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The challenges of insuring US online product sellers

Insurers that cover US-based companies distributing imported products must beware the intricacies of US product liability laws



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With the rise of online retailers and the ease with which such firms can sell products online, it is no surprise numerous individuals and companies with no previous experience in product design, product manufacturing or quality control have begun to act as distributors, selling consumer products on e-commerce websites such as Amazon.

Many times, the products sold online by distributors based in the US are manufactured in China or elsewhere abroad, privately labelled for the distributors and sold directly online without any quality control or testing by the US-based distributors.

These distributors often work under a false sense of security, thinking they have no liability exposure for simply moving a product through the world of cyber commerce. However, under US law both manufacturers and sellers of a defective product can be held liable for injuries arising from the use of such a product. Importantly, a majority of US jurisdictions have implemented product liability laws that provide a “product seller” encompasses everyone in the chain of commerce, including a wholesaler or distributor that did not cause or know about any defects.

Product liability law in the US is intended to protect consumers and provide them with multiple avenues by which to seek recourse for damages. Insurers that cover

US-based companies distributing imported products should take the time to fully understand the intricacies of US product liability laws and regulations.

Under US law, a “defective product” is generally a product that causes damage or injury to a person as a result of some defect in the product itself, its labelling or its intended use. Generally, product liability cases allege a product contains at least one of the following: a manufacturing defect, a design defect and/or insufficient instructions or warnings.

A product contains a “manufacturing defect” when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product. A product with a manufacturing defect is typically one that did not get assembled properly, regardless of the adequacy of the design.

Risk of harm

A product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, and the omission of the alternative design renders the product not reasonably safe.

Finally, a product contains inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the



Online sellers of toys made outside the US are still considered ‘product sellers’ and regulated by the CPSC
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seller or other distributor, and the omission of the instructions or warnings renders the product not reasonably safe.

Consumer products in the US are regulated by the US Consumer Product Safety Commission (CPSC). The CPSC treats importers of goods from China as if they were the manufacturers of said products.

An example of the CPSC’s regulatory reach can be seen with how it treats sellers of children’s products. As of February 28, 2018, the CPSC requires all toys manufactured or imported for use by children under 12 years old comply with the applicable provisions of 16 CFR part 1250, which incorporates the mandatory US Toy Safety Standard, ASTM F963-17.

One of the most important CPSC requirements is toys and products imported for use by children under 12 years old be tested by a pre-approved accredited third-party laboratory and be certified with a Children’s Product Certificate. The CPSC has accredited

laboratories in both the US and abroad. As of September 1, 2019, the CPSC has accredited 234 laboratories in China.

The CPSC also requires all children’s products imported for use by children under 12 years old have distinguishing permanent marks which are called “tracking labels”. The tracking labels must be affixed to each such product and its packaging and provide certain identifying information, including the manufacturer or private labeller name and the location and date of production of the product. It also requires detailed information on the manufacturing process, such as a batch or run number or other identifying characteristics and any other information to facilitate ascertaining the specific source of the product.

Regulatory compliance

Insurance companies that insure product sellers importing products from China or other countries

must be aware of the CPSC regulations applicable to their products and make certain their insureds abide by all applicable regulations. Compliance with all applicable regulations is not only relevant for purposes of complying with US law, but it also matters with respect to potential third-party tort liability, as US plaintiffs’ lawyers like to point to the failure to abide by applicable regulations as proof of product defect. One of the best defences available to a US product seller is proving the product in question is compliant with all applicable regulations.

With respect to children’s products specifically, insurers covering product sellers can limit exposure by making sure their insureds regularly test all their products intended for use by children under 12 years old with accredited laboratories either in the US or abroad and the insureds maintain records of same. Insurers should also confirm their insureds are complying with the tracking label requirements set forth by the CPSC.

The CPSC website provides easily accessible information for product sellers to review. The “Regulatory Robot” is particularly helpful, as it asks a series of simple questions to provide basic guidance on compliance regulations.

With the holiday season fast approaching, sales rising and the resulting risk of product liability exposure increasing, insurers need to be sure their US-based product selling insureds are aware of and adhering to the regulations issued by the CPSC. ■

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