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INSURANCE PROTECTION FOR PRODUCTS LIABILITY AND COMPLETED OPERATIONS — WHAT EVERY LAWYER SHOULD KNOW

Roger C. Henderson*

There have been many recent changes in the field of tort law,1 but none as personal and important to each member of our society as the changes in tort liability theories for injuries associated with products and related services. It is difficult, if not impossible, to conceive of an individual in America today who is not exposed to some serious risk of injury from such a source, and, of course, the source is likewise exposed to a correlative liability.2 It is this latter exposure and the means of protecting against it that is the subject of this article.

Although trial lawyers and judges are the natural objects of an article dealing with anything so fraught with litigation, it is hoped that the office practitioner will also find this of value in the way of preventive law practice. Certainly not every manufacturer that is sued on a products liability theory is a giant automobile manufacturer or chemical company in a distant location. There are many small and medium size manufacturers, not to mention wholesalers and retailers, whether in the form of sole proprietorships, partnerships or corporations, that are subject to suits for products liability. One wonders how many of these entities are aware of the extent of their exposure and whether they are prop-

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1 See R. Keeton, Venturing To Do Justice (1969).

2 This exposure has but recently been labeled "products liability." As long as the basis of liability of the source of the product was restricted to negligence, the victim's cause of action was merely another personal injury or property damage suit, and seemed to call for no special name to distinguish it. Even the early food cases, e.g., Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942), which recognized strict liability against the manufacturer without regard to privity, were not given a special name. With the advent, however, of strict liability as to defective products, whether one talks in terms of warranties or Restatement Second of Torts § 402A (1965), (see Greenman v. Yuba Power Products, 59 Cal. 2d 57, 63, 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901 (1962)), the term "products liability" developed to denote, not necessarily a particular theory of action since all three theories are subsumed by the term, but a certain class of cases involving the marketing of unreasonably dangerous products. The term "Products Hazard" has been used in insurance policies to denominate the applicable coverage, regardless of theory of liability.

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erly protected by insurance. Because of the broad nature of the exposure, the complexities of insurance coverages, and resulting diversions in court decisions, the lawyer has a special obligation to educate himself as to the problems in this area and counsel his clients in regard thereto. One of the purposes of this article is to help prepare the lawyer for that task.

I. PRODUCTS HAZARD AND COMPLETED OPERATIONS

A. Development of Coverage

The development of insurance protection for products liability, denominated "Products Hazard" coverage, has paralleled the development of the modern rules for products liability. One writer states that the coverage was offered as early as 1890, but it took the burgeoning common law to bring it to its present full-blown status. Prior to the expansion of the common law theories of

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4 See note 2 supra.


6 "It appears that products liability insurance was first written in England about 1890, to insure pie bakers against liability for accidents that sometimes happened when roach powder inadvertently got into pie dough. The insurance was known as 'poison insurance' in those days. It is sometimes still called that." Andersen, Current Problems On Products Liability Law and Products Liability Insurance, 31 Ins. Counsel J. 436, 441 (1964).

7 "In the present climate of the law, many modern manufacturers have retreated from their former status as self-insurers. Products liability insurance, cautiously and hesitantly written shortly before the mid-Twenties as the result of demands of manufacturers for coverage, has
liability for injuries arising from unreasonably dangerous products, there was not much need for such insurance coverage. The manufacturer could only be sued for negligence, and this alone was an insurmountable burden for the plaintiff in many cases. Even if the plaintiff could marshal the necessary evidence, there was the privity barrier. Thus, the greatest risk that a manufacturer suffered, aside from employer's liability, was for injuries to third persons arising out of conditions or activities on or near his premises and for operations away from such premises but related thereto. Insurance protection for such risks was readily available in the form of what is now called "Premises and Operations" coverage.\(^8\) This coverage, as indicated, however, applied only to injuries occurring on, or adjacent to, the described premises,\(^9\) and during the progress of operations away from the premises.\(^10\) If the injury occurred away from the premises and after operations had been completed, there was no coverage.\(^11\)

By describing the premises and defining the operations of the insured, the insurer limited the risks insured against. The premises and operations coverage was not particularly designed to meet the limited exposure of a manufacturer for products liability based on negligence although it is clear that such an injury occurring on the premises or during covered operations would be within the policy terms. An injury resulting from a product or completed operation away from the premises could only be said to be covered under the premises and operations clause by manipulating the word accident to mean the negligent act or omission instead of the

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\(^8\) For a general discussion of premises and operations coverage, see 7A J. Applemann, Insurance Laws and Practice §§ 4493.2, 4493.3 (1962).

\(^9\) See Graustein & Co. v. Employers' Liabl. Assur. Corp., Ltd., 214 Mass. 421, 101 N.E. 1073 (1913), holding, in an action on a policy covering injuries to third persons within or on the premises of insured, or ways adjacent thereto, that the words "elsewhere in service of employers" did not mean anywhere that the insured was engaged in doing any of its business, but was confined to the location of insured's premises.

\(^10\) See Camden & Atl. Tel. Co. v. United States Cas. Co., 227 Pa. 242, 75 A. 1077 (1910), construing coverage for telephone company's operations provided the injuries were suffered "during the immediate doing of the work of construction."

\(^11\) See Kelly-Dempsey & Co. v. Century Indemn. Co., 77 F.2d 85 (10th Cir. 1935), holding indemnity policy insuring pipe line construction company against liability for injuries resulting from business operations not to cover injury resulting from explosion of dynamite cap left on pipe line by insured's employee, where at time of injury insured had finished construction of pipe line and surrendered possession and control thereof.
injury caused by such conduct. This construction was a departure from accepted tort analysis and was easily blocked by defining the word accident in the policy. Thus, with the fall of the privity requirement and development of strict products liability, a new coverage was in order. This coverage, products hazard coverage, was supplied by simply adding to the existing premises and operations coverage a provision for injuries caused by products away from the premises and after the insured had relinquished possession of them. At the same time, and usually under the same paragraph entitled simply “Products Hazard” or “Products Hazards (Including Completed Operations),” coverage was provided for operations that had been completed or abandoned and which had taken place away from the described premises. As will be discussed later, this physical arrangement proved to be an unhappy choice for insurance companies.

The above dichotomy in coverage was perpetuated in the original standard Comprehensive General Liability policy adopted by most casualty companies after World War II, and, with some refinements, continued in the 1966 revised standard Comprehensive General Liability policy produced by the underwriting and policy drafting committees of the Mutual Insurance Rating Bureau and the National Bureau of Casualty Underwriters. In addition to the Comprehensive General Liability policy, one can obtain products hazard and completed operations coverage in connection with the following types of policies: (1) Comprehensive General-Automobile; (2) Manufacturers’ and Contractors’ Liability; (3) Schedule Liability; (4) Garage Liability; and (5) Owners’, Landlords’, and Tenants’. This does not mean, however, that when one purchases one of the above policies that products hazard and completed operations coverage is automatically included. On the contrary, this coverage has to be specifically purchased by the insured by so electing on the face of the policy or by purchasing an endorsement which either adds the coverage to or deletes the exclusion of the coverage under the basic policy. For example, the name of the standard Manufacturers’ and Contractors’ Liability policy would lead one to believe that products hazard and completed operations coverage is included, but, in fact, it is expressly excluded. Thus, one should be very careful in counseling his client to ensure that the desired coverage is obtained.12

12 By way of further clarification in analyzing policy forms, it is worth noting that most insurers now have a form called the General Liability Automobile Policy, which is a standard form and is referred to as the Jacket. Included in the Jacket are the general definitions, conditions, and other materials that apply to liability policies in general. The Jacket is then assembled with standard inserts called Coverage Parts to form a complete policy. These inserts provide the specific insurance
INSURANCE FOR PRODUCTS LIABILITY

B. THE SCOPE AND INTERRELATIONSHIP OF PRODUCTS HAZARD AND COMPLETED OPERATIONS COVERAGE

Prior to 1966, the typical products hazard provision, in its entirety, appeared in most policies as follows:

Division 4. Products hazard

(1) The handling or use of, the existence of any condition in or a warranty of goods or products manufactured, sold, handled or distributed by the named insured, other than equipment rented to or located for use of others but not sold, if the accident occurs after the insured has relinquished possession thereof to others and away from the premises owned, rented or controlled by the insured or on premises for which the classification stated in division 1 of the declarations excludes any part of the foregoing;

(2) Operations, if the accident occurs after such operations have been completed or abandoned at the place of occurrence thereof and away from premises owned, rented or controlled by the insured, except (a) pick-up and delivery, (b) the existence of tools, uninstalled equipment and abandoned or unused materials and (c) operations for which the classification stated in division 1 of the declarations specifically includes completed operations; provided, operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to a service or maintenance agreement.

As previously explained this provision was designed to complement the premises and operations coverage by defining where the latter stopped and where the products hazard and completed operations coverage began. To illustrate how these coverages fit together, assume a tire manufacturer owns some of its retail outlets or dealers and that it has a liability policy providing premises and operations coverage, but excluding products hazard and completed operations coverage. Assume further that a company-owned dealer was engaged in mounting a new tire on a customer's car at the dealer's place of business and that the tire exploded due to a defect in manufacture, injuring the customer who was standing nearby. Even though the manufacturer would be subject to a cause of action based on a products liability theory, the loss will come

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coverage desired by the insured such as Comprehensive General Liability, Manufacturers' and Contractors' Liability, and Owners', Landlords', and Tenants' Liability. By proceeding in this fashion insurers attempt to achieve standardization and efficiency in underwriting operations, but to those not familiar with the relationship, and non-relationship, of the different parts of this type of policy arrangement, it appears to be a successful attempt at obfuscation by insurers. See note 3 supra.

18 CCH Products LIDAB. REP. ¶ 3550 (1970). See also Ocean Accid. & Guar. Corp. v. Aconomy Erectors, 224 F.2d 242, 244-45 (7th Cir. 1955).

under his premises and operations coverage. The same would be true if the dealer relinquished possession of the tire to the customer, but due to an innate instinct the customer stopped his car on the edge of the dealer's premises and gave the tire a sharp kick only to have it explode and injure him. Paragraph (1) of the products hazard exclusion only comes into play where the dealer relinquishes possession of the tire and the injury occurs away from his premises. From this it can be seen that the products hazard coverage parallels the common law exposure in regard to products liability only so far. The coverage is dependent on the location of the accident and the possession of the product, factors which are usually irrelevant to the common law theories of products liability.

The above illustrates how paragraph (1) of the products hazard provision relates to the premises and operations coverage. Unfortunately, however, due to the language and location of paragraph (2) of the products hazard provision, the relationship of that paragraph to paragraph (1) and to the premises and operations coverage is far from clear. If one construes the word "operations" in its broadest sense, there is an unmistakable overlap between paragraphs (1) and (2) because "operations" certainly encompasses the "handling or use of" products. This can be shown by pursuing the above illustration further. Assume the dealer receives a telephone call from a customer who is stranded on the highway with a blown-out tire. The dealer takes a new tire to the customer, mounts it, and, as he drives away, the tire explodes and injures the customer as the latter gives it a kick. This situation obviously involves the handling or use of a product, but it can also be said to involve an operation. Thus, it can fit just as comfortably under the language of paragraph (1) or (2), and there appears to be no

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15 Where a liquefied petroleum gas dealer sold propane gas which did not contain the required odorizing agent, and which later exploded when a match was ignited in a house which unknowingly had become filled with the undetectable gas, the cause of action clearly fell within the products hazard exclusion. Bramlett v. Pan American Fire & Cas. Co., 391 P.2d 256 (Okla. 1964).

16 See Tidewater Assoc. Oil Co. v. Northwestern Cas. Co., 264 F.2d 879 (9th Cir. 1959), where the insured sold stove oil contaminated with gasoline which later exploded on ignition. The court classified the injury as arising out of a completed operation, but it would be just as logical to say that the injury arose from handling or selling a product, after possession was relinquished and away from the insured's premises.

advantage or disadvantage in selecting one or the other in this case.\textsuperscript{17}

Any time a person handles or uses goods or products which he manufactures, sells, handles or distributes this involves an operation, but not all operations involve products as one normally thinks of the word, and herein lies the source of the dispute as to how paragraph (2) relates to the premises and operations coverage. As one court has noted:

The products hazard provision does not usually give rise to unusual difficulty as to liability insurance coverage where there is only involved the manufacture or sale of what is commonly known and regarded as a product. Where the transaction involves . . . the erection of a structure and the contractor furnishes material for the structure, greater difficulty is encountered as to liability insurance coverage under the products hazard provision. However, when the contract involves . . . the rendering of services which do not involve the furnishing or supplying of any product or material, the question of liability insurance coverage under the products hazard provision becomes most difficult.\textsuperscript{18}

The question that plagued the completed operations subdivision embodied in paragraph (2) is: was it meant to cover pure service operations? It was clear that paragraph (1) could only apply where a product was involved. Paragraph (2) could also apply where products were involved in the operation, but was it limited to that situation? This became a very important question where products hazard coverage was excluded from a comprehensive risk type policy containing premises and operations coverage.\textsuperscript{19} Any opera-

\textsuperscript{17} Because of the exception in paragraph (1) "other than equipment rented to or located for use of others but not sold," paragraph (2) would not duplicate the coverage in those fact situations unless one reads this exception into paragraph (2), as did the court in Insurance Co. of North America v. Electronic Purification Co., 67 Cal. 2d 679, 63 Cal. Rptr. 382, 433 P.2d 174 (1967).

\textsuperscript{18} In some policies the exception is worded "but shall not include any vending machine or any property . . . rented to or located for use of others but not sold." See Peerless Ins. Co. v. Clough, 105 N.H. 76, 81, 193 A.2d 444, 448 (1963).

\textsuperscript{19} See, e.g., Insurance Co. of North America v. Electronic Purification Co., 67 Cal. 2d 679, 685, 63 Cal. Rptr. 382, 386, 443 P.2d 174, 178 (1967). No case could be found where an insured had purchased products hazard and completed operations coverage without also purchasing premises and operations coverage, although this would be advisable,
tions not specifically excluded would be covered. In resolving this question great emphasis was usually placed on the fact that the completed operations provision was a subdivision of the policy section captioned either "Products,"20 "Products Hazard,"21 "Products-Completed Operations,"22 or "Products Hazards (Including Completed Operations),"23 the inference being that the provision was meant to cover only those operations which involved products in the ordinary sense of the word.24 Other factors that influenced the courts were: (1) the completed operations hazard was tied in by hyphen, format and premium charge with the products hazard in the description of risks section of the policy and one could not insure against risks arising from completed operations separate and apart from products liability;25 (2) the singular nature of the word "Hazard" in "Products-Completed Operations Hazard;"26 (3) the premium for the products and completed operations coverage was determined by "the gross amount of money . . . charged for all goods and products sold;"27 (4) the language and arrangement of the policy would lead the ordinary person to believe he had coverage for risks arising from completed operations;28 and, (5) at the

as where a business is being terminated. 1 CCH, PRODUCTS LIAB. REP. ¶ 3520 (1970). If this were the case, would a court say that there was no coverage for service operations not involving products since the products hazard and completed operations coverage dealt only with products? Unless the court found the policy ambiguous this would be the logical result.


24 Just what the courts mean by products "in the ordinary sense of the word" is not susceptible to precise definition, but in Kammeyer v. Concordia Telephone Co., 446 S.W.2d 486, 489 (Mo. Ct. App. 1969), the court said that "any effort to define 'product' as the end result of the activity will be rejected . . . ."


very least, the policy was ambiguous and should be construed against the insurance company.\textsuperscript{29}

The majority of courts\textsuperscript{30} facing this issue followed the view that the completed operations provision does not apply to an insured's business if it involves services only, or if the product composes but

\begin{quote}
In Lumbermens Mut. Cas. Co. v. Pattee, 108 N.H. 298, 234 A.2d 537, 539 (1967), where the policy contained an endorsement defining completed operations to include "any act or omission in connection with operations performed by or on behalf of the named insured on the premises or elsewhere, whether or not goods or products are involved in such operations," the court still held that the provision applied only to those operations involving products. "Since the 'interpretative endorsement' is also boldly headed 'Products-Completed Operations Hazard,' the insured would have no more reason to think that it applied to him than he would the other provisions relating to the same hazard."
\end{quote}

\textsuperscript{29} Hoffman & Klemperer Co. v. Ocean Accid. & Guar. Corp., 292 F.2d 324, 328 (7th Cir. 1961).

a minimal part of the business,\textsuperscript{31} despite the fact that in so doing it made the completed operations provision redundant to the coverage already provided in paragraph (1).\textsuperscript{32} The minority took the position, for which the insurance companies argued, that the completed operations provision covered all types of operations regardless of the involvement of a product.\textsuperscript{33} The latter view is more in keeping with the intent of the drafters of the policy terms, and, notwithstanding the ambiguity that might have been created by the arrangement of the policy provisions, it is more in keeping with the basic concept that the products hazard and completed operations coverages only apply when the insured is finished with the product or through with operations.\textsuperscript{34}

\textsuperscript{31}Similarly, if the business of the insured may be severed into operations not related to a product, only those operations that do involve a product are subject to the completed operations provision. Insurance Co. of North America v. Electronic Purification Co., 67 Cal. 2d 679, 691, 63 Cal. Rptr. 382, 393 P.2d 174, 182 (1967).

\textsuperscript{32}"The Kendrick decision [following the majority rule] not only ignores the express language of the 'operations' definition under 'Products Hazard' but also renders that whole definition of no effect when considering the activities as here of a construction contractor." Neumann v. Wisconsin Nat. Gas Co., 27 Wis. 2d 410, 423, 134 N.W.2d 474, 481 (1965). See also Waterman S. S. Corp. v. Snow, 222 F. Supp. 892, 898 (D. Ore. 1963).


The basis for the ambiguity discussed above lies in the way the parties to the insurance view their exposure to the risk. An insurer that writes an ordinary public liability policy does not want a risk extending without end as a result of work performed or merchandise sold. The underwriting considerations are different for this type of risk which, in turn, give rise to different premium rates. On the contrary, a businessman does not necessarily think of his exposure on this basis and expects his insurance to cover any injuries arising out of an operation or product, regardless of whether he is finished with it. He does not categorize his association with the operation or product as does his insurer. While the dichotomy is logical to the insurer, it is arbitrary to the insured, and not one which he would usually expect. Thus, an insurer has a duty in drafting its policies to clearly delineate the hazards which it purports to protect against.

In the 1966 revision of the standard Comprehensive General Liability policy, the insurance industry has taken steps to eliminate the confusion caused by tying the completed operations provision to the products hazard provision. In the revised standard policy the description of hazards lists completed operations and products as separate hazards to be insured against. The premium for the former is based on receipts while the premium for the latter is based on sales. Moreover, the definition of each hazard is separated completely from the other. To date there are no cases reported construing the new provisions, but the above changes would seem to meet the objections that were raised in regard to the old policies.

C. PRODUCTS LIABILITY COVERAGE

1. Risks Included In Products Hazards

When the products hazard provision was originally designed to include both protection for risks arising from products and completed operations it was not so important to define exactly what risks in regard to products were intended to be covered. As discussed in the previous section, it became very important to know whether or not a product was involved, but once it was determined that there was a product involved very little attention was devoted to whether it fell under paragraph (1) or (2) because both were

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37 It should be pointed out that not all insurers use the same forms, but there is a great deal of uniformity because most companies are members of or subscribe to rating boards, such as the Mutual Insurance Rating Bureau and National Bureau of Casualty Underwriters, and use the forms promulgated by these organizations.
usually interpreted to cover risks arising from products. If a retailer committed an act of negligence in selling or delivering a perfectly good product, this conduct could be classified as a risk arising out of the handling of a product or an operation. The retailer either had both coverages or neither since they were always sold together.

Under the 1966 revision, it is now possible to buy one coverage without the other and it has now become very important for the insured to know exactly what risks each of these two coverages purports to protect against. It is clear that the new products hazard provision will protect against defective products, breached warranties and misrepresentations and it should now be clear that the new completed operations provision covers services not involving goods or products. But what coverage should our negligent retailer mentioned above have? Should he have purchased only the products hazard coverage or should he have also purchased the completed operations coverage? He cannot answer these questions until he knows exactly what risks are covered by each. At present there is no clear answer.

The language adopted by insurers in defining the risks insured against under the products hazard provision has been the source of differing opinions. The early policies provided:

This policy does not cover any accident ... caused directly or indirectly by the possession, consumption, handling or use, else-where than upon the premises described in the schedule of state-ments, of any goods, article or produce, manufactured, handled or distributed by the assured unless covered hereunder by written permit endorsed on this policy.

The revised standard products hazard coverage protects against "bodily injury and property damage arising out of the named insured's products or reliance upon a misrepresentation or warranty made at any time with respect thereto."

See note 37 and accompanying text supra.

By solving one problem, whether the completed operations provision applied to services not involving goods or products, the insurers have exposed another problem. Perhaps the insurance industry had the correct approach originally by combining the two coverages and selling it under the one heading, but erred only in the name identifying it. The objections raised by the courts might have been met by changing the name to "Completed Operations (Including but not limited to Products Hazards)." Another alternative would have been to include both coverages in one paragraph reading: "Operations, including but not limited to those involving goods or products of the named insured after possession has been relinquished, if such operations have been completed or abandoned at the place of occurrence thereof, and away from premises, etc."

This language was subsequently simplified by referring to accidents caused by "the handling or use of, the existence of any condition in or a warranty of goods or products manufactured, sold, handled or distributed by the named insured."\(^\text{42}\) Some shortened it even further by merely referring to accidents caused by "goods or products manufactured, sold, handled or distributed by the named insured."\(^\text{43}\)

The words "handling or use of" would seem to include any theory of tort liability in regard to a product which caused bodily injury or property damage away from the premises and after the insured relinquished possession of it. Yet, it was not infrequently argued that the negligence of one in handling or using a product in which he dealt was independent of and unrelated to the product, even though one cause in fact of the injury was the product. The end to be achieved by such an argument was, of course, that the products hazard exclusion was inapplicable. For example, in \textit{Lessak v. Metropolitan Casualty Insurance Co.}\(^\text{44}\) it was argued that there was no defective condition in the product, nor any breach of warranty, and that the negligence of the storeowner in selling ammunition for a BB gun to a minor was not excluded by the products hazard provision. The court accepted this argument, and in so doing gave a narrow construction to the products hazard provision to the effect that it did not apply to mere negligence in the sale of a product as this was not a risk inherent in the product itself. The latter risk, however, was already covered by the language "the existence of any condition in or a warranty of goods or products." Thus, the result of the decision was to delete the words "the handling or use of" from the policy.\(^\text{46}\)

\(^{42}\) See note 13 and accompanying text supra.
\(^{43}\) See Diversified Products Co. v. Fidelity & Cas. Co., 355 F.2d 846 (6th Cir. 1966).
\(^{44}\) 168 Ohio St. 153, 151 N.E.2d 730 (1958).
\(^{45}\) For another court indicating approval of this view, see Employers Liab. Assur. Corp. v. Youighogheny & Ohio Coal Co., 214 F.2d 418 (8th Cir. 1954) (where it was alleged, \textit{inter alia}, that coal was negligently loaded on a railroad car so that when an attempt was made to open the door, it fell off causing severe personal injuries, and the court held that such negligence was not related to the insured's product). But see Mohawk Valley Fuel Co. v. Home Indem. Co., 3 Misc. 2d 445, 165 N.Y.S.2d 357 (Sup. Ct. 1957) (negligent delivery of fuel to wrong address, which resulted in a fire when fuel was discharged through an intake valve onto the cellar floor, was held to be "handling" of a product); Bitts v. General Accident Fire & Life Assur. Corp., 282 F.2d 542 (9th Cir. 1960) (failure to warn of the characteristics of refrigerator coil and dangerous consequences of opening same constituted negligence arising out of the handling of a product). See also Employers Mut. Liab. Ins. Co., v. Underwriters at Lloyd's, 177 F.2d 249, 251 (7th Cir. 1949) (where the court refused to limit the products hazard provision to risks arising out of defective products).
Although there have been other cases which have carried the narrow construction in *Lessak* over to those policies which define the products hazard as risks “arising out of goods or products manufactured, sold, handled or distributed by the named insured” the more tenable approach was taken in *Hagen Supply Corp. v. Iowa National Mutual Insurance Co.* This case involved a mail order house which was found to be negligent in selling a tear gas device to a minor. In answer to the argument that the products hazard provision should be limited to defective products, the court rejected the *Lessak* position and held that there were many acts or omissions that would subject a manufacturer or seller to liability, to wit: failure to warn, defective workmanship, negligent design, illegal sale, misrepresentation, inadequate testing, and inherently dangerous objects. The court thus concluded that the illegal sale of the tear gas device was within the products hazard provision.

By giving the products hazard provision a broad construction so that it covers any injury caused in fact by a product manufactured, sold, handled or distributed by the insured, one eliminates the near hopeless task of trying to determine if the injury falls within a risk arising out of the product itself. Moreover, it will be consistent with what the insured reasonably expects to receive by way of insurance coverage. A retailer would be covered by the

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47 331 F.2d 199 (8th Cir. 1964).

48 Once liability is established under tort law where a product is the cause in fact of the injury, one should not look further to determine whether the loss falls within the products hazard provision if the accident happens after the insured has relinquished possession of the product and away from the premises. To hold otherwise will lead to analysis so abstruse as to rival that found in proximate cause.
products hazard provision regardless of whether he negligently sells to a minor, as above, sells or delivers a product different from that requested, or fails to warn in regard to a dangerous characteristic. All of these are commonly termed products liability cases even though the product itself may be perfect. A supplier of products should be covered for these risks when he purchases coverage denominated products hazard, and should understand that he has no such coverage if he refuses it. This would leave the completed operations provision to cover those services not involving products and any duplication in coverage between the two would be avoided. If this construction is not followed, a prospective insured dealing with products would have to take both coverages to be sure he is fully protected and this he should not be required to do. The products hazard provision should not be limited to certain classes of transactions involving the insured and his products, but should be extended to all hazards related to an insured's products which actually cause injuries away from the insured's premises and after possession of the products is relinquished by him.

2. What Constitutes Goods or Products Manufactured, Sold, Handled or Distributed By the Insured?

What are "goods or products"? These two words standing alone have a meaning which is most commonly associated with the commercial world. They are most often thought of as some tangible or material units in which one trades. The qualifying words "manufactured, sold, handled or distributed" really do not broaden the ordinary meaning associated with these words, but limit "goods or

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51 The word "handled" standing alone does not necessarily have the commercial connotation associated with the others, but, because of the basis of the liability the products hazard provision is designed to protect against, it is reasonable to give it a construction consistent with the others. For such an interpretation see Smedley Co. v. Employers Mut. Liab. Ins. Co., 143 Conn. 510, 515, 123 A.2d 755, 758 (1956) where the court held that the intent of the drafters was to restrict the word "handled" to mean "to buy and sell; to deal, or trade, in."
products" to those in which the insured trades or deals. This is best illustrated in *Liberty Mutual Insurance Co. v. Hercules Powder Co.* where a sealed aluminum tube was, in its use by the insured, repeatedly plunged into a mass of molten explosive material for experimental purposes. Thereafter the tube was sent to another concern to have work performed on it and was to be returned to the insured upon completion of this work. While the work was being performed the tube exploded. In answer to the insurer's argument that the tube constituted goods or a product handled by the insured the court pointed out that the basis of products liability was the responsibility placed on one who sends goods or products out into the channels of trade for use by others and that a piece of equipment sent by a manufacturer to a laboratory for processing was not such goods or product. The court likened the tube to a wrench or jack or any other of the numerous pieces of paraphernalia about a laboratory or factory.

While the *Hercules* case shows that it is necessary to actually trade or deal in an item, it is not necessary that this be the product or goods in which one primarily deals. In *Liberty Mutual Insurance Co. v. Guin* a bottled gas dealer provided empty gas cylinders at his cost to customers without any obligation to return them regardless of whether they purchased gas from the dealer to fill them. When one of these bottles exploded it was held to be "goods" under the Alabama Sales Act, and, therefore, to be within the products hazard provision. In fact, it has been held that even a brief excur-

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52 See Gehriein Tire Co. v. American Emp. Ins. Co., 243 F. Supp. 577 (W.D. Pa. 1964), aff'd per curiam, 348 F.2d 918 (3d Cir. 1965) (tire dealer who mounted tires on rims, both of which were brought to him by a customer, was not engaged in manufacturing, selling, handling, or distributing a product); Smedley Co. v. Employers Mut. Liab. Ins. Co., 143 Conn. 510, 123 A.2d 755 (1956) (public warehouse operator who delivered from storage different product than ordered was not engaged in manufacturing, selling, handling or distributing products); Swillie v. General Motors Corp., 183 So. 2d 813 (La. Ct. App. 1961) (original manufacturer of Natchez Double Loadster was not engaged in manufacturing, selling, handling or distributing a product while installing a Loadster for a third party who purchased it from intermediate source); Lieberman v. New Amsterdam Cas. Co., 284 App. Div. 1051, 135 N.Y.S.2d 850 (1954), motions for reargument and leave to appeal denied, 285 App. Div. 830, 137 N.Y.S.2d 840 (1955) (hubcap replaced after repairing flat tire was not a product manufactured, sold, handled, or distributed by service station operator); Philadelphia Fire & Marine Ins. Co. v. Grandview, 42 Wash. 2d 357, 255 P.2d 540 (1953) (city did not manufacture, sell, handle or distribute methane gas which, as a result of city's negligence, was allowed to enter homes through city water mains).

53 224 F.2d 293 (3d Cir. 1955).

54 370 F.2d 297 (5th Cir. 1966), cert. denied, 388 U.S. 910 (1967).
sion into the stream of commerce will cause one to be classified as a manufacturer, seller, handler or distributor of goods or products regardless of how foreign this occasional venture may be to his normal activities. In Smith v. Maryland Casualty Co., the court held that a sling shot sold at a church bazaar was a product sold by the church and coverage was excluded by the products hazard provision when the sling shot broke, causing personal injuries. Thus, it can be seen that the stream of commerce has some unexpected bends in it.

Certainly the court in Hercules was sound in relying on the common law basis of products liability for its decision, and this should continue to be the approach for determining what constitutes "goods or products." As the common law changes, the insurance protection should change with it. For example, who would have thought a decade ago that a house might be classified as a product for purposes of imposing strict liability for defects on the builder? Yet, this has happened because of changes in the home building industry. At one time most houses were built for the landowner by a contractor on an individual basis and houses were not considered a product. Today when many homes are built by developers and contractors on subdivided property which they own and then sold on the open market, there is no reason not to think of such houses as products, and these should come under the products hazard provision.

In order to complete the discussion of the definition of "goods or products" two policy provisions need to be briefly mentioned. Prior to 1966 some policies provided that goods or products in-
cluded any container thereof, other than a vehicle.60 This has been carried forward in the 1966 revised standard forms and should cover any container, regardless of whether it is the immediate container, such as a bottle, or a secondary container, such as a paper carton which contains the bottle which in turn contains the goods or product. The second provision deals with goods or products which are furnished for use of others, but not sold, such as rented, leased or bailed equipment or property. The 1966 revised standard policies carry forward this exception by using the language "‘named insured’s products’ shall not include a vending machine or any property . . . ".61 rented to or located for use of others but not sold.” Thus, even though the courts have held that persons engaged in the equipment rental or leasing business are subject to products liability actions,62 the products hazard coverage is not what such a person should purchase for protection. He would be protected under a premises and operations provision63 and this is what he should buy.

3. Relinquishment of Possession

The word “possession” in the phrase “relinquishment of possession” in the products hazard provision was a source of dispute in the pre-1966 policies. Was it sufficient that the insured relinquished physical control, sometimes referred to as custody, or did he also have to relinquish his proprietary rights of control? There was no unanimity on the answer to this question. There were two authoritative cases that considered this problem and, even though they involved almost identical facts, they reached opposite results. In 1960 the Ninth Circuit Court of Appeals decided General Casualty Co.

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61 Containers are excepted.
63 In Insurance Co. of North America v. Electronic Purification Co., 67 Cal. 2d 679, 686, 63 Cal. Rptr. 362, 386, 433 P.2d 174, 178 (1967), the court rejected the insurer’s argument that the exception of rented products from the products hazard provision contemplated an absolute exclusion from any coverage whatsoever under the comprehensive risk policy in question, and that additional protection must be purchased to insure a risk of liability related to rented goods. The court concluded “that since rented products are excepted from the products hazard exclusion, they come within the general coverage.” Accord, Aetna Ins. Co. v. Loxahatchee Marina, Inc., 236 So. 2d 12 (Fla. Ct. App. 1970).
v. Azteca Films, Inc.\textsuperscript{64} which involved the sale by the insured of used motion picture films to a cellulose scrap dealer. The insured would ship the used film to the dealer in containers owned by the latter and it was the practice of the dealer to examine the used film, pay for what he could use and destroy the remainder. In this case the insured had delivered the film to a common carrier and it caught fire destroying certain property. Physical possession had been relinquished by the insured, but title had not passed to the dealer at the time of the loss. Applying California law the court determined that the policy should be interpreted as understood by a reasonably prudent person and that under this test the word “possession” contained no ambiguity, but would be understood to mean actual or physical possession.\textsuperscript{65}

Six years later the Second Circuit held, with one dissent, in a factually similar case, \textit{National Screen Service Corp. v. United States Fidelity and Guaranty Co.}\textsuperscript{66} that under New York law there was an ambiguity in the word “possession” as used in the policy and that the New York courts would give a broad construction to it so as to include constructive as well as actual possession.\textsuperscript{67} The \textit{Azteca} case was the sounder of the two if one approaches the question from the standpoint of what an ordinary insured under this type of policy would expect. A lawyer might be expected to understand the difference between custody and possession, but to most people they are synonymous. Moreover, this interpretation was more in keeping with the overall design of the products hazard provision. It was the insurers who chose to make a distinction in coverage based on where the accident happened and whether or

\textsuperscript{64} 278 F.2d 161 (9th Cir.), \textit{cert. denied}, 364 U.S. 863 (1960).

\textsuperscript{65} The court buttressed this interpretation by noting that the products hazard provision contained an exception as to “equipment or other property rented to or located for the use of others but not sold,” and reasoned that if one construed the word “possession” to mean constructive possession it would render this exception “nugatory if not absurd, for if the exclusion must relate to property ‘sold’ and off the premises, it is completely unnecessary to except therefrom property rented to or located for the use of others but not sold.” \textit{Id.} at 168. The court concluded by saying that the inescapable implication was that there were certain types of unsold property other than equipment rented to or located for use of others, as here, which were meant to be excluded by the products hazard provision.


\textsuperscript{67} For other cases construing the word “possession” to mean constructive possession as well as actual possession, see \textit{Canadian Radium & Uranium Corp. v. Indemnity Ins. Co.}, 348 Ill. App. 171, 108 N.E.2d 515 (1952); \textit{Boeing Airplane Co. v. Firemen’s Fund Indem. Co.}, 44 Wash. 2d 488, 268 P.2d 654 (1954).
not the insured was through with the product or operation.\textsuperscript{68} From an underwriting standpoint the mere passage of the proprietary right to control would not appear to have had any effect on costs of investigation and settlement of claims. It was not legal title that concerned the insurers; it was the added burden of administering claims when the insured was not around to help with the process that counted. If the passage of legal title, that is, the relinquishment of the proprietary right to control, was the test, then it would be possible for title to pass and the insured still have physical possession of the property, and surely this was not a "relinquishment of possession" within the meaning of the policy.\textsuperscript{69}

In any event the insurance industry has taken steps to solve this problem by inserting the word "physical" immediately prior to the word "possession" in the 1966 revised standard provisions and for those companies adopting these forms their intent should be abundantly clear.

\textbf{D. Completed Operations}

Prior to 1966 there was diversion in court decisions as to whether the completed operations provision applied to pure service operations or merely to those service operations involving goods or products.\textsuperscript{70} The insurance industry has attempted to clear up this problem by rearranging the policy provisions,\textsuperscript{71} and, as it was previously submitted, the completed operations provision should now be construed to cover only those operations which do not involve goods or products manufactured, sold, handled or distributed by the insured.\textsuperscript{72} This would leave the products hazard provision to cover any injury which is caused in fact by a product, and, thus hopefully simplify, at least from the insured's standpoint, what could otherwise become a very confusing and misleading situation. With this perspective of the completed operations hazard, one needs to turn to another problem which has arisen under this provision: when is an operation completed? In the early policies there was no elaboration on what was meant by the seemingly innocent word "completed," but the question was soon raised.

Where an insured begins an operation and the evidence shows that it is still in progress, as in \textit{Lloyd's Casualty Insurer v. McCrory},\textsuperscript{73} the answer is self-evident. In that case the insured installed

\begin{itemize}
\item \textsuperscript{68} See notes 34-36 and accompanying text supra.
\item \textsuperscript{69} See Bituminous Cas. Corp. v. Horn Lumber Co., 283 F. Supp. 365 (W.D. Ark. 1968).
\item \textsuperscript{70} See notes 30-33 and accompanying text supra.
\item \textsuperscript{71} See note 37 and accompanying text supra.
\item \textsuperscript{72} See note 39 and accompanying text supra.
\item \textsuperscript{73} 149 Tex. 172, 229 S.W.2d 605 (1950).
\end{itemize}
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a butane gas system in a house, but the pressure gauge, valve and fittings on the gas storage tanks did not operate properly. The insured knew this and intended to return to the home and correct these defects, but in the meantime fire resulted from a leak in the system, destroying the home. The combination of the deficiencies and the insured's intentions clearly showed the job was not completed, and therefore was not excluded.\(^7\)

Had the insured in McCrary thought that he was through and not intended to return, however, regardless of the defects or his knowledge of such, some courts under the early policies would have held that the operation was not complete because of the existing defects. In Daniel v. New Amsterdam Casualty Company\(^7\) the insured, a plumber, was employed to convert a hot water heater so that it could be used as a stove or room heater. In performing the work the insured sealed the water tank, but left some water inside. The work was accepted and paid for by the customer. Upon lighting the heater the water turned to steam, expanded, and caused the heater to explode, seriously injuring the customer's wife. The court, in construing the completed operations clause, said:

Completion is an independent fact which cannot be determined by the act or intention of a workman who may cease work regarding the job as completed, nor wholly by the conduct of the owner who without knowledge of the condition pays off before actual completion. . . .

We do not consider that the work is complete within the meaning of the insurance contract so long as the workman has omitted or altogether failed to perform some substantial requirement essential to its functioning, the performance of which the owner still has a contractual right to demand.\(^7\)

The Daniel case was not cited by the New York Court of Appeals two years later when it took the opposite view on this issue in Berger Brothers Electric Motors, Inc. v. New Amsterdam Casualty Co.\(^7\) In this case the insured negligently connected electrical wiring so that the motors and fans on certain turkey egg incubators

\(^7\) For other cases where the operations were held not to be completed, see General Cas. Co. v. Larson, 196 F.2d 170 (8th Cir. 1952) (cleaning and servicing furnace); Connecticut Co. v. Mongillo, 144 Conn. 200, 128 A.2d 528 (1957) (removal of trolley poles and filling holes); Arnold v. Edelman, 393 S.W.2d 231 (Mo. 1965) (installation of revolving doors); Employers Mut. Cas. Co. v. Hetner, 254 S.W.2d 565 (Tex. Civ. App. 1952) (temporary installation of gas heating unit); Boeing Airplane Co. v. Firemen's Fund Indem. Co., 44 Wash. 2d 488, 268 P.2d 654 (1954) (modifying aircraft under government contract).

\(^7\) 221 N.C. 75, 18 S.E.2d 819 (1942).

\(^7\) Id. at 77, 18 S.E.2d at 820.

\(^7\) 293 N.Y. 523, 58 N.E.2d 717 (1944).
operated in the wrong direction, resulting in the ruin of 17,000
turkey eggs. The court held that the work was completed within
the terms of the policy at the time of the accident:

This must be so unless we yield to the plaintiff’s contention and
hold that the work was not completed at that time because the
wiring was defective; but so to construe the language of the ex-
cluding clauses would deprive them of all meaning and purpose.
By these clauses the parties intended to limit the casualty com-
pany’s liability to accidents occurring during the progress of the
work and to exclude liability for accidents occurring, after the
work was completed, as the result of defective workmanship. If
that be not the meaning of the plain language used, the insurer
would remain liable indefinitely for defective workmanship upon
the theory that defective work is never complete until the defect
is discovered and corrected.\textsuperscript{78}

In view of the fact that liability without fault for injuries re-
sulting from services has yet to be imposed in this country, the
Berger view has to be the correct one if the completed operations
provision applies to pure service operations. If one were covered
elsewhere, as under the premises and operations coverage, for risks
contemplated under the completed operations clause, that is, lia-
ibility for faulty work that has been completed, there would never
be any need for purchase of this coverage by one who renders
services not involving products. In other words, the only time lia-
ability is going to be imposed is when fault is involved in the oper-
ation and if fault prevents the operation from being complete, the
coverage is illusory.

Despite the Berger decision some courts continued to follow the
view espoused in Daniel,\textsuperscript{79} which caused the insurance companies
to add the following proviso to the completed operations section:
“[O]perations shall not be deemed incomplete because improperly
or defectively performed or because further operations may be re-
quired pursuant to a service or maintenance agreement.” This was
not entirely satisfactory\textsuperscript{80} so in the 1966 revision the question of

\textsuperscript{78} Id. at 527, 58 N.E.2d at 718.
\textsuperscript{79} See Hardware Mut. Cas. Co. v. Schantz, 186 F.2d 868 (5th Cir. 1951)
(negligent repair of hoist rendered work incomplete); Hercules Co. v.
cleaning ship’s hold resulting in clogged bilge pumps prevented work
from being complete). For cases rejecting this view, see Baker v.
Maryland Cas. Co., 73 R.I. 411, 56 A.2d 920 (1948) (negligence in
improperly replacing lid on cesspool after cleaning); Butler v. United
States Fidelity & Guar. Co., 197 Tenn. 614, 277 S.W.2d 348 (1955)
(negligence in repairing porch).
\textsuperscript{80} In Fidelity & Cas. Co. v. Fratarcangelo, 201 Va. 672, 112 S.E.2d 892
(1960), the court ignored the new clause in the completed operations
provision and held: “[T]he ‘operation’ which consisted of the alleged
when an operation is completed received very thorough treatment. There is little room for controversy under the new provision which now reads:

"[C]ompleted operations hazard" includes bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. "Operations" include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

1. When all operations to be performed by or on behalf of the named insured under the contract have been completed,
2. When all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or
3. When the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

In connection with the 1966 revised standard completed operations provision two things should be pointed out. First, the clause "or reliance upon a representation or warranty made at any time with respect thereto" was added to cover the situation where some negligent act of plugging the outlets in the stove, was not 'completed' until King, to whom the stove was sold, had an opportunity to put it to use." See also Lumbermens Mut. Cas. Co. v. Town of Pound Ridge, 362 F.2d 430 (2d Cir. 1966) (ice and snow had been removed from streets, but the court held that the job was not completed because the city would periodically check to see if the streets needed to be sanded); Vito v. General Mut. Ins. Co., 15 App. Div. 2d 289, 223 N.Y.S.2d 431 (3d Dept' 1962) (insured agreed to keep a customer's propane tanks filled, as well as service and examine the tanks from time to time and the court held that, when further operations are constantly required, this situation is not covered by the new provision).

An earlier problem evidenced by Heyward v. American Cas. Co., 129 F. Supp. 4 (E.D.S.C. 1955) had not been resolved either. The insured in that case had a contract to do plumbing work on a multi-unit housing project. Units were occupied as they became usable. An explosion occurred in one of the occupied units in which the work had been completed and the court held that the work in all the units had to be completed before the completed operations provision would apply.
courts were holding that a misrepresentation or warranty could not be considered as completed until acted upon by the person to whom it was made. This was an intolerable construction since injury and reliance were simultaneous and thus always occurred prior to an operation being completed. There should be no doubt now that misrepresentations and warranties in regard to operations are included if that operation is otherwise complete. Second, the revised standard provision does not include bodily injury or property damage arising out of:

(a) operations in connection with the transportation of property, unless the bodily injury or property damage arises out of a condition in or on a vehicle created by the loading or unloading thereof,

(b) the existence of tools, uninstalled equipment or abandoned or unused materials, or

(c) operations for which the classification stated in the policy or in the company’s manual specifies “including completed operations.”

These excepted situations will be covered under the premises and operations provision.

II. “BUSINESS RISK” EXCLUSION

In the 1966 revision a new provision, commonly referred to as the “Business Risk” exclusion, was added to the products hazard and completed operations coverages. This provision excludes:

bodily injury or property damage resulting from the failure of the named insured’s products or work completed by or for the named insured to perform the function or serve the purpose intended by the named insured, if such failure is due to a mistake or deficiency in any design, formula, plan, specifications, advertising material or printed instructions prepared or developed by any insured; but this exclusion does not apply to bodily injury or property damage resulting from the active malfunctioning of such products or work.

This exclusion attempts to eliminate from the products hazard and completed operations coverage losses caused by management in the planning stages unless the loss was caused by an active malfunction of the product or operation. For example, where an automobile suspension system is negligently designed so as to cause

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the driver to lose control at certain speeds this would be an error in the planning stage, but would fall within the exception as to active malfunction of the product.

Although this provision received much attention when it came out there are no reported cases construing it. This is somewhat surprising because it is certainly no mean task to decide whether a mistake or error was made in the planning stage in many businesses since the planning and production stages are inextricably intertwined. The decision as to when a product or operation actively malfunctions is no less fraught with difficulty. For example, in a recent California case a manufacturer was sued for defective design of an earth moving machine. The machine was built in such a way that the driver could not see behind him and a workman was killed when the machine was backed over him. The manufacturer was allegedly negligent in failing to install a rear view mirror so that the driver could see behind him and in failing to have an audible warning device so fellow employees would know the machine was moving in reverse. Was this injury caused by an active malfunction of the machine? The product was not malfunctioning in the sense that it was properly performing the work of spreading and tamping earth as it was designed to do. When viewing it from a broader perspective, however, it can be argued that it was not capable of performing the work without creating unreasonable risks and thus it was malfunctioning in that sense. From here one can go on to ponder the harder question of when a "malfunction" is active as opposed to inactive. Without pursuing the matter further, it can readily be seen that there are many tortious acts which will cause difficulty in the application of this provision. More important than this, however, is the question of whether the insurance industry should attempt such an exclusion in the first place.

In order to raise the issue more precisely, imagine the situation where a person injures himself by moving his body against a negligently designed sharp or pointed portion of a product, which is stationary at the time of the accident, such as an automobile bumper, door handle, or window glass. These defects were, by assumption, created in the planning stage and one would be hard pressed to rationalize the injuries into the category of resulting from an active malfunction of the product. Thus, they would appear to be excluded. Why should one not be allowed to insure against such risks to persons and property evolving from the plan-

82 For a discussion of some potential problems under this provision, see Sorensen, What A Lawyer Ought to Know About Products Liability Insurance Coverage, 1968 TRIAL LAWYERS GUIDE 322.
ning stage? It is submitted that there are no tenable distinctions between errors in planning and production resulting in physical damage which should prevent one from insuring against the former. If liability is imposed on the fault basis of negligence, the standard is one of ordinary care in each situation. If liability is imposed on a non-fault basis, that is, warranty or strict liability, the reason for the defect is irrelevant and the question of what stage of the business it arose from is likewise irrelevant.84

The insurance industry evidently feels that the risks of bodily injury or property damage arising from the planning stage of business are a business risk of the insured, that is, a responsibility which he must undertake just as he does for other business decisions. There is, however, a difference between insuring against economic risks arising from the market place which subject the businessman to ruin for faulty planning or judgment and risks to others for bodily injury or property damage arising from faulty planning or judgment. The former is not the type of loss that we attempt to shift under our economic system. To do so would seem to effect an indirect, but drastic change in the system itself. Perhaps we approach such a change when we deviate from the fault principle in favor of strict liability as a different moral basis for shifting the loss is emphasized. The test is no longer one of determining whether an unreasonable risk has been created, but is best expressed by the rhetorical question: "Who shall pay when the benefits to the many come at a high cost to the few?"65 This emerging theory of products liability is based on the concept that the supplier is best able to distribute losses arising from defective or unreasonably dangerous products, thus making him an initial insurer. But this is limited to physical damage, as under the fault basis, and does not extend to all economic loss. The process at the planning stage out of which defectively designed or otherwise deficient work is produced may be the same as where a "business" decision is made which subjects the supplier to financial risks arising from our exchange oriented economic system. It is the consequences of this process and not the process itself which should concern the insurers. It is the imposition of liability for physical damage caused by deficient work placed in the stream of commerce and not the stage of business organization out of which the deficiency arises that is of concern. This would seem to hold true re-

84 Id. at 477, 85 Cal. Rptr. at 637, 467 P.2d at 237 (where the court recognized that strict products liability may be imposed for defects in design and that there is no reason to attempt a distinction based on the source of the defect).
gardless of whether the product or work is defective or unreasonably dangerous. Suppliers should not be obliged to assume tort liability for damages without the opportunity to, in effect, re-insure. Thus, the insurance industry would do well to eliminate the "Business Risk" exclusion from the policy.

III. DAMAGE TO PROPERTY OTHER THAN THE PRODUCT OR WORK ITSELF

The products hazard and completed operations provisions are not intended to cover damage to the insured's products or work project out of which an accident arises. The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained.

This limitation on the type of property damage covered was expressed in the policies prior to 1966 by language which excluded coverage for injury to or destruction of "any goods, products or containers thereof manufactured, sold, handled or distributed or premises alienated by the named insured, or work completed by or for the named insured, out of which the accident arises." Where a product or work project was looked upon as an undivided whole there was little difficulty in the application of this provision. For

87 See Aetna Ins. Co. v. State Motors, Inc., 109 N.H. 120, 244 A.2d 64 (1968) where the insured represented that certain cars were fit for use as taxi cabs. The representations proved to be false, and the customer sued the insured for damages for repair and replacement costs, loss of use, loss of business, injury to reputation, inconvenience and other losses. The court held there was no coverage under the policy which clearly stated that there had to be physical injury to tangible property other than to the insured's goods or products before there would be coverage.
example, where a grain elevator developed leaks or collapsed or where a foundation wall on a home collapsed it was clear that the damage to the work product was caused by an accident or occurrence arising out of the work itself. Conversely, where the product or work project resulted in physical damage to property which was clearly independent of and unrelated to the product itself there was little problem.

Not all products, however, were looked upon as an undivided whole, but were considered by some courts as being comprised of components. Where this view was taken a question arose as to whether the insurer would be liable for damages caused to one component by another component. In S. L. Rowland Construction Co. v. St. Paul Fire and Marine Insurance Co., the insurer was held liable under the products hazard and completed operations coverages for fire damage to a home constructed by the insured caused by the placement of a joist or header too near the firebox of a fireplace. The court reasoned that the exclusionary clause in question did not apply to the entire house as being the product of the insured, but that it applied only to the component parts thereof out of which the accident arose. This view was not universally accepted, but did cause enough concern to insurers that it was remedied in 1966. Now the revised standard policy provides that the products hazard and completed operations provisions do not apply.

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84 Even the insurance industry was not sure of the answer to this question. See Volf v. Ocean Accid. & Guar. Corp., Ltd., 50 Cal. 2d 373, 380, 325 P.2d 987, 992 (1958) (Carter, J., dissenting).
85 The court in Blackfield v. Underwriters at Lloyd's, 245 Cal. App. 2d 271, 53 Cal. Rptr. 838 (1966) adopted the view that a house was comprised of component parts and if one part damaged other parts then
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(j) to property damage to premises alienated by the named insured arising out of such premises or any part thereof;

....

(l) to property damage to the named insured's products arising out of such products or any part of such products;

(m) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith ....

Another problem with the pre-1966 version of the exclusion in question, which was much more serious, arose in regard to deficient products or work which did not cause physical damage, as such, to other property, but, when used in connection with other property, adversely affected the value or use of the other property. In 1954 the Minnesota Supreme Court had before it a case where the insured sold plaster to a contractor who, in turn, applied it to the wall of a hospital the latter was constructing. The plaster shrunk and cracked and had to be replaced by the contractor. The contractor sued the insured for breach of warranty and the insured brought an action for declaratory judgment against its insurer who had refused to defend. The court rejected the argument that the plaster lost its identity as goods or a product after it had been applied to the wall and ceiling of the building, but did hold that the building had sustained damage by way of a lower market value and that this was covered by the policy. This decision led other courts to apply the same analysis and come to the same conclusion in other cases where the product was used in close connection with other property. One of the most perplexing situations


97 The measure of damages was held to be "the diminution in the market value of the building, or the cost of removing the defective plaster and restoring the building to its former condition plus any loss from deprivation of use, whichever is the lesser." Id. at 358, 65 N.W.2d at 125.

98 See Bowman Steel Corp. v. Lumbermens Mut. Cas. Co., 364 F.2d 246 (3d Cir. 1966) (diminution in market value of building due to discoloration and separation of asbestos felt bonded onto steel sheets used in...
in this regard arose in connection with the seed cases. In one case an insured supplied a variety of wheat seed less productive than that ordered and the court held that the prospective wheat crop was not merely the seed in changed form and thus excluded, but that, by virtue of the germination process, a transformation took place so as to constitute the wheat crop a separate and distinct entity from the original seed wheat. The insurer was held liable for the diminution in the wheat crop. In another case, an insured sold cranberry seed beans which were not suitable for the growing conditions where the beans were intended to be planted. The insurer was held liable for the market value of the loss of use of the land where the beans were planted when they failed to germinate. Suffice it to say that the insurance industry had not expected to provide coverage for commercial law type damages arising out of a breach of a sales warranty under the products hazard and completed operations provisions.

Under the pre-1966 versions of the products hazard and completed operations provisions it was not clearly stated in the policies that consequential damages to other property as a result of deficient products or work without physical damage was not covered, as contended by the insurers. This the insurance industry has

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sought to clarify in the revised standard policies by providing that "damages" includes the loss of use of property resulting from property damage, and then defining "property damage" to mean "injury to or destruction of tangible property." By this it is intended that consequential damages such as loss of use, loss of good will, or diminution in market value will be covered if there is physical damage to tangible property other than the product or completed work, but that such consequential damages alone, without physical damage to other property caused by the product or completed work, will not be covered.

Lastly, it should be noted that the cost of withdrawing defective or deficient products or work from the market, which can be substantial, is not covered by the products hazard or completed operations provisions as the revised standard policy has an express exclusion in regard

(n) to damages claimed for the withdrawal, inspection, repair, replacement, or loss of use of the named insured's products or work completed by or for the named insured or of any property of which such products or work form a part, if such products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein . . . .

This is true even though the policy also makes it a condition of the insurer's liability that the insured "shall promptly take at his expense all reasonable steps to prevent other bodily injury or property damage from arising out of the same or similar conditions, but such expense shall not be recoverable under this policy." This is the so-called sistership exclusion, and, as has been noted,102 a void has been created in available insurance coverage by virtue of this exclusion.103

102 Sorensen, supra note 82, at 325.
103 Evidently very few insurance companies are providing any coverage at all for products withdrawal expense. The author has found only one such policy and that was offered by the Fireman's Fund American group which provided coverage for expenses paid by the insured for the withdrawal of products named in the declarations where such withdrawal is made necessary by reason of determination by the insured or by any ruling of any governmental body that the use or consumption of such products shall result in bodily injury, sickness, disease, or death solely because of error or inadvertent omission in the manufacture or labeling of products. The author has been unable to find any insurer offering such a policy covering property damage. Perhaps an insurer such as Lloyd's of London would underwrite coverage for withdrawal expense on an individual basis.
IV. CONCLUSION

To date there have been no reported cases construing the 1966 revised standard products hazard and completed operations provisions. In order to clarify the intent behind these provisions emphasis has been placed on analyzing and categorizing the problems and relevant judicial opinions concerning prior versions of these provisions. By approaching the subject in this manner, it is hoped that the resolution of future disputes, which are inevitable, will be facilitated. There is still, however, no substitute for familiarizing oneself with the details of a particular policy. This is most crucial in preventative law practice so that the client can be assured of receiving the protection he needs prior to a loss rather than searching the policy afterwards in an attempt to find coverage. Again, it is hoped that this article will be of assistance to counsel in that process, too.