

expert ease

Advice for exporters

Liability

A hidden trap for exporters – let the seller beware

As a nation of exporters, it's likely that many New Zealand businesses will at some time be linked to or involved in some form of export. When this happens businesses need to carefully consider their insurance cover to ensure that they have the appropriate cover for their circumstances and that their interests are fully protected at all times.

It is important to consider where your customer's product might end up. Despite a business selling products domestically, it's possible that months or even years later it could end up in another country. Having been sold to a wholesaler or retailer it could be on-sold to a customer just visiting New Zealand, who uses the product in another country, perhaps one with a more litigious culture such as the United States.

Of course with a global market being easy to access through the internet, more sales and orders are being placed via websites which means customers can be living anywhere in the world. Many of your clients may have a potential exposure to a serious claim and the risks should be identified, quantified and evaluated.

Important factors to assist in mitigating risk (other than insurance) are the disclaimers, terms and conditions that are either attached to the product and the sales or distribution agreements. Your customer should seek appropriate legal advice in structuring these in the best way in order to minimise their risk.



However, these can only be considered the first line of defence and, as such, General Liability cover needs to step in to back these up if litigation cannot be avoided.

With respect to the General Liability cover, there are a couple of basic steps to take to ensure a client's insurance programme provides adequate protection:

1. Make sure that the limit of indemnity is appropriate for the business.

Questions to ask are:

- What potential does the product have for property damage or personal injury?
- Where will it be used or exported to? (you should also consider unintentional export risk as mentioned above)
- What is the legal climate in the country to which it's being exported?

2. Because the insured may not always know the end use of their products they need to ensure that their General Liability policy covers the export of products to countries they do not directly export to or have knowledge of. The Lumley General Liability policy covers products that are exported without the insured's knowledge to countries that are outside the territorial limits of their policy.

The territorial limits of a policy are usually defined as the countries where the insured carries on their business or places to which they knowingly export their products.

However, whilst cover may extend to other territories, it's the jurisdiction detailed on the General Liability policy that will dictate where the insurer will defend an action. The best cover option would be to have the jurisdiction limits match the territorial limits of the Policy.

Let's illustrate how an offshore claim could come about:

A company manufactures a simple electronic component which serves a variety of purposes, for example a switch. It is possible, that at the end of the supply chain, it could end up as a component of a potentially high hazard product, such as an electric wheelchair.

We know of several cases of serious injury in the United States where a wheelchair has "run amok" without it being started by the operator. The cause could have been a malfunction of the switch or some other component, or simply a case of incompatible products.

There are potential situations where legal proceedings may be issued against New Zealand companies, despite them not having assets in the US. In the hypothetical case above it is very likely that the plaintiffs would apply a "scatter gun" approach and sue everybody involved, including the New Zealand supplier.

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The cost of mounting a defence can be breathtaking – even if not found guilty. Additionally, the financial cost of proceedings can be far-reaching and a company could lose its overseas market due to a loss of faith in the integrity of its product. It could also be financially stretched as a result of mounting a successful defence, and it is not unheard of for a company to fail as a result of someone bringing a non-meritorious claim against it and its product.

This is where appropriate insurance cover and professional guidance from a liability insurer could really assist a company and protect against such events. And the premium may be surprisingly small when compared to the fees a lawyer would charge to defend you in a case brought before a US court.

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If you have any questions, please call Lumley Liability on
0800 111 888 to discuss cover with one of our experts.
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