WILHELM

RECHTSANWÄLTE

Lars Winkler Versicherungsmonitor.de, 19 January 2015

Column

Knockout argument testing clause

Insurers more and more often refer to an alleged breach of the testing clause to deny coverage under product liability insurance. The clause excludes coverage in case a product was not tested according to acknowledged rules of technology or science. But especially in case of exotic products there are no generally acknowledged rules how to test.

Product liability insurance covers property damages and financial losses resulting from the use of defective products. Excluded from coverage are though damages by products which have not been sufficiently tested with regard to the specific purpose of use by acknowledged means of technology and science or in another way.

This so-called „testing clause“ is useful to ensure that producers do not transfer development risks of their products to the insurer by not trying out and testing their new products, but by testing them subsequently “in the field”.

If a producer of floorings for example develops new and high-quality flooring which shall then be installed in an automobile museum, the testing in terms of insurance law comprises two aspects: first, the newly developed flooring has to be installed on a test area. Second, it has to be examined whether the flooring withstands the weight load when used in an automobile museum.

The testing clause is dangerous even for conscientiously working producers. If such high requirements are set to the testing of a product before its market launch, one would discover any product defect – even a “hidden” defect – before delivery of the product.

Insurers more and more often refer to the testing clause

Insurers therefore more and more often refer to an alleged breach of the testing clause in order to deny coverage under product liability insurance. Insurers hereby often argue unreasonably: Since the product had a specific defect it had obviously not been tested

properly. The defect would certainly have been detected in the course of a proper testing.

If the existence of a product defect generally presupposes an insufficient testing, coverage under product liability insurance can always be denied.

Policy holders often argue that a testing was performed „according to acknowledged rules of technology or science" which determine how a specific product has to be tested. But this is problematic when there are no such acknowledged rules for an individual product.

The more „exotic" a product is, the less probable is the existence of "acknowledged rules of technology or science" for testing. Especially in such cases, the policy holder often gets the impression to be defenseless against the objection of insufficient testing.

Detailed testing before market launch advisable

The question whether the testing of a product was done according to such rules or not, has to be clarified by an expert in case of dispute between insurer and policy holder. The result of this expert report can hardly be predicted.

Every producer is therefore well advised to test products in detail before their market launch, and not only abstractly but also with regard to the intended purpose of use. In the example above, it would therefore not be sufficient to install the flooring only to a test area without execution or at least simulation of the weight load it would be exposed to within the framework of the purpose of use (automobile museum). The testing of a product and considerations about kind and scope of the testing should be documented in detail by the producer.

Insurers regularly claim that they do not routinely refer to a breach of the testing clause to deny coverage. However, according to our experience, this is though more and more often the case especially when the claim is high.

Lars Winkler

Wilhelm Rechtsanwälte

Partnerschaft von Rechtsanwälten
Reichsstraße 43
40217 Düsseldorf

Telephone: + 49 (0)211 687746 - 0
Telefax: + 49 (0)211 687746 - 20

www.wilhelm-rae.de
lars.winkler@wilhelm-rae.de

Registered office: Düsseldorf - AG Essen: PR 1597