



Product Liability

in 33 jurisdictions worldwide

Contributing editors: Harvey L Kaplan,
Gregory L Fowler and Simon Castley

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Global Overview

Harvey L Kaplan

Shook, Hardy & Bacon LLP

The connection among countries around the world grows closer every year. This underscores the importance of keeping abreast of developments in our respective product liability laws.

Europe's economic crisis has affected markets well beyond its borders. The impact of the changes in European civil justice systems also has a global impact. We await the European Commission's final recommendations on class actions, which has the potential to reshape the way in which European consumers seek redress against product manufacturers.

The most recent class action rule, adopted by Malta in June 2012, permits class actions for claims based on violations of competition and consumer law when a 'common' issue is present. Of particular interest to product liability lawyers, the law's explanatory note states that the 'fundamental purpose of collective proceedings is to efficiently address cases of alleged mass tort and to improve access to justice'. However, the law not only lacks a predominance requirement, but it also specifically provides that a court shall not refuse to admit a claim for collective proceedings solely on the grounds that it requires individual assessment after determination of the common issues.

The manner of funding consumer litigation in Europe also continues to expand. In May 2012, England and Wales adopted the Legal Aid, Sentencing and Punishment of Offenders Act. Among other things, the Act introduces US-style contingency fees; abolishes the recoverability of success fees and after-the-event insurance premiums, and creates additional sanctions for defendants that fail to accept a claimant's reasonable offer to settle. Further regulations will soon follow, including the elimination of 'loser pays' from personal injury cases.

The demand for greater 'access to justice' in Latin America continues to drive legislation with several notable developments for product liability claims. For example, several bills to introduce punitive damages are still pending in Brazil. In Argentina, a new Civil and Commercial Code has been proposed that would create a longer statute of limitations, permit the burden of proof to be shifted, and allow for joint-and-several liability. New class action bills are also pending in Costa Rica and Ecuador.

In Mexico, litigants now have a class action model for claims against product manufacturers. The law provides for an opt-in class action procedure with certification rules. It envisions a two-phase procedure, with a first phase to assess general liability and a second phase for individual class members to claim individual relief. The first class action was filed just days after the law went into effect against two telecoms companies on behalf of a class of subscribers.

Class actions and punitive damages may also be taking hold in Asia. China's Tort Responsibility Law took effect on 1 July 2010; among other features, it includes the introduction of punitive damages for defective products. Japan has also introduced a bill to introduce class actions that, in its current form, would not exclude a claim based on product liability. Also, after many years of debate, the Hong Kong Law Reform Commission finally released its extensive report on class actions in May 2012. The Commission's working group has recommended an opt-out model that would permit product liability

and personal injury claims, but it rejected the adoption of contingency fees or punitive damages, and urged the preservation of the 'loser pays' rule. The Commission must now convert these recommendations into a draft bill, which will require further legislative debate.

The United States, on the other hand, has shown signs of moving in the other direction. Both Texas and Tennessee have now adopted tort reform bills that introduced a 'loser pays' cost shifting scheme. In addition, last year the US Supreme Court issued a ruling with significant implications for pharmaceutical litigation, *PLIVA Inc v Mensing*. The court held that federal law preempts failure-to-warn claims brought under state law against generic drug manufacturers.

However, changes in US product safety regulations also have the potential to influence manufacturers' global product safety obligations. For example, in 2011, the Consumer Product Safety Commission (CPSC) opened an office in Beijing – its first overseas office – to aid in coordinating product safety between the two countries. At the US-China Consumer Product Safety Summit, held on 13 October 2011, it was reported that, during its first year of operations, the CPSC's Beijing staff trained more than 6,000 Chinese managers, engineers and technicians. The staff also established a system to notify China's product safety agency whenever the CPSC announces a recall involving a product manufactured in China.

In a similar spirit, in April 2011, the US Office of International Programs and Intergovernmental Affairs within the CPSC issued its recommendation for achieving global harmonisation of toy safety regulations. A few months later, President Barack Obama issued an Executive Order to establish a framework for federal agencies to harmonise US regulatory standards 'involving health, safety, labor, security, environmental, and other issues' with the regulations of foreign governments. According to Executive Order 13609, 'In some cases, the differences between the regulatory approaches of US agencies and those of their foreign counterparts might not be necessary and might impair the ability of American businesses to export and compete internationally'.

In short, product liability litigation on a global scale continues to present new challenges for multinational product manufacturers. The following chapters provide counsel with a multinational overview of potential risks by examining:

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

The 2012 edition of this product liability survey is intended to 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.

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