Product Liability

Contributing editors
Gregory L Fowler and Simon Castley

2016

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Product Liability 2016

Contributing editors

Gregory L Fowler and Simon Castley
Shook Hardy & Bacon LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2008
Ninth edition
ISSN 1757-0786

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Global overview

Gregory L Fowler
Shook, Hardy & Bacon LLP

The 2016 edition of this product liability survey, like those in years past, is intended to assist counsel in understanding developments in our respective national product liability laws and, based on that understanding, developing global product liability and risk minimisation strategies. While there is scope for arguing that the various national product liability regimes are becoming normalised as they continue to develop, it is also true that there remain critically important differences in both the procedural and substantive laws that make each jurisdiction's product liability system unique. The reader is thus encouraged to seek advice from any of these well-qualified authors concerning the challenges posed by the product liability laws in their countries.

As we survey the world of product liability today, one of the largest current questions facing many countries is how to handle the fallout from admissions by Volkswagen that a 'defeat device' was used in some models of its clean diesel vehicles, amounting to over 11 million vehicles worldwide. Governments around the world are investigating whether Volkswagen violated a variety of types of laws including consumer and safety standards, environmental standards and vehicle emissions standards. Switzerland has gone so far as banning the sale of certain Volkswagen diesel models. Claimants' lawyers are also entering the fray in a big way. In the United States, a massive multi-district litigation has consolidated hundreds of actions against Volkswagen for centralised pretrial discovery and motion practice. Class actions have also been filed in Canada and Australia. Before it is all said and done, and that may not be any time soon, government regulatory and criminal lawyers, along with civil product liability lawyers, will all play a role in untangling this situation.

Procedural and substantive changes in the law continue to reshape the product liability landscape. Consumers' demand for greater 'access to justice' in Latin America, for example, continues to drive legislation that has resulted in several notable developments for product liability claims. Argentina has adopted a revised Civil and Consumer Code that took effect from 1 January 2016. Among other features, the new Code, which has retroactive application, creates strict liability for certain products and activities, permits courts to shift the burden of proof to manufacturers and explicitly excludes certain disputes – including actions involving the rights of consumers – from arbitration agreements. Argentina also adopted a new User and Consumer Code that creates tribunals with exclusive jurisdiction over consumer claims, which are heard on an expedited basis. Despite low jurisdictional limits for compensatory damages, these new courts may still award large punitive damages under the Consumer Protection Act. These reforms have had an immediate impact in Argentina. The Court of Appeals in Civil Proceedings has already decided that the new provisions on arbitration agreements will apply to agreements made before the code became effective. Elsewhere, Brazil, Ecuador and Costa Rica updated their civil procedure codes in 2015. Ecuador's changes included the elimination of provisions shifting the burden of proof and allowing courts to order injunction relief without notice to the opposing party, the exclusion of consumer protection claims from the scope of summary proceedings, and prohibitions on courts awarding provisional remedies where a judgment is pending on appeal (with limited exceptions).

In Asia, the Hong Kong Law Reform Commission's working group on class actions continued its work during 2015 and early 2016 to prepare a draft bill introducing the Commission's recommendation for an opt-out class action for product liability claims, among other causes of action. In mainland China, new amendments to the Civil Procedure Law took effect from January 2013, introducing a number of changes to the way cases will be litigated against manufacturers. For example, government agencies or authorised social institutions may bring public interest litigation for environmental pollution, infringements of consumer rights or other public interest matters. There are also provisions for fast-track and small-claim litigation, and evidentiary tools that address electronic evidence and the appointment of forensic investigators on factual issues. China continues to adopt legal reform measures aimed at advancing the rule of law including procedural interpretations related to class actions and court filing reforms that make it easier to file lawsuits.

At the end of 2013, Japan adopted a proposal to expand its existing consumer group litigation mechanism to permit collective actions for damages based on consumer claims. Korea, however, continues to debate the expansion of its Consumer Basic Act to permit broader class actions for consumer damages. In addition, there are continuing efforts to amend the Korean Product Liability Act to create a presumption that a product is defective if either the defect occurs within an area under the exclusive control of the manufacturer or the damages caused are of a kind that would typically be the result of a product defect. A separate bill would permit punitive damages where manufacturers are aware of a product defect but failed to take corrective action and consumers were injured as a result.

Elsewhere in the Pacific, Australia continues to expand its class action regimes. Class actions are presently only allowed in federal courts and in the state courts of Victoria and New South Wales. In 2015, the Western Australia Law Reform Commission submitted a final report and recommendation to the Western Australia Parliament to adopt a similar class action regime for the state, as did the state of Queensland in 2014.

The class action regime in South Africa initially received much-needed clarification from the country's Supreme Court in November 2012. In two price-fixing cases against various bread companies, the Court ruled that the classes should not be admitted and in doing so, provided helpful guidance on things like the application of certification criteria, the need for a clear class definition and the assessment of whether there is a triable issue. Nevertheless, the Court failed to adopt a strong predominance requirement and left the door open for 'mass personal injury' claims. Soon after, the Constitutional Court reviewed the matter, and, although it agreed with the Supreme Court on many points, it ruled that the certification criteria are not conditions precedent to proceeding with a class action. Instead, certification is granted where it is in the interest of justice to do so, which might occur where only a few certification criteria are met or might not be granted even if all criteria are met. In May 2016, a South African High Court gave the go-ahead for gold miners to bring personal injury silicosis cases as a class action suit, creating the largest class action suit in South Africa's history.

The European Commission released its long-awaited initiative on collective redress in 2013. It recommended, but did not require, member states to adopt class actions in the areas of competition claims, consumer protection, environmental protection, and data privacy. The Commission has also identified features that such class action models should include. Member states had until the middle of last year – 2015 – to comply, and the Commission is currently evaluating the compliance and determining whether more binding action is warranted.

Among the member states, the governments of Belgium, France and Lithuania adopted class action laws in early 2014. The class action procedure in France's new Consumer Act requires a determination of general liability before a class is certified and class members opt in. Personal injury claims are excluded, but the government has included a similar class action

model as part of the new National Health Law and a general purpose class action model is included in a pending bill by the Ministry of Justice. This model would permit personal injury claims based on harms caused by a health product, broadly defined. Belgium and Lithuania also adopted class action laws in March 2014. In contrast to France, their models include a preliminary certification stage, but with wider scopes that permit personal injury claims. Reforming or creating collective redress procedures remained a topic of legislative proposals across other European states in 2015 with proposals being considered in Italy and the Netherlands.

In addition to these procedural changes that affect product manufacturers, in 2013, the European Commission released a new package of measures seeking to improve the consistency of product safety rules. The proposal would only apply to non-food products and would provide better coordination of the way in which national authorities monitor and enforce consumer product safety rules. This new legislation is expected to take effect this year.

While many countries are seeking to strengthen consumer protection and access to justice, the Organisation for Economic Co-operation and Development (OECD) has increased access to information by launching a global online consumer product recall portal in October 2012. The portal provides easy access to the latest information on products recalled in Australia, Canada, Europe and the United States. Thus, consumers can check whether a product they plan to buy has been recalled in another country and inform their purchasing choices accordingly, even though there may not have been any reported incidents in their own country or any recall due to differences in the governing consumer product safety standards. A global product safety standard is evidently the OECD's goal.

In sum, we believe that global product liability litigation will continue to present challenges for product manufacturers. What follows is a multinational overview of potential product liability risks with a country by country summary of:

- their respective court systems, including the roles of lawyers, judges and juries, if any, as well as the nature of trials or hearings;
- theories of recovery available for product liability claims (strict, tort, contract, fraud, etc) and potential defences;
- discovery procedures available – disclosure and document production requirements – and the role of experts and company witnesses; and
- important means for assessing potential risks, such as the status of class actions, damage awards, fee arrangements, and efforts to introduce or expand these types of access-to-justice provisions.

Before I close, please allow me a parting word about my long-time friend and mentor, Harvey Kaplan, who has been a mainstay in the international product liability bar for several decades up until the time of his retirement at year-end. During his career, he both witnessed and helped shape the development of product liability at home and abroad. He was there virtually from the beginning of modern product liability law. Harvey was a hands-on participant in the development of product liability law in the US and in many countries where he regularly worked counselling and representing his clients. Harvey has contributed not only to this publication as co-editor, but also to countless others over the years. We will miss seeing his keen insights in this space and we wish him all the best in his retirement as we endeavour to build on the work he began.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

Law Business Research

Product Liability
ISSN 1757-0786

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

LACCA
LATIN AMERICAN CORPORATE COUNSEL ASSOCIATION

Official Partner of the Latin American Corporate Counsel Association

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Sponsor of the ABA Section of International Law