

# Cutting Product Liability Issues Down To Size: A Guide for Nevada Startups

BY CARYN S. TIJSSELING, ESQ

As more entrepreneurs and startup companies emerge in Nevada, it is important for these companies to understand the many legal issues related to their specific business enterprises. Many startup companies are product-based. Few things can ruin a startup's hopes faster than a claim that the new product is defective, unsafe, and has caused significant injuries to a consumer or group of consumers. Such claims can be catastrophic to a small startup business.

It is important for businesses involved in product design, development and manufacturing, as well as those advising such businesses, to consider and mitigate the potential for liability arising from a possibly defective or unsafe product. It is also critical to consider whether or not a new product will be subject to any federal regulations. Thoughtful planning and procedures by startup companies involved in manufacturing new products will help reduce the risk of liability for a product defect claim at the state level and prevent the company from violating federal consumer product safety laws.

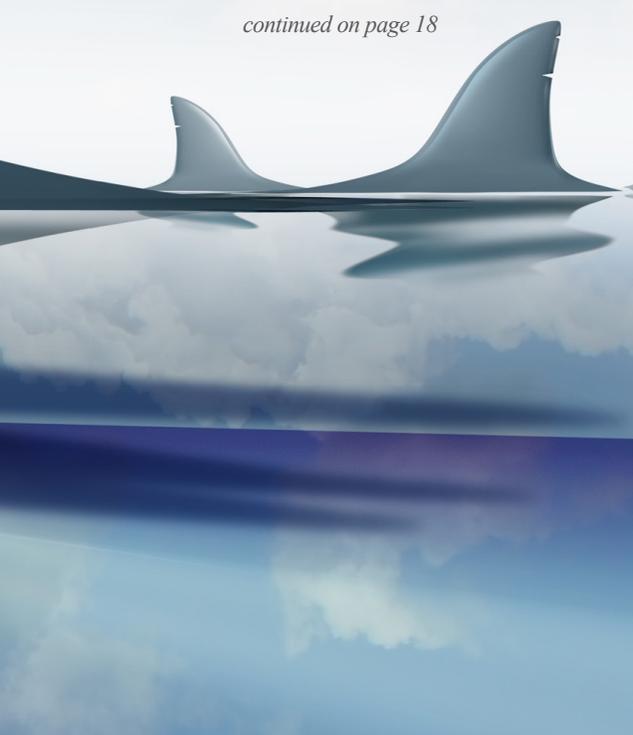
**A consumer may sue the manufacturer under a breach of warranty claim when the product does not meet the expectations of the consumer or perform as stated or promised. In addition, there may be liability under fraud or misrepresentation theories.**

## What is the potential for state law liability?

Product liability claims can be linked to almost any stage of product development, including design, production or marketing. Claims for product liability can generally arise under several different legal theories. Often a claim for a defective product may arise under a negligence theory. Negligence, in the product liability context, is essentially the failure to use reasonable care in the design and/or manufacture of a product. Another common theory under which a claim for a defective product may arise is under a breach of warranty claim. Generally, a consumer may sue the manufacturer under a breach of warranty claim when the product does not meet the expectations of the consumer or perform as stated or promised. In addition, there may be liability under fraud or misrepresentation theories. Liability under a misrepresentation theory could potentially arise due to overstated advertising claims, false or misleading labels, or other information misrepresenting material facts about the product.

Importantly, in Nevada many product liability claims will sound in strict liability so that a consumer does not need to establish negligence on the part of the manufacturer.<sup>1</sup> A strict liability claim requires a demonstration that the product had a defect

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that made it unreasonably dangerous. The consumer must further establish that the defect existed at the time the product left the manufacturer. Finally, the consumer must show that the defect was the cause of their injury.<sup>2</sup> Strict liability allows the manufacturer to be liable in cases where a product itself was unreasonably dangerous as manufactured.<sup>3</sup>

One important factor in mitigating the risk of liability for an unreasonably dangerous or defective product is for a company to ensure that the product has adequate warnings. An effective warning may shield a manufacturer from liability for misuse of a product.<sup>4</sup> However, even an adequate warning will not shield a manufacturer from liability when the defect could have been avoided by a commercially reasonable design alternative that was available at the time of manufacturing.<sup>5</sup> Further, a manufacturer can be liable for foreseeable product misuse even if the product contained an adequate warning of a risk of harm associated with the product.<sup>6</sup> While a warning will not necessarily shield a manufacturer from all liability, an effective and strongly worded warning will theoretically help minimize the risk of injury from misuse and thereby reduce the risk of liability.

### What federal regulations apply to new products?

While it is important for startups involved in product development and manufacturing in Nevada to be aware of these state law issues, it is also important for these companies to understand and be advised as to the federal regulations governing consumer products, specifically, the Consumer Product Safety

Act (CPSA) and its related amendments, and the Consumer Product Safety Improvement Act (CPSIA) of 2008.

CPSA was passed by Congress in 1972.<sup>7</sup> It created the Consumer Product Safety Commission (CPSC), a five-person commission with the power to prescribe safety standards for many types of consumer products. The CPSC also has the ability to develop safety standards, issue recalls or ban products altogether if they present an unreasonable risk of injury or death to consumers.<sup>8</sup> In addition to setting standards, the CPSC has a great deal of power to identify products it considers to be hazardous and to take corrective measures, including recalls and bans of such products when it deems a product unsafe.

CPSA was amended in 1990 to establish stricter guidelines for reporting product defects and injuries associated with those products. The amendments created fines and other civil and criminal penalties for failing to report known risks associated with products. As set forth below, it is critical for any company to understand these reporting requirements.

CPSA was further expanded by the CPSIA.<sup>9</sup> It provides CPSC with additional regulatory and enforcement tools. It also specifically expands the scope of CPSC to regulate certain products, such as lead-based products, and allows CPSC to take steps to ensure that children's toys are free from harmful chemicals. CPSIA also allows CPSC to regulate durable infant and toddler toys. Additional requirements include third-party testing and certification for certain types of products and provides stricter regulations for ATVs. It also requires tracking labels for certain

types of products. CPSIA further regulates imported consumer products to ensure they are safe and adds civil and criminal penalties for failure to comply with its regulations and enhanced protections for whistleblowers. Additionally, it required the creation of a publicly-searchable database of products reported as harmful: [www.saferproducts.gov](http://www.saferproducts.gov).

Although CPSA and CPSIA are extensive and should be reviewed, for a startup involved in product manufacturing, a thorough understanding of the reporting requirements imposed by these laws is particularly important when it comes to avoiding liability. If a startup company becomes aware that its product could create a substantial risk of injury to consumers or that its product creates an unreasonable risk of serious injury or death, it must report this immediately to CPSC. Companies are encouraged to report potentially substantial product hazards, even while their internal investigations are ongoing. Normally, a company is required to report to the commission within 24 hours of obtaining reportable information. However, if there is uncertainty as to whether information is reportable, the company is allowed a reasonable amount of time to investigate the matter; it is generally accepted that a company's investigation into to whether or not they are required to report to CPSC should, under no circumstances, take more than 10 business days following notice. Civil and criminal fines may result from a company's failure to fully and immediately report information to

CPSC. Once a product has been reported to CPSC, it will evaluate the report and, in most instances, work with the company toward corrective action.

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Careful of quality products tasks will be of a

# documentation quality assurance procedures, production and product testing essential components of an effective product liability risk management program.

## What can a startup do to minimize risk?

It goes without saying that startup companies should be aware of, and make all efforts to meet and exceed, all voluntary safety standards applicable to their product. The careful startup company will work to reduce the risk

of liability under any theory related to product claims by implementing a quality assurance program. The company should also develop a system for monitoring its products and reporting claims relating to the product. An essential component of the monitoring of the product will include a regular review of recalls and bans of similar product types.

It is also essential that, when customer service departments receive claims or complaints related to injuries caused by the product, the reports are carefully monitored and recorded. In addition, where applicable, startup companies should utilize third-party testing and certification procedures to ensure no potential safety risks have been overlooked. Careful documentation of quality assurance procedures, production tasks and product testing will be essential components of an effective product liability risk management program.

## Conclusion

Although there are significant risks involved in the manufacture of any new product, there are many ways to minimize those risks. A careful understanding of the risk involved in manufacturing consumer products, along with the creation of quality assurance procedures and thorough documentation, is essential for ensuring that a startup company and its new product are both successful. **NL**

1. *Young's Mach. Co. v. Long*, 100 Nev. 692, 692 P.2d 24 (1984).
2. See *Fyssakis v. Knight Equipment Corp.*, 108 Nev. 212, 826 P.2d 570 (1992); *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 470 P.2d 135 (1970).
3. *Lewis v. Sea Ray Boats, Inc.*, 119 Nev. 100, 65 P.3d 245, Prod.Liab.Rep. (CCH) P 16,547 (2003).
4. See *Robinson v. G.G.C., Inc.*, 107 Nev. 135, 808 P.2d 522, Prod.Liab.Rep. (CCH) P 12,789 (1991).
5. *Id.*

6. See *Crown Controls Corp. v. Corella*, 98 Nev. 35, 693 P.2d 555 (1982).
7. 15 U.S.C. §§ 2051-2084. The federal regulations implementing the Act are found at Title 16 CFR parts 1101 through 1406.
8. <http://www.cpsc.gov/en/Regulations-Laws-Standards/Regulations-Mandatory-Standards-Bans/> contains an extensive list of regulated products.
9. PL 110-314, sec 219, the Consumer Product Safety Improvement Act of 2008; 15 USC 2087.

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