NEWSLETTER

PRODUCT LAW AND ADVERTISING

INTERNATIONAL BAR ASSOCIATION LEGAL PRACTICE DIVISION

the global voice of the legal profession

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IN THIS ISSUE

FROM THE EDITOR

From the Editor

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As usual, this newsletter features a subject-oriented section covering the analysis of a specific topic of interest to the committee and a section on recent developments in different jurisdictions. This particular issue features a very interesting survey carried out concerning product liability in the Asia-Pacific region and several contributions concerning that subject from other regions.

We hope that our members and those persons attending the annual meeting in Singapore will join us in our committee's working sessions (for full details of sessoins, see page 3).

Whether you are attending or not, you are very welcome to send us your ideas, comments or suggestions concerning future committee newsletters, publications and working groups.

Enjoy the newsletter and we hope to see you in Singapore!

Contributions to this newsletter are always welcome and should be sent to the Publications Officer, Gabriela Mancero-Bucheli, at the address below:

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Singapore 2007

The Product Law and Advertising Committee is planning to hold the following sessions at Singapore, 14-19 October 2007

Show me the miles – loyalty programmes

Joint session with Leisure Industries.

Nearly all of the delegates attending the annual conference will belong to one of the many loyalty programmes that exist, ranging from air miles to hotel loyalty, from credit card to supermarket shopping programmes. The black, gold or silver elite cards will feature prominently in many lawyers' briefcases. This session will examine the legal issues surrounding these programmes. How can programmes be changed unilaterally? What rights are available to the programme participant? What are the data protection issues? As a bonus, the Leisure Industries Section is in the process of securing 500 miles with their favourite mileage programme for all attendees of the session.

0930 – 1230 WEDNESDAY

Alternative methods of payment

Traditional methods of payment are, in particular, cash payments, payments by cheque and payments by transfer. This session will discuss the following:

- payments via internet portals (like Paypal); and
- payments via mobile devices like mobile phones.

The session will deal with the following issues relating to such methods of payment:

- the technical execution of such a payment;
- the regulatory framework involved (in particular whether the service provider needs a banking concession);
- the contractual relationship between the involved parties, payer, payee and service provider, as well as their rights and liabilities; and
- potential risks and liabilities caused by fraud and crime.

Harold R Shupak *Shupak & Co, London, England*

0930 – 1230 THURSDAY

International Sales, Franchising and Product Law Section session

Total recall

This session will examine the issues which arise if there is the need for a product recall of an article that has been sold and distributed under a worldwide franchise agreement. Utilising a hypothetical scenario it will address the legal issues from the perspective of international sales, franchising and product law. The session will examine such issues as contract terms, warranties, choice of law provisions, the rights and liabilities of the various parties involved in the distribution chain, responsibility for the returned product and managing product disposal. The session will also focus on dealing with governmental agencies and statutory notification obligations, managing and addressing consumer rights to compensation and managing customer expectations.

0930 – 1230 MONDAY

RECENT DEVELOPMENTS

Argentina

New food advertising regulations in Argentina

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In May 2007 the Argentinean Federal Office for Food and Drug Control (ANMAT) enacted Regulation Nr 2335/2007, creating the Advertising Commission, a commission comprising 13 members with jurisdiction, inter alia, to control drugs and foods advertising throughout the entire Argentinean territory. This Commission is not the only public office with jurisdiction to control food advertising; similar powers are also vested in local authorities, as well as other federal agencies. Food advertising must comply with general rules or principles of advertising (ie those with which any sort of advertising must comply), as well as with specific food-related advertising regulations. This article will briefly refer to general advertising regulations and specific food advertising regulations, as well as the powers authorities have to control advertising.

General advertising regulations

Article 42 of the National Constitution provides that users and consumers have the right to the protection of their health and safety, and to adequate and truthful information.

In addition, the Consumers' Defense Act Nr 24240 and the Fair Trade Act Nr 22802 also apply. The Consumers' Defense Act stipulates that providers of goods and services shall give consumers objective, truthful, detailed, efficient and sufficient information regarding the essential characteristics of the goods and services offered. The Fair Trade Act prohibits advertising using misrepresentation and/or concealment which may lead to deceit or may confuse consumers with regards to the nature, origin, quality or characteristics of the advertised goods.

Food advertising regulations

Regulation 20/2005, enacted by the Health Ministry in 2005, introduced significant changes to food advertising. First, it introduced the governmental post-advertising control (ie with no need of prior clearance by the authorities for certain advertising materials) for certain specific food products (dietary supplements) that required prior administrative authorisation before advertisements could be released. Secondly, it expanded the control on advertising to every kind of media, including audiovisual media. In doing so, the health authorities advance over the jurisdiction and/or the powers of other governmental agencies, such as the Federal Communication Bureau (COMFER), the agency in charge of controlling the content of audiovisual media.

Additionally, Regulation 20/2005 introduced ethical criteria for food and drug advertising, further regulated by ANMAT's Regulation Nr 4980/05 establishing, inter alia, the following ethical guidelines:

1) advertisements shall be in Spanish, without prejudice of the optional use of foreign words;
2) food products shall not be advertised as 'new' after two years from their first release to the market, and/or if it is an 'old' product with minor changes;
3) advertising shall not include phrases involving governmental authorities, such as, 'advertisement authorised by the National Health Authority', or the like;
4) advertising that consumption of a product guarantees the consumer's health is banned;
5) advertisements may not change a product label if it has been approved by the National Health Authority;
6) advertising that a food product contains therapeutic properties and/or suggesting that it cures and/or calms and/or prevents diseases is banned. An advertisement may only claim that the product 'helps or contributes to the prevention of' certain diseases;
7) comparative advertising is allowed – from a sanitary point of view - as long as it does not create confusion in consumers, it does not denigrate other products, and it does not constitute misleading advertising; and
8) advertising shall not target children under 12 without adults' advice.

Finally, food advertising shall also comply with the provisions set out in the Argentinean Food Code, a health regulation applicable to certain foods and beverages.

Jurisdiction to control

The federal authority with jurisdiction to control and enforce the food advertising regulation outlined above is the ANMAT, through the Commission mentioned above. In addition, other agencies may have concurrent jurisdiction on the same advertising materials, such as the Secretariat of Commerce and the Domestic Trade Office for issues under the Consumer Defence Act and/or the Fair Trade Act. The Domestic Trade Office is also involved in controlling food advertising activities, if the advertising in question infringes the provisions contained in the Fair Trade Act (ie if an advertisement infringes the aforementioned food legislation *and* it also amounts to misleading advertising pursuant to the Fair Trade Act). Indeed, in recent cases, two major multinational companies whose adverts infringed the Advertising Food Regulations were not sanctioned by the Health Authorities but they were fined by the Domestic Trade Office.

AUSTRALIA

Product liability in the Asia-Pacific region

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Overview

Widespread reform of product liability laws has taken place in the Asia-Pacific region since 1992. The reliance on the provisions of the 1985 EC Product Liability Directive (Directive 85/374/EC) as a model for reform has provided some measure of uniformity in the region. Australia, Korea, Japan, Taiwan, Indonesia, Malaysia and the Philippines have introduced laws similar to the EC Directive.

Otherwise, the product liability laws of the Asia-Pacific region are characterised by diversity. A mosaic of legal rights exists under contract, tort and statute in most countries. In many of these jurisdictions, product liability is only just beginning to emerge as a significant body of law. With many countries going through a period of economic development, some legislatures are only now beginning to recognise the need to address consumer protection and the legal liability of manufacturers in the region.

The diversity of approaches to product liability is a reflection of the diversity of legal systems in the region. Some countries such as India, Singapore and Hong Kong do not have a specific body of law dealing with product liability. Instead, consumer protection is dealt with under general principles of the common law or statutory provisions applicable to each state. The laws of some jurisdictions share a common law heritage (Australia, New Zealand, India, Malaysia, Hong Kong and Singapore), while others have mostly continental European origins (the Philippines, Japan and Indonesia).

Over the past three years, Clayton Utz, an Australian law firm, has undertaken a survey of product liability risks in the Asia-Pacific region. Specifically, the survey has sought to assess the impact of legislative reforms in the area of product liability throughout the region since 1992. The purpose of the Clayton Utz Asia-Pacific survey was to identify product liability trends and to provide a baseline for comparison in the future, assisting manufacturers with risk management and insurers in setting premiums.

The survey also suggests that the experience in the Asia-Pacific region is likely to correlate to the European experience. While there are some 'hotspots', including China, the United States remains the global product liability anomaly. Most respondents to a study conducted for the European Commission in the European Union in 2003 thought that the adoption of the EC Directive had increased the prospects of product liability claims being brought only 'a little'. One of the conclusions that emerges from both the Clayton Utz survey and the EC study is that it is really the United States which is different and the US experience is not being replicated in either the Asia-Pacific or Europe.

Reforms to product liability laws in the region

During the last 15 years there has been widespread reform of product liability laws throughout the Asia-Pacific region. The following timeline illustrates the wide geographical extent of the reforms:

1992	Australia enacted product liability laws based on the 1985 EC Product Liability Directive and introduced a class action procedure into the Federal Court of Australia. Concurrently, the Philippines introduced the Consumer Act of the Philippines into its laws, the product liability provisions in it also being based upon the EC Directive.
1993	Against the background of its national compensation scheme, and despite suggestions that the EC Directive was the emerging international standard in the Pacific, New Zealand rejected any need for product liability legislation based on the EC model given the existence of its National Compensation Scheme, but passed a Consumer Guarantees Act to give consumers additional rights based on implied product warranties. During 1993, the People's Republic of China also enacted two laws, the Product Quality and Quantity Law and the Consumer Rights Protection Law, enhancing consumers' rights.
1994	The People's Republic of China's reform example was swiftly followed the following year by Taiwan when it promulgated its Consumer Protection Law based on the EC Directive.
1995	Following vigorous debate, during which Japanese consumer organisations advocated the introduction of product liability laws similar to those existing in the United States, the Japanese Product Liability Law of 1994 based upon provisions of the EC Directive came into effect.
1999	After legislative debate lasting over a decade, both the Indonesian and the Malaysian parliaments passed Consumer Protection Acts based on the EC Directive.

2000	Korea passed its Product Liability Act, again based on the EC Directive, which came into effect on 1 July 2002. Cambodia passed its Law on the Quality and Safety of Products and Services.
2003	Australia debated a possible tort law crisis resulting in tort law reform. Taiwan added class action provisions. China also introduced a quality and safety mark, the China Compulsory Certification (CCC) mark affecting manufacturers in some 19 industry groups and 132 product categories.
2004	Product liability reforms were announced in Thailand based on the EC Directive: these remain pending. A Memorandum of Understanding between the US Consumer Product Safety Commission and its counterpart, the General Administration of Quality Supervision, Inspection, and Quarantine (AQSIQ) of the People's Republic of China, was also signed.
2006	Australia passed laws excluding causes of action based in misleading and deceptive conduct and false representations as a cause of action in product liability personal injury claims, except if the death or personal injury results from smoking or other use of tobacco products. In China, a new Farm Product Safety Law also came into effect banning the sales of farm products that fail to meet safety standards.
2007	China proposed the introduction of laws equivalent to the US motor vehicle 'lemon laws'. These laws seek to provide regulations as to the responsibility for the repair, replacement and return of domestic use vehicle products.

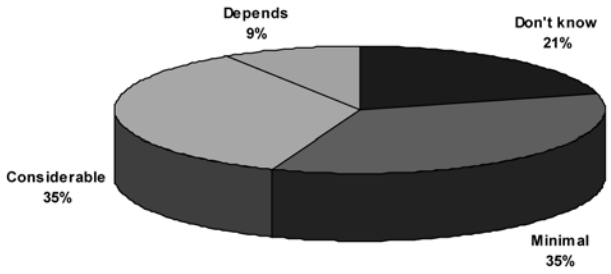
However, the results of the survey show the experience of product liability claims in the region to be similar to that in Europe, with the US experience of significant numbers of claims not being replicated.

Summary of the results

In summary, the Clayton Utz Asia-Pacific survey found that:

- Overall, 44 per cent of respondents thought that the reforms had increased or greatly increased product liability risk for manufacturers distributing goods in the region. However, 39 per cent of manufacturers and 28 per cent of insurers thought implementation of the reforms had not changed product liability risks.
- Unanimously, 100 per cent of insurers/brokers thought that there had been an increase in the number of product liability claims in the Asia-Pacific region since the reforms. 100 per cent reported that there had been an increase in settlements. Overall, total respondents thought the increase was 0–20 per cent. However, 78 per cent of respondents, in explaining why they could not return completed surveys in any detail, reported that they had no claims in the region, and the balance reported that they had experienced no increase in claim numbers. The risk profile of foreign manufacturers and domestic manufacturers appears to be different. Overall, 37 per cent of total respondents thought that claims against foreign manufacturers were prevalent compared to 26 per cent for domestic manufacturers.
- Perhaps unsurprisingly, given that manufacturers, members of the insurance industry, in-house counsel and defendants' lawyers were surveyed, 59 per cent of respondents thought that traditional causes of actions adequately protected consumers from unsafe products (yet only 22 per cent thought it provided consumers with an efficient means of obtaining compensation).
- In terms of the impact of the reforms, 20 per cent of manufacturers thought that they provided consumers with an efficient means of compensation. The main motivations for consumers to bring actions under the reforms were reported as a perceived higher success rate and damages, with the factors of less expense and evidentiary hurdles also being identified. An increase in out-of-court settlements was identified as being due to the reforms and greater access to legal advice.

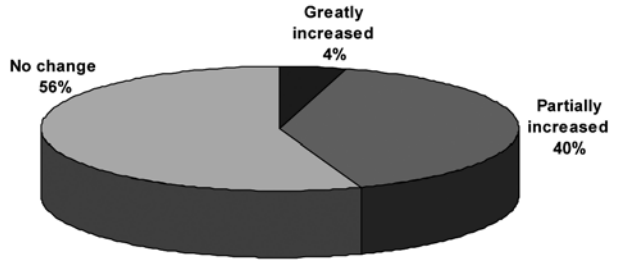
Figure 1. To what extent do you find product liability risk varies amongst different countries?



The lawyer and manufacturer groupings within the survey showed conflicting views as to the extent of geographical diversity in product liability risks between countries, from considering the risks as being 'very alike' to 'very different' from country to country. Responses indicated that the United States is considered to be the benchmark against which other jurisdictions are measured (it being thought to be 'high risk'), that Australia and New Zealand were perceived as having 'entrenched laws' governing product liability, and that manufacturers were more likely to become involved in a product liability suits in Japan and China.

In contrast, insurers/brokers almost universally saw product liability risks as being notably different between countries. It is probably reasonable to suggest that the insurers/brokers are best placed to accurately form such opinions despite being a minority of respondents, as assessment of risk and handling of product liability claims across the region constitutes their day-to-day business.

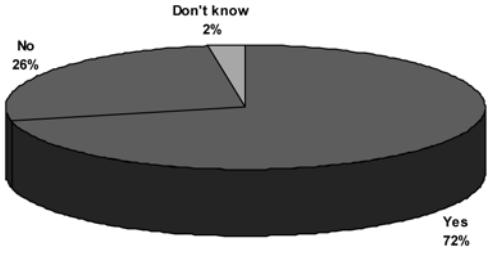
Figure 2. How has implementation of the reforms affected product liability risks?



Respondents were divided in relation to their assessment of the impact of the reforms. Overall, 44 per cent of respondents returning detailed responses thought that the reforms had either increased or greatly increased product liability risks. Of these, 39 per cent of manufacturers and 28 per cent of insurers thought that the reforms had either increased or greatly increased product liability risks for manufacturers, with 60 per cent of lawyers considering that the reforms had increased levels of consumer protection. However, 61 per cent of manufacturers and 71 per cent of insurers thought implementation of the reforms had not changed product liability risks.

Manufacturers reported overall that the difference in product liability risk did not affect their decision to distribute to countries throughout the region. A number of reasons were given: that their products were not high risk; that the company insured against product liability risks; and that, in the case of pharmaceutical products, there was an ethical obligation to distribute drugs internationally. One US corporation commented that as its products were distributed in accordance with US product liability requirements, local risks did not affect its decision to distribute to countries in the region, unless local laws had more stringent requirements.

Figure 3. Do you think there has been a general increase in product liability claims in the Asia-Pacific region over the past decade?



Overall 72 per cent of respondents returning completed surveys thought that there had been an increase in claims in the Asia-Pacific region. Significantly, however, 100 per cent of the insurance industry thought that there had been an increase in claims in the Asia-Pacific region. One would expect that insurers and brokers would be well placed to have an overall and general perspective and have statistics allowing for an assessment of such a trend. In contrast, 69 per cent of lawyers and 63 per cent of manufacturers thought that there had been an increase.

Most manufacturers, however, would appear to be unaffected by product liability claims. In characterising their experience since 1992, 78 per cent of respondents explaining why they could not return completed surveys in detail reported that they had no claims in the region and the balance reported that they had experienced no increase in claim numbers.

The risk profile of foreign manufacturers and domestic manufacturers appears to be different. Overall, 37 per cent of total respondents thought that claims against foreign manufacturers were prevalent compared to 26 per cent for domestic manufacturers.

Do you find that the number of product liability claims against manufacturers has generally increased as a result of the reforms, and, if so, by what percentage?

Of respondents returning detailed responses:

- of total respondents, 31 per cent thought that the number of product liability claims had increased as a result of the reforms by 0–20 per cent;
- of manufacturers, 24 per cent thought that the number of product liability claims had increased by 0–20 per cent;
- of lawyers, 40 per cent thought that the number of product liability claims had increased, with 33 per cent considering the increase was 0–20 per cent; and
- of insurers/brokers, 43 per cent thought that the number of product liability claims had increased but were equally divided as to whether the increase was 0–20 per cent, 21–40 per cent or 41–60 per cent.

Causes of increase in product liability claims (Figure 4)

A number of causes were thought to have contributed to an increase in product liability claims. The most important factors which respondents overall thought had either increased or greatly increased claims were increased awareness of consumer rights (65 per cent), the media (56 per cent), the implementation of the reforms (55 per cent) and access to legal advice (54 per cent). There was no real suggestion that any decrease in product safety was responsible (eight per cent). Only three per cent of total respondents thought that advertising by lawyers was a factor behind the increase.

Among the manufacturers and insurers/brokers there was generally a view that 'greater access to legal advice (ie from consumer groups)' was a leading cause for the increase in claims.

Factors influencing consumers when deciding to bring actions under traditional causes of action or the reforms (Figure 5)

Overall, the factors rated as very influential by total respondents were types of damages (36 per cent), less expense (31 per cent) and higher success rate (29 per cent). Similarly, grouping the top two categories of responses, the most important factors influencing consumers in deciding to bring a cause of action under the reforms were reported to be the higher success rate (68 per cent of total respondents rated this factor as very influential or influential), types of damages (64 per cent overall), and evidentiary hurdles (58 per cent overall).

Figure 4. Total - If you think there has been a general increase, how influential do you think the following factors have been on increasing product liability claims?

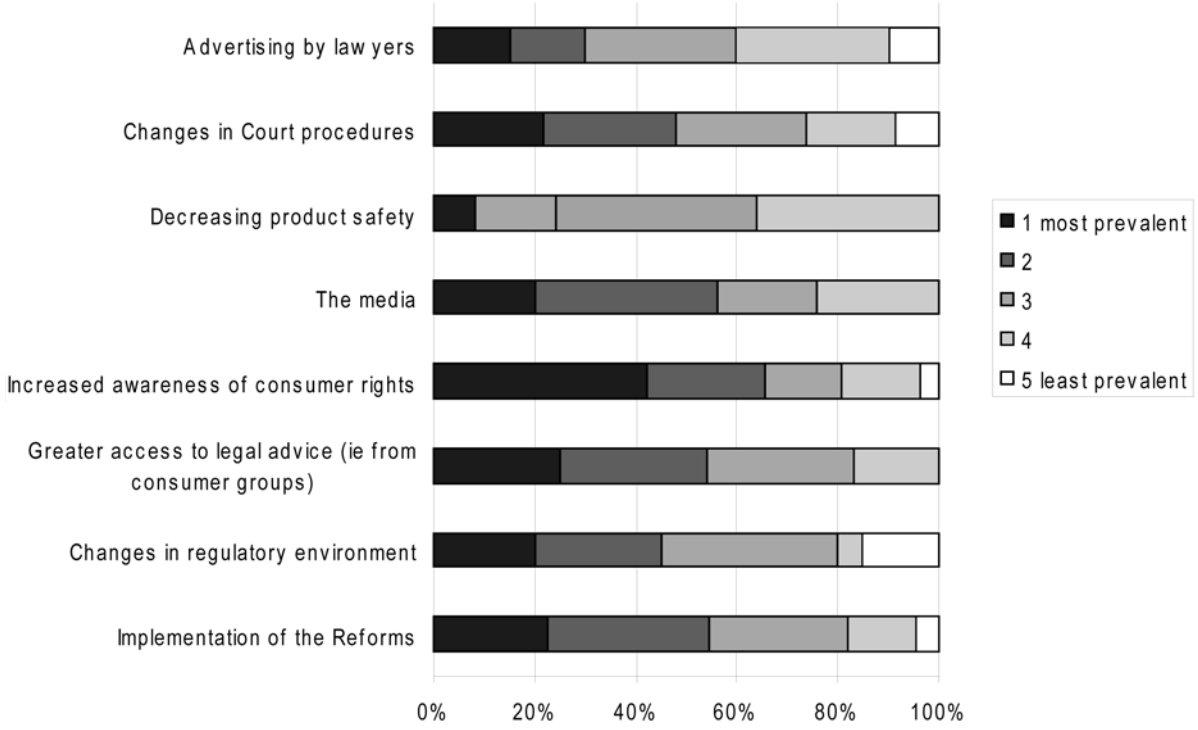
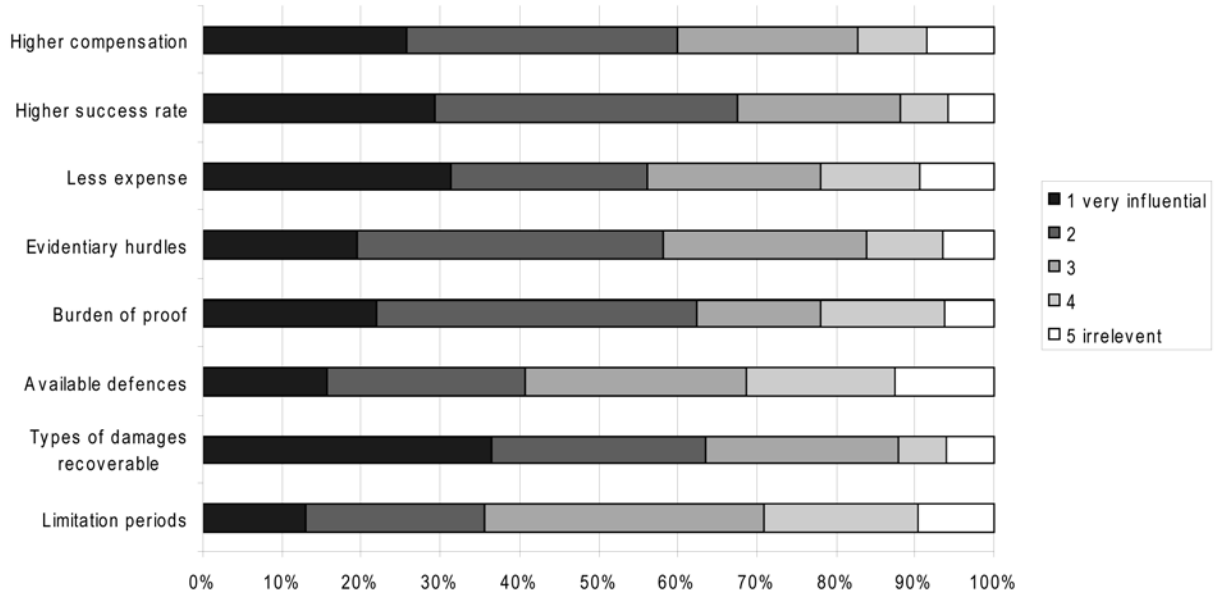


Figure 5. Total – What factors do you think influence consumers when deciding whether to bring actions under traditional causes of action or the reforms?



Increase in settlements (Figures 6 and 7)

A clear majority of respondents thought that there had been an increase in settlements over the last decade. Overall, 69 per cent of respondents (100 per cent of insurers/brokers, 70 per cent of lawyers and 58 per cent of manufacturers) considered that there had been an increase. However, only a minority of 44 per cent of total respondents and 33 per cent of insurers/brokers thought that it was caused by the reforms.

There was, however, a wide variation in assessments as to what the increase in settlements had been, with very few respondents choosing to answer these questions. Lawyers reported that settlements had increased to no more than 20 per cent, manufacturers to up to 75 per cent and insurers/brokers to up to 90 per cent.

The factors behind the increase in settlements (Figure 8)

There was a general consensus of opinion across manufacturers, insurers/brokers and lawyers that 'greater access to legal advice (ie from consumer groups)' was a key factor for the increase in settlements, with 80 per cent of all respondents considering this factor to be either influential or very influential. Changes in regulatory environment (47 per cent), changes in judicial attitudes towards claims (47 per cent), the media (50 per cent) and cultural changes (50 per cent) were also thought to be influential or very influential. In comparison, only 26 per cent of respondents thought that changes in court procedures were an influential or very influential factor and 47 per cent thought that it was of minor importance or not applicable.

Figure 6. Total – Do you believe that there has been an increase in the level of out of court settlements as a result of the Reforms?

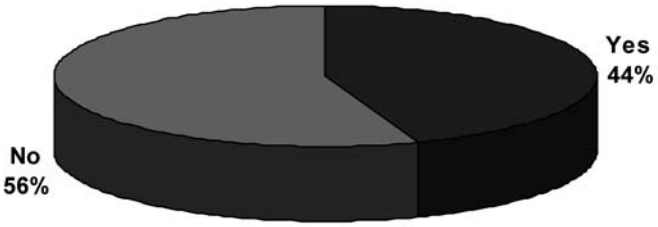


Figure 7. Total – Apart from the effects of the Reforms, do you believe that there has been a general increase in out of court settlements over the past decade?

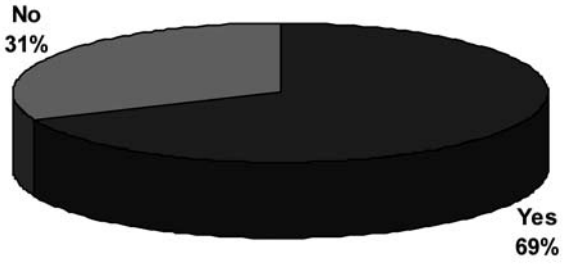
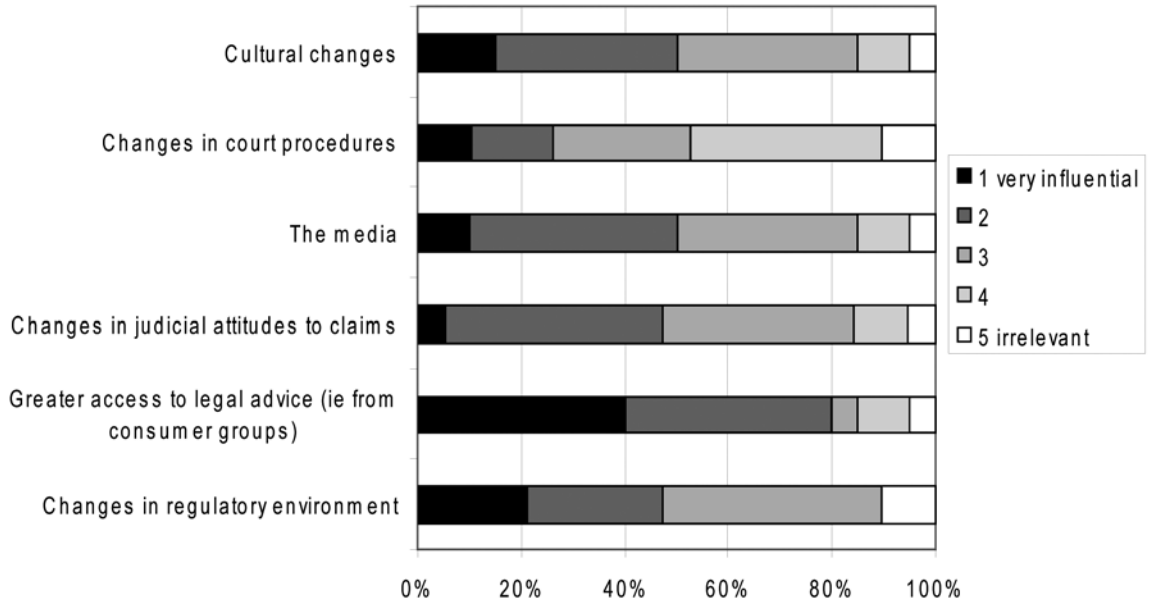


Figure 8. Total - If you think there has been a general increase, how influential do you think the following factors have been in increasing the frequency of out of court settlements?



Comparison with the European experience: the EC study

In 2003 a study was undertaken by the European Commission to investigate the practical effects of the product liability legal regimes in each of the Member States, to allow the European Commission to assess whether there was a need for future reform. The questions asked in the Clayton Utz survey were based upon those asked in the EC study to allow a direct comparison of results. The findings of the EC study are similar to those of the Clayton Utz Product Liability Survey. The results of the EC study are set out in a report *Product Liability in the European Union*, which can be found on the Commission's website at http://europa.eu.int/comm/internal_market/en/goods/liability/lovells-study_en.pdf.

The EC study revealed a growing litigation culture in the European Union. Most respondents reported that product liability claims had increased in the European Union, 55 per cent reporting that the level of claims had increased a little (and 22 per cent reported no change). Similarly, the incidence of out of court settlements had increased somewhat.

When asked to identify what the major factors were that contributed to these increases in the European Union, factors relating to media activity, access to legal assistance/advice and consumer awareness of rights were commonly cited as major factors. While the EC Directive had contributed to the increase in product liability claims and settlements, these other factors were more important.

The results of the Clayton Utz survey, however, show that reforms in the Asia-Pacific region have had less of an impact in the region than in the European Union. However, this may be due to two significant differences between the Clayton Utz survey and the EC study. First, government and consumer groups were not surveyed in the Clayton Utz survey. Secondly, a pilot survey conducted to identify any problems, for example with the design of the Clayton Utz survey, indicated that a low response rate might be expected because manufacturers thought that they did not have the requisite experience to answer as they had not experienced any claim. To increase the response rate, respondents sent the survey by e-mail were given the opportunity to either answer the survey in detail or to answer two simple questions: whether they had any product liability claims, and whether they had experienced an increase in claims.

By including the two questions, it was hoped to increase the number of respondents who otherwise might not complete the Clayton Utz survey, thinking that they had nothing to contribute and thereby biasing the results towards respondents reporting claims or an increase in claims. In the result, the number of respondents answering the two questions (96) was more than double the number of respondents who completed the survey in detail.

Conclusion

In the run-up to the 2008 Olympics, renewed attention has been focused in the region on issues relating to product safety, particularly in China. There have been media reports of a number of incidents concerning China, including:

- the deaths in Panama last year of people who had taken medicine contaminated with a chemical imported from China allegedly passed off as the harmless ingredient glycerine;
- the closure of 180 food factories in China after inspectors had found illegal dyes, industrial wax and formaldehyde being used to make candy, pickles, crackers and seafood. Reports indicate that half of the 223,297 factories inspected by the Chinese regulator, the General Administration of Quality Supervision, Inspection, and Quarantine (AQSIQ) were not completely certified;
- the sentencing to death of a former regulatory official in Beijing for taking bribes to approve substandard medicines, which included an antibiotic blamed for at least ten deaths; and
- the banning of a Chinese-made toothpaste containing diethylene glycol, a thickening agent in antifreeze known as DEG, by governments in North and South America, Europe and Asia.

As a result, governments in the region are focusing attention on product-related issues. Recent Chinese initiatives include, for example, the signing of a Memorandum of Understanding between the US Consumer Product Safety Commission and its Chinese counterpart, AQSIQ in April 2004. There have also been a number of agreements between China and the EU. An EU-China Memorandum of Understanding (MEMO/05/418) between the EU Directorate General for Health and Consumer Protection and AQSIQ was signed in January 2006. In terms of specific goods, an agreement in relation to toys was concluded between the EU Directorate General for Health and Consumer Protection and AQSIQ in September 2006. It outlines a strategy for improving the safety of Chinese toys, and, inter alia, contains a commitment from AQSIQ on tightening up inspection and supervision of toys exported to Europe. On 18 September 2006, the American National Standards Institute and the National Institute of Standards and Technology, with the Standardization Administration of China announced the availability of a standards portal (www.standardsportal.org) providing information about product standards to facilitate the trade of goods and services between the United States and the People's Republic of China.

Product liability reform internationally has typically been preceded internationally by statements from governments and consumer groups as to the need for reform versus concerns expressed by industry groups

and manufacturers as to a possible flood of claims, replicating the US experience. The Clayton Utz survey establishes a benchmark for claims in the region 15 years after the reform process had begun, long enough one would have thought for trends to have become apparent.

There is no doubt that product liability litigation is entrenched in the region. Product liability litigation is well established in Australia with there being more than 25 reported cases concerning Part VA of the Trade Practices Act 1974 (Cth) based on the EC Directive. In Japan, there are at least 21 reported decisions (as well as many unreported decisions) under the Japanese Product Liability Law.

Elsewhere in Asia, there have been at least two cases of prominence. In *Phillips v Ciba-Geigy (HK) Ltd* (unreported, 31 July 1997) a timpanist with the Hong Kong Philharmonic Orchestra was awarded in excess of HK$18 million damages, excluding interest and costs, after exposure to a chemical at the Hong Kong Academy for Performing Arts. The case of *Andrea Heidi De Cruz v Guangzhou Yuzhitang Health Products* [2003] SGHC 229 achieved attention after a prominent actress suffered liver failure after consuming Slim 10 capsules, a popular brand of slimming capsules. In comparison, however, the compensation award of S$250,000 was small, and on appeal the Singapore Court of Appeal reduced it to S$150,000.

The Clayton Utz survey, however, confirms what has been suspected through anecdotal observation and comment, that there has been no large or widespread increase in claims throughout the region. Indeed, the increase is modest and is reported to be between 0–20 per cent, with the overwhelming majority of respondents reporting that they have no claims. Rather than the reforms, increased awareness of consumer rights and the media were identified as being more important factors behind the increase in claims.

What the survey also suggests is that the Asian experience is likely to correlate to the European experience. One conclusion that emerges both from the Clayton Utz survey and the EC study is that it is really the United States that is different and the US experience is not being replicated in either the Asia-Pacific or Europe. In short, the United States remains the global product liability anomaly.

The survey results provide a benchmark against which trends in the Asia-Pacific region can be measured against the future. While manufacturers doing business throughout the region can be content that the product liability risks they face are measured, as some manufacturers are facing claims and some jurisdictions such as Australia, China and Japan are perceived to be more litigious than others, the possibility of claims cannot be ignored. The possibility also exists for further reforms throughout the region and increased consumer awareness of the potential to bring claims.

Nature of the survey

The Clayton Utz Asia-Pacific survey could be answered either online or by hard copy. In total approximately 4,800 hard copy surveys were distributed to manufacturers, insurers/brokers and lawyers. Those receiving surveys were selected either because they were based in countries in the Asia-Pacific region (including but not limited to Australia and New Zealand, China, Taiwan, Singapore, Malaysia, Korea, Indonesia, Vietnam, Thailand, the Philippines, Japan and Papua New Guinea) or were multinational companies known to do business in the region and their legal advisers.

The response rate was three per cent. The overwhelming majority of the respondents (96) chose to answer the two questions only. In all, 47 participants answered the survey in detail, comprising 25 manufacturers, 15 lawyers and seven insurers/brokers.

A majority of responses were received from Australia, the United States and Europe from companies that do business in the region. The balance of the responses was received from companies based in Asia, mainly from Singapore but also China, Japan and Korea.

In total, 143 responses were received to the survey, with 47 being detailed responses. The response rate therefore at three per cent while perhaps to be expected was numerically relatively small.

However, the calibre of the respondents, comprising leading international insurance companies and brokers and major multinational manufacturers across a broad range of industries, suggests that the results should provide a good indication of product liability exposure generally and in different industries. Manufacturers and the members of the insurance industry responding were reported to produce a broad range of goods: computers, food/beverages, chemicals, toys, retail, household appliances, pharmaceuticals and medical devices, plastics, cosmetics, general electronics, aviation, clothing, telecommunications, sporting goods, furniture, tobacco and tools. Respondents commonly also reported that they did business throughout the region generally, in either all or almost all countries.

AUSTRIA

Decision on advertising for legal services abroad

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In a recently published decision (4 Ob 62/06 f, of 21 November 2006), the Austrian Supreme Court has dealt with advertisement in Austria offering the formation of a 'Limited Company' in England. The respondent offered online to form a limited company, notarise the documents and translate them into German. The claimant argued that such advertising would infringe the Austrian lawyer's monopoly of representation, and so be unfair under the Bundesgesetz Gegen Den Unlauteren Wettbewerb (UWG), Article 1 (the Austrian Act Against Unfair Trade Practices).

The Austrian Supreme Court ruled that any form of online advertising constitutes an information service and thus the country of origin principle applies. According to E-Commerce Gesetz (ECG), Article 21 (the Austrian E-Commerce Act), the representation of parties before courts, tribunals and certain public authorities is not governed by the country of origin principle; however, the advertising for and offering of legal advice is governed by the principle of origin. In addition, the Austrian Supreme Court referred to European Court of Justice rulings that courts maintaining companies' registers do not constitute courts under Directive 2000/31/EC and so do not constitute courts under ECG, Article 21.

Since the services being advertised are not rendered on the internet, the country of origin principle of the ECG does not apply to them and so Austrian law is applicable. However, the advertised services will be rendered in England and the Austrian lawyer's monopoly of representation does not extend to services rendered abroad. Therefore, in the absence of a breach of law the advertisement cannot be considered to be unfair under UWG, Article 1.

AUSTRIA

Liability of assemblers in Austria

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Under the Produkthaftungsgesetz (PHG) (the Austrian Product Liability Act), which implements Directive 85/374/EEC (the Directive) into Austrian law, producers are liable for physical damages caused by defects in their products. Article 3 of the PHG (corresponding to Article 3, paragraph 1 of the Directive) defines a producer as the manufacturer of a finished product, the producer of any raw material, or the manufacturer of a component part, and any person who put his name, trademark or other distinguishing feature on the product.

Until recently it had been debated whether an assembler also falls under the scope of the PHG. While proponents argued that an assembler would be the manufacturer of the finished product, and thus a producer in terms of the PHG, opponents pointed out that assembly alone would not cause the PHG to be applicable and would rather constitute a finishing or make-ready service. The latter view was unanimously accepted for products that were intended to be assembled by the customer, since in such cases professional assembly would constitute an additional service. Thus, the proponents offered various solutions for the definition of assemblers and the delimitation between making-ready and assembly.

The decision of the Austrian Supreme Court

In the recently published decision 8 Ob 135/06 t of 23 November 2006, the Oberster Gerichtshof (OGH) (the Austrian Supreme Court) had the first opportunity to rule on this question.

In the case brought before the OGH, the respondent had assembled a glass table from a frame and a glass plate, which he had bought from different producers, and sold it to the two claimants' employer. The respondent did not put his name or any distinguishing feature on the sold product. During a tradeshow the glass plate suddenly broke and injured the claimants. No external causes for this accident could be proven.

The first instance court ruled in the claimants' favour without addressing the problem of the liability of assemblers. The Court of Appeal also ruled in the claimants' favour and stated that assemblers constituted producers under the PHG. It defined assemblers as businessmen who, by common agreement, created new products by assembling or completing other products. The glass table would constitute a new product in this sense, and since the respondent represented an indispensable stage in the manufacturing of the glass table, he would have to be regarded as assembler and thus producer.

The OGH first decided that the definition of producers under PHG, Article 3 also includes assemblers. It then affirmed the definition of assemblers by the Court of Appeal and elaborated, stating that it is irrelevant whether the assembly is done at the request of the customer. However, contrary to the opinion of the Court of Appeal, the OGH stated that it is of no consequence that an assembler represents an indispensable stage in the manufacturing of the product, since this would also be the case if the consumer performed the assembly themselves. In deciding whether a new product was created through assembly, several criteria have to be taken into consideration, such as the change of the value, the extent of the change to the product's intended use or characteristics (especially concerning possible safety risks) and the possible need for expert knowledge or special tools to perform the assembly.

Therefore, the glass table would not constitute a new product, if its assembly can be accomplished without expertise and with tools usually found in the average household. In such a case, assembly would qualify as a finishing or make-ready service, which is outside the scope of the PHG. Since the first instance court made no discoveries on the ease of assembly, and no hearing of evidence takes place before the OGH, the verdicts of the first instance court and the Court of Appeal were annulled and the case was remanded to the first instance court, which will now have to render a new judgment, giving special consideration to the ruling of the OGH.

Perspective

The OGH has not only clarified that the provisions of the PHG cover assemblers, but it has also very elegantly solved the problem of delimitation between assembly and make-ready services. The single most important (especially in the light of the ever rising popularity of do-it-yourself products), and at the same time most easily comprehensible criterion is, whether assembly requires special knowledge or tools. By investigating this one criterion, the one decisive question arises: namely, does the customer actually needs the assembler to receive a finished product?

While the OGH did not state whether the criteria have to be met cumulatively or alternatively, the question should not prove to be relevant in practice. Usually, assembled products are worth more than their unassembled components, just as the finished product will have a different intended use and pose different safety risks to its components. Thus, the question of whether the customer could easily assemble the product himself would prove to be the decisive criterion.

COLOMBIA

Proposal to amend the regime for protecting the rights of users of telecommunication services

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The progress of information technology and telecommunications requires adequate performance of services, leading to satisfied users, and thus encouraging additional consumption. It is essential to have incentives to provide good service and adequate means to rectify defective services, as have existed up to now for defective products.

In this regard, the Telecommunications Regulation Commission (CRT), the authority in charge of regulating telecommunications in Colombia, has submitted for discussion a project for protecting users, based on five essential aspects:

1) general protection of rights;
2) relevant information for users;
3) proof and certification of legal relations;
4) verification and control of services consumed; and
5) submission of petitions, complaints and remedies as tools for exercising users' rights.

General protection of rights

In contrast to the environment that surrounded the use of telecommunication services in the 1990s, individuals may now fulfil their communication needs by using different telecommunication services, eg fixed telephony, mobile telephony or the internet.

However, Colombian legislators have not caught up with technological advances, leading to differences in the degree of protection for users. Law 142 of 1994, which regulates public utilities, established the difference in protection among users by referring to household services and including those considered as essential and excluding others which, given the time the law was made, were not considered essential, eg access to the internet. Comparing the current market of different telecommunication services to that of the 1990s, it is no longer logical to maintain differences in respect to protection of users' rights. The proposed regulations suggest a general protection regime, through which minimum rights are recognised as guaranteed for users of any telecommunication service, regardless of the special characteristics of each service.

Relevant information for users

A standard form contract is usually used as the legal basis for supplying public utilities. Under this contract one of the parties unilaterally sets forth the conditions that will regulate the contract relationship, and the other adheres to it, having been informed of the conditions. This type of contract is commonly used for the supply of public utilities, under which the company renders a service to an undetermined number of users.

In order to prevent the possible abuses arising from this type of contract, it is essential to supply the best possible information to users, so that they have the necessary knowledge for taking a decision in respect to acquiring a service.

The information users get is the decisive factor in preventing possible abuses of the controlling position of the company. From the very beginning of the contract relationship, the user should have the necessary tools to make the supply of the service enforceable. Similarly, users should be constantly informed about amendments made to the conditions initially agreed upon. The proposed regulation contains an ample range of provisions favourable to guaranteeing the user both access to, and the quality of, the relevant information in respect to the services offered, contracted and used by means of the operators.

The mandatory information contains provisions related to the norms covering the rights of users of telecommunication services, and, specifically, the procedure for processing petitions, complaints and claims. The right of users of telecommunication services to receive detailed information about their invoices in respect to consumption is recognised. The intention is to supply the greatest possible level of certainty to users in respect of the relation, consumption and payment, when the payment is calculated on units consumed, and to directly decrease the percentage of claims submitted because of excessive charges and refusals of consumption charges.

Proof and certification

The draft of the resolution contains several provisions that force service suppliers to store proof of the information supplied to users as a consequence of requests for services, petitions, complaints or resources, cancellation or deactivation of services.

It is now easy for users of services to establish verbal contact with companies, through the toll-free helpline, or by other means of satisfying users' requirements, making formal written documents redundant. This way of accessing services, which itself represents benefits for users since it minimises transference costs and investment in time, also shows the disadvantage of not making proof of information supplied available for users.

The storage of proof of amounts invoiced is closely related to the acceptance of services by the users, or the desire not to continue with the service that generates the invoiced items, promoting transparency for both companies and users.

In the case of promotional offers and special offers, certain mechanisms are established, under which the companies must make clear conditions and restrictions applicable to them, and demonstrate proof that the user was informed of them at the moment of contracting the service.

Verification and control of services consumed

The proposal presents several provisions that help to guarantee users' rights to pay only for services consumed. As part of the guarantee, users may control their consumption, and may obtain compensation for any time the service has not been available due to causes that were the fault of the operators. They may not be charged for services when the services should have been interrupted at the request of the user.

The objective is that the use of services match the payment abilities of users, and that the users' particular needs are satisfied, partially guaranteeing that users are not forced to stop using the service due to lack of payment of amounts exceeding their payment capacity, thus preventing the companies from increasing their portfolio for this reason.

Petitions, complaints and remedies as tools for the exercise of users' rights

In Colombia, both the Constitution and the law allow clients to resort to complaint against entities supplying public utilities. This is called the 'right of petition'.

Law 142 of 1994 established a mechanism for guaranteeing the defence of users of household public utilities in respect to the companies supplying those services, and it created provisions enabling users to submit petitions, complaints and remedies in respect to public utilities contracts.

The provisions relating to the right of users to present petitions, complaints and remedies (PCR) are generally incorporated in the proposed regulation. The creation of these norms has the purpose of carefully regulating how PCRs should be presented, the way they should be complied with by the companies and the mechanisms by which the decisions and replies in respect to them should be communicated.

To enable the control and surveillance authorities to carry out their functions regarding the protection of the rights of users of telecommunication services, it is proposed that companies keep a detailed record of PCRs presented and that they adequately communicate their replies.

DENMARK

Product liability in Denmark

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The EEC Product Liability Directive was implemented in Denmark by virtue of the Product Liability Act, which was passed in 1989. Prior to the enactment of the Product Liability Act this legal area was governed by a set of rules developed in case law and based on the principles of the Danish law of tort. As the Product Liability Directive, and consequently also the Product Liability Act, does not cover all aspects of product liability, the original set of rules, which has a broader scope, has remained in effect, acting as a catch-all, especially in cases involving professionals. However, the two sets of rules are materially more or less identical.

The following is a short discussion of the impact of the Product Liability Act on product liability in Denmark and of recent developments.

The number of product liability claims

Although the area of consumer law has been the subject of intense and steadily increasing public attention in the last decade or so, it has apparently had surprisingly little effect on the number of product liability claims brought before the courts.

Unfortunately, at the moment there are no reliable, publicly available statistics regarding the number of product liability claims being litigated. However, a rough survey of rulings from the Maritime and Commercial Court, the High Courts and the Supreme Court published in the *Danish Weekly Law Reports* over the last 25 years shows a steady trend, with the number of cases concerning product liability ranging from 0.5 per cent to one per cent of all published cases. Of course, this figure does not purport to present an exhaustive picture of the caseload, but it does give a general impression of a relatively quiet area of Danish law. Moreover, it also indicates that there has been no, or at least no larger, increase in the number of product liability claims, even though the product liability regime has been affected by substantial changes, namely by implementation of the Product Liability Directive. More specifically, the Product Liability Act does not seem to have had any significant effect on the number of claims.

This conclusion could be seen as somewhat at odds with the data published in February 2003 by Lovells in a major study of product liability in the European Union and of the impact of the enactment of the Product Liability Directive, undertaken on behalf of the European Commission. On the basis of a questionnaire answered by European (including Danish) professionals experienced in the area of product liability, Lovells concluded that the general impression was that there had been a 'noticeable increase' in the number of product liability claims over a ten-year period, and that product liability claims had become more successful. However, Lovells also concluded that in general the overall number of claims remains far from overwhelming.

Without reliable, precise data the actual number of product liability claims in Denmark and the impact of the Product Liability Act thereon cannot be finally assessed. It is, however, a safe assumption that it is not overly significant.

Recent developments

Until 2006, the Product Liability Act had only undergone one, insignificant amendment. However, a number of recent developments affecting the product liability regime may possibly trigger a change in the number of product liability claims advanced, although it is far too soon to speculate how much, if at all.

As reported in the last edition of this Newsletter, the Danish Administration of Justice Act was recently amended in order to implement new rules allowing for class actions. Consumer law has been expressly named as an area where class actions would be relevant, and the Consumer Ombudsman has been authorised to initiate the so-called 'opt-out' actions, where potential claimants will be considered class members, unless they expressly choose not to be. The amendment will enter into force on 1 January 2008.

As has also been reported earlier, the Product Liability Act was amended last year as a consequence of the preliminary ruling by the European Court of Justice in Case C-402/03 *Skov Æg v Bilka*, where a provision, imposing vicarious liability for distributors solely on the basis of a product defect and regardless of any negligence on behalf of the producer, was found to be in contravention of the Product Liability Directive. Under the new rules, which are effective for products marketed on or after 10 June 2006, the distributor can still be held vicariously liable, but only if the claimant can show negligence on the part of the producer. It remains to be seen how strict the courts will be in their assessment of the producer's negligence in such cases, but it is fairly predictable that the European Court of Justice will not accept a regime where the standard is set so low that the

assessment becomes de facto non-existent, thus in effect reinstating the old rules.

Finally, in the most recent development, a new Danish Limitation Act, which replaces the old Act dating back to 1908, was adopted on 1 June 2007. The Limitation Act determines the basic statutes of limitation governing both private and public law, including claims of liability in torts and consequently also claims of product liability, which under the old Act were statute barred five years after the claimant had become aware of the cause of action. However, as claims governed by the Product Liability Act are subject to a three-year statute of limitation, a two-tiered limitation system has developed, where the general five-year rule was applied in product liability claims outside the scope of the Product Liability Act.

Under the new Limitation Act, the basic statute of limitation, which will also be applied in questions of liability in torts and product liability, will now also be set at three years. However, with regard to the absolute statutes of limitation, claims made under the Product Liability Act will still be subject to the ten-year provision set out in the Product Liability Directive, where some claims made outside the scope of the Product Liability Act will become subject to a 30-year provision in the Limitation Act. Accordingly, the two-tiered system of limitation under the Danish product liability regime will, to some degree, remain in effect.

Conclusion

Product liability remains a relatively quiet area of law in Denmark, although the adverse ruing in *Case C-402/03* was the cause of some initial confusion. It remains to be seen what, if any, impact the developments outlined above will have on the number of product liability claims. While the introduction of class actions could help raise the number of claims, the amendment of the Product Liability Act regarding the distributor's vicarious liability and the new limitation rules could possibly have a chilling effect.

HUNGARY

Product labelling in Hungary – an update

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National product labelling requirements are an important aspect of the free movement of goods within the European Economic Area. Labelling requirements qualify as quantitative restrictions under the terms of Article 28 of the EC Treaty, which provides for the free movement of goods within the European Economic Area (EEA). According to the jurisdiction of the European Court of Justice (ECJ), these product labelling requirements (just like the mandatory application of a single national language, prescription of the application of a certain product shape or information requirements) are held to be eligible to impose disproportional restrictions on Community free trade, unless they are expressly justified pursuant to the *Cassis de Dijon* ruling of the ECJ, for consumer protection or even to maintain fair trade.

In Hungary, the Consumer Protection Act sets down the horizontal rules on consumer information requirements; these provisions apply, inter alia, to user manuals, instructions and product labelling as well. The Act states that consumer information shall provide consumers with adequate knowledge for selecting goods or services, as well as providing basic knowledge of the essential attributes and characteristics of those goods and services, and the essential information necessary for consumers to assert their rights.

The general rules on product labelling are also governed by the Consumer Protection Act in respect of the above general consumer information requirements. According to these rules, goods may be marketed only if the label, affixed on the packaging or some other place, but inseparable from the goods, contains, in a legible, clear and understandable fashion, the data necessary for giving information to consumers and for regulatory inspections. Goods labels shall include:

1) a precise description of the goods, which may not be substituted by a trademark or a given name;
2) the name and address of the manufacturer or distributor of the goods in a manner which allows for identification; and
3) the place of origin of the goods, if it is not from the EEA.

It is also set out in the Act that the above information shall be indicated in the Hungarian language. However,

in accordance with the *Piageme I* and *Piageme II* decisions of the ECJ, the contents of the label may also be displayed in text, numbers, images, diagrams, markings or signs in order to comply with the above requirements.

Following the accession of Hungary to the European Economic Area, the Hungarian Supreme Court has published two important decisions with respect to the interpretation of the above provisions.

In the first case, the Consumer Protection Authority imposed a fine on the distributor of air fresheners and oven cleaners regarding the deficient labelling of these goods for retail, and the breach of consumer information requirements on product designation, especially the indication of the address of the distributor. The Authority ruled in its decision that the indication of just the name of the firm and the city where the offices of the company are located, does not comply with the above provisions of the Act, as the Act requires the exact address of the manufacturer or distributor, ie allowing for identification. The applicant filed a claim against this decision that was rejected by the court on first instance. The applicant then applied for a supervision procedure of the Hungarian Supreme Court.

The Supreme Court ruled in Decision No 2005/1271 EBH, that the clause of the Act 'which allows for identification' maintains that the exact address, including the postcode, city, street and street number (topographical lot number) of the distributor or manufacturer of the product must be indicated. The Court formulated a general provision that including the address allows for identification, provided that the customer can contact the manufacturer or distributor per se and without further conditions, ie they do not need to search for additional information in order to communicate with the person indicated on the product or packaging.

In the second case, the Consumer Protection Authority imposed a fine on the distributor of certain foodstuffs, as they merely indicated a PO Box number on the labelling of the products. The Authority held that the PO Box number does not allow for identification of the distributor, and so the label does not comply with the consumer information requirements set out by the Consumer Protection Act. The distributor filed a claim for the above decision to be overturned, claiming that the legal notion of the 'address' is not defined by consumer protection laws, and so the definition of the address should be determined on the basis of postal regulations and not by the definition of the 'seat of the company' as provided by the Firm Registry Act. The distributor asserted that the decision of the Authority provides a strict interpretation of consumer protection laws that is impermissible under the right of free movement of goods within the Community.

In its Decision No 2005.105 BH, the Supreme Court held that Hungarian postal regulations do not apply in the above matter, as they are not specifically aimed at the protection of consumers. Under the Consumer Protection Act, the indication of the address provides for the identification and contact details of the manufacturer or distributor. A PO Box number does not meet this requirement, as the distributor or manufacturer could vanish behind such an address and this could hinder inspection by the authority or the ability of the customer to contact the manufacturer or distributor if it does not match the geographical/physical location of the company.

In conclusion, the above decisions of the Supreme Court, state that indication of the manufacturers' or distributors' address on product labelling may pose a justifiable barrier to free trade as an admissible and fundamental instrument to protect Hungarian consumers. Therefore, indication of the address of the company offices (ie the physical location of the manufacturer/distributor) should aim to give proper information to consumers. Furthermore, it provides a contact for regulatory inspections as well. It should be noted that the Court has expressly refused to refer these cases on preliminary ruling to the ECJ, and has provided that the European regulation of product labelling does not provide more detailed rules than the Hungarian regulation.

IRELAND

Product law and advertising

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Over the last few years a momentum has been growing in Ireland to update the law insofar as it applies to consumers, and recently there have been two specific initiatives which are bound to impact on consumers in this jurisdiction.

Background

By way of background, the primary statute which protects consumers (when not dealing with a defective product) is the Sale of Goods and Supply of Services Act 1980. It was generally accepted that this legislation

was in need of updating to comprehensively address consumer issues, to mirror what was taking place at a European level, and to more fully protect consumers in Ireland. In particular one of the main flaws of the 1980 Act was that the principal of privity of contract applies to it. The essence of the privity rule is that only the people who actually negotiated the contract (who are 'privy' to it) are entitled to enforce its terms. Therefore, from a consumer's point of view, given that they are unlikely to have any contractual relationship with the manufacturer, they would not be able to pursue a manufacturer or distributor under this legislation. They could only pursue the supplier, with whom they would have a direct contractual relationship. In circumstances where the courts are likely to hold that the duty of care owed by a supplier is far more limited than that owed by a manufacturer this considerably weakened the effectiveness of the Act as a tool of consumer protection.

Consumer strategy group

In March 2004, a consumer strategy group was established by the then Minister for Enterprise, Trade and Employment. Its mandate was to advise and make recommendations on new national consumer policy. The consumer strategy group commissioned eight separate research projects and an international benchmarking exercise to ensure that Ireland would learn from best practice abroad.

The Group's report, *Making Consumers Count*, was presented to the Minister for Enterprise, Trade and Employment in April 2005. The report concluded that consumer power was considerably weak in Ireland in comparison to other developed countries. In many areas of commercial and public life, the consumer was considered to have no voice, and in many areas of daily life consumers felt that they had little power. The report recommended the establishment of a new agency to champion consumer rights and in May 2005, the National Consumer Agency was set up on an interim basis.

Consumer Protection Act 2007

On 21 April 2007, the legislature enacted the Consumer Protection Act 2007. The Act gave the establishment of the National Consumer Agency ('NCA') a statutory footing. The Board of the NCA is comprised is a number of individuals from diverse backgrounds who are academics, business people and consumer activists.

The Consumer Protection Act 2007 also provides for the transposition of the Unfair Commercial Practices Directive (Directive 2005/25/EC) into Irish law. Accordingly consumers now enjoy much greater protection against unfair, misleading or aggressive commercial practices. The 2007 Act outlaws over 30 different practices, including pyramid selling, prize draw scams, unwanted cold-calling, making false claims about products or services, etc. It introduces much stronger penalties and on the spot fines for those that break the law.

The 2007 Act also contains provisions to prohibit discrimination against consumers on the grounds of method of payment and also includes special powers for the NCA regarding product safety. Consumers can personally sue the company for damages arising from particular breaches as well as any officers who consented or connived in the breach. Furthermore, there is now a positive obligation on the NCA to publish a list of all traders who were fined or penalised under the Act. Being included on this list would clearly result in negative publicity and damage to a trader's goodwill.

Overall, the NCA has been given greater enforcement powers and resources than would have been the case with its predecessor (the Office of Director of Consumer Affairs). Therefore, the risks of being prosecuted for non-compliance for consumer legislation will be greater.

Law Reform Commission – privity of contract and third-party rights

Another relevant development concerns the publication of a consultation paper by the Law Reform Commission (LRC). The LRC is an independent body established to keep the law under review and make recommendations for its reform. In November 2006, the LRC published a consultation paper on Privity of Contract - Third Party Rights.

As set out above, privity of contract is a long established aspect of the law of contract. Only the people who actually negotiated the contract (who are 'privy' to it) are entitled to enforce its terms. Even if a person is mentioned in the contract – and the contract was intentionally for their benefit – the 'third party' cannot sue. Ireland is one of the few jurisdictions which retains the privity of contract rule.

In this consultation paper the LRC has provisionally recommended that, subject to certain limitations, the privity of contract rule should be changed so that a third party, who the contracting parties clearly intended to benefit from their agreement, would be able to sue if the agreement is not carried out properly.

The follow are some of the provisional recommendations of the LRC in this regard:

1) reform should be by means of detailed legislation, which in itself should not constrain judicial development of third party rights;
2) the appropriate test for establishing whether a third party may enforce terms under a contract made for their benefit should consist of :
   a) an intention on the part of the contracting parties to benefit the third party; and
   b) an intention on the part of the contracting parties that the term benefiting the third party be enforceable;
3) there should be a rebuttable presumption in favour of an enforceable third party;
4) the third party should be identified by name or by

description in the agreement, which can include membership of a particular class or group of people;

5) the contracting parties should require the consent of the third party prior to any modification or termination of the agreement;
6) the existing exceptions and remedies to the privity rule should remain in force alongside the additional powers.

Clearly, this proposed legislative reform (if adopted by the legislature) will result in complex contracts being simplified. The LRC has asked all interested parties to make submissions to them on these issues and has indicated that it intends to publish its final report on this topic by the end of 2007. It is then up to the legislature to determine if it wishes to enact legislation to implement its recommendations.

SINGAPORE

National Foods Ltd v Pars Ram Brothers (Pte) Ltd [2007] 2 SLR 1048

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Under Singapore law, the court may sometimes imply terms into the contract in addition to terms which have been expressly agreed. In such instances, the courts will imply such a term only if the term is so necessary that both contracting parties must have intended its inclusion in the contract. Terms may also be implied in a contract as a matter of statutory requirement. For instance, sections 12 to 15 of the Sale of Goods Act (Cap 393, 1999 Rev Ed) (SOGA) contain terms that are statutorily implied in a contract for the sale of goods. Nevertheless, section 14(1) of SOGA also provides that except as provided by sections 14 and 15 of SOGA and subject to any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied.

The interpretation and scope of section 14(1) of SOGA was recently examined by the Court of Appeal in Singapore in *National Foods Ltd v Pars Ram Brothers (Pte) Ltd* [2007] SGCA 23 (*National Foods*).

In *National Foods*, the plaintiff alleged that the ginger slices purchased from the defendant under several contracts had a higher ash content than was permitted under Regulation 227 of the Food Regulations. The plaintiff commenced proceedings against the defendant for breach of an implied contractual term of the contract for the sale of the ginger slices and breach of the implied contractual term of satisfactory quality under section 14(2) of the SOGA. The plaintiff argued that it was an implied term of the contract that the ash content of the ginger slices should not exceed the requirements of Regulation 227. Thus, one of the main issues before the Court of Appeal was whether it was an implied contractual term of the contracts that the ash content of the ginger slices should not exceed the requirements of Regulation 227.

The judgment of the Court of Appeal is instructive. It held that while Regulation 227 applies to the contracts, it does not operate in and of itself as an implied term of the contracts. The reasoning of the Court of Appeal was that further implied terms, which would impose additional responsibilities on the seller in respect of the quality or fitness for purpose of the goods, are not to be implied. This was because section 14(1) of SOGA unambiguously prevents the implication of contractual terms for quality or fitness for purpose of goods, other than those already stipulated in section 14 and section 15. Indeed, the Court considered that as the scope of the terms implied by section 14 are very broad, one would find it difficult to imagine a situation where parties can imply further terms relating to quality and fitness for purpose that do not already fall within the extensive scope of section 14.

Nonetheless, in ascertaining whether there was a breach of the implied term of satisfactory quality under section 14(2) of SOGA, Regulation 227 remained a key criterion. The Court of Appeal noted that where the contract is silent as to the standard that is to be expected of the goods, a good benchmark of quality would be the standards prescribed by relevant statutes, such as Regulation 227. This was reinforced by the fact that Regulation 227 is an internationally accepted standard.

As the evidence showed that the ash content exceeded the requirements of the regulations, the Court of Appeal found that the ginger slices were of unsatisfactory quality *vis-à-vis* section 14(2) of SOGA. The appellant was thus entitled to succeed on this claim.

In summary, even if the court finds that a standard imposed by government regulations for goods do not necessarily form an implied term in a contract by virtue of section 14(1) of SOGA, such a standard may nonetheless be instrumental – if not determinative in some instances – in aiding the court to decide whether the goods fall foul of the terms implied by the sections under SOGA.

TURKEY

Comparative advertising

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Legislation

The regulations relating to advertising emanate from Consumer Protection Law No 4077 (CPL), Article 16, which protects consumers against misleading advertisements. The CPL is the legislative basis for the advertising-related regulations, in which provisions relating to advertising are treated in detail. According to the CPL's main relevant provision, namely the Regulation Pertaining to Advertisement Principles (the Regulation), comparative advertisements are authorised under the following conditions:

1) the name of the product, service or trademark to be compared may not be mentioned;
2) comparing services or products of the same qualifications and features or being profited to the same requisition and demand;
3) being in infirmity with the fair competition essentials and not misleading the consumer.

Considering the practice, it would be fair to say that, despite the authorisation granted by the legislation, to advertise by comparing without being sanctioned by the Advertising Board deserves thunderous applause.

Comparative in practice and according to the Advertising Board

The prohibition regarding mention of a competitor or the name of a competing product or service is strictly controlled by the Board. Even the slightest association is banned. Except where there are highly creative solutions, this prohibition limits comparative advertising to using the superlative form (the first, the best, the cheapest, the most beloved, preferred, trustworthy etc), given that referring to a specific competitor, or a competitor's goods or services by name is not an option.

However, comparison using the superlative form without proof is another area in which the Board has competence, given its interpretation of the Law's provision regarding misleading advertising, ie that any allegation made in an advertisement is expected to be proved by its owner. The Board consults with expert governmental institutes, universities etc in examining an allegation's accuracy. However, very little is accepted as adequate proof except prizes, medals, or certificates awarded in nationally accepted contest results or by universities and scientific institutes founded by law. Thus, surveys conducted by the advertiser, magazines or foundation awards, demonstrating success rates in study groups etc are not legally safe as reliable data.

To date there have been no published decisions from administrative courts on appealed Board decisions regarding comparative advertising. However, there are some Court of Appeal decisions granted on first instance courts' unfair competition decisions relating to comparative advertising.

Approach of the Court of Appeal

In a case involving two rival companies, Aygaz and Likitgaz, marketing bottled gas used in cookers and heaters, the Court of Appeal surprisingly judged Aygaz's marketing statement ('Do not lose your precious bottles by being fooled by fraudulent imitation Likit Gaz bottles') as a defamatory unfair competition act. In fact, while 'Likit' is the name of the rival, it also means 'liquid' in Turkish. Despite Aygaz defending itself by claiming that its bottles were actually imitated, that this had been determined by a court decision, and that the statement's purpose was to alert the consumer to pirate liquid gas marketers, the court held that the advertisement was created in a way that would remind the consumer of the competitor's name, given that the 'Likit Gaz' phrases were written with capital initial letters.

In another decision, the Court of Appeal decided that the declaration 'DYO the first in painting' was misleading because DYO did not mention the field in which it was first and the allegation as displayed was too wide to be proved. The decision may be criticised under the doctrine that states that the court should have investigated whether DYO was the first in all fields of painting and then, if not, should have decided that the ad was a misleading superlative.

Conclusion

It would not be incorrect to say that case law on comparative advertising in Turkey is taking its first evolving steps. However, given the uncertainty in practice and the Board's strict approach, advertisers should, for the time being, take into account in their advertising budgets the financial penalties the Board may impose.

UNITED STATES

Product safety: the winds of change

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As a result of a series of high-profile recalls of Chinese consumer products over the past several months, the US Congress has begun a series of hearings on the status of product safety laws in the United States. Both the US House of Representatives and the US Senate conducted hearings in mid-July to determine how unsafe consumer products imported from China managed to enter the stream of commerce in the country, despite a host of regulatory agencies whose missions are to assure the safety of these very products. The consensus that emerged from the hearings is that a major update of the product safety statutes in the country is overdue.

The agencies that have been targeted for criticism are the Food and Drug Administration (FDA), the Consumer Product Safety Commission (CPSC), the National Highway Traffic Safety Administration (NHTSA) and the National Oceanic and Atmospheric Administration (NOAA). The affected products that fall under their respective jurisdictions are diverse: the FDA is responsible for pet food, toothpaste, baby formula, drugs; the CPSC regulates toys and durable infant products; the NHTSA has standards for tyres and car seats; and the NOAA addresses the safety of seafood. The statutory authority that each agency has to regulate products under its jurisdiction likewise varies widely. For example, some have mandatory recall authority (CPSC & NHTSA) and others do not (FDA and NOAA).

To date, there has not been a legislative proposal to address these disparities in a systematic way. Rather, the legislative proposals to address the problem of unsafe imports have focused on individual agency issues or topics. Senator Schumer has called for an additional tax on imports to fund more FDA inspectors. Senator Bill Nelson promised to introduce a bill to require all imported toys to have a certificate of compliance from a third party testing laboratory in the United States before being cleared by US Customs. Senator Ted Stevens promised that Chinese ATVs would soon have to meet the voluntary safety standard that the domestic manufacturers of ATVs do pursuant to a consent decree that they entered into more than a decade ago.

At the hearings, the respective heads of the health and safety agencies pointed out that their statutes did not contemplate the flood of imported consumer products that exist in commerce today and therefore did not provide tools with which the agencies could address these problems. Nancy Nord, the Acting Chairman of CPSC, developed a discussion draft of CPSC legislative proposals for the members of the Senate Commerce Committee to consider: The Product Recall, Information and Safety Modernization (PRISM) Act. Among other things, she recommended that Congress act to prohibit the sale of a recalled product after the date of the public announcement of the recall; to make it unlawful to fail to furnish a certificate of compliance with a mandatory standard under any statute administered by the CPSC or any voluntary standard relied upon by the Commission, or to issue a false certificate of compliance; and to add asset forfeiture as a potential additional criminal remedy. The House Commerce Committee already has under consideration an increase in the cap on civil penalties from US$2.8 million to US$20 million.

The White House also entered the scramble and issued an Executive Order to establish an interagency working group on import safety on 18 July 2007. This working group consists of the Secretaries from the Departments of State, Treasury, Justice, Agriculture, Commerce, Transportation and Homeland Security, as well as the heads of the Office of Management and Budget, Trade Representative, Environmental Protection Agency and Consumer Product Safety Commission. It will be chaired by the Secretary of Health and Human Services. Its mission is:

1) to assess current methods aimed at ensuring the safety of products exported to the United States;
2) to identify potential means of enhancing the safety of imported products such as best practices in the selection of foreign manufacturers, inspection of manufacturing facilities, inspection of goods before distribution in the United States; and
3) to enhance coordination among federal, state and local government agencies to safeguard the supply chain.

Taking into account the August recess of the US Congress, it is doubtful that any concrete actions will be taken soon. However, the House Commerce Committee recently announced additional hearings to be held on import safety in September and it is widely expected that the Senate Commerce Committee will follow suit. At this juncture, it is impossible to know if this attention will result in a substantial revision of the health and safety laws in the United States or a patchwork of amendments to the various statutes. But whatever the result, it is bound to have repercussions around the world as international product safety officials are linked together through a series of memorandums of understanding.

UNITED STATES

Trends in US product liability law 2007

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For nearly a decade, pejorative characterisations of the tort law system, such as 'jackpot justice', and of some of the courts that have administered it, such as 'judicial hellholes', have stood as symbols for the long-standing need for tort reform in the United States. By many accounts, however, tort law changes adopted by courts and legislatures in the United States are beginning to have their intended effect. In many states, more appropriate statutes of repose and limitations, damage caps, limitations on liability, and 'medical criteria' laws (for asbestos and silica claims) are being adopted or are being more effectively enforced. At the federal level, the Class Action Fairness Act of 2005, which expanded federal jurisdiction over class-action lawsuits, has significantly increased the number of class action cases filed in the federal courts, considered less likely than their state counterparts to certify nationwide classes against corporate defendants.[1]

Recent articles in business and legal journals have reported that 'the easy money in injury lawsuits is gone.'[2] The American Tort Reform Association has commented that 'the type of extraordinary and blatant unfairness that sparked the Judicial Hellholes project and characterized the report over the past few years has decreased across the board.' [3] Still, there is room for concern that tort and product liability law will be subject to creative expansion efforts by the leadership of the American Association for Justice (AAJ), the re-branded ATLA, most notably in the areas of public nuisance and so-called consumer protection lawsuits. Against this backdrop, we examine specific decisions rendered in the first six months of 2007.

US Supreme Court

Punitive damages

In a 5-4 decision that was the product of an atypical court alignment, the US Supreme Court reversed a US$79.5 million punitive damages award in a smoking and health case involving Philip Morris USA and the widow of a man who allegedly died from smoking-related disease.[4] The majority determined that an award based in part on a jury's desire to punish the defendant for harming persons not before the court amounts to a taking of property without due process. Because it appeared that the Oregon Supreme Court had applied the wrong constitutional standard when considering the cigarette manufacturer's appeal, the case was remanded for it to apply the correct standard. The Court did not reach the question whether a 100-to-1 ratio between punitive and compensatory awards is constitutionally 'grossly excessive'.

The issue was raised at trial when Philip Morris asked for a jury charge that would have informed the jury it could consider the extent of harm suffered by others in determining what the reasonable relation is between any punitive award and the harm caused to the plaintiff by the defendant's misconduct, 'but you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other parties can resolve their claims.'[5]

The trial court rejected this proposal and instructed the jury that 'punitive damages are awarded against a defendant to punish misconduct and to deter misconduct,' and 'are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct.'[6] According to the US Supreme Court, the Due Process Clause forbids a state from using a punitive damages award to punish a defendant for injury it inflicts on non-parties, saying there is no opportunity for a defendant to defend against the charge. The jury will be left to speculate how many other victims there are, how seriously they were injured and under what circumstances the injury occurred, and no authority supports the use of punitive damages awards for the purpose of punishing a defendant for harming others.

Justices Ruth Bader Ginsburg, Antonin Scalia, John Paul Stevens, and Clarence Thomas, who do not generally form alliances on the bench, dissented in three separate opinions. According to Justice Thomas, the US Constitution places no constraints on the size of a punitive damages award. Justice Ginsburg did not believe that the issue had been properly preserved, and Justice Stevens contended, as Justice Ginsburg had, that the Oregon courts correctly applied Supreme Court jurisprudence on punitive damages. He suggested that the Court has imposed a 'novel limit' on the state's power to impose punishment in civil litigation.[7]

Thereafter, the US Supreme Court vacated the judgment in a Ford rollover case involving a US$55 million punitive damages award and remanded it to the California Court of Appeal 'for further consideration in light of Philip Morris

USA v Williams.'[8] The jury's punitive damages award had already been reduced twice, once by the trial court and then by the court of appeal. The Supreme Court's ruling will not affect the US$27.6 million in compensatory damages awarded to a 51-year-old woman who was paralysed after her Ford Explorer rolled over in 2002. Because the Williams decision did not address whether the punitive damages in that case were unconstitutionally excessive, the California court will be limited to determining whether the jury might have inflated the award after hearing that many others, not before the court, had been injured or killed in similar rollover accidents, an issue the US Supreme Court squarely addressed in Williams.

While some thought the Williams ruling would limit damages verdicts, a Los Angeles jury was given instructions that accounted for the Court's holding and returned a punitive damages verdict against DaimlerChrysler for US$50 million.[9] The case involved an unoccupied 1992 Dodge Dakota pickup truck that purportedly shifted into reverse due to a safety defect and ran over the plaintiff's decedent after he left the vehicle believing the transmission was in park; he suffered fatal head injuries. The jury rendered a compensatory award of US$5.2 million for wrongful death. The plaintiff's attorneys were reportedly pleased that a large punitive damages verdict can be obtained even when a court instructs the jury that it may not punish a liable defendant for injuries to persons who are 'strangers to the litigation'.[10]

Foreign litigants

In a case involving foreign litigants, the US Supreme Court determined that federal courts may dismiss a case on *forum non conveniens* grounds before considering whether they have jurisdiction, if a foreign tribunal is a more suitable forum for resolving a dispute's merits.[11] Malaysia International sued *Sinochem* in a US district court while related court proceedings were pending in a Chinese court. The district court determined that it had subject matter jurisdiction over the dispute and conjectured that limited discovery might show that it had personal jurisdiction over the defendant. Regardless, the court dismissed the case on *forum non conveniens grounds*, finding that the matter could be adjudicated adequately and more conveniently in the Chinese courts. A divided Third Circuit Court of Appeals reversed this decision, reasoning that the trial court must first rule on its jurisdiction before considering whether another court would provide a more appropriate forum. The US Supreme Court decided to take the appeal to resolve a conflict among the circuits as to this issue.

Writing for the unanimous court, Justice Ruth Bader Ginsburg described *forum non conveniens* as 'a threshold, nonmerits issue', that 'does not entail any assumption by the court of substantive "law-declaring power."'[12] Because a court need only establish jurisdiction if it proposes to issue a judgment on the merits, the court held that '[a] district court . . . may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant.'[13] She characterised Sinochem as a 'textbook case for immediate *forum non conveniens* dismissal' and stated that 'where subject-matter or personal jurisdiction is difficult to determine, and forum non conveniens considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course.'[14] The Court reversed the Third Circuit's judgment.

Removal jurisdiction

Putting a halt to a somewhat unusual attempt to remove a case from state to federal court, the US Supreme Court determined that the nearly 200-year-old federal officer removal statute, which allows 'any person acting under' a federal officer to remove a case to federal court, did not apply to a cigarette manufacturer defending unfair and deceptive business practices claims.[15] Writing for a unanimous Court, Justice Stephen Breyer explored the statute's language, history, context, and purpose to rule that 'the help or assistance necessary to bring a private person within the scope of the statute does *not* include simply *complying* with the law.'[16] Because there was no evidence that the defendant had done anything more in testing its cigarettes for tar and nicotine content than comply with Federal Trade Commission advertising rules and testing specifications, the Court said nothing warranted 'treating the FTC/Philip Morris relationship as distinct from the usual regulator/regulated relationship', which does not come within the statute's terms.[17]

According to the Court, 'A contrary determination would expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries.'[18] While defendants have not often used this legal theory when seeking removal, companies that manufactured, refined, marketed, or distributed gasoline containing a purportedly toxic additive did advance the theory when seeking, unsuccessfully, to remove water contamination claims to federal court.[19] Product manufacturers attempting to rely on this removal statute in the future will have to show that when they acted, they were:

1) lawfully assisting a federal official in the performance of official duties;
2) facing 'local prejudice' under unpopular federal laws or officials; and
3) helping a federal official enforce federal law and authorised to do so on his or her behalf.

Federal preemption

As for whether federal regulation of a product insulates it from liability claims in state courts, the US Supreme Court agreed to hear an appeal in a case involving

a medical device.[20] The plaintiff allegedly suffered complications after his doctor inserted a Medtronic catheter into a badly blocked coronary artery and the catheter's balloon burst. The lower courts ruled that his state law design, labelling and manufacturing defect claims were preempted by the Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act because the device at issue received pre-market approval from the Food and Drug Administration, and the amendments prohibit states from establishing regulatory requirements different from or in addition to federal requirements. Allowing a jury to say that a device conforming to federal requirements was defective would necessarily impose different requirements on product manufacturers. According to the plaintiff's petition for *certiorari*, the federal circuits have reached opposite conclusions on this preemption issue, and a Supreme Court ruling is needed to resolve the conflict. The Solicitor General was asked to file a brief to provide the Court with the benefit of the US Government's view of the matter.

The Court was also considering whether to grant a *certiorari* petition filed in a case involving a US$6.8 million state court judgment against drug maker Wyeth, which is hoping to argue to the high court that the Food and Drug Administration's drug regulation authority bars litigation alleging problems with product labelling.[21] The issue arose in a case involving loss of part of an arm to gangrene after anti-nausea drug Phenergan® was injected into the plaintiff's artery. While the drug's label warned about risks of gangrene if used this way, the plaintiff claimed the warning was inadequate. The Solicitor General was asked to file a brief in this case as well. The cases, if appeal is granted in both, will likely be heard during the Court's 2007-2008 term.

US federal courts

Tort reform

A number of states have adopted laws requiring plaintiffs to share their punitive damages awards with the state. Such initiatives were part of the litigation abuse reforms that have been pursued by the defence bar and business interests in recent years. While a number of courts have considered issues arising under these statutes, a unique challenge faced one federal circuit in 2007.

The Ninth Circuit Court of Appeals determined that an Oregon statute which requires plaintiffs to share their punitive damages awards with the state violates neither the Takings Clause of the Fifth Amendment nor the Excessive Fines Clause of the Eighth Amendment of the US Constitution.[22] The plaintiff had successfully sued her former employer for constitutional deprivations and interference with contract and was awarded US$175,000 in compensatory damages and US$250,000 in punitive damages, of which US$75,000 was allocated to Oregon's Criminal Injuries Compensation Account (State Account). When the employer appealed, the plaintiff filed a cross-appeal, challenging the judgment entered in favour of the State Account. The court found that the plaintiff's constitutional claims were invalid as a matter of law and remanded for an adjustment to the damage awards related to those claims. Because the trial court made the State Account allocation on the basis of the punitive damages the plaintiff was awarded for her state law claims, the court addressed her cross-appeal.

According to the court, the federal courts have not considered whether punitive damages awards qualify as property for purposes of the Takings Clause. Because such awards are 'contingent and uncertain', ie they can only be awarded if the jury finds the defendant's behaviour to be malicious or reckless and decides to invoke its discretionary moral judgment against the defendant's conduct, the court determined that 'a plaintiff's interest in a prospective punitive damages award does not qualify as "property" under the Takings Clause.'[23] As for the plaintiff's claim that being forced to split her award with the state violates the Excessive Fines Clause, the court noted that the clause applies only to government acts intended to punish and that 'the split-remedy scheme is not intended to punish' plaintiffs.[24] Such statutes, said the court, are 'unrelated' to a plaintiff's culpability.[25]

Class Action Fairness Act

The Ninth Circuit Court of Appeals also considered issues arising under the Class Action Fairness Act of 2005 (CAFA) in recent months, and, while they did not arise in the context of product liability claims, the principles are likely to be applied in such cases in the future. In employment-related litigation, the court determined that the party seeking to remand a putative class action to state court under CAFA bears the burden of establishing any exceptions to federal court removal jurisdiction. [26] The district court required the removing party, ie the defendant, to show the inapplicability of the exceptions to jurisdiction, an approach the Ninth Circuit expressly rejected. The court discussed the statutory exceptions, known as 'local controversy' and 'home-state controversy', and compared them to the structure of the general removal statute and cases interpreting that legislation. The court noted that its interpretation is consistent with decisions from the Fifth, Seventh and Eleventh Circuits.

In *Progressive West Insurance Co v Preciado,*[27] the court determined that a complaint and cross-complaint filed in state court before CAFA went into effect on 18 February 2005 cannot be removed to federal court under CAFA. So ruling, the court discussed the state's 'relation back' doctrine which can, in limited circumstances, deem an amended action commenced as of the date of the original filing. Here, the defendant/cross-complainant amended his complaint after CAFA's effective date, and the plaintiff argued that the amendment commenced

a new action that substantially changed the nature of the action from an individual action to a representative action which should not 'relate back' to the earlier filing. The court disagreed and also ruled that even if CAFA were applicable, the district court correctly remanded the action to state court because Progressive West, as a plaintiff/cross-defendant, is not authorised to remove an action under CAFA.

In *Lowdermilk v US Bank National Association*,[28] a split circuit panel ruled that when a plaintiff has pleaded damages less than the jurisdictional amount, the party seeking removal must prove with 'legal certainty' that the amount in controversy is satisfied to successfully remove the case to federal court under CAFA. The case involved employment law issues and alleged that 'the aggregate total of the claims pled herein do not exceed five million dollars'.[29] Specifically, the plaintiff claimed, on behalf of a class of employees, that the defendant rounded down actual hours worked, which practice resulted in employees not being compensated for one to five minutes of the time they worked each day.

By adopting the 'legal certainty' standard, rather than the preponderance standard that defendant championed, the court joins the Third Circuit and 'guard[s] the presumption against federal jurisdiction and preserve[s] the plaintiff's prerogative, subject to the good faith requirement, to forego a potentially larger recovery to remain in state court'.[30] The court further determined that because state law provided for the payment of attorneys' fees in employment litigation, it would include the fees in determining the amount in controversy. Because the defendant 'left [the court] to speculate as to the size of the class, the amount of unpaid wages owed due to the rounding policy, and whether or not members of the class qualify for penalty wages', the court held that it had failed to prove with legal certainty that the amount in controversy meets CAFA's jurisdictional requirements.[31] The dissenting judge contended that new law was not required to decide the case, claiming that the complaint did not plead a specific amount in controversy, and thus, required the court to apply the preponderance standard.

Expert witnesses/Daubert

In 1993, the US Supreme Court established standards in its *Daubert v Merrell Dow* decision that would thereafter apply to the admissibility of expert testimony and were later codified in the Federal Rules of Civil Procedure.[32] In many respects, the standards have helped cull unmeritorious product liability claims by allowing defendants to challenge the quality of the evidence used against them well before the claims go to trial. This year, the Sixth Circuit Court of Appeals dismissed claims in a personal injury case involving an allegedly defective boom truck crane, finding that standards for the admissibility of expert testimony should be applied 'with greater rigor' when the expert is a 'quintessential expert for hire'.[33]

The expert at issue was a registered professional engineer who had been employed exclusively as an engineering 'consultant' since 1980 and had testified in a wide range of design defect cases. He had, in fact, rendered opinions on 'almost any machine', including a 'wheelchair, a deep fat fryer, a passenger elevator, an antique replica shotgun, a hay baler, a meat tenderizer, a forklift, a manure spreader, a lawn mower, a seat belt assembly, a log skidder, a concrete saw, a trampoline, and a tree stand'.[34] A magistrate judge had analysed the expert's testimony under the *Daubert* standards and found it lacking because the expert failed to test the equipment at issue in the case and because his 'opinions were conceived, executed, and invented solely in the context of this litigation'[35]

While the US Supreme Court did not include a 'prepared-solely-for-litigation' factor in its *Daubert* analysis, a number of courts, most notably the Ninth Circuit, have established it as a corollary to the 'flowing-naturally-from-independent-research' factor, which, where shown, can lead to a more lenient application of the other *Daubert* factors. As the Sixth Circuit noted, this 'would be in line with the notion that an expert who testifies based on research he has conducted independent of the litigation "provides important, objective proof that the research comports with the dictates of good science'"[36] Conversely, 'if a proposed expert is a "quintessential expert for hire," then it seems well within a trial judge's discretion to apply the *Daubert* factors with greater rigor, as the magistrate judge seems to have done in this case.'[37] Because the plaintiff essentially conceded he could not survive summary judgment without his expert's testimony, the court affirmed the grant of summary judgment in defendant's favour.

State claims – causes of action rejected

Medical monitoring

With the plaintiffs' bar creatively seeking to expand liability in personal injury cases, the best possible outcome, from a defendant's perspective, is when the courts reject causes of action outright. On a question certified to it by the Fifth Circuit Court of Appeals, the Mississippi Supreme Court unequivocally stated, after spurning the argument that it lacked authority to create and discontinue common law torts, 'Mississippi common laws continues to decline to recognize a medical monitoring cause of action.'[38] The case involved class claims for medical monitoring costs to detect disease development from beryllium exposure purportedly caused by the defendant's negligence. The question certified to the court was 'whether the laws of Mississippi allow for a medical monitoring cause of action, whereby a plaintiff can recover medical monitoring costs for exposure to a harmful substance without proving current physical injuries from that exposure?' Because

Mississippi law requires injury to prove a tort, the case was returned to the federal court with a negative response. The Fifth Circuit then affirmed the district court's dismissal.[39]

'Inadequate' warnings (Vioxx)

A Texas District Court judge, before whom nearly 1,000 Vioxx® lawsuits are pending, dismissed the inadequate warning claims, finding them preempted by federal law.[40] In 1999, the Food and Drug Administration (FDA) approved Vioxx,® an anti-inflammatory painkiller, for sale in the United States. A study later indicated that the drug increased the risk of cardiovascular thrombotic events, such as myocardial infarctions, and Merck withdrew the product from the market. Thousands of lawsuits ensued across the country, and most of them allege that Merck failed to provide an adequate warning.

In Texas, as in a number of other states, there is a rebuttable presumption that a defendant is not liable for failure to provide adequate warnings, if the warnings provided were those approved by the FDA. This presumption may be rebutted if a claimant can establish that the defendant 'withheld from or misrepresented to the [FDA] required information that was material and relevant to the performance of the product and was causally related to the claimant's injury'. Construing this language, adopted in 2003 as part of a tort reform initiative in the state, the court determined that 'plaintiffs must prove by a preponderance of the evidence that required information was withheld from or misrepresented to the FDA, such that the allegedly withheld or misrepresented information, if disclosed or not misrepresented, would have led to a different regulatory outcome such as refusal to approve Vioxx for marketing or requiring a label change'.[41] The court further determined, 'The allegedly withheld or misrepresented information must relate to the same injury complained of by plaintiff'.[42]

The court, following a line of decisions in the federal courts, ruled that a plaintiff can only invoke the 'fraud on the FDA' exception if the FDA itself determines that it was defrauded. Otherwise, said the court, 'permitting a Texas jury or judge to make the same inquiry would impinge on a uniquely federal issue'.[43] Because the FDA 'has not made a determination that material and relevant information was either withheld or misrepresented concerning Vioxx'. the court granted Merck's motion for partial summary judgment and found the Texas exception to the rebuttable presumption 'preempted to the extent that someone other than the FDA is being asked to make the determination'.[44] According to news sources, the judge planned to hold all of the state's Vioxx® cases in abeyance until the appellate courts consider the issue.[45] A final ruling from the Texas Supreme Court could take several years.

Public nuisance (lead paint)

In a split decision based on issues of statutory interpretation, the New Jersey Supreme Court dismissed public nuisance claims filed by 26 municipalities and counties against lead paint manufacturers, seeking to recover the costs of detecting and removing lead paint from homes and buildings, providing medical care to residents allegedly affected by lead poisoning, and developing educational programmes.[46]

The court examined the historic underpinnings of the public nuisance cause of action, observing that it was traditionally raised in cases involving 'conduct on one's own land or property as it affects the rights of the general public.'[47] Citing a law review article authored by Shook, Hardy & Bacon Partner Victor Schwartz and Associate Phil Goldberg, the court also discussed the influence brought to bear on the *Restatement (Second) of Torts* sections on public nuisance by those looking to redress environmental pollution.

Turning to the state's laws on lead paint in buildings, which focus on the conduct and liability of premises owners as opposed to product sellers, the court determined that even if the laws applied to the defendants, the plaintiffs were acting as private individuals in bringing their suit, because they were seeking damages, which 'fall outside the scope of remedies available to a public entity plaintiff'.[48] And because they 'have not, and cannot, identify any special injury,' which is required of private plaintiffs, the court found that their 'damages are inadequate to support a claim sounding in public nuisance'.[49]

The court further analysed the complaint from the perspective of the state's products liability statute and found the claims 'squarely within' the law's theories.[50] The court also ruled that an environmental tort action exception to the law did not apply because the legislature did not intend to include the sale of lead-based paint within the exclusion. The majority concluded, 'We cannot help but agree with the observation that, were we to find a cause of action here, "nuisance law would become a monster that would devour in one gulp the entire law of tort'."[51] While numerous cases of this type are pending in courts across the nation, it is unclear whether the court's opinion will prevail in other jurisdictions given its grounding in statutory law and the deep division among the justices who decided the case (3-2, with one abstention). Nevertheless, the opinion provides a thorough analysis of the issues and will likely be cited by product manufacturers defending similar claims.

Conclusion

Many court watchers and legal commentators have concluded that the United States Supreme Court, which completed its first full term under a new Chief Justice, is a more conservative, business-friendly place.[52] And one observer notes that the same holds true at the lower

federal court level where '[c]onservative appointees dominate almost all of the federal courts of appeals.'[ba] With high court decisions making it more difficult for plaintiffs to bring or appeal lawsuits, reining in class actions and placing limitations on punitive damages, and with legislatures willing to adopt the liability reforms sought by tort reform advocates, it seems likely that the plaintiffs' bar will face additional hurdles litigating products claims in the United States for the foreseeable future. It would be a mistake, however, to declare the bar moribund; creativity has always been its strong suit. In addition, the continuing vitality of contingency fees and the lack of a 'loser pays' system for funding litigation will ensure that product liability plaintiffs have ongoing access to the courts with little personal financial risk.

1 See Thomas Willging & Emery Lee III, 'The Impact of the Class Action Fairness Act of 2005 on the Federal Courts', *Federal Judicial Center Report* (April 2007); Brian Wingfield, 'Class-Action Law Gums Up Courts', *Forbes.com*, 15 February 2007.
2 See, eg, Michael Orey, 'How Business Trounced the Trial Lawyers', *BusinessWeek Online*, 8 January 2007.
3 American Tort Reform Foundation, *Judicial Hellholes*, iii (2006).
4 *Philip Morris USA v Williams*, 127 S Ct 1057 (2007).
5 Ibid at 1061.
6 Ibid.
7 Ibid at 1066.
8 *Ford Motor Co v Buell-Wilson*, No 06-1068 (US, 14 May 2007).
9 See Matthew Hirsch, 'DaimlerChrysler hit with US$50M Punitive Verdict,' *The Recorder, Law.com*, 12 March 2007.
10 Ibid.s
11 *Sinochem Int'l Co v Malaysia Int'l Shipping Corp*, 127 S Ct 1184 (2007).
12 Ibid at 1186-87.
13 Ibid.
14 Ibid. at 1187.
15 *Watson v Philip Morris Cos, Inc,* No 05-1284, slip op (US 11 June 2007).
16 Ibid at 8.
17 Ibid at 14.
18 Ibid at 9.
19 *In re MTBE Prods Liab Litig*, Nos 04-5974 & 04-6056 (2d Cir 24 May 2007).
20 *Riegel v Medtronic, Inc,* No 06-179 (US, cert granted 25 June 2007).
21 *Wyeth v Levine,* No 06-1249 (US, petition for writ of cert filed 12 March 2007).
22 *Engquist v Or Dep't of Agric,* 478 F 3d 985 (9th Cir 2007).
23 Ibid. at 1004.s
24 Ibid. at 1006.
25 Ibid. at 1007.
26 *Serrano v 180 Connect, Inc,* 478 F 3d 1018 (9th Cir 2007).
27 479 F 3d 1014 (9th Cir 2007).
28 479 F 3d 994 (9th Cir 2007).
29 Ibid at 996.
30 Ibid at 999.
31 Ibid at 1002.
32 *Daubert v Merrell Dow Pharm*, 509 US 579 (1993).
33 *Johnson v Manitowoc Boom Trucks, Inc,* 484 F 3d 426 (6th Cir 2007).
34 Ibid at 427
35 Ibid at 435.
36 Ibid at 434.
37 Ibid at 435.
38 *Paz v Brush Engineered Materials, Inc,* 949 So 2d 1 (Miss 2007).
39 *Paz v Brush Engineered Materials, Inc II,* 483 F 2d 383 (5th Cir 2007).
40 *Ledbetter v Merck & Co, Inc.* No 2005-58543, slip op (Harris County Dist Ct, Tex, 19 April 2007).
41 Ibid at 5.
42 Ibid at 6.
43 Ibid at 9.
44 Ibid at 10.
45 *See* Mary Flood, 'Judge Casts Doubt on Vioxx Point', *Houston Chronicle,* 16 April 2007.
46 *In re Lead Paint Litig,* No A-73-05, 2007 Westlaw 1721956 (NJ 15 June 2007).
47 Ibid at *9.
48 Ibid at *16.
49 Ibid at *17.
50 Ibid.
51 Ibid at *19.
52 *See,* eg Warren Richey, 'The 2006-2007 Term was Dominated by Notable Conservative Rulings', *The Christian Science Monitor,* 2 July 2007; Tony Mauro, 'High Court Reveals a Mind for Business', *Legal Times,* 2 July 2007; Jess Bravin, 'Barring the Door: Court Under Roberts Limits Judicial Power, Conservative Shift Sets Hurdles for Litigants; Businesses Get a Break', *The Wall Street Journal,* 2 July 2007; Linda Greenhouse, 'In Steps Big and Small, Supreme Court Moved Right', *The New York Times,* 1 July 2007; Bob Egelko, 'Rulings Seal High Court's Shift to Right', *San Francisco Chronicle,* 1 July 2007.
53 Edward Lazarus, 'Under John Roberts, Court Re-Rights Itself', *The Washington Post,* 1 July 2007.

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