



Product Liability

in 32 jurisdictions worldwide

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Law

Business

Research

Global Overview Harvey L Kaplan Shook, Hardy & Bacon LLP	3
Argentina Miguel N Armando and Luis E Denuble Sánchez Noetinger & Armando	4
Australia Moira Saville Mallesons Stephen Jaques	10
Bosnia and Herzegovina Branko Marić and Anisa Strujic-Tomić Marić & Co	17
Brazil Júlio César Bueno Pinheiro Neto Advogados	24
Bulgaria Stela Sabeva Borislav Boyanov & Co	32
Canada Douglas Harrison, Yves Martineau and Samaneh Hosseini Stikeman Elliott LLP	38
China Terence Lee and Karrie Cheung Smith & Partners	45
Czech Republic Philip Smitka and Alice Mlýnková Noerr vos	51
Ecuador Rodrigo Jijón-Letort Pérez Bustamante & Ponce Abogados	58
England & Wales Simon Castley and Aaron Le Marquer Shook Hardy & Bacon International LLP	64
Finland Pekka Puhakka and Johan Práhl Hammarström Puhakka Partners, Attorneys Ltd	70
France Florian Endrös EBA Endrös-Baum Associés	77
Germany Michael Molitoris and Boris Handorn Noerr LLP	85
Guatemala Eduardo A Mayora Alvarado and José Eduardo Aguilar Mayora & Mayora SC	92
Hong Kong Terence Lee and Karrie Cheung Smith & Partners	98
Hungary Eszter Sieber-Fazakas Noerr & Társai Iroda	104
India Gowree Gokhale, Huzefa Tavawalla and Debargha Basu Nishith Desai Associates	111
Israel Avi Ordo S Horowitz & Co	118
Italy Andrea Barenghi Barenghi & Associati	125
Japan Naoki Iguchi and Mari Shimizu Anderson Mōri & Tomotsune	132
Korea Sang Ho Han, Kwan Seok Oh and Inhak Lee Kim & Chang	139
Malta Antonio Depasquale MA&A Advocates	145
Mexico Carlos F Portilla Robertson and Gonzalo Ruy-Díaz Benhumea Portilla, Ruy-Díaz y Aguilar, SC	149
Puerto Rico Néstor M Méndez-Gómez, Heidi L Rodríguez, María D Trelles-Hernández and Jason R Aguiló Pietrantoni Méndez & Alvarez LLP	154
Romania Alexandru Ene and Razvan Caramoci Noerr Romania	161
Russia Ekaterina Kalinina and Thomas Mundry Noerr OOO	167
Slovakia Pavol Rak Noerr sro	174
South Africa Pieter J Conradie Cliffe Dekker Hofmeyr	180
Sweden Christer A Holm Advokatfirman NorelidHolm	184
Switzerland Dieter Hofmann Walder Wyss & Partners Ltd	189
Thailand Michael Ramirez Tilleke & Gibbins International Ltd	195
United States Gregory L Fowler and Marc E Shelley Shook, Hardy & Bacon LLP	201

Global Overview

Harvey L Kaplan

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The global recession has not affected the volume of product liability litigation. In a recent interview in the *Law Society Gazette*, SAB Miller's general counsel observed: '[T]he world is getting [to be] a more difficult place to do business in. There are more regulatory, reputational, compliance and governance issues, and people are getting more litigious.'

Consumer organisations are demanding greater 'access to justice' and new tools for holding companies accountable. As a result, pro-consumer legislative initiatives pose significant risks for global companies.

In 2009, the Foreign Manufacturers Legal Accountability Act (section 1606) was introduced. This Act would make it easier to sue foreign manufacturers in the US by requiring, among other things, that foreign corporations consent to state and federal jurisdiction if they choose to enter the US marketplace. In June 2010, the US Supreme Court ruled in a landmark case involving a 'foreign-cubed' lawsuit, involving a foreign plaintiff, a foreign corporation and a foreign market. The Court overruled prior case law allowing such 'foreign-cubed' cases and limited the extraterritorial effects of Rule 10b-5 of the US Securities Exchange Act of 1934. The decision holds that the Act only applies to claims arising out of securities purchased or sold in the US or listed on a US exchange. Although the decision does not concern product liability litigation, many believe that the Court's decision will limit the availability of securities class actions in the United States and thereby increase the pressure in other countries to introduce or expand class actions generally.

Indeed, this decision may fan the flames in a number of countries that are currently exploring ways to ease procedural constraints in order to enhance 'access to justice' for consumers against corporate defendants and product manufacturers. For example, in March 2009, the Mexico City legislature began considering a class action bill, which would grant broad standing to potential plaintiffs and allow recovery of punitive damages. In February 2010, a proposal to specifically allow class actions for product liability claims became law in Hungary, although an actual model to implement this provision has not yet succeeded.

Class actions continue to reshape the litigation landscape in countries that already permit class actions in product liability cases. In March 2010, an Australian federal court ruled that

the painkiller Vioxx nearly doubled the risk of heart attack among users. This was the first-ever Vioxx trial outside the US and will likely encourage others to follow suit in Australia and elsewhere.

There are, however, a few instances where the pendulum has swung in the other direction. Recently, US courts have moved from a minimal notice-pleading standard toward a plausibility standard, which requires plaintiff to state sufficient facts to prove that the case is indeed 'plausible'. This shift has already begun to impact frivolous claims in federal courts.

In the UK, Lord Jackson published his final report on potential reforms to rein in the costs of civil justice. While the corporate community supports several of these proposals, there is cause for concern in the product liability arena. For example, Lord Jackson's report proposes one-way cost shifting in personal injury suits, particularly class actions, which would allow plaintiffs to recover their costs if they prevail, but not defendants when the tables are turned. This recommendation thereby reduces the disincentive to filing unmeritorious claims and will likely lead to more claims.

Product liability litigation on a global scale presents challenges for multinational product manufacturers. The following 32-country survey provides counsel with an overview of potential risks in these countries and examines:

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

I hope that the 2010 edition of this product liability survey will assist counsel in developing global product liability and risk minimisation strategies. The reader is encouraged to seek the advice of any of these well-qualified authors to assist in that effort.

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