
Comparative Study on Consumer Protection in Indonesia through Mechanism of Product Liability Insurance

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Abstract:

This research discusses and analyzes consumer protection in Indonesia through product liability insurance mechanism. Insurance institution becomes important to transfer producer's liability risk for the products he produced for consumer's consumption or use, if consumers suffer accident and or loss because of consuming or using such product.

In Indonesia, the intention to materialize legal effort of Consumer Protection has existed since 1998 with enactment of Law Number 8 of 1999 on Consumer Protection. To face business law development especially in insurance area which its impact on legal protection for consumers of product in general, at present it is necessary to have a reform and or regulation which certainly will be able to anticipate the development of business, in creating and implementing contracts in insurance business practices.

The research method used in this research is normative-qualitative with comparative approach. The outcome of the research shows that product liability insurance has an important role in protecting consumers' interest in the current Indonesian society.

This product liability insurance provides guarantee for consumers to receive compensation if the products being used cause injuries/loss, even such compensation is not only for the consumer who uses the product but also for bystanders when the product is being used. In mechanism of product liability insurance, producers have to pay premium for products insured which its value shall depend on quantity and type of product, risk level for products insured.

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1. Introduction

The insurance institution becomes important to transfer the risk of the producer's responsibility for the product to be consumed by the consumer, if the consumer has an accident and/or loss resulting from consuming or using the product. Insurance also has a function and purpose that is very far and wide beyond the interests of individuals and includes risks that can be taken into account and that can not be predicted.

Some important reasons, for the existence of research on the transfer of responsibility of business actors through product liability insurance. First, to protect consumers from losses due to an accident due to consuming or using the product. Second, reduce the burden of producers and also consumers, against losses due to accidents consuming or using products. Third, the improvement of product quality.

In Indonesia, the desire to realize Consumer Protection law efforts has been around since the 1980s. The effort was only realized in 1999 with the issuance of Law No. 8 Year 1999 on Consumer Protection. As revealed by Colin Scott and Julia Black, that the problems facing consumers are:

"Do you believe in a used car salesman giving the right information about a car? Will the new drug you buy will have an impact? Does your developer know what he really does? Does HP emit brain-fighting airwaves? Is chocolate that is said to contain low fat content is really low fat content? Do you pay the correct price for your newly purchased stereo? Do you have any idea how the price should be?"

Consumer regulations are intended to establish that consumers are protected against their rights to, producers or suppliers of goods and services.

The raising of Law No. 8 Year 1999 on Consumer Protection, has given hope to the people of Indonesia, namely the hope that consumers get adequate protection for losses suffered by consuming a goods and services. The protection is not only for low-quality goods but also for goods that endanger human life. For example, food, medicine and drinks. Law No. 8 Year 1999 on Consumer Protection, has guaranteed legal certainty for consumers. Prior to the introduction of this law, many people viewed the position of consumers as weak and business actors less concerned about consumer rights. The Civil Code, the Criminal Code, and other regulations relating to consumer protection are not sufficient.

The importance of product liability insurance is to reduce the burden of producers and consumers, on losses from accidents consuming products. Free trade and technological progress have implications for the diversity of products traded by producers in a market, in terms of type, quality, price or rule of law attached to the product. All this will certainly result in the amount of risk that will be faced both by consumers and producers, in a both relationship. Risk is an uncertain condition that

results in loss and insecurity, this is where the insurance agency is needed as a risk transfer agency.

Insurance is intended to anticipate the claim for damages arising from the use of the products produced or sold, But on the other hand, insurance is also a cost associated with the responsibility of products borne by the company in its business activities. In terms of risk transfer needs, the insurance company acts as the insurer for the lawsuit filed by the consumer. Insurance institutions are intended to meet the demands or demands of society in creating a balance of interests of consumers and business actors or producers, by providing a scope of guarantee on the risk of liability resulting from an accident or damage suffered by the consumer.

In Indonesia, although the practice of the mechanism of responsibility insurance, but the arrangement is still partial and not specifically the legislation governing it. Frans Lamury Chairman of the Indonesian Insurance Mediation Board (BMAI) confirmed that insurance products in the form of product liability insurance already existed in Indonesia since the fifties and more developed again in the seventies. In the developed countries product liability insurance has become a liability and there are separate rules about insurance responsibility.

2. Methodology

The research method used in this research is normative juridical research method. Normative juridical research is a study that refers to the legal norms contained in legislation and court decisions relating to the transfer of risk and responsibility of business actors in the perspective of consumer protection. This research have done through comparative study of other countries such as the United States and Britain.

The study also examined data on both primary legal materials, secondary law materials and tertiary legal materials, among others by collecting all legislation or law that transfer of risk and responsibility of business actors in the perspective of consumer protection in Indonesia, the United States and the United Kingdom.

In order to obtain accurate data, then the following steps are taken: First, the study of literature, the way taken is to read, study, cite, compare and connect the legal materials of legislation and literature, so as to become one Easy to process. Second, conduct interviews on parties related to the problems studied, namely interviews to Insurance Companies, Insurance Associations and others who deal directly or indirectly with this research. Data Processing in this research is done through stages (1) Editing, which is checking the data carefully to avoid from errors of data collected. (2) Classification, data that has been collected and then classified based on their respective subjects, this processing is done to avoid errors in the data grouping. (3) Organizing, data that has been collected and then sorted in accordance with the grouping, in order to avoid errors in the sense in accordance with systematization of materials.

Analysis of data that has been processed and then constructed qualitatively, which gives meaning and interprete each data that has been processed then described in a comprehensive and in-depth form of systematic description of the sentence to then drawn conclusions. There are three stages: data reduction, data presentation, and data verification. The three stages will be done simultaneously.

3. Results

3.1 The Importance of Product Liability Insurance

Product liability insurance is an important issue that needs to be studied and discussed in depth to get a solution to the loss suffered by consumers due to the use and/or use of a product. Attendance of product liability insurance, On the one hand can provide a guarantee to the consumer for compensation losses experienced. On the other hand, the existence of product liability insurance will be able to assist producers on the compensation of consumers especially large losses. Thus, product liability insurance can provide benefits to both producers and consumers.

Benefits for producers, among others, can ease their responsibility for the demands of consumer reparations, especially on a large scale, their position can be replaced by insurance companies to pay for losses. While profits for the consumer is the guarantee and clarity of the party responsible for the replacement of losses that he experienced.

Benefits for manufacturers in the insurance of product liability closure, as mentioned above, the insurer/insurance company takes over the position of the liability/producer In the procedure of consumer liability, in case of any claim from the consumer, either outside or in court.

In the concept of product liability insurance, The producer is required to pay premium on the insured product whose value depends on the amount of the insured product. Premiums paid by the manufacturer is used as a fund for the replacement of losses experienced by consumers of the producers concerned.

Regarding to the construction of an agreement in the insurance of product liability, one of the most important and most difficult questions is whether the parties are actually committed to doing anything that has been committed or simply doing their best to secure the interests of the implementation of the contents of the agreement. This question then spawned the next question. Whether the parties to the agreement may be held liable as a consequence of the denial of the treaty resulting from an error which is not by him. In this connection how to relate these responsibilities to the errors that occur. Agreement is the link between responsibility and error, in the form of consequences experienced by consumers.

3.2 Policy and Mechanism of Product Liability Insurance

The review of the construction of the agreement in the insurance of product liability will begin by looking at the product's liability insurance policy, the object of the product liability insurance agreement, the risks in product liability insurance.

An insurance agreement constitutes a risk agreement whereby the insurer is liable to pay for events occurring specifically specified in the agreement. Insurers provide compensation to the insured when a predetermined event occurs. Because contractual obligation is absolute, and that absence of fault is no defence. Implementation of insurance services rely heavily on the moral aspect, good faith. Utmost good faith is the root of any insurance agreement. Without it, can be ensured that the provision of insurance generates loopholes and even fraud.

The insurance agreement actually represents an attempt to achieve corrective justice in the sense of Aristotle. But corrective justice is not enough. In the context of a liability insurance agreement, John Rawls's fairness principle is being relevant to placing the glory of the insurance agreement. The principle of fairness becomes a description of the good faith implementation by the parties.

The essence of the liability insurance activity is to provide a guarantee to a third party or the insured to obtain compensation for the occurrence of events that may occur. Events that may occur is a risk that becomes a burden. Insurance broke the load.

In the perspective of insurance, events that are within the scope of the possibility of something or someone, no matter how small a potential that can eliminate the economic value or even the life of a person. Therefore, the insurance business is to assess the possibility and what the financial value that can be used as protection (coverage).

There are three kinds of disadvantages that can be filed that is (1) economic damages, (2) non-economic damages, and (3) punitive damages. Claims apply to almost any kind of insurance. Economic damages can be identified with the civil suit of material loss. Technically the loss can be calculated and measured. Non economic damages is same as the civil lawsuits of immaterial losses. A loss that can not be verified its value, the calculation is very subjective because it involves abstract aspects such as, suffering, loss of happiness, and others. While punitive damages are a guilty verdict of the court against the responsible party. Punitive damages are the result of the demands of policyholders or consumers who are harmed from consuming or using products that are defective, failing or imperfect through courts.

Submission of claims is based on loss of property and is related to events to losses suffered. Consumer losses are caused by manufacturing failure to provide precautions that will prevent accidents or defective products. The liability insurance policy covers two things: "First, property damage is defined as either (a) "physical injury to tangible property, including all resulting loss of use of that property," or (b)

"loss of use of tangible property that is not physically injured." Second, an "occurrence" means "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Claim submission is not only based on insurance agreement (policy), but also connected with economic loss rule. There are four things contained in the provisions of economic loss rule commonly found in the policy are:

1. Statement "We will pay some amount to the insured for loss caused by physical injury or property damage to which the insurance applies. Condition, physical injury or damage due to the insurer must find a link between claims with economic loss. Property is protected by an insurance policy.
2. Insurers will not necessarily grant the claim submitted, "They would point to two parts of the basic insuring language: the requirement of an "occurrence," and the requirement of either "bodily injury or property damage." These provisions, insurers would argue, should knock out coverage for losses that fall within the economic loss rule. If this is correct, then the general liability coverage in the market does match up with the underwriting and risk allocation concerns reflected in the economic loss rule."

There are two things that need to be ascertained or agreed upon in the settlement of a claim. First, the claim must also be within the scope of what is called an occurrence. The event (occurrence) is said to be an accident that includes perenaan or exposure continuously or repeatedly resulting in dangerous circumstances. This is the subject of negotiation and even debate between the insurer and the insured. The debate is resolved in the courts let alone there is uncertainty in the definition.

3. Claims that are economic loss and are in the period of validity will not be resolved in case of moral hazard, because: Perhaps the strongest insurability concern would be moral hazard. If the loss is the failure to live up to the contract's performance obligations, resulting in a diminished value or quality of service, then the presence of insurance could reduce the insured's incentives to live up to the contract.

Physical injury or property damage does not receive compensation, when evidence is found to be fabricated.

4. Claims submitted by policy. However, insurance agreements always declare a matter of limitation. There are two kinds of policy limits to file claims. First, the factence limit determines how much the insurer must pay for all claims arising from one event. Second, aggregate limits are applied to limit the insurer's liability to the kinds of claims, no matter how many events are involved.

An insurance policy is nothing but an agreement or a contract. The agreement is in written form And must comply with all applicable regulations, as described in Article 380 of the California Insurance Code: "The written instrument, in which a contract of insurance is set forth, is the policy".

Before each insurance institution issues an insurance product liability policy, they must have certain underwriting information from the insured. This information may be collected using a written proposal form or by other means. Because the insurer bases its acceptance on risk and premium on the information provided, it must be accurate. Important information that will be taken into account by the insurer is as follows:

- (a) The type of product and the dangers attaching to it, e.g. pharmaceuticals are a heavier risk than paint-manufacturers.
- (b) The past records of claims, since the past is often a guide to the future.
- (c) The turnover. Premium is related to turnover by applying a rate for each £ 1000 turnover. An initial premium is charged on estimated turnover, subject to adjustment at the year end, when the correct turnover is known. Where there are exports to the USA, a higher rate may be charged because of the increased risk in that country.
- (d) The experience of the proposer in the business and the time he has been established in that business.
- (e) The limit of indemnity. The higher the limit, the higher the premium.

Insurance product liability has become an important issue considering in the era of free trade and economic globalization, Consumer positions often do not get adequate legal protection. It is acknowledged that the dimension of economic globalization to national industry and trade has led to the production of various types of consumable goods or services. This condition provides benefits for consumers because the needs of consumers of goods or services desired can be met. Even consumer freedom to choose various types and quality of goods/services in accordance with the desires and capabilities of consumers increasingly open (consumer sovereignty).

For the sake of appropriation of consumer rights adequately in an increasingly open trading system, in particular to protect the interests of consumers of goods and services products that may harm consumers, it should be accompanied by the responsibility of business actors as set forth in the Consumer Protection Act.

In Indonesia, although there is a practice of liability insurance mechanisms but the arrangements are still partial and there is no specific legislation to regulate them. Frans Lamury, Chairman of the Indonesian Insurance Mediation Board (BMAI), confirmed that insurance products in the form of product liability insurance already existed in Indonesia since the fifties and further developed in the seventies. Duane J. Gingerich says of this: "Indonesia does not yet have specific product liability legislation addressing the legal liability of manufacturers and sellers to compensate

users, buyers and even bystanders for injury or damage suffered on account of defective goods. Nevertheless the Indonesian Civil Code (which is based on the Dutch civil law system) provides a framework of tort and contract law principles within which to consider product liability issues in Indonesia.”

In the field of product supervision related to product responsibility insurance, especially for medicinal and food products, Indonesia has BPOM (Badan Pengawas Medicines and Foods). BPOM serves to, protect the public from drugs and foods that are at risk to health, and has the following tasks:

1. Arrangement, regulation, and standardization.
2. Industrial licenses and certifications in the pharmaceutical field based on Good Production Methods.
3. Evaluate the product before it is allowed to circulate.
4. *Post marketing vigilance* including sampling and laboratory testing, inspection of production and distribution facilities, investigation and law enforcement. *Pre-audit* dan *pasca-audit* iklan dan promosi produk.
5. Research on the implementation of drug and food control policy.
6. Communication, information and public education including public warnings.

BPOM as regulator and product traffic filter, especially food and medicine, in Indonesia is responsible to supervise and regularly evaluate the circulation of goods in the field. Sweeping and investigation of new or old products must be routinely run, both domestic and imported products. BPOM not only see the visible and administrative requirements, even laboratory tests. The reality in Indonesia at this time there is insurance product responsibility provided by an insurance company:

Which company in the business sector needs this Insurance? Companies in manufacturing, non-manufacturing, and non-business (organization) businesses have the same level of requirement for liability insurance. These companies are:

1. *Manufacturing Company:*

- a) Consumer goods: food and beverage, household and personal items, cooking oil, and others.
- b) Pharmaceuticals and related industries: medicine, medical devices, and others.
- c) Automotive: tires, spare parts, accessories, vehicle assembly, and others.
- d) Stationery: paper, and others.
- e) Textile and its supporting industries: yarn, fabric, garment.

2. *Non-Manufacturing Companies:*

- a) Finance: Banks, securities companies, leasing companies, and others.
- b) Construction: Development consultants, contractors, property agents, and others.
- c) Insurance: Insurance companies, reinsurers, brokers, and others.
- d) Tourism: Travel agents, hotels, restaurants, recreational parks, and others
- Trading: department store, supermarket/hyperstore, dan others.

- e) Others: Car rental, outsourcing company, building management (apartment, office, mall, hotel), event organizer, and others.
3. *Non-Business Institutions (Organization):*
- a) Health: hospital, clinic, and others.
 - b) Education: school, college, course, and others.
 - c) Foundation.
 - d) Non-governmental organization.
 - e) Pension fund.

An important event that has become a valuable lesson for Indonesians is the recent loss of consumers and producers, with the explosion of 3 kg LPG gas tubes (including related components, stoves, gas regulators and gas hoses). Victims are already falling, property/economic losses, bodily injuries and even the loss of human life should have awakened all circles (government, society and business associates) of the importance of this product's liability insurance.

In the context of a positive law prevailing in Indonesia, a consumer if harmed in consuming goods or services may sue the loser. Parties here may mean producers/manufacturers, suppliers, wholesalers, retailers/sellers or those who market products; Depending on who did or did not do the deeds that cause harm to consumers, even death.

The researcher believes that the impact and magnitude of the loss will not be so widespread if the gas cylinder and its accessories have been covered with product liability insurance, as it will be easily known and sought accountability from related parties, and most importantly, in indemnity insurance compensation mechanism Products, the victims are compensated properly by the insurance company.

Another important and horrendous event related to the insurance product liability context is "Pertamina's premium gasoline sued to damage the fuel pump of the car". If Pertamina closes with the insurance of product liability for the premium gasoline it produces, surely there should be no confusion about which party is responsible for the event. Fortunately there were no casualties in this event.

Product liability insurance will lower the producer's risk costs and increase their ability to respond to compensation for the occurrence of food poisoning or consumer victims. Indemnification by the insurer will also reduce the pressure on the government that arises from potential bailouts that are threatened by bankruptcy due to claims that drain the financial resources.

4. Conclusions and Recommendations

First, the conclusion of the first issue of product liability insurance has an important role in protecting the interests of consumers in Indonesian society at this time, for the following reasons:

In product liability insurance, the insurance company shall indemnify the producer/insured against the legal liability to pay for losses and legal costs in connection with the unintentional injuries suffered by persons, unintentional loss/loss of property Occurs during the period of insurance incurred by products made, supplied, or sold by the insured within a particular territory and related to the business. This product liability insurance provides a guarantee for the consumer to obtain compensation if the products he uses incur losses, even this compensation is not only for consumers who use the product but also for those who are nearby when the product is used.

Product liability insurance is one of the important mechanisms in consumer protection, and it is also one way to alleviate the burden of the producer if it is responsible for a product consumed by the consumer that causes the loss, since the risk has been transferred to the insurer or the insurance company. In addition producers will attempt to improve the quality of products produced due to increased supervision from the insurer so that the standard of the product was really fulfilled so that the insurer would be responsible for any losses incurred.

Secondly, concerning the issue should the mechanism of product liability insurance in Indonesia carried out and regulated. The position of the product liability / product responsibility needs to be considered, since the consumer loss issue must be accompanied by an analysis of who should be and to what extent the accountability is charged. Responsibility for an item produced by a company or industry, in the juridical sense commonly referred to as product liability. The product responsibility of the producer at this time is only to provide product warranty, then if the consumer wants to protect himself against the product, he can do the first party insurance, for example on the purchase of a car, where the consumer is paying the premium.

As it is known to apply the principle of law that any person who commits an act with an adverse effect on another, shall bear the responsibility for his actions. Attributed to first party insurance, here is an injustice, because the manufacturer as the maker of the product is the responsible party, should pay the premium, not the consumer / buyer. The mechanism of product responsibility insurance, ie third party insurance, is a mechanism that must be used to protect consumers who suffer losses from consuming a product.

References:

Amstrong, J.J., Sembiring, 2006. *Strict Product Liability Dalam Institusi Hukum Ekonomi : Harapan Dan Cita-Cita Sebagai Kaidah Hukum Berlaku Di Suatu Negara (Studi Kasus Pada Perkara Masyarakat Konsumen Air Minum Di Jakarta Dalam Memperjuangkan Hak Memperoleh Ganti Kerugian)*, Program Pascasarjana Fakultas Hukum Universitas Indonesia.

- Arnold, 1957. Products Liability Insurance. Wis. L. Review, 429.
- Atiyah, S.P. 1989. Introduction to The Law of Contract. London: Clarendon Press.
- Central Chamber Law Corporation. 2005. Model Commercial Contracts and Letters. Singapore: Thomson, Sweet And Maxwell Asia.
- Colin, S., Black, J. 2000. Cranston's Consumers and The Law, (London : Edinburgh Dublin).
- Cowells, G.J. 1977. The Situation in Europe, European Insurance Perspectives. Paper Seminar, Product Liability and Insurance, A Two-day Seminar Organised by Lloyd's of London Press, Ltd., May 19-20.
- Craig, F., Stanovich, A. and Stanovich, T. 2002. Risk Managers, Duty To Defend in the CGL Policy. IRMI online.
- Djoko, Prakoso 2004. Hukum Asuransi Indonesia, Penerbit Rineka Cipta, Cetakan ke 5, Jakarta.
- Dworkin, M.T. and Sheffet, J.M. 1985. Product Liability in the '80s. Journal of Public Policy and Marketing, 4, 69-79, Published by: American Marketing Association.
- Erman, Rajagukguk, 1997. Agenda Pembaharuan Hukum Ekonomi di Indonesia Menyongsong Abad XXI. Unisba. No.33/XVIII/1/1997.
- Fletcher, P.G. 1996. The Basic Concepts of Legal Thought. Oxford: Oxford University Press. Fordham Law Review.
- Frech, E.H., Hamm, G.W. and Wazzan, C.P. 2006. An Economic Assessment of Damage Caps in Medical Malpractice Litigation Imposes By State Laws And The Implications for Federal Policy And Law. Journal of Law-Medicine Summer.
- Husni, Syawali dan Neni Sri Imaniyati (Penyunting), 2000. Hukum Perlindungan Konsumen (Bandung: Mandar Maju).
- Keating, C.G. 2004. Rawlsian Fairness And Regime Choice in The Law of Accidents.
- Kellam, J.J. (Ed) 1995. Product Liability in the Asia-Pacific, Legal Books.
- Mayerson, S.M. 1997. Perfecting and Pursuing Liability Insurance Coverage a Primer for Policyholders on Complying with Notice Obligations. Tort and Insurance Law Journal, 12(4).
- O' Connor, F.J. 2003. Insurance Coverage Settlements and the rights of Excess Insurers. Maryland Law Review.
- Reinman, M. 2003. Liability for Defective Products At The Beginning of The Twenty-First Century: Emergence of A Worldwide Standard. American Journal Comparative Law, Fall.
- Rothschild, P.D. and David W. Carrol, W.D. 1986. Consumer Protection Reporting Service, (Maryland: National Law Publishing Corporation).
- Sinder, A.S. 2001. The Gramm-Leach-Bliley Act And State Regulation of The Business of Insurance-Past, Present And ... Future? North Carolina: University of North Carolina School Law of Banking Institute, April.
- Soerjono, Soekanto, Pengantar Penelitian Hukum. 1986. Jakarta. UI Press. Tahun.
- Sri, Redjeki Hartono 1997. Hukum Asuransi dan Perusahaan Asuransi:, Sinar Grafika, cetakan ketiga, Jakarta.