



Product Liability

in 37 jurisdictions worldwide

2009

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Global Overview

Harvey L Kaplan

Shook Hardy & Bacon LLP

Events in 2008 demonstrated how rapidly financial havoc and litigation risk can spread to shareholders and consumers across the globe. As these trends continue in 2009, product manufacturers must have a firm grasp on their risk-management plan.

The autumn 2008 report by Lloyd's of London, 'Litigation and Business: Trans-Atlantic Trends', concludes: 'In principle, any company with an international dimension to its business could find itself being sued at any of its global locations.' This observation continues from its spring report, 'Directors in the Dock', in which Lloyd's concluded that boards of directors are allocating more resources to litigation than ever before – already 13 per cent of their time is spent discussing litigation – and many expect this amount to increase over the next three years.

This drain on resources results in lost opportunities for investment and product innovation at a time when these are needed most. Lloyd's, therefore, urges businesses to take note of the accelerated pace of global legal changes, particularly in the area of class actions, litigation funding and intercontinental forum shopping.

Multinational product manufacturers are at least somewhat familiar with the perils of US class actions. In the past few years, they have also learned about new legislation and debates in many European and Latin American countries seeking to adopt or expand class actions.

For example, in November 2008, the EU Consumer Commission released its Green Paper on collective actions. The report focused on the need to increase the availability of collective redress by improving access to funding, simplifying admissibility and standing requirements, and reducing the risk of paying high litigation fees. Notable class action developments have also continued elsewhere. In April 2008, Argentina adopted a more robust class action measure that extends to product liability claims and allows for the award of sizable punitive damages.

Any discussion of current trends in global product liability risk must surely mention China, whose exports made headlines in 2008. In fact, a class action was filed within China over the melamine-contaminated milk that reportedly caused serious injury for many children and even death.

The expansion of class actions has brought the call for options to fund this costly litigation. In May 2008, the Victorian Law Reform Commission in Australia made eight recommendations on litigation funding to achieve greater access to justice in the civil justice system. Similarly, in November 2008, the Civil Justice Council in the UK recommended changes to their civil justice system that included the adoption of contingency fees.

These recent developments are, of course, just the 'tip of the iceberg' for the complexities of transnational product litigation facing companies in 2009. The solution offered by Lloyd's is to adopt 'formal, proactive strategies' to monitor and manage emerging risks with the help of government authorities, specialists, and risk-management consultants.

To begin crafting a more proactive strategy, one needs to understand the product liability landscape. We believe the country reports assembled here offer a useful roadmap to survey in each of the countries covered in this book:

- the type of court system, including the respective roles of lawyers, judges and juries, if any, along with the nature of the trials or hearings;
- theories of recovery available for product liability claims (strict, tort, contract, fraud, etc) and potential defences;
- discovery procedures available – disclosure and production requirements – and the role of experts and company witnesses; and
- other important means for assessing the threat – class actions, damage awards, and fee arrangements.

The reader is encouraged to seek the advice of any of these well-qualified authors to tailor their company's global product liability strategy.

