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Should the insurers pay?

Liability insurance and product recalls in the light of the PIP breast implants scandal

In recent discussions about the PIP breast implants scandal, many people have asked why PIP's insurers are not paying for replacement of the implants. It may be a good time to remind readers about the different types of business insurance for third party claims, and how they might respond to a product liability claim.

Leaving aside **employer's liability insurance** and **motor insurance**, the most common form of liability insurance for UK businesses is **public liability insurance**. It covers injury to persons or property arising from business activities, which will normally only arise at the company's premises, or on others' premises when visiting them. Liability for defective products will not be covered, nor will obligations under contracts. I am sometimes bemused by the common requirement in public sector contracts for a minimum level of public liability insurance: there is often woeful ignorance of what is likely to be covered by such insurance, and so long as the contractor can produce a certificate showing he has insurance for a sufficiently large amount, the likelihood of being able to claim doesn't get questioned. The chances of a claim by contract counterparty under public liability insurance are extremely small.

Basic **product liability insurance** covers injury to persons or property arising from defective products. It does not cover repair or replacement of the products themselves. That would normally require **product recall insurance**, which is much rarer.

Finally, **professional indemnity insurance** covers liability for negligent advice or negligent design.

Unless it is required in a particular industry – for instance solicitors must have professional indemnity insurance – and apart from employer's liability and motor insurance, none of these types of insurance is compulsory, so any given supplier may not have it, or may not have sufficient cover.

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To get the benefit of the insurance, the third party claimant first has to establish her claim against the insured business. In most cases there must be a legal liability –for example liability for a defective product under the [Consumer Protection Act 1987](#). The outcry over PIP breast implants is far short of proving that any particular implant is defective or has caused harm. In the PIP case the claimant could be the patient trying to claim direct against the manufacturer, or could be the buyer of the product from PIP wanting to recover its own loss if it compensates its patient or customer.

Insurance usually exists to protect the policy-holder, and third parties normally have no direct right to claim under it (motor policies are different). It is up to the insured business to decide whether to claim on its insurance, and the policy will be subject to limits and exclusions, or may be void for breach of conditions or non-disclosure – eg if the insured manufacturer had deliberately used sub-standard materials. A common condition of product recall insurance excludes recalls forced on the manufacturer by government or a regulator – to prevent authorities passing liabilities to insurers they would not otherwise have, perhaps under the pressure of a public scandal.

The position changes slightly where the policy-holder has become insolvent. Its rights are transferred to the third party claimant under the [Third Parties \(Rights Against Insurers\) Act 1930](#) (to be replaced by the [2010 Act](#) when the Government decides to bring it into force). Both Acts invalidate a condition terminating cover on insolvency, and the new Act will remove the need to sue the insolvent company. The Acts prevent the proceeds of the insurance claim falling into the insolvent estate and being distributed to the creditors generally.

Insurance written on a "claims made" basis requires a claim to have been made while the policy was in force. If no claim was notified to the insurer during the policy period, no claim can be made subsequently. Product liability insurance may be on a "claims made" or "claims arising" basis. So the insurance could have expired before the third party makes her claim, especially if the business has ceased trading and stopped paying premiums.

In the case of a foreign manufacturer, the policy terms may well be under foreign law, though the Third Parties (Rights Against Insurers) Act probably applies to UK claimants against the foreign insurers after insolvency, if the foreign law would not allow them to claim.

Further reading: a good explanation by Airmic of business insurance generally, including the different types of cover, is [here](#). An excellent summary of the law on product liability and product recall insurance by Herbert Smith is [here](#).

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