



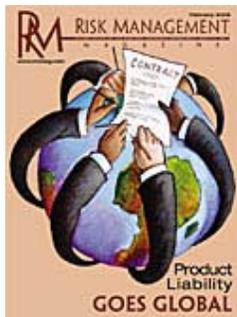
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Product Liability Goes Global

by Kenneth Ross

Product liability concepts, which were developed in the United States in the early 1960s, leapt across the ocean in 1985 when the European Union adopted the legal concept of strict liability. Despite this development in Europe, in the last 20 years, litigation has not occurred with much frequency.

However, more recently, the passage of product liability and product safety laws and regulations has expanded significantly, both in the European Union and all around the world. This has resulted in a dramatic increase in litigation and potential liability in foreign countries and could also increase product liability risks in the United States.

A U.S. manufacturer and product seller must consider product liability as a global risk. It is more likely that manufacturers will be sued anywhere they sell their products and possible that this litigation could adversely affect litigation in the United States. Similarly, it is possible that manufacturers could be subject to government regulatory actions or be required to undertake foreign recalls or other remedial programs.

Any company that sells in the United States and in global markets must consider these new risks when designing products, selling products, tracking post-sale field experience, and trying to comply with all applicable laws and regulations wherever their products are sold. Let's first look at the new laws and regulations.

European Union Product Liability Laws and Litigation

The Product Liability Directive, adopted in 1985 by the European Union Parliament, provides, that "[t]he producer shall be liable

Inside February:

Features

[RM in February](#)

[Global Product Liability](#)

[Class Action Reform](#)

[Section 404 Compliance](#)

[Key Person Claims](#)

[The Value of ERM](#)

[Duty to Advise](#)

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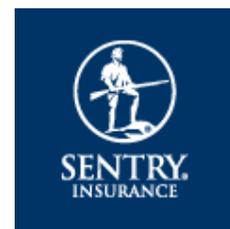
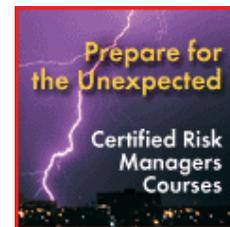
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for damage caused by a defect in his product." Producers include manufacturers, component part suppliers, importers and anyone using a trade name or trademark. A product is defective when it "does not provide the safety which a person is entitled to expect."

Lovells, an international law firm based in England, undertook a survey between 2001 and 2003 of companies in Europe concerning their views on litigation and product safety. Seventy-seven percent of the respondents said that product liability litigation is increasing in the European Union with 22% of them saying that it has increased significantly. The main reasons for such increases are an increased awareness by consumers of their rights to file claims against manufacturers and increased coverage of such rights by the media.

Despite the increased numbers of cases, however, litigation will never be as big of a financial risk in the European Union as it has been in the United States. While contingent fees are beginning to be accepted in some countries, there are still very few or no jury trials or punitive damage awards, no high compensatory damage awards, no U.S.-style discovery rules, and no U.S.-style class actions.

What has occurred in the European Union, however, is that there is enhanced publicity involving product liability and negligence actions and, in some cases, criminal prosecutions of executives involved in alleged wrongdoing. The result is that actual risks to the reputation of the company and its executives can be more significant than any individual product liability case. And this risk is further enhanced if evidence of the criminal prosecution or wrongdoing is discovered by the plaintiff's lawyer in a U.S. product liability case who may try to get that evidence in front of the jury.

European Union Product Safety Regulatory Law

The area of greatest growth in the European Union is the adoption of product safety laws that increase the responsibility of the manufacturer to monitor the safety of products in use and to report to government entities if there are safety issues involving such products.

The 2004 General Product Safety Directive (GPSD) that is now being implemented in all EU countries increases responsibilities for manufacturers and distributors. Distributors will have to monitor the safety of products placed on the market, especially by passing on information on product risks, keeping and providing documentation necessary for tracing the origin of products, and cooperating in actions taken by manufacturers and government agencies to avoid the risks.

Both manufacturers and distributors now will have a duty to immediately notify government agencies when they know or ought to know that a product they have placed on the market poses risks to the consumer that are incompatible with the general safety requirement of the directive.

The GPSD defines a "safe product" as one that "does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons..." Suffice it to say that this threshold for reporting appears to be much lower than under any U.S. statute or regulation, which usually requires that a defect be present.

The GPSD also attempts to strengthen each member country's powers to monitor and to improve collaboration on market surveillance and enforcement. The mechanism for this effort will be a Product Safety Network that will develop Rapid Alert System (RAPEX) procedures. RAPEX requires member countries to inform the Commission of serious risks so that it can alert other member countries.

The obligations and enforcement powers of the member countries have been expanded to meet these objectives. This includes clarification of when a member country can order or organize the issuance of warnings or a recall of a dangerous product. And there will be close cooperation between the EU countries and the U.S. governmental agencies such as the Consumer Product Safety Commission (CPSC) and the National Highway Traffic Safety Administration (NHTSA) in the use of the RAPEX website and Product Safety Network.

Practitioners in the EU predict that

implementation of the GPSD will result in more recalls, more publicity within the EU and elsewhere, more effects on product liability litigation (either by making litigation more likely or making the risk of an adverse result more likely), more criminal prosecutions, and more disputes between companies in the chain of production and distribution. And all of these bad results can be discovered by U.S. plaintiff's lawyers in U.S. litigation.

Unfortunately, it will be difficult for a manufacturer for the foreseeable future to determine who to contact in each government entity, how to submit information regarding this safety issue, and how to undertake a recall that satisfies the requirements or desires of each individual country. With 25 countries now members of the European Union, and each of them struggling to implement the GPSD, a manufacturer who reports and recalls its products in many of these countries will undoubtedly spend a lot of time trying to meet its regulatory

obligations. And the results will certainly be inconsistent from country to country.

As a direct result of the Ford/Firestone tire fiasco, the CPSC and NHTSA revised their laws and regulations to require manufacturers who recall products in foreign countries to report these recalls to them so they can determine if a U.S. recall is also warranted. Consequently, any post-sale remedial actions anywhere in the world must be coordinated with the manufacturer's U.S. safety and regulatory personnel.

Given the newness of GPSD and its implementation, it is unclear how significant these regulatory laws will turn out to be. However, right now, manufacturers who sell into the EU must start to establish post-sale monitoring programs that try to meet the requirements and expectations of the various governmental entities and have systems and personnel in place who understand the reporting responsibilities and know who to contact and what information needs to be gathered and submitted.

Pacific-Asian Product Liability Laws and Litigation

Most countries in Pacific Asia including Australia, Japan, Hong Kong, China, Taiwan,

India and South Korea have adopted some form of product liability law. These laws are modeled on the EU Product Liability Directive. All of these countries have well-developed or developing court systems and adjudication systems. The number of consumer complaints and lawsuits are increasing significantly as a consumer's awareness of their legal rights and the publicity concerning these laws and regulations increases. For example, it was reported in South Korea that product liability lawsuits doubled between 2003 and 2004.

As in the European Union, trial by media is particularly robust in virtually all of these countries. Since the legal systems are not as well developed as in the United States and it can take a long time to for a case to work through the system, many times obtaining justice for consumers will be accomplished by consumer action and the resulting publicity and also possibly by criminal prosecutions by the government. Whether it is an expose by the media or protests by families of injured or killed individuals outside a company's offices, it has become commonplace for a company to be criticized publicly for selling defective products that cause injury, death or damage. And criminal prosecution of a manufacturer's executives will obviously have an adverse effect on the defense of litigation in that country and in any U.S. litigation concerning the same or similar products.

Pacific-Asian Product Safety Regulatory Law

Most countries in Pacific Asia have also adopted laws which require manufacturers to report safety problems to the government and to take appropriate remedial actions. For example, in October 2004,

China implemented new recall procedures for defective vehicles. The government agency in charge of administering this program is trying to position itself as an international recall center. And China expects to use these recall procedures as a blueprint for implementing recall procedures for other products.

In addition, the CPSC and the Chinese government have signed a Memorandum of Understanding with a goal of improving the safety of products imported from China. China is the single largest source of consumer products in the United States and over 60% of all consumer products recalled

in the United States were made in China.

In Japan, Mitsubishi Fuso suffered significant consequences from a product liability and product safety matter involving one of their trucks. Accidents were occurring and the government determined that the manufacturer had been hiding safety problems for years. In addition to being sued in product liability, the Japanese government raided the manufacturer's offices, arrested and prosecuted the executives, suspended the manufacturer from government contracts, and caused it to lose ISO 9001 certification. In addition to that, sales dropped precipitously in Japan and there were a number of additional product recalls.

The Effect of Globalization

Plaintiff's lawyers generally need to prove in a U.S. court that the manufacturer should have made the product safer and that the resultant product was unreasonably dangerous. One way to do that is to show that the manufacturer sold a safer product either in the United States or elsewhere. Another way would be to show that the product was recalled in a foreign country. Globalization and increased safety regulations and products liability litigation have definitely made the plaintiff lawyer's job easier.

One of the biggest decisions that a manufacturer needs to make is whether it is acceptable to sell a safer product in a foreign country because it cannot be sold in that country without complying with a stricter foreign standard.

Some manufacturers have tried to sell products worldwide with a level of safety that complies with or exceeds the safety required wherever they are sold. Many times, this is very difficult or costly to do because the customer will not pay for the extra safety, the safer product is too hard to use with the extra safety, or none of the competitors sell it that way.

Recalls and retrofits are another area of risk. It might be possible to do a recall in Europe and not do one in the United States, but the manufacturer will still have to tell a U.S. government agency about the recall and then convince them that it is not necessary here. Then, if there is an accident in the United States, the plaintiff's attorney will try to use the foreign recall against the

manufacturer and it will be necessary to convince a jury why there was no U.S. recall. This might be very difficult to justify and cases with such facts usually settle unless the rationale is very compelling.

An Ever-Shrinking World

The world has gotten smaller, both from a litigation and regulatory perspective. Government agencies around the world are talking to each other about safety and regulatory matters. Plaintiff's lawyers around the world are communicating with each other. Selling globally increases the risk a manufacturer will do something that makes it more potentially liable in the United States or elsewhere.

As a result, manufacturers need to consider product safety and product liability issues in all countries where it intends to sell the same or similar products. While it will be necessary to at least comply with all of the laws and regulations of each country where it will sell, the manufacturer must also consider the effect of many of these decisions on liability in other countries, especially those with active product liability and product safety systems.

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