AIRCRAFT PRODUCTS LIABILITY

When does a Product Become an Aircraft Product?

What is or should be a risk manager’s biggest fear?

- Missing a critical emerging risk?
- Not properly identifying an exposure?
- Not having proper insurance in place for a risk that should have been identified and managed?

All of these questions bring concern and perhaps fear to risk managers. These issues can be particularly problematic for manufacturers of products that end up in aircraft or spacecraft without knowledge to the company. A second related problem arises for manufacturers who identify they may have products that have the ability to be used in an aircraft product. You may think you have coverage for this exposure under your general liability or other insurance policies but the reality is the only true coverage available for an aircraft product is under an aircraft products liability insurance policy.

One of the most important functions of risk management is to identify any and all risks your company might be exposed to. Once those exposures are identified and assessed, the next step is to determine the proper risk financing and loss control techniques to use to mitigate or eliminate the risk. The aviation arena is an exposure that is very difficult to assess. It is hard to determine when a product becomes an aircraft product and is something that is not perfectly defined. Also, companies may think they are covered contractually through Federal Acquisition Regulations (“FAR's”) and other flow down contractual wording but that also may not be the case.

A risk manager’s worst case scenario would be to find out your company is being sued for something you had absolutely no knowledge about. The remainder of this document highlights ideas to consider as you assess product liability risk for your organization.

WHAT IS AN AIRCRAFT PRODUCT

The standard definition of an aircraft product in insurance policies reads: “Aircraft Products means aircraft which shall be deemed to include a missile, spacecraft, satellite, spaceship or launch vehicle and any ground support or control equipment, and any component manufactured or installed by the insured and used in connection with any aircraft or for spare parts for aircraft. This includes tooling used in manufacturing, ground handling tools and
equipment and also means training aids, instruction, manuals, blueprints, engineering or other data, and/or any article in respect of which engineering or other advice and/or services and/or labor have been given or supplied by the insured relating to such aircraft or articles”.

Whew!! By anyone’s definition, this very broadly defines what could possibly be an “aircraft product.” An aircraft product could be:

- a bolt that is used to fasten the overhead bins
- fabrics from a manufacturer that sells to furniture manufacturers but then are incorporated into aircraft seats or carpets
- an electronic device that is used mostly in the automobiles but also works well in aircraft or spacecraft
- chemicals introduced into the composite structure of aircraft where the manufacturer of those gets sued
- the luggage conveyor belt that loads bags onto the plane.

As one can see, this definition is very broad and could cause coverage issues for many products you would normally not think are aircraft related but become an aircraft product when incorporated into an aircraft or any of its many components or systems.

In reality, an “aircraft product” can be just about anything that is manufactured that is subsequently put into an aircraft or used in conjunction therewith. If that part, device or apparatus is somehow involved in the sequence of events that causes an aircraft to fail, your company can and most likely will be brought into the lawsuit in today’s environment. The tactic for suing is to bring in anyone and everyone that touched the aircraft in any way and force them to extricate themselves from the litigation.

Prime contractors and lower tier contractors also are no longer automatically providing financial protection for lower tiered suppliers. The primes and their subcontractors realize they are assuming significant liability of other companies that they no longer want to assume. This practice is leaving smaller companies unprotected against a large loss and is a scenario risk manager’s and CFO’s really need to assess more closely for their company.

**INSURANCE COVERAGE ISSUES**

Most primary general liability insurance policies are silent regarding aircraft products/completed operations liability. General exclusionary language may address use of aircraft, whether owned or non-owned, but the exclusions are
not specific to aircraft products and the liability associated with their use. Once an aviation products exposure is identified, underwriters will typically attach an aviation products liability exclusion endorsement to the general liability policy. In the absence of the exclusion, there may be coverage for a product or component that ends up in, or is used in connection with, an aircraft but this is leaving the potential that a non-aviation claims adjuster tries to settle an aviation claim, not the best scenario to be involved with. Risk managers should read their policy, as well as application, carefully to determine how the wording applies to their specific products. There also is special coverage in aircraft products liability policies for “grounding liability” that is not found in any other insurance policies. The policies also exclude damage to governmental property that may be covered elsewhere that you do not want to cover.

Most umbrella and excess liability policies do have exclusions for aircraft products. These exclusions can be very broad (anything used in connection with aircraft) or very specific (aircraft components such as landing gear, navigation equipment, etc.) Any product that is deemed to be “flight critical” (its failure could directly affect the airworthiness of the aircraft) will likely not be covered in these policies. Risk managers should read the policy exclusions carefully to determine where there may be holes in coverage or gaps in the layers of your program. You may find you only have coverage in your primary layer of general liability/products liability insurance.

**CLAIMS PREVENTION/LOSS MITIGATION PROGRAMS**

The defense of aviation litigation, and especially complex aviation products cases, is a highly specialized area of legal practice. As the risk manager for your company, your long term planning and preparation should also include taking full advantage of the background and experience of your insurers and defense counsel and their capabilities to assist the company in preventing claims from occurring or to mitigate that loss should a claim occur. Working with experienced aviation defense counsel, these claims prevention services could include the following:

1. Seminars at the company’s facilities on the subject of products liability and how it impacts the day to day operations of the company. Attendees can cut across the whole spectrum of the company including design, engineering, quality control, inspections, contracts, marketing, finance, legal, products support and field service. These Seminars guide the company’s employees
through what the law expects and demands from them every day in the design, manufacture, and support of products. Defense counsel also explains the litigation process including pre-trial discovery and how each employee can become directly involved in assisting and supporting the defense of the company’s product and reputation.

2. Development and implementation of Product Integrity or Product Safety Programs and Committees with a particular focus on tracking products in the field to monitor and review similar or repetitive failures and to determine their cause as well as any changes, revisions or warnings that may be required from a safety standpoint.

3. Work with Safety Committees to help to prevent claims against the company that may effectively insulate the company from allegations of punitive damages if a claim occurs.

4. Regular reviews of the company’s contracts both for the sale of their products and contracts with customers and to review and update warranty language, limitations of liability as well as hold-harmless and indemnity provisions.

5. Development and updating of the company’s document retention program including the extensive legal responsibilities as to electronically stored information.

6. Review and guidance on the drafting of service letters and service bulletins on the use and operation of the product and also reviewing drafts of sensitive correspondence to customers or governmental agencies such as the FAA and NTSB.

From an overall risk management standpoint, in the complex field of aviation, having a close relationship with experienced insurance brokers and underwriting teams as well as aviation defense counsel allows you to respond effectively from the date of an accident through the entire litigation process. Continuous guidance to the company on both claims prevention and loss mitigation concepts by all of these parties is also critical to a well rounded and effective risk management program.

For more information, please visit the ABC website at www.aircraftbuilders.com or email info@aircraftbuilders.com