

Product Liability

in 29 jurisdictions worldwide

2014

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



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and Simon Castley
Shook, Hardy & Bacon LLP

Getting the Deal Through is delighted to publish the seventh edition of *Product Liability*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 29 jurisdictions featured. New jurisdictions this year include Argentina, the Dominican Republic and the Netherlands.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editors, Harvey L Kaplan, Gregory L Fowler and Simon Castley of Shook, Hardy & Bacon LLP for their continued assistance with this volume.

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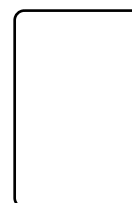
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Global Overview

Harvey L Kaplan

Shook, Hardy & Bacon LLP

The increasing connection among people and companies in countries around the world underscores the importance of keeping abreast of new developments in our respective product liability laws. We hope the 2014 edition of *Product Liability* is helpful in that regard.

Starting with the United States, the extraterritorial reach of its courts continues to be a cause for concern for non-US product manufacturers, whether it may relate to a discovery application abroad, the Foreign Corrupt Practices Act, the Alien Tort Statute (ATS) or questions of personal jurisdiction. Last year, the US Supreme Court reined 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. During this past term, in the case of *DaimlerChrysler AG v Bauman*, the Court ruled that a federal district court in California may not exercise personal jurisdiction over a 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 is examining 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 changes are being explored in Argentina, Chile, Costa Rica and Ecuador.

In Asia, new amendments to China’s Civil Procedure Law took effect from 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.

At the end of 2013, Japan adopted a proposal to expand its existing consumer group litigation mechanism to permit collective actions for damages based on consumer claims. Korea, however, continues to debate the expansion of its Consumer Basic Act to permit broader class actions for consumer damages. In addition, there are continuing efforts to amend the Korean 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.

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 released its long-awaited initiative on collective redress in June 2013. The Commission has recommended, but not required, member states to adopt class actions within two years in the areas of competition claims, consumer protection, environmental protection, and data privacy. The Commission has also identified features that such class action models should have.

Among the member states, the governments of Belgium, France and Lithuania adopted class action laws in early 2014. The French law requires a determination of general liability before a class is certified and class members opt in. Personal injury claims are excluded, but the government is considering possible expansion of the law to include health and environmental claims. Belgium and Lithuania also adopted class action laws in March 2014. In contrast to France, their models include a preliminary certification stage, but with wider scopes that permit personal injury claims. Other member states, such as the Netherlands and Hungary, are considering similar legislation.

In addition to these procedural changes that affect product manufacturers, the European Commission 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 increased 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, fee arrangements, and efforts to introduce or expand these types of access-to-justice provisions.

The 2014 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 advice from any of these well-qualified authors.

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