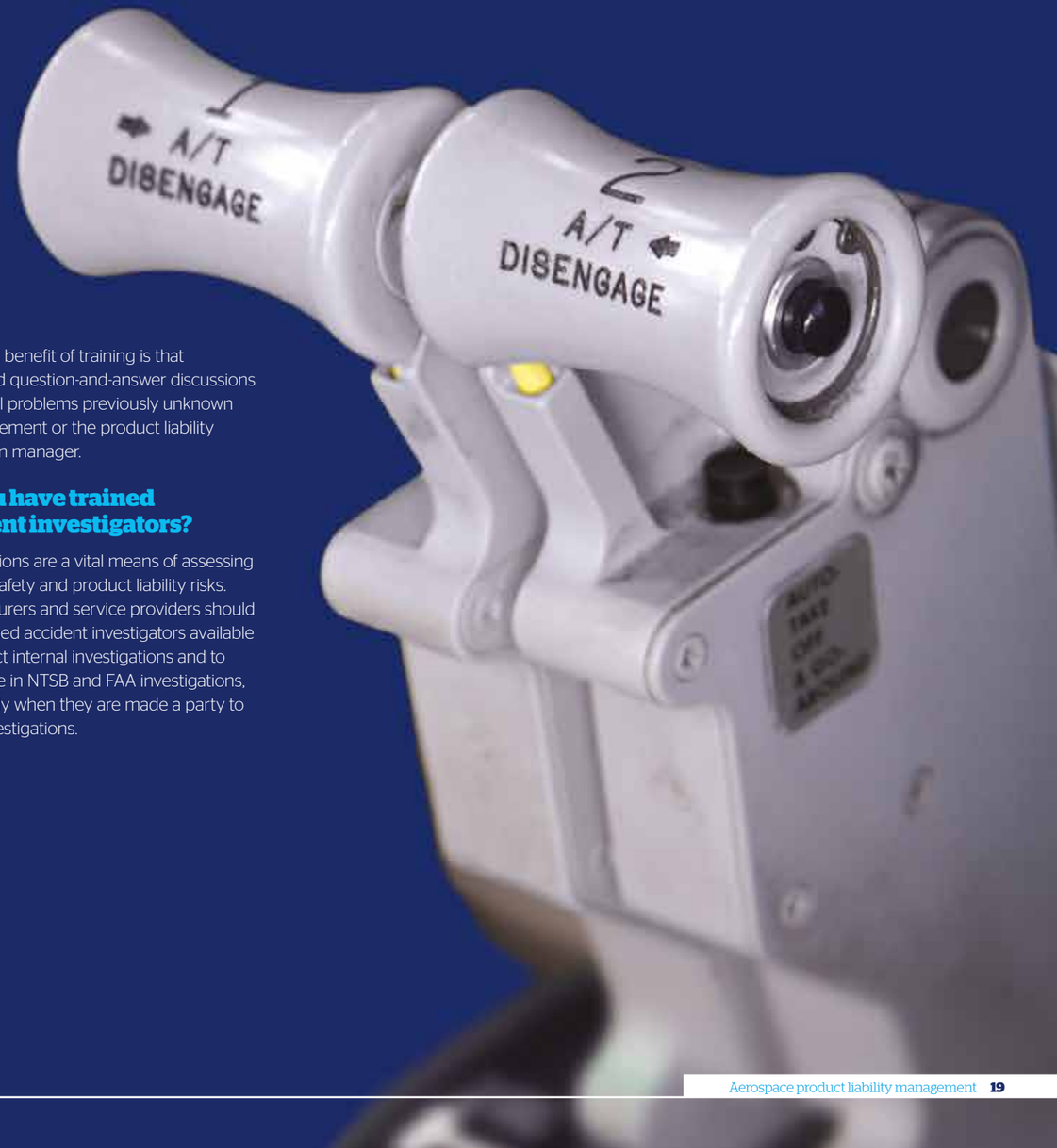
Do you provide education or training to your workforce on product liability and the risks of not following procedures?

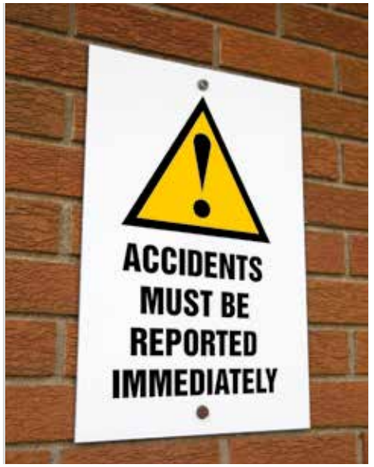
Education is important. Training can take the form of written materials like this guide, seminars, case studies based on believable scenarios involving the types of products or services you provide, posters, and e-mail notices. Video materials can also be used, especially if you run a full training exercise involving a mock incident or accident.

An added benefit of training is that associated question-and-answer discussions can reveal problems previously unknown to management or the product liability prevention manager.

Do you have trained accident investigators?

Investigations are a vital means of assessing product safety and product liability risks. Manufacturers and service providers should have trained accident investigators available to conduct internal investigations and to participate in NTSB and FAA investigations, particularly when they are made a party to those investigations.





Do you comply with reporting obligations?

Federal aviation regulations require manufacturers, maintenance providers, flight operators, pilots, air traffic control personnel, and others to report a variety of matters, including aircraft incidents, to the FAA. Manufacturers and service providers may also be responsible for reporting matters to other federal and state regulatory agencies. Violation of reporting requirements can result in civil and criminal penalties and other sanctions.

Companies that manufacture or distribute products worldwide should recognize that information reported in one country may have implications for managing product liability risks in other countries. These companies should have systems in place to collect and share product safety information and provide for a consistent response to reporting obligations.

Do you create records that will be useful in defending a product liability investigation or lawsuit?

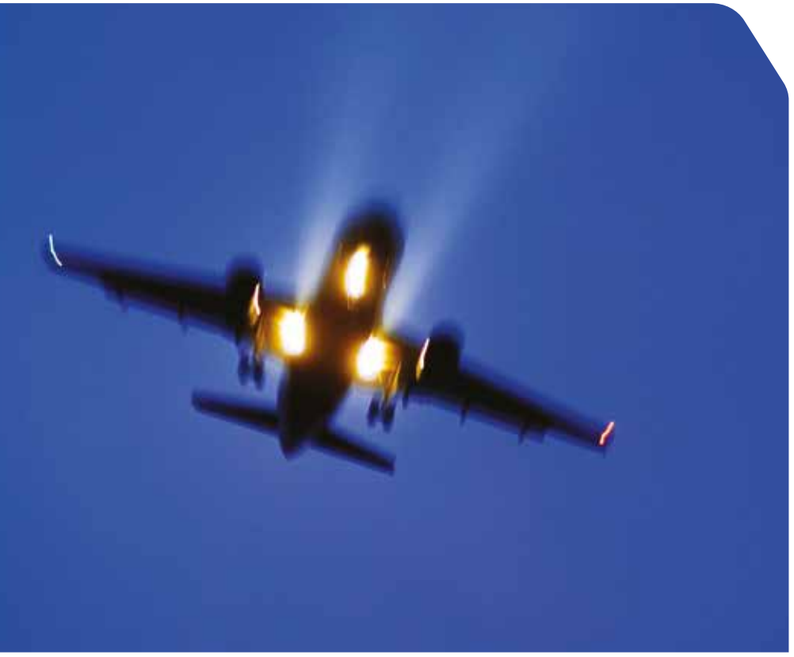
Reliance on human memory to defend product liability cases should be minimized. Written records are a daily part of the highly regulated business of aviation. Once memories have faded and/or key personnel have left your organization, those records may provide the only means of disproving fault for an incident or accident.

Consider whether you can improve the kinds of documents you create and the instructions for their completion, storage, and preservation. Pay particular attention to electronically stored information and to documents that your employees may generate outside of prescribed procedures. Internal e-mails and memoranda can raise issues that, in the absence of other documents closing the loop, could prove embarrassing or require explanation in litigation. For example, if management decides not to adopt a change in a non-destructive testing procedure suggested by a knowledgeable employee in an internal memo, but does not generate a contemporaneous document explaining its decision, your lawyers may find it harder to convince a court that the suggestion was properly considered.

Do you have the proper procedures for retaining and retrieving potentially relevant records?

Procedures for creating the right kind of written records will be useless unless you also have procedures for ensuring that those records will still exist at trial. Recent amendments to the Federal Rules of Civil Procedure have approved court-imposed sanctions on parties that fail to preserve information that is potentially relevant to pending or reasonably anticipated litigation.

Statutes of limitation applicable to product liability claims vary considerably, but lawsuits are typically triggered by an incident or accident rather than by anything involving the date of manufacture or sale of a product. Years, even decades, may pass between the date that the product left your hands and the start of litigation. Thus it is necessary to keep certain documentary records for long periods of time.



Your company should have a comprehensive records management policy that is specifically tailored to your size, the nature of your business, applicable federal and state laws and regulations, and other unique characteristics. That policy must contain a complete and accurate list of records retention periods, based on, legally required retention periods, applicable statutes of limitation, and the operating needs of your business among other things. The policy should allow for the destruction or disposal of records that are not subject to retention requirements, but only if the destruction or disposal of records is done regularly and non-selectively at predetermined intervals and in the ordinary course of business. Finally, the policy should impose a "litigation hold" on any potentially relevant records if litigation is reasonably anticipated or another "triggering event" occurs.

Are your contracts satisfactory?

Your contracts typically represent the only opportunity for shifting certain liabilities to your buyers, suppliers, or service providers.

The law's willingness to imply certain warranties, combined with limits on the disclaimer of liability, requires that your contracts include provisions dealing with warranties, limitations of liability, indemnities, and other means of apportioning liability.

Typically, a well-structured and professionally drafted contract for the sale of goods or services will disclaim any implied warranties, provide carefully defined but limited remedies for the buyer if things go wrong, accept liabilities that cannot be excluded, and allocate other liabilities to the buyer through indemnity clauses.

A poorly prepared contract may leave you liable not only for your own actions, but also for products you have not manufactured – and also leave you without protection from the claims of third parties, such as passengers.

Are your procedures for entering contracts satisfactory?

Regardless of how well-drafted, contract provisions that apportion or limit liability will be useless unless properly incorporated into each contract with your customers and suppliers.

In practice, your contracts may comprise a series of documents, perhaps intermingled with oral agreements to certain terms or conditions that have not been put into writing. A course of dealing or standard conditions of trade affecting one or both parties may also become an implied part of the contract.

In these situations, it is often difficult to identify the terms you agreed to include in the contract. This may make it difficult, in turn, to identify whether a breach of contract has occurred and whether contract provisions protect you from liability.

Therefore, when oral agreements, courses of dealing, or standard conditions of trade are used instead of signed documents, your purchasing and sales staff must know how to incorporate those terms into the written agreement and deal with situations when a buyer tries to impose its own, and perhaps conflicting, conditions.

Do you have the means for early identification of incidents and accidents involving your products/ services?

Early identification has two prime effects: (1) to help you use in-service information to improve your products/ services; and (2) to provide early warning of the possible involvement of your products/services in an incident or accident so you can be prepared for the inevitable inquiries from accident investigators, original equipment manufacturers, regulatory authorities and, in worst cases, the media.

Do you have the ability to conduct early and effective internal investigations of incidents and accidents?

Once you learn of an incident or accident involving your products or services, you must process and handle that information in a constructive manner. Repeated incidents or serious accidents may justify conducting an internal investigation to identify safety issues that need to be addressed and to create a documentary record of relevant facts for possible use in a future lawsuit. Because potential litigation is involved, you may wish to conduct the second investigation separately, maximizing confidentiality through available attorney-client and trial preparation privileges.

Do you have procedures to deal with an emergency involving your products/ services?

If a major incident or accident occurs, events often unfold quickly in its aftermath. You may receive, for example, unexpected visits from the National Transportation Safety Board, Federal Aviation Administration, police, or even the FBI with requests to see company records and/or interview employees. The media may also focus its spotlight on you – which, in turn, could lead to early attention from those affected by the accident and their lawyers.

In each case, you need an advance understanding of what you can and cannot do and should and should not do. Learning on the job is difficult. Prepared procedures, accompanied by training, are necessary to manage.

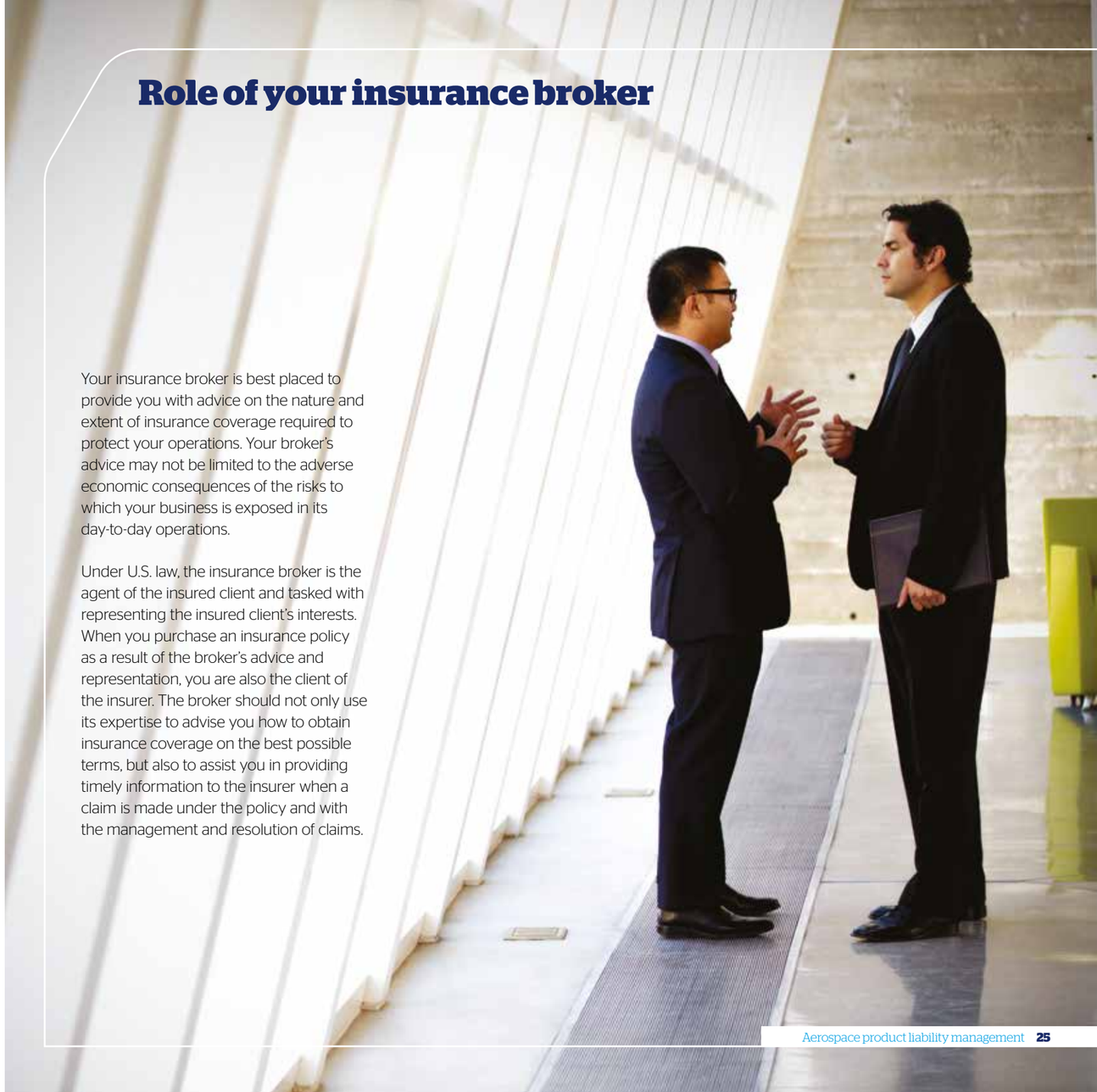
Do you have employees with media management training?

The media's impact in the aftermath of an accident or incident is often underestimated. You should consider in advance who from your organization is best placed to receive media management training.

Do you have procedures for preserving evidence?

In the event of an incident or accident involving your product or service, records about the product or service, as well as the product itself, must be retained for examination at a later date. If a product is removed and later returned to you by regulators or investigators, you must ensure that procedures are in place to retain that product in an unchanged condition. As noted earlier, litigation hold policies must be in place to assure that potentially relevant evidence is preserved.

Role of your insurance broker



Your insurance broker is best placed to provide you with advice on the nature and extent of insurance coverage required to protect your operations. Your broker's advice may not be limited to the adverse economic consequences of the risks to which your business is exposed in its day-to-day operations.

Under U.S. law, the insurance broker is the agent of the insured client and tasked with representing the insured client's interests. When you purchase an insurance policy as a result of the broker's advice and representation, you are also the client of the insurer. The broker should not only use its expertise to advise you how to obtain insurance coverage on the best possible terms, but also to assist you in providing timely information to the insurer when a claim is made under the policy and with the management and resolution of claims.

Product liability insurance

A typical product liability insurance policy for manufacturers or service providers in the aviation and aerospace industry might contain the following types of provisions:

Coverage

A typical insurance policy will protect you when a third party (not one of your employees) has suffered death, personal injury, or property damage arising from the possession, use, consumption, exposure to, or handling of any goods or products you design, manufacture, assemble, alter, repair, service, treat, sell, supply, or distribute. This coverage is usually afforded for products or services when used in conjunction with aircraft.

Your product liability insurance would normally cover only damage to third party property that is not your property and not within your custody or control. It would not cover the cost of repairing or replacing defective goods or rectifying defective services that may be subject to a warranty, for example, as part of a product recall.

Duty to notify claims

It is essential to inform your insurer of any potential claims as soon as you become aware of them. Your policy may require you to give this notification within a certain time period. Failure to comply with this requirement may prejudice coverage under the policy.

Taking on liability or waiving rights in contracts

When you enter into any contract in which you assume liability or waive rights, your insurance may only protect you to the extent that any liability would have existed in the absence of that contract. As a result, any extra liability that you voluntarily assume may not be covered by the policy, and should be discussed with your broker and insurer.

Claims control

In normal circumstances, your insurer will retain the right to manage how a claim is handled and resolved in consultation with you and your broker. As part of your coverage, your insurer will pay the costs of external loss adjusters and lawyers appointed by the insurer. You must provide all reasonable assistance that the insurer may require to investigate and defend the claim. Any failure to provide reasonable assistance may prejudice coverage under the policy.

Role of loss adjuster

Your insurer may appoint specialist loss adjusters to investigate and assess the facts of the claims, usually property damage claims, and to recommend appropriate repair methods and/or appropriate amounts of payments. Loss adjusters, who often have technical backgrounds in aviation engineering, may also monitor the progress of repairs.

Role of lawyers

When a claim is legally complex or litigation is initiated or threatened, your insurer will retain specialist lawyers to act on your behalf. The lawyers, in consultation with your insurer and your broker, will investigate the claim and protect your interests by defending lawsuits and other legal proceedings and resolving them in an effective fashion, either through a negotiated settlement or by defense in court.

Early retention of lawyers is preferred to help minimize the risk of inadvertent admissions or loss of records and other information needed to allow a full legal assessment of a claim. The insurer will consult with you and your broker when instructing lawyers to act on your behalf.

Notes and disclaimer

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This guide provides information about the law to help readers understand and assess their insurance needs. Legal information is not the same as legal advice. Because of the diversity and complexity of its subject matter and the limited space available to summarize legal concepts that may have differing interpretations from state to state and nation to nation, this guide cannot possibly provide a definitive statement of the law, and is not intended to replace, nor may be relied upon as a substitute for specific legal or other professional advice.

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