

Product Liability: Who Sues?

● Only a small proportion of people injured by products take legal action to recover damages. But the few who do sue are increasing in number. Businesses must use care when developing new products and making advertising claims. When these efforts fail, a well-run damage control effort can determine a company's future.

by Paula Mergenbagen

Somewhere between the media-hyped, multi-million-dollar awards and an overheated political debate lies the reality of product liability. The reality is that huge cash awards—such as the notorious case of an Albuquerque woman

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who sued over a hot cup of McDonald's coffee—are the exception rather than the rule. Most Americans with product-related injuries do not file lawsuits or make any type of claim for compensation. But the number of liability cases has grown, thanks to legal changes and the emergence of class-action suits over products such as asbestos and contraceptive devices.

Avoiding defective products and product-liability lawsuits are important business objectives. Product-liability concerns have stifled research and development

activities in some industries, and the adverse publicity that lawsuits create can play havoc with a company's image. Businesses must walk a careful line between the costs and benefits of safe products and accurate advertising. For their part, consumers are deeply conflicted about the issue. Most Americans want products to be safe at any cost, yet they don't agree with all aspects of current liability law.

INJURIES AND ACTIONS

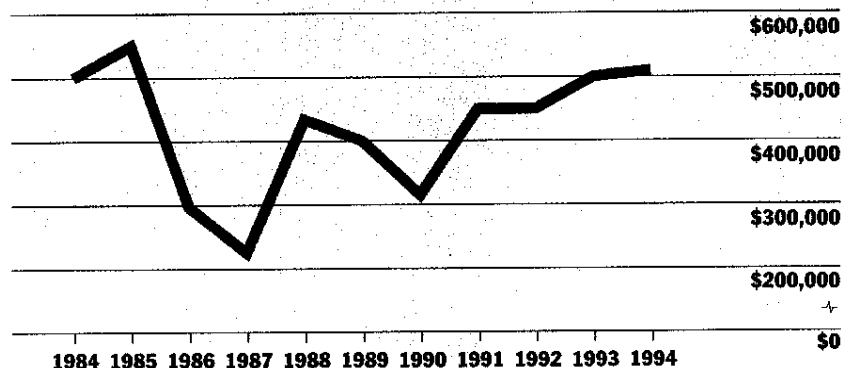
About 9.5 million people a year receive nonfatal injuries in product-related accidents, excluding automobiles, according to a 1989 survey by RAND, a non-profit research institute in Santa Monica, California. RAND interviewed 26,000 households representing over 70,000 individuals nationwide. To be counted in the study, an injury had to cause at least one visit to a health-care provider or result in at least one day of missed productivity during the previous year.

One-third of nonautomobile product-related injuries happen to people at work. Accounting for a smaller percent-

Prize-Winning Injuries

The median award in product-liability cases peaked at \$550,000 in 1985, fell to \$225,000, then rose to \$509,000 in 1994.

(median jury awards in product liability cases, 1984-94)



Source: Jury Verdict Research, Horsham, PA

affected are those producing chemicals, rubber, pottery, various types of machinery, fabricated metal products, and electrical, industrial, and laboratory apparatus. The miscellaneous manufacturing category, which includes highly litigated cigarette lighters, has also been hard-hit.

Manufacturers of pharmaceuticals and medical devices are other frequent targets of product-liability litigation. But R&D efforts in these industries have been stifled only for certain products, according to a study by Steven Garber of RAND. This group includes medications with an extremely high liability risk, such as those used during pregnancy, or products with limited profit potential, such as vaccines. "Liability is unlikely to deter efforts to develop products believed to have exceptionally large profit potential—so-called 'blockbusters' (e.g., Prozac)," writes Garber.

Although the potential effects on manufacturing firms are the most obvious, those who provide professional services often feel that their work has been affected, too. Seven in ten member firms surveyed

by the American Consulting Engineers Council say that innovation in engineering design has been adversely impacted by a fear of liability suits.

ADVERTISING CLAIMS

Americans may not be the sue-happy customers that businesses fear, but companies still have to be pro-active to minimize the risk of lawsuits, says Eli Cox, a professor of marketing at the University of Texas Graduate School of Business in Austin. Focusing on complex and often contradictory liability laws is probably not the best solution. "The better focus is to try to improve the safety of products," says Cox. Most consumers would presumably agree, preferring to avoid injury over suing someone.

Businesses can improve product safety by listening to customer complaints through the use of 800 numbers. Product returns can also be very informative. Companies should "investigate to see whether they are just anomalies or indicate some sort of pattern," says Cox. He

also suggests assembling teams of company experts to assess product design, manufacturing practices, information and training provided to dealers, and customer communications such as instruction manuals, advertising, and hazard warnings.

Advertising and marketing strategies can also have a significant impact on product liability. They have been used in lawsuits to demonstrate that consumers were injured when they relied on advertising judged to be false or misleading. One such case involved a "Golfing Gizmo" that came in a carton stating, "Completely safe ball—will not hit player." Unfortunately, it did hit a 13-year-old player, who successfully sued the company.

In a presentation for the New York State Bar Association, attorneys Lawrence Savell and Barry Cutler suggest that copywriters avoid such absolutes as "unbreakable," "harmless," "foolproof," or anything else—"proof." The term "safer"

Avoid such words as "unbreakable," "harmless," or "foolproof." The term "safer" is preferable to "safe."

is preferable to "safe," and "minimal maintenance" is preferable to "maintenance-free."

Attorney Candace Croucher Dugan, writing in the *Journal of Public Policy and Marketing*, suggests that companies also ask these questions: "Do advertisements show the product being used safely? Can consumers engage in the same activities without running unnecessary or unanticipated risks? Do warnings or disclaimers accompany the advertising?"

Legally, companies have a strong duty to warn of potential hazards in their products, but "it's a very difficult balance to provide adequate warnings about hazards