

HOW NOT TO BE THE LAST MAN STANDING IN A PRODUCTS LIABILITY LAWSUIT

As the risk manager of a large component manufacturer in Ohio, you learn there has been a major plane crash off an island in the Caribbean Sea and all 74 on Board (including 6 crew members) have perished. The aircraft is known to have components on board manufactured by your company.

What should you do at this point?

Within a month you learn that the plane was operated by a local small airline and it crashed in a lagoon. The aircraft is a total loss. At first, the cause of the accident is unclear as the plane disappeared from radar quickly, radio contact was lost and then the airplane was found in the lagoon hours later. The only evidence that has come to light is that witnesses from the departure airport report having seen the pilot and co-pilot drinking in a bar at the airport the night before the flight. At this point you also find out that the local Air Safety Board has taken control of the investigation.

Has anything changed dramatically? Again, what should you do at this point?

- Do you ignore these reports and wait for more details about the accident?
- Do you try to contact other related parties to see what they have found out?
 - The airframe manufacturer who is a customer?
 - The engine manufacturer? Any other parties?
- Do you inform your insurer at this point?
- Should you bring in experts and your attorney to start working on this immediately?

Within two to three months of this accident, a law suit is filed in a Texas Court. There was one passenger on board who had a residence in Texas so the plaintiff attorneys for the 74 decedents decide on this venue and name the following parties in the lawsuit:

- The jet manufacturer from Texas
- The jet engine manufacturer from Detroit
- The avionics manufacturer from Chicago
- Your company, a hydraulics manufacturer from Cleveland
- The Inflight Entertainment Systems manufacturer from Los Angeles, and
- Numerous smaller component manufacturers around the US and the Far East

The lawsuit alleges unspecified aircraft design issues and product failure(s) as the cause of the accident and each entity above is sued for all of the same allegations.

Are you ready to start taking action yet?

In an accident a few years ago, a similar situation occurred and a manufacturer similar to the hydraulics company you are risk manager for decided they did not need to act on the initial information and maintained throughout that their product could not be the cause for the accident. Preparing for a trial was not even on the radar screen until too late in the progression of events. After four years of activity by plaintiff's attorney and other defendants in the case, the claim did go to trial and a verdict was reached against the company that stood on the sidelines thinking they had no liability. A lower tier component manufacturer, whose part was not determined to be causally related to the crash, became

the only party left in this major lawsuit. Due to their inactivity and lack of knowledge of how the lawsuit was proceeding, they became THE LAST MAN STANDING in the suit and the jury came back with a verdict of \$240,000,000. This is an extreme case of how wrong a verdict can be by a jury but there are steps that should be reviewed when an event occurs from someone's use of your product.

WHAT ARE THE STEPS NECESSARY TO PROTECT YOUR COMPANY PROPERLY?

Once the "mad dash" to the court house began with plaintiff attorneys in this case, where the attorneys spread a wide net of lawsuits naming any and all component manufacturer(s) they could find, all companies named should do the following:

- Deliver internal litigation holds to all employees and vendors for preservation of relevant documents.
- Remind people of electronic discovery responsibilities.
- Develop complete product history from original design through manufacturing including any service history.
- Collect all relevant contracts: from customers, OEMs, vendors, suppliers etc.

At this point, a response team from your company needs to begin to prepare as well and consider the following:

- Setting up regular contacts and briefings with your investigation team.
- Prepping the legal team and products teams who should start inspections and testing of company parts, protocols and internal reports.
- Begin interviews with company personnel to see what information might be known about any possible known failures (or reported prior failures from customers).
- Review of warnings, service bulletins, customer letters and all relevant documents.
- Review of draft government accident and group reports.
- Review of liability issues, exposures and defenses to see if any should be defined and refined as further facts are developed.
- Having General Counsel begin discussions with other parties to see if coordination efforts with other defendants makes sense and to see if there is an opportunity for a Joint Defense Agreement to be formed.

Communication among risk management, counsel and insurers is key early in the process after a major accident. In the aviation world, the attorneys are a small community (the same is true in other industries) where most people know each other very well and have faced each other in many trials. Plaintiffs' counsel will certainly be coordinating efforts among their collective clients so defense counsel of each entity should be doing the same to try to develop a unified defense. The group should work together to gather early intelligence on theories being used by plaintiffs, define if it is possible for early settlements to be developed for consideration (if appropriate), and find ways to include other parties and manufacturers on releases.

Strong rationale for the use of a joint defense agreement are:

- Parties can exchange confidential information in furtherance of common defense or common interest.
- Privileges already attached to such information can be preserved.

- Shared work product, legal memoranda and investigation work can be collectively used.
- They provide the possibility of early funding/sharing agreements and discussions.

Some other developments that occurred during the trial that would have come to light by staying involved were that:

1. An informal verbal agreement was made where your company could have access to expert witnesses that later fell apart.
2. Certain parties to the suit were dismissed from the claim and had no liability remaining.
3. One party settled for \$100,000 and got out of the claim.
4. An offer of \$3,000,000 was summarily rejected that set the tone.
5. A mediator had determined your company could pay \$1,000,000 to get out of the claim yet none of the company's decision makers were aware of this proposal.

Having a plan in place is important so risk management and the liability team can determine what steps should be taken based on new information and developments. A realistic assessment of liability has to be done to include damages and exposures at various points throughout litigation to continually be informed and to be able to make informed decisions along the way. Issues such as reviewing jurisdictions, judges, jury pools and applicable laws that should be the most advantageous to the defense case should be assessed along the way. All of these issues should be planned for after an event occurs.

Summation:

This case study provides an overview of an approach to consider as a solution to an outrageous court verdict. Wouldn't it be nice if there was a program that existed that has a lot of what was discussed above bundled into one comprehensive package of insurance and services? There is such a vehicle in the aircraft products liability space that is described below.

The Aircraft Builders Council, a 60 year institution based in London, England, provides many services within their program that helps their insureds to be prepared before and after a loss occurs. The advantages built into this program include:

1. The ability to buy UP TO \$1 Billion in limits through a single point of access
2. Underwriters on the program meet or exceed the financial standards of every major aviation brokerage house with no large exposure to any one insurer
3. Defense Counsel is assigned as part of the contract and the following is available to your risk management department and legal department:
 - a. Litigation team available from inception through appeal process
 - b. On-site product liability training sessions
 - c. Post-accident product teardowns, inspections and testing
 - d. Liaison with government agencies
 - e. Response to FAA and NTSB inquiries and investigations from people experienced with these agencies
 - f. Centralized claim handling services
4. Pre-loss work including onsite product liability seminars covering:
 - a. Legal theories of liability
 - b. The judicial system

- c. Document retention policies
- d. Updates on product liability law changes
- e. Contractual reviews
- f. Development of product integrity and safety programs

This is a unique product offering in the aircraft products liability arena but provides very broad services and insurance coverage that includes pre-planning efforts to avoid a loss, planning process once a loss occurs and providing outstanding legal defense to protect your company in the event a claim does occur. These ideas can and should be used to develop programs around all of your liability and products liability exposures.

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