



Product Liability

in 31 jurisdictions worldwide

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

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Global Overview

Harvey L Kaplan

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The increasing connection among countries around the world underscores the importance of new developments in our respective product liability laws. We hope the 2013 edition of *Product Liability* is helpful in that regard.

Starting with the United States, where the extraterritorial reach of its courts continues to be controversial and a cause for concern for non-US product manufacturers, whether presented in the form of a discovery application abroad, the Foreign Corrupt Practices Act, the Alien Tort Statute (ATS) or questions of personal jurisdiction. During this past term, the US Supreme Court has tried to rein in the reach of the ATS in the case of *Kiobel v Royal Dutch Petroleum Co*, finding that the plaintiffs failed to overcome a presumption against the extraterritorial application of US common law to foreign entities for alleged violation of international law on foreign soil. In the course of the next term, in the case of *DaimlerChrysler AG v Bauman*, the Court must consider whether a federal district court in California may exercise personal jurisdiction over the German car manufacturer simply because the company in question has a subsidiary in Michigan that generates considerable sales in the United States.

Of course, the risks faced by foreign entities extend well beyond the United States.

The demand for greater 'access to justice' in Latin America continues to drive legislation that has resulted in several notable developments for product liability claims. For example, Brazil continues to examine extensive changes to its Civil Code and Consumer Defence Code that could substantially alter class actions, shift the burden of proof onto manufacturers, and even introduce punitive damages. Similar efforts are being explored in Argentina, Chile, Costa Rica and Ecuador.

In Asia, new amendments to China's Civil Procedure Law took effect as of January 2013, introducing a number of changes to the way cases will be litigated against manufacturers. For example, government agencies or authorised social institutions may bring public interest litigation for environmental pollution, infringements of consumer rights or other public interest matters. There are also provisions for fast-track and small-claim litigation, and evidentiary tools that address electronic evidence and the appointment of forensic investigators on factual issues.

There are presently proposals in Korea seeking to expand the Consumer Basic Act to permit broader class actions for consumer damages. In addition, there are ongoing efforts to amend the Product Liability Act to create a presumption that a product is defective if either the defect occurs within an area under the exclusive control of the manufacturer or the damages caused are of a kind that would typically be the result of a product defect. Japan also continues to review its proposal to expand the existing consumer group litigation mechanism to permit collective actions for damages based on consumer claims.

Elsewhere in the Pacific, Australia continues to expand its class action regimes. Class actions are presently only allowed in federal courts and in the state courts of Victoria and New South Wales. In 2013, the Western Australia Law Reform Commission issued its final report recommending that Western Australia adopt a similar class action regime.

The class action regime in South Africa received much-needed clarification from the country's Supreme Court in November 2012. In two price-fixing cases against various bread companies, the Court ruled that the classes should not be admitted and in doing so, provided helpful guidance on things like the application of certification criteria, the need for a clear class definition, and the assessment of whether there is a triable issue. Nevertheless, the Court failed to adopt a strong predominance requirement and left the door open for 'mass personal injury' claims. This could be tested by another looming case on behalf of former miners seeking redress for lung diseases.

Class action efforts continue in Europe and the European Commission's long-awaited initiative on collective redress is set to be adopted during 2013. Among the member states, legislation is either being drafted or under parliamentary review in Belgium, France, the Netherlands, and Lithuania.

In addition to these procedural changes that impact product manufacturers, the European Commission recently released a new package of measures seeking to improve the consistency of product safety rules. The proposal would only apply to non-food products and would provide better coordination of the way in which national authorities monitor and enforce consumer product safety rules.

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

In sum, we believe that product liability litigation on a global scale will continue to present new challenges for product manufacturers. The following chapters provide a multinational overview of potential product liability 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, and whether there are efforts to introduce or expand these types of access-to-justice provisions.

The 2013 edition of this product liability survey is intended to assist counsel in developing global product liability and risk minimisation strategies. As always, the reader is encouraged to seek advice from any of these well-qualified authors.

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