

BEWARE THE EFFECT OF THE CONSUMER PROTECTION ACT ON PRODUCTS LIABILITY & GOODS SOLD AND SUPPLIED

The writer intends to bring to the attention of the reader some of the changes and issues which arise now that the Consumer Protection Act has been passed into law. This is by no means an exhaustive study of the implications of the proposed Act and only touches on some of the possible effects on liability insurance.

The standard liability policy wording used in the SA market commences with “Defined Events”, followed by definitions of “The Limits of Indemnity” and “Territorial limits”, “Specific exception”, “Specific conditions” and then “Extensions” and in its present form caters adequately for the insured’s needs as a link in the supply chain of goods to the consumer.

The cover provided by the standard commercial public liability policy is stated in the “Defined Events” which can be summarised as damages which the insured becomes legally liable to pay consequent upon accidental death of or bodily injury to or illness of any person or accidental loss of or physical damage to property which occurs in the course of or in connection with the insured’s business

At first glance it would seem that the cover is unlimited but contained in the policy are exclusions/exceptions. For the purposes of this discussion the exceptions that are seen to be relevant when dealing with “products liability” are quoted from a standard commercial policy and read as follows: - “The company/insurer will not indemnify the insured in respect of

2. damage to
 - (a)(ii) **property in the custody or control of the insured or any employee of the insured**
 - (b) that part of any property on which the insured is or has been working if such damage results directly from such work
3. liability consequent upon injury or damage
 - (a) **caused by or through or in connection with any advice or treatment of a professional nature (other than first aid treatment) given or administered by or at the direction of the insured**
 - (d) **caused by or through or in connection with goods or products (including containers and labels) sold or supplied and happening elsewhere than on premises occupied by the insured other than food and drink supplied incidentally for consumption on the premises**
 - (e) occurring after the completion and handing over of any work and caused by or through or in connection with any defect or error in or omission from such work

The standard policy extension which provides cover for “Products liability” reads as follow:-

“Products liability (if stated in the schedule to be included)

Notwithstanding anything to the contrary contained in specific exception 3(d), the company will indemnify the insured in respect of defined events happening anywhere in the territories stated in the schedule elsewhere than at premises occupied by the insured, and caused by goods or products (including containers and labels) sold or supplied

(including wrongful delivery and delivery of incorrect goods) by the insured in connection with the business.

The amount payable under this extension, inclusive of any legal costs recoverable from the insured by a claimant or any number of claimants, and all other costs and expenses incurred with the company's consent, for any one event or series of events with one original cause or source or during any one (annual) period of insurance, shall not exceed in the aggregate the limit of indemnity for this extension stated in the schedule.

Additional specific exceptions (applicable to products liability extension)

This extension does not cover liability

- (i) for the cost of repair, alteration, recall or replacement of the goods or products (including containers and labels) causing injury or damage
- (ii) for the cost of demolition, breaking out, dismantling, delivery, rebuilding, supply and installation of the goods or products (including containers and labels) and any other property essential to such repair, alteration or replacement unless physically damaged by the goods or products
- (iii)(a) arising from defective or faulty design, formula, plan or specification, but if the insured is a retailer this specific exception (iii) does not apply if the insured's activities are wholly restricted to sales, distribution and/or marketing (including any marketing advisory service accompanying the products) of the product, and the insured's activities do not include final preparation which means repackaging, packing, labelling, cleaning or provision of operating instructions prior to sale to the insured's original customers, nor include any enhancement, amendment or alteration to the product
- (b) arising from inefficacy or failure to conform to specification, unless such inefficacy or failure is due to negligence in the following of such specification
- (iv) arising from goods or products intended to be installed and installed in, or intended to form part of and forming part of, an aircraft
- (v) in respect of injury or damage happening in the United States of America or Canada caused by or through or in connection with any goods or products sold or supplied by or to the order of the insured, if such goods or products have, to the insured's knowledge, been exported to the United States of America or Canada by or on behalf of the insured."

Liability arising from damage caused by goods is presently dealt with under Common Law (and to some extent Criminal Law) and negligence or the breach of an explicit or implied contractual condition needs to be shown by claimant if they have any chance of success with a claim against a person who is a link in the supply chain of goods. The main defence of a supplier would thus be to show that there was no negligence on its part or that the liability was excluded or limited in terms of a contractual term such as a warranty.

There may also be other defences such as Prescription and that it is unreasonable to expect the distributor or retailer to have been aware of the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing process would have weight.

In view of the difficulty a consumer has in proving negligence on the part of specific persons who distribute goods and are a link in the supply link between manufacturer and customer as well as the fact that the liability would more than likely rest with the manufacturer many persons in the supply chain regarded it as an unnecessary expense to buy "Products Liability" cover.

The Consumer Protection Act has far reaching effects on the liability of a person who is a link in the supply chain of goods and more specifically for damage caused by such goods sold to consumers.

Section 61 of the Act imposes a no fault liability on any producer or importer, distributor or retailer of any goods for damage caused wholly or partly as a consequence of supplying any unsafe goods, a product failure, defect or hazard in any goods, or inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

In terms of Section 61, a consumer who has suffered a loss or damage has the right to hold any person who is a link in the supply chain liable for the loss or damage suffered and can lodge a complaint, which is a relatively simple process, against any or all of the links in the supply chain with the Consumer Complaints Commission who, in turn, will investigate the complaint and call for responses from the person/s against whom a complaint has been made. If the Commission fails to resolve the matter by negotiation, the Tribunal will determine whether liability exists. In the event of the Tribunal coming to the conclusion that liability in fact does exist, the Tribunal will issue a certificate to that effect thereby enabling the consumer to approach a court to determine an award. The court will not need to find on whether liability exists as this had already been determined by the Tribunal. After the court has made an award against a person, which at the whim of the consumer could be any person within the supply chain, all other parties would be absolved.

Indemnity for such risk can, however, be obtained through “Products Liability” insurance cover. The less prudent suppliers may not wish to pay the additional premium demanded by insurers for “Products Liability” insurance cover and rely on “Legal Defence” covers which they may have in place to pick up the legal fees to defend an action against them. This would be short sighted as any awards made by the courts would still need to be paid by the supplier. The standard liability policy make provision for “legal defence” costs but these defence costs will not be available to the insured supplier to defend an action involving “Products Liability” unless the supplier has extended its liability insurance to provide “Products Liability” cover in which case the legal defence costs as well as the award made to the claimant would be covered up to the limit of indemnity.

Whilst there are defences as set out in Section 61(5) of the Act, prudence should dictate that, because of the greater exposure that exists for all persons in a supply chain, they avail themselves of the cover provided in the market and that can be obtained by extending their basic Liability insurance to cover “Products Liability” at an additional cost.

Taking cognizance of the changes by The Consumer Protection Act of 2008, short term insurance brokers, when analyzing their client’s needs should establish

whether “Products Liability” cover is required by the client and what realistic limits of indemnity should be adequate to cover the client’s risk. Brokers who fail to advise their clients of the dangers of not effecting “Products Liability” cover could find themselves faced with a professional indemnity claim against themselves.

The pricing of liability insurance is influenced by the ease with which a claimant is likely to succeed in an action against a potential insured as well as the amount of the awards made to courts. (The relatively simple process of lodging a complaint with the Consumer Protection Commission leads one to believe that it will be easy for a consumer to succeed with a claim). The Consumer Protection Act makes provision not only for the direct and foreseeable losses the consumer suffered but also for Consequential or Economic loss no matter how unforeseeable such consequential losses could be. (At common law one could argue that the consequential loss was entirely unforeseeable and should not form part of the court award).

Before the introduction of the Act it could have been argued that a person in the supply chain is merely selling on what has been sold to it, it is extremely difficult for the consumer to prove that a particular party in the supply chain was negligent and was the cause of his, the consumers loss or damage.

Insurers and reinsurers should be aware that the passing of the Bill into law brings about an increased risk. Servicing the awards made by the courts together with the cost of defending actions and the cost of recovery from the original source of the liability will need to be factored into the premium charged for cover provided to the insuring public.

SOME OTHER ISSUES OF INTEREST CONCERNING THE ACT ARE:-

Of interest although not relevant to liability insurance, Section 112 of the Act introduces a penalty for intentional or grossly negligent persons who transgress the terms of the “Act”. The penalty is in the form of a fine of R1 million or 10% of the persons turnover. Provision is also made for possible prison sentences of up to 10 years which could be imposed against individuals in an organization who are grossly negligent or transgress the law.

The Act also deals with recalling of products which, in itself, has cost implications and could be subject to insurance particularly when a person in the supply chain is not the manufacturer. All parties in the supply chain may need to keep accurate record of purchases and sales to ensure that, should it be necessary to recall products before damage or harm is caused by the product or goods, they are able to do so. This could also mean the voluntary recall of goods to avoid a products liability claim.

Section 113, provides that, if an employee or agent of a person is liable in terms of this Act for anything done or omitted in the course of that person's employment or activities on behalf of their principal, the employer or principal is jointly and severally liable with that person. Whereas presently under common law this protection is available to a consumer, the proposed section makes this easier to enforce as the element of negligence is no longer a requirement for liability for the actions of an employee or agent.

The testing and keeping of accurate records by persons in the supply of goods chain may be the only remedy available to sustain the defence that it is unreasonable to expect a distributor or retailer to have discovered the characteristics of a product which may render it unsafe and/or hazardous.

What has not changed is that, unlike in the courts in the USA, there are no punitive damages.

The “goodwill” and the reputation of business could suffer incalculable harm because of adverse publicity which could emanate from press reports on a court award. Press coverage could also spur other consumers to lodge complaints and so escalate the cost of claims.

For completeness, Section 61 of the Bill together with Section 113, as an extension of Section 61, is included below.

Liability for damage caused by goods

61. (1) Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of—

(a) supplying any unsafe goods;

(b) a product failure, defect or hazard in any goods; or

(c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

(2) A supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer, for the purposes of this section.

(3) If, in a particular case, more than one person is liable in terms of this section, their liability is joint and several.

(4) Liability of a particular person in terms of this section does not arise if—

(a) the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation;

(b) the alleged unsafe product characteristic, failure, defect or hazard—

(i) did not exist in the goods at the time it was supplied by that person to another person alleged to be liable; or

- (ii) was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person, in which case subparagraph (i) does not apply;
 - (c) it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers; or
 - (d) the claim for damages is brought more than three years after the—
 - (i) death or injury of a person contemplated in subsection (5)(a);
 - (ii) earliest time at which a person had knowledge of the material facts about an illness contemplated in subsection (5)(b); or
 - (iii) earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property contemplated in subsection (5)(c); or
 - (iv) the latest date on which a person suffered any economic loss contemplated in subsection (5)(d).
- (5) Harm for which a person may be held liable in terms of this section includes—
- (a) the death of, or injury to, any natural person;
 - (b) an illness of any natural person;
 - (c) any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and
 - (d) any economic loss that results from harm contemplated in paragraph (a), (b) or (c).
- (6) Nothing in this section limits the authority of a court to—
- (a) assess whether any harm has been proven and adequately mitigated;
 - (b) determine the extent and monetary value of any damages, including economic loss; or
 - (c) apportion liability among persons who are found to be jointly and severally liable.

Vicarious liability

113. (1) If an employee or agent of a person is liable in terms of this Act for anything done or omitted in the course of that person's employment or activities on behalf of their principal, the employer or principal is jointly and severally liable with that person.
- (2) This section does not apply in respect of criminal liability.